

Submission to the Royal Commission into Victoria's Mental Health System

4 July 2019

We commend the Victorian Government for ordering the Royal Commission into Victoria's Mental Health System. We welcome the appointment of Chairperson Penny Armytage, and Commissioners Professor Bernadette McSherry, Professor Allan Fels AO and Dr Alex Cockram.

An overarching and systemic barrier to improvements in the police treatment of people experiencing mental illness in Victoria is the lack of any meaningful system of police accountability in the state.

We point the Commission to the principles and practices of therapeutic jurisprudence (Wexler 1990). Therapeutic jurisprudence posits that legal actors and processes can produce consequences that are both harmful ('anti-therapeutic') and beneficial ('therapeutic').¹

Through targeted research and advocacy, unnecessary harms caused by legal actors and practices can be identified and ameliorated.² This framework recognises 'law enforcement' officers as legal actors who have an obligation to minimise the harm caused by policing practices.

The ultimate aim of therapeutic jurisprudence is 'to transform laws, rules, procedures, and the behaviour of legal actors in a manner that promotes well-being'.³ To this end, this submission asserts that the policing of people experiencing mental health issues is a vital and central area of reform.

Further, we stress that previous reforms in this area after reviews or coronial inquests have focused upon changes or additions to police training or operational procedures, protocols and guidelines. As highlighted in this submission, we have found these reforms not only to be manifestly inadequate but fundamentally misunderstand the nature and dynamic of police misconduct and abuse of power in a context of impunity from accountability. We urge this Royal Commission to look instead to the

¹ David Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990); David Wexler and Bruce Winick (eds), 'Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence' (1996) 8(3) *Current Issue in Criminal Justice* 337. Marg Liddell and Diana Johns, 'Evaluation of the Walking Alongside Program' (Flemington & Kensington Community Legal Centre, 2016)

² Liddell and Johns, above n 15, 24; Barbara Babb and David Wexler, 'Therapeutic Jurisprudence' in *Encyclopedia of Criminology and Criminal Justice* (Springer, 2014) 5202.

³ Babb and Wexler, above n 16, 50202.

systemic reforms highlighted by the 2018 report of the Parliament's IBAC Committee Inquiry into the external oversight of police corruption and misconduct in Victoria, which remains before Parliament.

This submission responds to terms of reference 4 (especially 4.5) and 5. It also responds to formal questions 4, 5, 8 and 9. It focusses on police interactions with people experiencing mental illness.

1. About us

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.

2. Our relevant expertise

The Flemington Kensington Community Legal Centre, through its involvement in police accountability case work, has worked with clients who suffer from mental health conditions since its inception in 1980. Our client work has indicated strongly that people living with mental health conditions face significant risks of death, disability, injury, humiliation and other forms of detriment when in contact with police services.

Our clients with mental illness describe excessive police contacts, stops and searches. They receive inappropriate fines and charges (including assault police and resist arrest). They experience criminalisation, hospitalisation and imprisonment. We have assisted in those matters, and have acted in the Coroners Court when mentally unwell people have died in connection with police contact.

Since 2007 we have lodged literally dozens of formal police complaints for mentally ill clients, and have seen first-hand how the current police complaints system fails to deliver either redress or accountability. This lack of an effective complaints investigation system undermines any opportunity for meaningful change in police operational practice and procedures when responding to people with mental health issues.

Police Accountability Complaints Clinic, run by this centre in partnership with the Melbourne Law School found that 48% of PAP clients experienced some form of physical or cognitive disability, or mental illness. Of these 48%, 51% experienced mental illness or cognitive disability and 21% experienced physical disability. (2016)

In 2017, 50.1% of PAP clients reported having some form of disability. Of these, 32.5% experienced physical disability, 41.8% experienced cognitive disability or mental illness, and 16.2% experienced both physical/cognitive disability and mental illness.

These findings reflect previous research (discussed below) which suggests that people experiencing disabilities and mental illness are significantly more likely to require legal assistance related to unfair police treatment.

In several cases, our clients reported that the police abuse and misconduct that they experienced was either the cause of *or a contributing factor* to their deteriorating mental health.

Further, protracted and unfamiliar legal processes in relation to seeking redress after an incident of police misconduct are an additional source of stress and can impact the mental health of clients.⁴

3. The policing of people experiencing cognitive disability and mental illness

Interactions between police and people who appear to have a mental illness 'are remarkably frequent'.⁵ Approximately 20 percent of all police interactions involved a person perceived to be experiencing mental illness according to a 2011 survey of Victorian Police officers.⁶

There are several reasons for this. Police are often the first responders to incidents involving a mental health crisis in the community. Section 351 of the *Mental Health Act 2014* (Vic) grants police with the power to detain and transport a person experiencing a mental health crisis to an appropriate location for a mental health assessment. Recent cases exposed in national media have highlighted the misuse and abuse of this power.⁷

In one particularly illustrative incident in September 2017, Police had gone to the Preston home on an invalid pensioners 'John', after his psychologist called triple zero to say she was worried about his deteriorating mental health.

Award winning investigative journalist Nick McKenzie, who broke this story in April 2018 writes:

"The officers had warned John, who has a decade-old conviction for assault, that they would use a crowbar to force entry.

"Mate, we don't want to break open the door," one policeman said.

John, who in addition to his mental illness and back problems, is in cancer remission, continued pleading: "I'm going through withdrawal ... I'm laying on the floor. Now, please

⁴ Marg Liddell and Diana Johns, 'Evaluation of the Walking Alongside Program' (Flemington & Kensington Community Legal Centre, 2016) n 15.

⁵ Office of Police Integrity, *Policing people who appear to be mentally ill*, Report (2012).

⁶ Joel Godfredson et al, 'Police Perceptions of Their Encounters with Individuals Experiencing Mental Illness: A Victorian Survey' (2011) 44(2) *Australian & New Zealand journal of criminology* 180, 184.

⁷ Nick McKenzie, 'Beaten, abused, humiliated and filmed by Victoria Police,' *The Age* (online), 2 April 2018 <<https://www.theage.com.au/national/victoria/beaten-abused-humiliated-and-filmed-by-victoria-police-20180321-p4z5f2.html>>.

leave me alone ... you'll have to shoot me."

Police coaxed him some more: "C'mon, John. We just want to have a chat."

John is then filmed opening his front door and emerging to plead again for police to leave. The lead policeman appears to move forward and attempt to grab John. John brushes the officer's hand aside and, in the same motion, extends his hand upwards and towards the policeman, as if to push him back with a flimsy jab.

He makes no contact but is pepper sprayed, bundled down his stairs by police and pinned down in his yard."

Later, a police officer appears to record a video on his phone as John is sprayed with a garden hose in an effort to remove OC spray from his face.

The CCTV footage of this incident is available online [here](#).

A total of six officers were involved in the incident, but none of them reported it to the internal Professional Standards Command (PSC) unit or IBAC. Victoria Police initially resisted standing down the officers involved when CCTV footage of police pinning down John was first viewed. Action by Victoria Police and IBAC was only taken *after it was revealed* as part of a The Age investigation into problems with the force's internal oversight system, which dismisses most complaints of police misconduct.

IBAC charged three of the officers with assault-related offences including assault with a weapon later in 2018.⁸

In another incident from 2017, footage showing a Victoria Police senior constable hurl abuse at a man who called an ambulance to help his suicidal friend was provided to media. Renaud Kobrinsky was told to 'f*** off' when he questioned why police - not paramedics - arrived at his Melbourne home and arrested his mentally ill friend.

Video shows an officer, a Senior Constable scream in Mr Kobrinsky's face as he pleaded for an explanation. That footage is available online [here](#).

'Walk back to your house. You are this close to getting arrested yourself... You're hindering me,' the officer yelled. Earlier, police were heard threatening to break down a door to the room where the mentally ill man was hiding in Mr Kobrinsky's home.

'They pushed me they went inside and straight through to the room there and started yelling at him through the door,' Mr Kobrinsky told A Current Affair.

⁸ <https://www.ibac.vic.gov.au/media-releases/article/ibac-charges-a-third-victoria-police-officer-over-incident-in-preston-last-year>

'I said, maybe this was not the right approach at this time can we just wait for the emergency services?'⁹

Over-representation in police use of force incidents

People experiencing mental illness are massively over-represented in incidents involving both fatal and non-fatal police force.¹⁰

'Out of 48 fatalities in Victoria between November 1982 and February 2007, all but six of those killed had recorded histories of mental health problems'.¹¹ Similarly, 'police were found to be two times more likely to use pepper spray on those who appeared mentally disordered, even after controlling for other situational and individual characteristics'.¹² This suggests that, at least in some cases, police are using excessive force when dealing with people experiencing mental illness. Importantly, these statistics were derived from official use of force data, which under-represents between 30 to 70 percent of incidents involving police use of force.¹³

Contrary to popular beliefs, 'people experiencing a mental disorder are much more likely to be a victim of crime than a perpetrator'.¹⁴ A study by Baksheev et al. established that people who had a diagnosed mental illness 'were over 1.5 times more likely to have been a victim of violent crime compared to those with no contact with the public mental health system'.¹⁵ For individuals with an intellectual disability and a co-morbid mental illness, rates of violent crime victimisation were found to be three times higher and rates of sexual crime victimization up to ten times higher than the general population.¹⁶

'National and international studies reveal that people with disabilities are more likely to be victims of crime than other groups in the general population'.¹⁷ As a result, legal needs frequently arise from police discrimination and duty failure when people with disabilities report crime and attempt to seek justice.¹⁸ The VEOHRC report documents numerous cases of police refusing to take or accept reports of crimes committed against people with disabilities.¹⁹ This constitutes both duty failure and the denial of procedural justice. The report also outlines extensive discrimination by Victoria Police officers towards people with disabilities who were victims of crime. This includes the use of

⁹ Margin, M. Daily Mail, <https://www.dailymail.co.uk/news/article-5632205/Senior-constable-swears-man-called-ambulance-help-suicidal-friend.html>

¹⁰ Kesic, Thomas and Ogloff, above n 28; Dragana Kesic, Stuart Thomas and James Ogloff, 'Mental Illness among Police Fatalities in Victoria 1982–2007: Case Linkage Study' (2010) 44(5) *Australian & New Zealand Journal of Psychiatry* 463.

¹¹ Kesic, Thomas and Ogloff, above n 28; Kesic, Thomas and Ogloff, 'Mental Illness among Police Fatalities in Victoria 1982–2007: Case Linkage Study', above n 61; Jessica Shaligari and Richard Evans, 'Beacon of Hope? Lessons Learned from Efforts to Reduce Civilian Deaths from Police Shootings in an Australian State' (2016) 93(1) *Journal of Urban Health* 78.

¹² Kesic, Thomas and Ogloff, 'Use of Nonfatal Force on and by Persons with Apparent Mental Disorder in Encounters with Police', above n 28, 331.

¹³ Office of Police Integrity, *Policing people who appear to be mentally ill*, above n 58.

¹⁴ *Ibid* 26.

¹⁵ Gennady Baksheev, Lisa Warren and James Ogloff, 'Correlates of Criminal Victimisation among Police Cell Detainees in Victoria, Australia' (2013) 14(6) *Police Practice and Research* 522, 527.

¹⁶ Billy Fogden, Michael Daffern and James Ogloff, 'Crime and Victimisation in People with Intellectual Disability: A Case Linkage Study' (2016) 16(1) *BMC Psychiatry* 170.

¹⁷ Victorian Equal Opportunity and Human Rights Commission, *Beyond doubt: the experiences of people with a disability reporting crime*, Report (2014), 18.

¹⁸ *Ibid*.

¹⁹ *Ibid* 24.

'derogatory language', paternalism, victim-blaming and treating people with suspicion. It was found that discrimination more profoundly affected Aboriginal and CALD individuals who also experience disabilities. This reiterates how various indicators of disadvantage compound and intersect to exacerbate legal needs.²⁰

People experiencing cognitive and intellectual disability (ID) are over-represented in the criminal justice system, and as a result face distinct legal needs associated with increased police contact. People with an ID are particularly vulnerable to breaches of rights and abuses by Police.²¹ Additionally, for similar reasons, people with an ID are less likely to hold the legal knowledge and capability to respond to police misconduct. 'People with a disability accused of committing crimes are particularly vulnerable because their special needs are often not met and because the legal system tends to discriminate against the less articulate, just as it discriminates against the less wealthy'.²²

The Human Rights and Equal Opportunity Commission highlights the many ways in which police procedures can disadvantage and/or impinge the rights of people with an ID.²³ They identify several factors:

- 'they may be more prone to suggestibility, and thus leading questions by interviewing officers may be a distinct problem;
- many may be eager to please a person perceived to be an authority figure thus giving the answers he or she believes are the desired ones rather than the correct ones;
- people with an intellectual disability may be more likely to respond to questions in a manner they believe is expected of them;
- many may be prone to 'cued' or 'initiative behaviour';
- there may be poor understanding of questions asked, and the implications of the answers given;
- many people with intellectual disabilities try to hide their disability and may, for example, answer a question to which they do not know the answer, so as not to appear 'dumb or stupid'.

At present, there is no legally enforceable obligation on police officers to ensure that an accused receives fair treatment during interrogation.

4. Recommendations

This submission makes the following recommendations:

²⁰ Disabled people routinely denied justice by Victoria Police, human services and health, report finds,' *ABC* (online), 21 July 2014. <<http://www.abc.net.au/news/2014-07-21/people-with-disability-denied-justice-by-victoria-police-report/5612336>>.

²¹ Human Rights and Equal Opportunity Commission, *The Rights of People with Disabilities : Areas of Need for Increased Protection* (Human Rights Australia, 1989).

²² Ibid.

²³ Ibid.

Recommendation 1

Improvements around police conduct and procedures with mentally ill people must not be confined or limited to new or more training for police;

Recommendation 2

Provide properly funded non-aggressive, de-escalatory and care-based alternatives to police as first responders to mental health call-outs, regardless of perceived risk the person poses.

Recommendation 3

The assessments of risk posed by an individual to themselves or others, as well as their health and the need for this assessment, should be made independently of police observations and reports;

Recommendation 4

The introduction of a legal requirement that Victoria Police have a reasonable belief that an offence has been committed before a pedestrian or traffic stop is initiated (except for random drug/alcohol testing at established stations and when stopping witnesses to an incident such as under section 456AA of the *Crimes Act 1958 (Vic)*);

Recommendation 5

The Victorian Parliament fund and implement the 69 recommendations of the Parliamentary *Inquiry into External Oversight of Police Misconduct*, including creating a new Police Corruption and Misconduct Division within the Independent Broad-based Anti-Corruption Commission (IBAC) to investigate complaints of serious police misconduct;

Recommendation 6

The Victorian Government adequately funds a specialist, dedicated state-wide community legal service to provide legal assistance and support services to people affected by police misconduct.

Recommendation 7

That section 344 of the Children, Youth and Families Act 2005 be amended to read that 'a child under 14 years is not criminally responsible for an offence' in order to prevent the criminalisation of children and the significant mental health risks associated with this.

5. Police as first responders

Current service design and systemic restraints means that police are frequently the first responders to people experiencing mental health crisis in Victoria. The concern of this centre is that, in an unacceptably high number of cases, the attending police response has resulted in increased fear, anxiety or distress of the person in crisis. The police members' words, actions and behaviours often cause a 'cascade of escalation' which can then result in the injury, the laying of police contact related charges and sometimes the death of people who are experiencing a mental health crisis or episode.

The cascade of police intervention

In many cases – it appears as if the *Operational Safety and Tactics Training (OSTT)*²⁴ provided to all Victoria Police members at the academy level is a contributing factor in the cascade of intervention that occurs at these encounters. Police are trained to enact a 'staged response' and to escalate or deescalate their response according to the perceived behaviour of the person in question.

The Victoria Police *Tactical Options Model (TOM)* is an organisational visual aid that outlines the various tactical options available to members and includes communication and physical presence as well as operational safety equipment. When considering which tactical option to choose, members are instructed to be mindful that their goal is to minimise the overall harm caused by their actions or the actions of others.

Where the use of force is required, the random arrangement of tactical options (in a visual circle) encourages police members to escalate and de-escalate the choice of equipment or tactics in accordance with the direction the incident is taking, the objective and the information available to them.

In actuality, when a person who police are interacting with becomes distressed, upset, argumentative, swears or otherwise displays uncooperative behaviours, police 'scale-up' their response accordingly. This escalated response then prompts further distress, fear or anxiety, to which police respond to accordingly. People experiencing mental illness or living with some form of cognitive disability often report feeling 'trapped' in a situation during a police encounter where their every move is interpreted as antagonistic to police and their own attempts to deescalate the situations become impossible when their main motivation is to stop or remove themselves from a stressful situation. Clients report that their own attempts to deescalate the situation is ignored by police or becomes impossible once police reach a certain level.

Any force used by a member of Victoria Police must be in line with legal requirements and the principles of section 462A, *Crimes Act 1958*, which states:

A person may use such force not disproportionate to the objective as he or she believes on reasonable grounds to be necessary to prevent the commission, continuance or completion of an indictable offence or to effect or assist in effecting the lawful arrest of a person committing or suspected of committing any offence.

However, whilst the lawful justification to use force may not be present before the police encounter, by the end of a cascade or increasingly tense interventions and responses, the police members may perceive the justification to use force exists.

The extent of injury and distress, including fatalities caused by police responding to mentally ill

²⁴ Victoria Police Manual January 2019, Operational Safety and Tactics Training (OSTT) is delivered to all operational members and Police Custody Officers (PCOs) biannually through training programs designed by the Centre for Operational Safety.

individuals has resulted in numerous police complaints and civil claims²⁵, and has been noted in numerous coronial inquests²⁶ and inquires.

At times this has led to the adoption of programs or responses models that reform the police response to mental health call outs.²⁷ These programs have not, in our view led to any substantial reduction in harm to mentally ill individuals. Indeed, we have seen an increasingly armed and militarised response to mentally ill individuals despite decades of these reform attempts.

We note that all of the Victoria Police members who are subject to complaints or misconduct charges have received the OSTT and *use of force* training referred to above.

Victoria Police's response to previous adverse findings has been to review their OSTT models or introduce new or more training. We believe that that training has failed to bring about any meaningful change. For example, in the area of racial profiling by police. The literature, and police themselves, tell us that training at the Academy is insufficient to bring about systemic and behavioural change. That is already the case for people experiencing mental illness, where current provisions in the Victoria Police Manual, that might improve their police interactions, are not be adhered to, are circumvented by the use of tactical weaponry such as OC spray or are in part responsible for the escalation of the encounter.

Indeed, efforts to improve police response to people experience a mentally health episode or crisis

²⁵ See for eg <https://www.theage.com.au/national/victoria/beaten-abused-humiliated-and-filmed-by-victoria-police-20180321-p4z5f2.html>

²⁶ See for eg the *Inquest of Tyler Cassidy 2011, Victorian Coroners Court*,

²⁷ See for eg the discussion Coroner's decision in *Gregory Couper* a clear process of de-escalation and communication was described to the coroner as being appropriate to detentions under section 10 of the *Mental Health Act*:

Police Training

(1) Mental Illness

65. In his statement to the Court, Assistant Commissioner Shuey outlined the historical basis for the introduction of Operation Beacon in September 1994. He said the mentally ill featured prominently in critical incidents and a substantial focus of Project Beacon was aimed at assisting police in dealing with the mentally ill and those suffering from emotional disturbance and behavioural problems. He stated Project Beacon developed a comprehensive integrated approach for dealing with persons suffering mental disorders.¹⁰²

A training video entitled "*Similar Expectations*" was developed in 1995 and offered a range of methods for dealing with persons suffering mental disorders. That video tape was produced during the evidence of Senior Sergeant Miles and exhibited.¹⁰³ He said initiatives were undertaken which included mental health experts providing numerous lectures across Victoria to police members on better understanding and methods for dealing with the mentally ill. An examination of the training material provided to the Court by Senior Sergeant Miles reveals session plans dealing with mental illness. Session plan 4(a)/24 of 1996 recommended communications strategies to be adopted when dealing with a mentally ill person, including:

- establish rapport on one to one basis.
- introduce yourself informally eg. "*My names John, what's yours?*"
- Safety first-but try to reduce tension by turning police radio down or handing to another member, remove cap, reduce size by sitting down if person is seated (avoid impression of "*standing over*") Be aware of your own safety.
- Acknowledge their anger or distress and convey willingness to listen, ask how you can help.
- Be polite and respectful. A disturbed person is frequently very frightened. Abuse, threats and tough tactics will frighten them more and make them more likely to react aggressively and defend themselves.
- Stay calm and low key (but have your partner, if present, ready to come to your assistance).
- Reassure them that no harm will come to them.¹⁰⁴

66. Session Plan 2 of 23 for the period July to December 1997 entitled "*Managing the Mentally Ill*" was conducted over one hundred and five minutes. That session was aimed at developing skills in identifying and communicating with people who appear to be mentally ill.¹⁰⁵

appear to fundamentally misunderstand the nature of the police roles and functions – where efforts to “establish rapport” with “listen and offer support” or “treat with dignity and respect” are at odds with or directly conflict with police (perceived) imperatives to maintain situational control and functional imperatives to enforce laws.

This centre is aware of families who, on the basis of their own experience, no longer call the police to assist ill relatives for fear their loved one may be shot or injured.

The ongoing harm caused by police responding to mental health call-outs leads us to conclude that a new, non-aggressive, de-escalatory, care-based strategy of responding to mental health call outs that *does not involve police* must be the priority response and the recommendation by this Commission.

The response to mental health crisis and welfare checks should be led by trained and adequately resourced health professionals as primary responders, assessing incidents independently of police, placing people with a mental illness at the centre of decision making about their treatment and care. Multidisciplinary wraparound services should be provided wherever possible. This therapeutic response contrasts with the policing model, with its focus on constraint, control, use of force, arrest and deprivation of liberty.

Police, if attending, should do so only in a support role, with only secondary or tertiary responsibility and management of the situation.

Recommendation 1

Improvements around police conduct and procedures with mentally ill people must not be confined or limited to new or more training for police.

Recommendation 2

Provide properly funded non-aggressive, de-escalatory and care-based alternatives to police as first responders to mental health call-outs, regardless of perceived risk the person poses.

6. Undue police influence in the hospital setting

A related concern is the way in which hospital staff respond to ill individuals when they are brought into hospital by police. In numerous Victorian cases, our clients have reported that hospital staff have been too quick to accept a police account of their dangerousness rather than undertake an independent assessment.

The high-profile case of Ms Dhu's death in Western Australia provides a striking example of this dynamic we see in relation to mentally ill clients taken to hospital by police. The findings of the inquest by WA State Coroner Rosalinda Fogliani were delivered on 16 December 2016. Fogliani found that police had subjected Dhu to "unprofessional and inhumane" treatment that was "well

below the standards that should ordinarily be expected". She stated Dhu's treatment at her second hospital visit was "deficient", that both police and hospital staff had been influenced by preconceived ideas about Aboriginals. The overall impression is that neither doctor involved in her assessment or treatment believed Ms Dhu was genuinely unwell, let alone seriously so. The only reasonable inference was that they thought Ms Dhu's complaints were exaggerated, or not entirely genuine."²⁸

One of the treating doctors, Dr Naderi agreed that he was influenced by Dr Lang's diagnosis of "behaviour issues". He conceded that, "It is hard not to be influenced by what is said before." Given that the earlier treating doctor, Dr Lang's diagnosis was based on a cursory examination, and influenced by the police claim that Ms Dhu had started faking her pain in response to incarceration, the police contributed, at least to some extent, to Dr Naderi's ultimate dismissal of Ms Dhu from care.²⁹

In light of the susceptibility of health and medical staff to uncritically accept accounts by police members or allow those accounts to influence diagnoses we make the recommendation that state wide protocols be established that stipulate that any assessments of risk in any health or community setting posed by an individual to themselves or others, as well as their mental health and the need for this assessment, should be made *independently of police observations or reports*.

Recommendation 3

The assessments of risk posed by an individual to themselves or others, as well as their health and the need for this assessment, should be made independently of police observations or reports.

7. Negative impact of discretionary stop and search powers

A regular and frequent form of contact between people with mental illness and the police is when police interact with them on the street or in their vehicles.

These encounters are frequently experienced as stressful, terrifying or triggering for people with mental illnesses including PTSD (and, indeed, other conditions like autism). Consequently, these encounters can escalate in and of themselves, and result in offending or the laying of charges in the absence of any underlying offending.

In many cases, these encounters are often triggered for no better reasons than the person's unusual behaviour has attracted police attention; in the absence of any *reasonable belief* of unlawful activity or threat of harm to others.

This unfairly exposes people experiencing mental illness, who may dress, walk, speak and hold

²⁸ Brull, M. 'The Death Of Ms Dhu Part 4: How Did A Second Doctor Fail To Notice That Ms Dhu Was Dying?' New Matilda (2017) <https://newmatilda.com/2017/02/21/the-death-of-ms-dhu-part-4-how-did-a-second-doctor-fail-to-notice-that-ms-dhu-was-dying/>

²⁹ Fogliani, Rosalinda (16 December 2016). "Inquest into the death of Julieka Ivanna DHU" (PDF). Western Australian Coroner's Report.

themselves in ways outside social norms to the distress of police contact and the heightened risk of criminalisation.

We submit that the legislative power of police and PSOs to stop all individuals should be limited to situations where the person is reasonably believed to have committed an offence and make the following recommendation.

Recommendation 4

The introduction of a legal requirement that Victoria Police have a reasonable belief that an offence has been committed before a pedestrian or traffic stop is initiated (except for random drug/alcohol testing at established stations and when stopping witnesses to an incident such as under section 456AA of the *Crimes Act 1958 (Vic)*);

8. Absence of police accountability or redress when police misconduct occurs

An overarching and systemic barrier to improvements in the police treatment of people experiencing mental illness in Victoria is the lack of any meaningful system of police accountability in the state.

As stated above, the principles and practices of therapeutic jurisprudence (Wexler 1990) are relevant to this Commission. Therapeutic jurisprudence posits that legal actors and processes can produce consequences that are both harmful ('anti-therapeutic') and beneficial ('therapeutic').³⁰ Unnecessary harms caused by legal actors and practices can be identified and ameliorated.³¹ This framework recognises 'law enforcement' officers as legal actors who have an obligation to minimise the harm caused by policing practices.

Therapeutic jurisprudence aims 'to transform laws, rules, procedures, and the behaviour of legal actors in a manner that promotes well-being'.³²

We believe recommendations arising from this commission need to address the policing of people experiencing mental health issues.

Defining Police Misconduct and Accountability

According to Victoria's Independent Broad-based Anti-corruption Commission (IBAC), police misconduct occurs when officers are:

- failing or refusing to perform their duties

³⁰ David Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990); David Wexler and Bruce Winick (eds), 'Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence' (1996) 8(3) *Current Issue in Criminal Justice* 337. Marg Liddell and Diana Johns, 'Evaluation of the Walking Alongside Program' (Flemington & Kensington Community Legal Centre, 2016)

³¹ Liddell and Johns, above n 15, 24; Barbara Babb and David Wexler, 'Therapeutic Jurisprudence' in *Encyclopedia of Criminology and Criminal Justice* (Springer, 2014) 5202.

³² Babb and Wexler, above n 16, 50202.

- behaving disgracefully or improperly (on or off duty)
- discrediting Victoria Police or its personnel.³³

This includes:

- unauthorised access, use and disclosure of police information, e.g. the Law Enforcement Assistance Program (LEAP)
- misuse of police resources and breaches of information security
- stalking, family violence, sexual offences, assault
- racist behaviour
- breaches of human rights
- excessive use of force
- duty failure³⁴

More specifically, 'In relation to a police officer or PSO, 'misconduct' means:

- ... conduct which constitutes an offence punishable by imprisonment; or
- ... conduct which is likely to bring Victoria Police into disrepute or diminish public confidence in it; or
- ... disgraceful or improper conduct (whether in the officer's official capacity or otherwise)³⁵.

'Accountability is defined as a system of internal and external checks and balances aimed at ensuring that police carry out their duties properly and are held responsible if they fail to do so'.³⁶ By ensuring that police officers are held accountable, 'such a system' aims to 'deter misconduct and to restore or enhance public confidence in policing'.³⁷

Previous research has established key socio-demographic groups that are disproportionately affected by unfair police treatment and police misconduct.³⁸

Legal needs are experienced more frequently by people who experience disadvantage and social exclusion.³⁹ According to an Australia-wide law survey young people (18-24 years of age), victims of crime and men are more likely to experience unfair police treatment.⁴⁰ In addition, research suggests that Indigenous Victorians,⁴¹ culturally and linguistically diverse (CALD) individuals,⁴² and people experiencing disability and mental illness are also disproportionately affected.⁴³

While some types of police misconduct, such as excessive force and duty failure appear to be

³³ *What Is Police Misconduct?* IBAC independent broad-based anti-corruption commission Victoria <<http://www.ibac.vic.gov.au/reporting-corruption/what-can-you-complain-about/what-is-police-misconduct>>.

³⁴ Ibid.

³⁵ Independent Broad-based Anti-Corruption Commission Committee, above n 5.

³⁶ United Nations Office on Drugs and Crime, *Handbook on Police Accountability, Oversight and Integrity* (Criminal Justice Handbook Series, 2011) iv.

³⁷ Ibid.

³⁸ Coumarelos et al, above n 7; Stubbs, Lux and Wilson, above n 6.

³⁹ Coumarelos et al, above n 7.

⁴⁰ Ibid.

⁴¹ Kate Browne, *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria: Submission of the Victorian Aboriginal Legal Service* (Victorian Aboriginal Legal Service, 2017).

⁴² Bec Smith and Shane Reside, 'Boys, You Wanna Give Me Some Action? Interventions into Policing of Racialised Communities in Melbourne: A Report of the 2009/10 Racism Project *A Police Officer in Conversation with an African Young Person, 2009' (Legal Services Board, 2010).

⁴³ Dragana Kesic, Stuart Thomas and James Ogloff, 'Use of Nonfatal Force on and by Persons with Apparent Mental Disorder in Encounters with Police' (2013) 40(3) *Criminal justice and behaviour* 321.

widespread, others such as racial profiling, harassment and discrimination disproportionately affect marginalised groups.

The overwhelming majority of all complaints against police are investigated by the Victoria Police, often at the local level. That system is entirely unsatisfactory. Research has established that less than 10% of all complaints to police between 2000 and 2013 were substantiated and less than 4% of all assault complaints were substantiated.⁴⁴ More recent data published in the Victoria Police Annual Report 2017/18 is no more promising. In fact, the substantiation rate has dropped significantly from 14.1% in 2015/16 to 9.85% in 2017/18.

In our view, the low substantiation rate is an indicator of investigative and decision-maker bias. Other reports and findings support this view including that the current complaints system does not meet the standards for an 'effective system'.⁴⁵

Victorians and their families who have experienced police misconduct should not have to rely on coronial courts, civil litigation or Royal Commissions, with respect, to have their complaints properly investigated. An effective, properly resourced, independent police complaints body that can properly investigate and address police misconduct is required.

In 2018 the joint parliamentary Independent Broad-based Anti-corruption Commission Committee (the **Committee**) conducted an extensive inquiry into the external oversight of police corruption and misconduct in Victoria. The Committee completed a comprehensive report (the **IBAC Report**), making 69 recommendations that are currently before the Victorian Parliament.⁴⁶

The Committee found that people with disability or mental illness are more vulnerable to police misconduct and have 'distinctive challenges to making complaints about police misconduct'.⁴⁷ It noted with 'particular concern' that our Police and Accountability and Human Rights Clinic found that 48 per cent of our complainants reported having a disability, with 51 per cent having a mental illness.⁴⁸

The Committee recommended the establishment of an adequately staffed and empowered Police Corruption and Misconduct Division within IBAC. It has also recommended that IBAC, rather than Victoria Police, investigate serious police misconduct. To assist IBAC in carrying out these important functions, the Committee has recommended the conferral of selected additional investigative and oversight powers on it.

⁴⁴ Police Accountability Clinic, 'Independent Investigation of Complaints against the Police: Policy Briefing Paper' (Flemington & Kensington Community Legal Centre, 2017).

⁴⁵ Tamar Hopkins, 'An Effective System for Investigating Complaints against Police: A Study of Human Rights Compliance in Police Complaint Models in the US, Canada, UK, Northern Ireland and Australia' (Victoria Law Foundation, 2009).

⁴⁶ Victorian Parliament. [Parliamentary Inquiry: Inquiry into the external oversight of police corruption and misconduct in Victoria](#). (2018) 155.

The IBAC Committee was amalgamated in 2019 to form the Integrity and Oversight Committee, a joint investigatory committee of the Parliament of Victoria.

⁴⁷ Victorian Parliament. [Parliamentary Inquiry: Inquiry into the external oversight of police corruption and misconduct in Victoria](#). (2018) 155, and

https://www.parliament.vic.gov.au/images/stories/committees/IBACC/Submissions/police_oversight_submissions/Submission_49_Police_Accountability_and_Human_Rights_Clinic.pdf

⁴⁸ Ibid, p 156

The Committee found:

“[It] is essential for the maintenance of public confidence in Victoria’s complaints system [that] IBAC, rather than Victoria Police, generally investigate...serious police misconduct.”⁴⁹

This report is attached as an addendum to this submission.

Recommendation 5

The Victorian Parliament fund and implement the 69 recommendations of the Parliamentary *Inquiry into External Oversight of Police Misconduct*, including creating a new Police Corruption and Misconduct Division within the Independent Broad-based Anti-Corruption Commission (IBAC) to investigate complaints of serious police misconduct;

Our 2019 Legal Needs Analysis indicates that 3,000 to 4,000 Victorians experience some form of legal need as a result of an alleged incident of police misconduct each year⁵⁰. That legal need remains largely unmet in Victoria.

It is worth reiterating the consequential reality of police misconduct, abuse and brutality when discussing the legal needs of victims. This extends further than just individual harm, but has significant wider societal impacts as well.

In many cases, police misconduct and brutality constitute human rights violation as stipulated by the *Charter of Human Rights and Responsibilities Act 2006* and international law.⁵¹ Incidents of police misconduct can cause long-lasting physical and psychological damage as well as financial and legal costs.

As well as these harms to individuals, there are social and economic costs to families and communities in terms of trust, wellbeing, and social cohesion.⁵²

The abuse of power by police officers has a profound and detrimental impact on all of those who experience it, their families and entire communities. It undermines safety, self-worth and belonging, and erodes and degrades faith in the institutions of democracy and the rule of law. It impacts most upon those who already experience disadvantage, such as the mentally ill.

Recommendation 6

The Victorian Government adequately funds a specialist, dedicated state-wide community legal service to provide legal assistance and support services to people affected by police misconduct.

9. Raising the age of criminal responsibility

⁴⁹ Ibid, p xxvi

⁵⁰ Flemington & Kensington Community Legal Centre, *Legal needs as a result of police misconduct in Victoria*, unpublished draft, 2019.

⁵¹ Hopkins, ‘An Effective System for Investigating Complaints against Police’, above n 112.

⁵² Yolander G Hurst and James Frank, ‘How Kids View Cops: The Nature of Juvenile Attitudes toward the Police’ (2000) 28(3) *Journal of Criminal Justice* 189.

We believe that the Royal Commission should recommend that section 344 of the Children, Youth and Families Act 2005 be amended to raise the age of criminal responsibility to 14 years. We believe that it is crucial that these reforms be included in the recommendations made by the Royal Commission to prevent the criminalisation of children and the significant mental health risks associated with this.

The centre strongly support calls both nationally and internationally for the Victorian Government to raise the age of criminal responsibility and refer the commission to expert United Nations bodies, medical bodies, academics, Aboriginal and Torres Strait Islander and human rights organisations and most recently, the Northern Territory Royal Commission,^[10] who have all stressed that raising the minimum age should be done in conjunction with measures to ensure children receive appropriate community support directed at addressing risk factors.

We support the call by The Royal Australian College of Physicians' Dr Mick Creati who said in May 2019 that locking up children as young 10 had a lasting effect on their mental health, especially when most already came from disadvantaged backgrounds.

The reasons for reforming the current minimum age of criminal responsibility are clear.

Children under 14 in contact with the criminal justice system often are vulnerable, traumatised, may have neurocognitive deficits which can range from intellectual disabilities, foetal alcohol syndrome, ADHD, to massive trauma and neglect. Children in these circumstances need support, care, and protection - not detention in custodial settings.

Social science affirms the dangers of early contact. Criminalising the behaviour of young and vulnerable children creates a vicious cycle of disadvantage and forces children to become entrenched in the criminal justice system.⁵³ Studies show that the younger a child has their first contact with the criminal justice system, the higher the chance of future offending.⁵⁴ Children who are forced into contact with the criminal justice system at a young age are also less likely to complete their education and find employment.

The United Nations Committee on the Rights of the Child has consistently said that countries should be working towards a minimum age of 14 years or older.⁵⁵ Australia has been repeatedly criticised by the United Nations, most recently by the Committee on the Elimination of Racial Discrimination, for failing to reform the current minimum age.

⁵³ Australian Institute of Health and Welfare 2016. Young people returning to sentenced youth justice supervision 2014–15. Juvenile justice series no. 20. Cat. no. JUV 84. Canberra: AIHW: The younger a person was at the start of their first supervised sentence, the more likely they were to return to sentenced supervision. For those whose first supervised sentence was community-based, 90% of those aged 10-12 at the start of this sentence returned to sentenced supervision, compared with 23% of those aged 16 and just 3% of those aged 17. More staggering were those sentenced to detention as their first supervised sentence, all (100%) those aged 10-12 at the start of this sentence returned to some type of sentenced supervision before they turned 18. This rate of return decreased with age, to around 80% of those 14 and 15, 56% of those 16 and 17% of those 17.

⁵⁴ Ibid and AIHW (2013) Young People Aged 10 – 14 in the Youth Justice System, 2011-2012, AIHW, Canberra.

⁵⁵ Committee on the Rights of the Child, General Comment No. 10 Children's rights in juvenile justice, 44th sess, UN Doc CRC/C/ GC/10 (25 April 2007), paras 32–33.

Recommendation 7

That section 344 of the Children, Youth and Families Act 2005 be amended to read that ‘a child under 14 years is not criminally responsible for an offence’ in order to prevent the criminalisation of children and the significant mental health risks associated with this.

Conclusion

We conclude by re-stating that the policing of people experiencing mental health issues is a vital area of system-wide reform to improve Victoria’s mental health system and enable Victorians to experience their best mental health now and into the future.

We reiterate that previous reforms in this area which have focused only upon changes or additions to police training or operational procedures, protocols and guidelines have proved to be manifestly inadequate and misunderstand the nature and dynamic of police misconduct in the context of impunity and lack of an effective system of police accountability that can address abuses of power and systemic problems.

We urge this Royal Commission to look to the systemic reforms highlighted in this submission and by the 2018 report of the Parliament's IBAC Committee Inquiry into the external oversight of police corruption and misconduct in Victoria, that remains before Parliament.

This submission does not contain confidential or anonymous information and may be published on the Commission's website or referred to in the Commission's reports, at the discretion of the Commission.

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