



# Victoria Police – Community Consultation

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## Field Contact Policy and Cross Cultural Training

**Fitzroy Legal Service**

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## About Fitzroy Legal Service

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Fitzroy legal Service ('FLS') has been serving the community since 1972, and has provided legal assistance to more than 90,000 clients.

FLS operates a free legal advice service five nights per week, providing advice in referral in relation to a broad range of legal matters. We also operate a busy legal practice working in the areas of criminal law, victims of crime, domestic violence, family law, and infringements. As part of the practice, FLS operates a duty law service based at the Neighbourhood Justice Centre.

FLS also has a publications team responsible for the Law Handbook online, which is accessed by around 30,000 people per week, and is the most used legal information resource in Victoria.

FLS relies on pro bono support to deliver legal services to the community, and currently has around 150 volunteers working to enhance access to justice.

This submission has been developed by the Social Action Team in consultation with FLS staff and other stakeholders in the health and community legal sectors.

FLS has had opportunity to review the submission of Arnold Bloch Liebler/ Flemington Kensington Community Legal Service, and have elected not to respond to those questions raised by the inquiry relating to cultural competence. Instead we endorse the submission of Arnold Bloch Liebler/ Flemington Kensington Community Legal Service, and endorse also the youth specific submissions and recommendations put forward by the Smart Justice for Young People coalition.

In relation to the other terms of the Inquiry into the Field Contact Policy and Cross Cultural Training, FLS has put forward submissions and recommendations from our service delivery perspective and the experiences of the communities we provide assistance to.

We are inordinately grateful for the opportunity to engage with Victoria Police on the range of issues arising under the terms of the inquiry, and in particular welcome the breadth of issues in relation to which feedback has been sought.

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## **Summary of Recommendations**

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**Recommendation 1** - A Field Contact Report should only be generated in circumstances where there is a statutory power to obtain personal information in the form of name and address.

**Recommendation 2** - Training monitoring and reinforcement is provided in human rights compliance and anti-discrimination laws in relation to discretions retained by police/ PSOs.

**Recommendation 3** - The relationship between the rule of law, protection of civil liberties, and law enforcement responsibilities is reinforced in training and at a supervisory level within Victoria Police.

**Recommendation 4** - The terms of the Victoria Police Manual in relation to Field Contacts are reviewed for operational consistency with the Information Privacy Act 2000 (Vic).

**Recommendation 5** - The tort of misfeasance in public office is considered in relation to FCRs.

**Recommendation 7** - Presence in an area of high incidence of drug related crime should not be sufficient to generate a 'drug association' PWF.

**Recommendation 8** - Attendance at an overdose must not be used as an occasion to generate a 'drug association' PWF.

**Recommendation 9** - Attendance at or presence in the vicinity of a primary health care facility providing services to drug users, including at a needle and syringe program, must not be used as an occasion to generate a 'drug association' PWF.

**Recommendation 10** - Reliance on health information contained in a PWF are relied upon to enhance the safety of the person affected and the police members engaged.

**Recommendation 11** - Protocols for obtaining and managing health information are assessed for consistency with the applicable legal framework set out in the Health Records Act 2001 (Vic).

**Recommendation 12** - Victoria Police provide for VPM guidance, training and monitoring in relation to the exercise of discretion in prosecuting 'public order' offences, having regard to State and Federal anti-discrimination law and the Charter of Human Rights and Responsibilities Act 2006 (Vic).

**Recommendation 13** - Victoria Police report on data against protected attributes under anti-discrimination legislation in relation to the prosecution of public order offences.

**Recommendation 14** - The VPM incorporate objective criteria relevant to community safety objectives to guide decision making in the prosecution, whether by infringement or charge, of 'drunk in a public place'.

**Recommendation 15** - The VPM incorporate guidance for the decision to prosecute the offence of 'beg alms'.

**Recommendation 16** - VPM Guidelines and Procedures Drug Programs and Services are incorporated instead as Policy Rules.

**Recommendation 17** - The release of criminal record information by Victoria Police is reviewed and amended for consistency with section 8 and 70 of the *Sentencing Act 1991* (Vic), relating to the release of no conviction and unconditional dismissal records.

**Recommendation 18** - The fact and nature of a complaint lodged with ESD is not communicated to the members concerned, to the informant charged with preparing the brief, or to the local station where the incident has taken place, until such time as the relevant members have formalised their statements and authorized relevant charges. An exception stands where it is in the interests of preservation of evidence to act otherwise.

**Recommendation 19** - ESD does not oppose production of relevant complaint investigations in the course of proceedings where no public interest grounds against production can be meaningfully entertained.

**Recommendation 20** - The VPM should articulate the circumstances in which a VPM must be produced by defining 'use of force'. Accountability in relation to the production of use of force forms should be monitored and reported against by senior members.

**Recommendation 21** - Where police or PSOs are engaged in a number of incidents where they have force used against them or used force against a member of the public, de-escalation and communication training should be mandated and supervisory accountability measures introduced.

**Recommendation 22** - The VPM incorporate policy rules relating to the welfare and secondary impact on children of arrest processes, use of force as well as questioning and searches.

## 1 Field Contact Reports & Person Warning Flags

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### 1.1 Status of the VPM and power to obtain personal information

The Reporting Contacts VPM and Chief Commissioner's Instruction CCI 4/12 Protective Services Officers on the railway network (CCI)<sup>1</sup> - deriving from the power of the Chief Commissioner to make standing orders per section 17 of the *Police Regulation Act 1958* (Vic) - are appropriately characterised as internal policy documents which do not have statutory force. In *Director of Public Prosecutions v Zierk*<sup>2</sup> Warren CJ found that section 17 of the Police Regulation Act provides the power to 'make orders for the general administration of the force and instructions for the effective and efficient conduct of the force's operations.'<sup>3</sup> Section 17 does not confer the authority of the legislature and, consequently, orders made pursuant to it do not have the force of statute. A similar conclusion was reached by the Victoria Court of Appeal in the more recent case of *Watkins v Victoria*.<sup>4</sup>

There is a lack of clarity around the source and scope of power authorising field contact reports (FCR) when juxtaposed against the clear limits of power enunciated under section 456AA of the Crimes Act 1958 (Vic), section 59 of the Road Safety Act 1986 (Vic) and section 218B of the Transport (Compliance and Miscellaneous) Act 1983 (Vic).

This lack of clarity is from our perspective reinforced by the terms of the inquiry, which suggest the mandate of power to obtain personal details from community members is governed by a process of consultation as opposed to by law.

We submit the source of power to 'check' persons/ vehicles, and thereby request their personal information, is generally grounded in the statutory powers under which police and PSOs are permitted to request certain information from individuals. The subsequent handling of the information (that is, by completing an FCR in relevant circumstances) may be governed by an internal policy document, rather than a statutory obligation, but a policy directive alone cannot expand the power of police and PSOs to request personal information.

A number of the circumstances articulated in the FCR criterion are within the scope of exercise of statutory power, and we make no comment in relation to these. Where information is obtained and recorded pursuant to law, it may or may not be appropriate to submit an FCR, depending on the value of the intelligence derived and accountability expectations of the community. For example, it may be appropriate to record an FCR of searches without warrant whether of persons or vehicles.<sup>5</sup>

### 1.2 FCR Criteria - 'found in circumstances reasonably believed to be suspicious'

In general, the scope of a police member's or PSO's authority to fill out an FCR can be objectively identified as a question of fact in accordance with the existence of the necessary state of affairs described in each circumstance.

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<sup>1</sup> Reissued as CCI 4/13 on 11 February 2013, but is not publicly available.

<sup>2</sup> [2008] VSC 184

<sup>3</sup> Ibid, at 28.

<sup>4</sup> [2010] VSCA 138.

<sup>5</sup> FLS endorses the submission of Arnold Bloch Liebler/ Flemington Kensington Community Legal Service in relation to appropriate recording and reporting obligations.

It is our submission that the criteria of 'found in circumstances reasonably believed to be suspicious' does not fall into that category, and purports to expand the lawful scope of authority of police and PSOs to obtain personal details from members of the public on a broad discretionary basis.

The meaning of 'suspicious circumstances' has not been judicially considered. The natural meaning of the word 'suspicious' may be used by a court in determining the logical scope of what would be considered suspicious circumstances. The Oxford English Dictionary defines 'suspicious' to mean:

open to, deserving of, or exciting suspicion; that is or should be an object of suspicion; suspected or to be suspected; of questionable character.

'Suspicion' is defined as:

the action of suspecting; the feeling or state of mind of one who suspects; *imagination or conjecture* of the existence of something evil or wrong *without proof*; apprehension of guilt or fault *on slight grounds or without clear evidence*.

We note the Procedures and Guidelines - Field Contacts VPM provides some further guidance in relation to 'circumstances reasonably believed to be suspicious' as follows -

relationships to time, place, circumstances, crime instances should be made rather than generalised; and

to qualify, a person must have been located, spoken to, sighted in an area with a high incidence of crime which must be justified, or in other circumstances that could be deemed to be suspicious and recording of that person's presence may be valuable in any future investigation, e.g. an area of gang activity.

Despite this further guidance, the criteria '*found in circumstances reasonably believed to be suspicious*' remains significantly broader than the scope of statutory power – that is, police/PSO power to request name and address from

- a person in charge of a motor vehicle that has been stopped<sup>6</sup>,
- where a belief is held on reasonable grounds that a person has committed or is about to commit an offence (indictable or summary), or may be to assist with the investigation of an indictable offence<sup>7</sup>,
- in a 'designated place' where a belief is reasonably held that a person has committed or is about to commit an offence under the Transport (Compliance and Miscellaneous) Act 1983 (Vic), regulations made under it, or the Graffiti Prevention Act 2007 (Vic)<sup>8</sup>.

An FCR is a formal police contact of significance for the affected individual, and is likely to be relied upon as intelligence or evidence in the future policing of the relevant person. This is to be compared with ordinary contacts in the field where witness details or contact persons may be recorded in running sheets, day book entries and the like. As such, it is entirely appropriate that the information recorded in an FCR has been obtained pursuant to powers exercisable under law. This must be

<sup>6</sup> Section 59(1)(a) and 59(1A)(a) *Road Safety Act 1986* (Vic).

<sup>7</sup> Section 456AA(1) of the *Crimes Act 1958* (Vic), section 118D(1) of the *Police Regulation Act 1958* (Vic)

<sup>8</sup> Section 218B *Transport (Compliance and Miscellaneous) Act 1983* (Vic)

reflected in the terms of the VPM which may guide the exercise of existing power but cannot create additional powers that have not been mandated by Parliament.

#### *Case studies*

- FLS staff member catching train to work and wearing a hooded jumper, and was asked to provide her name, date of birth and occupation. Refused and entered carriage. Believes the only possible reason attracting attention was the hooded jumper she was wearing at the time. Other members of the public at the railway station were not approached.
- Member of the public reported being regularly stopped on public transport by Protective Services Officers to provide name date of birth and occupation. Believes he is obliged to provide the same, and that even if he isn't it would be easier to do so than to create a problem. Has been told the check is to identify if he has any warrants. Believes the reason he is singled out is because of his clothing and appearance. He works as a laborer, and is reliant on public transport.
- A group of seven males between 18 and 26 reported being stopped and asked for their details regularly when catching public transport. None has ever been charged with any offences, and believe the reasons they are singled out is due to their gender, age, and appearance (clothing). Most agreed that it was easier to provide the requested information than to enter into a dialogue with the officers making the request, as the situation could escalate if they are not compliant with requests. However, feel the targeting is unjustified, unfair and provocative.
- Reference in PSOs 'Asking Too Many Questions' from *The Age* (27 April 2013) to PSOs 'recording the name and date of birth of more than 29,000 people last year, including those not suspected of any wrongdoing', information that 'may be used, at PSOs' discretion, to conduct criminal record checks by radio.'<sup>9</sup>
- Practice of police obtaining photographs and details from members of the public who are in public spaces where there is high incidence of drug use or crime- not under arrest, and not in custody, ostensibly to assist in future criminal investigations through generating a data base. When raised with senior command of Victoria Police, it was stated to FLS staff and others that as there is no legal prohibition governing this activity, it is permissible. It is unclear where and how this information is stored, who it may be accessed by, and what information sharing takes place with other agencies.

Most of these instances indicate a practice of background checking and intelligence gathering unsupported by statutory criteria. Against the VPM criteria 'found in circumstances reasonably believed to be suspicious', there is no real measure of accountability given the assessment is entirely subjective and need not be based on objective facts or observations relating to the individual. This is

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<sup>9</sup> The Age 27 April 2013 'PSOs 'asking too many questions' <http://www.theage.com.au/victoria/psos-asking-too-many-questions-20130426-2ik8z.html>



particularly reinforced given under the VPM mere presence in an area of high criminal activity may suffice to legitimise 'suspicion' and therefore a stop and check process.

In relation to the above instances, it is unclear whether the contact was in the nature of an FCR, or some other form of data/ 'intelligence'. This information was not provided to the persons affected.

### **1.3 Protections under the Charter of Human Rights and Responsibilities**

We note as relevant protected rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) in this context of community protection and law enforcement the following: recognition and equality before the law<sup>10</sup>, privacy and reputation<sup>11</sup>, peaceful assembly and freedom of association<sup>12</sup>, protection of families and children<sup>13</sup>, cultural rights<sup>14</sup>, right to liberty and security of person<sup>15</sup>. Under the Charter, any derogation must be 'under law', demonstrably justified, proportionate to purpose, and unable to be achieved by any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.<sup>16</sup>

Public authorities are accountable in relation to infringements on protected rights.<sup>17</sup> The infringement of rights engaged by stopping members of the public, ostensibly without lawful justification, to undertake background checks and record personal details is significant in nature and breadth. Reliance on consent does not vitiate the obligation on Victoria Police to ensure the act of obtaining personal information through stop and check practices is under law, nor does it remove the need to engage in a meaningful assessment of the demonstrated justification for the infringement on protected rights.

### **1.4 Binding obligations on public authorities under the Information Privacy Principles**

The Information Privacy Act 2000 (Vic) (IPA), and 10 Information Privacy Principles regulating, the collection and handling of personal information by public bodies is binding on Victoria Police save where exemptions apply.<sup>18</sup>

Section 14 of the IPA identifies that an act of an organisation is an interference with the privacy of an individual if it is inconsistent with the IPPs. IPP 1 regulates the collection of personal information by an organisation which:

- must not collect personal information unless the information is necessary for one or more of its functions (IPP 1.1); and
- must collect personal information only by lawful and fair means and not in an unreasonable or intrusive way (IPP 1.2).<sup>19</sup>

Information recorded in an FCR and PWG meets the definition of 'personal information' in the IPA.<sup>20</sup>

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<sup>10</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) Section 8

<sup>11</sup> Section 13

<sup>12</sup> Section 16

<sup>13</sup> Section 17

<sup>14</sup> Section 19

<sup>15</sup> Section 21

<sup>16</sup> Section 7

<sup>17</sup> Section 6

<sup>18</sup> *Information Privacy Act 2000* (Vic) section 9

<sup>19</sup> *Information Privacy Act 2000* (Vic), Schedule 1

Section 13 of the IPA provides law enforcement agencies with specific (not blanket) exemptions for compliance with some of the IPPs (relevantly, relating to communication of the fact that personal information is being gathered<sup>21</sup>, and rights of access/ amendment of personal information<sup>22</sup>), if Victoria Police believes on reasonable grounds that non-compliance is necessary in one of the following circumstances:

- for the purpose of its (or another law enforcement agencies) law enforcement functions or activities;
- for the enforcement of law relating to the confiscation of proceeds of crime;
- in connection with conduct of court proceedings; or
- in the case of Victoria Police, for the purpose of community policing functions.

Significantly, this does not affect the threshold obligations on public authorities set out in IPP 1.1 and IPP 1.2 above which are binding and should be reflected in the terms of the VPM.

We submit the terms of the VPM in relation to 'circumstances reasonably believed to be suspicious', viewed in effect through the practices/ reports referred to above, suggest the information gathering practices of Victoria Police do not correspond with the IPP framework. Again, the principles of 'necessity' of collection of personal information, lawfulness, fairness, and concepts of unreasonableness and intrusiveness are core considerations in determining whether thresholds are met permitting collection of personal information.

### **1.5 Broad implications for the rule of law/ community engagement in a law enforcement context**

We are concerned that there is broad misconception regarding the circumstances when a police member or protective service officer are empowered to obtain personal details from a member of the public. That community members are unsure of their rights and responsibilities under the law in such circumstances is hardly surprising, as there is no clarity to begin with at a law enforcement level. As identified above, the policy directives contained within the VPM purport to expand the power of police members beyond clear statutory limitations in obtaining personal information for the purposes of intelligence gathering. Furthermore, it seems there is a view that consent from members of the public can be relied upon in order to expand the scope of statutory power. This is despite the power differential engaged between police members and the public, and clear, lengthy lines of precedent regarding constructive arrest and false imprisonment.<sup>23</sup>

The terms of this community consultation broadly engage two public interests – (a) the ability of police/ PSOs to engage effectively with the community to enact law enforcement goals, and (b) the right of community members acting lawfully to protection of their civil liberties under the law. These interests should not be seen as competing but as complementary.

It is our submission that the way in which threshold interactions between police, PSOs and the community are managed (authorised, controlled and monitored) have broad implications for community engagement and the rule of law. It is clear on the face of it that when a police member makes a request of a member of the public, they should be entitled to believe the request has been

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<sup>20</sup> Ibid, section 3

<sup>21</sup> Ibid, Schedule 1, IPP 1.3

<sup>22</sup> Ibid, Schedule 1, IPP 6.1 & 6.5

<sup>23</sup> For example *R v Lavery* (1978) 19 SASR 515, *R v O'Donoghue* (1988) 34 A Crim R 397

made within the lawful scope of authority of the police member and that their cooperation is to assist a legitimate law enforcement end. It is essential that appropriate value is accorded to the principle of acting within the identifiable scope of power, and to the principle that police/ PSOs are accountable in relation to interactions with the public in which their position of power is relied upon to obtain cooperation in any regard and for any purpose.

The damage to policing culture and community relations of relying on the power implicit in the office of PSOs/ police members to obtain consent is long term and broad ranging, and we submit it is the responsibility at a supervisory and policy level to support a 'rule of law' culture amongst police and PSOs. Sole reliance on the exercise of discretion to counter inappropriate and discriminatory use of power is irrational, given the membership of Victoria Police carries the same prejudices as any other part of the community. There will be components of policing that necessarily retain a discretionary component. To maintain of the trust and confidence of the community adequate safeguards, training, reinforcement and accountability must be incorporated in such exercises of discretion so that arbitrary and discriminatory outcomes are not produced, or indeed promoted.

We make this submission strongly given the expanded scope of police powers and public order offences in Victoria, and the potential for negative interactions with the public, particularly if perceived as discriminatory, provocative and unfair, to transform into an unnecessary engagement with the criminal justice system with the associated costs for the individual and community.

We note surveillance is a dedicated field, covered by extensive legislative enactments and resources, and submit it would be detrimental to the community relations and human rights protections that Victoria Police undertakes that task in an ad hoc fashion without legislative mandate. Moreover we submit it will have detrimental consequences for long term community engagement objectives that actually provide support to law enforcement objectives.

### **1.6 Misfeasance in public office**

We submit that further analysis should take place in the scope of this consultation in relation to the tort of misfeasance in public office, comprising elements as follows: (a) an invalid or unauthorised act; (b) performed knowingly or maliciously in abuse of power; (c) in the performance of the functions of a public office; (d) causing damage.

The scope of the implied authority authorised by the relevant terms of the VPM is clearly broader than that authorised by law, and imports subjective assessments which necessarily, being absent objective criteria, create scope for inconsistent, arbitrary, and discriminatory application.

Whilst a police member/ PSO who believes innocently, but incorrectly, they are empowered to compel a person to provide personal information may not be captured, if this belief is based, for example, on the VPM, or an internal training program, or on the instructions of a senior colleague, further questions arise.

In relation to damage we note this may be evidenced, for example, where there are health impacts as a result of numerous interactions with police that are outside of power, or where a person fails to comply and the relevant member engages in a more coercive manner with the affected person. The cumulative damage to communities experiencing higher numbers of interactions with police and PSOs in this context is a relevant consideration from a public policy perspective also.

We submit that by purporting to authorise systematically a course of conduct, knowing it is beyond power, by persons engaged in the performance of functions of a public office, and causing damage to community members individually, and collectively, Victoria Police as an organisation may engage these elements.

### **1.7 Recommendations in relation to Field Contact Reports**

**Recommendation 1** - A Field Contact Report should only be generated in circumstances where there is a statutory power to obtain personal information in the form of name and address.

**Recommendation 2** - Training monitoring and reinforcement is provided in human rights compliance and anti-discrimination laws in relation to discretions retained by police/ PSOs.

**Recommendation 3** - The relationship between the rule of law, protection of civil liberties, and law enforcement responsibilities is reinforced in training and at a supervisory level within Victoria Police.

**Recommendation 4** - The terms of the Victoria Police Manual in relation to Field Contacts are reviewed for operational consistency with the Information Privacy Act 2000 (Vic).

**Recommendation 5** - The tort of misfeasance in public office is considered in relation to FCRs.

### **1.8 FCR Criteria - 'in the course of entering a brothel during the execution of your duty'**

The specific terms of this criteria suggest that personal information may be obtained by reason of a person being entering a brothel. We are not aware of any statutory authority to support such a power. The relevance of the words 'during the execution of your duty' does not add clarity in our submission.

We submit it would be preferable if the criteria more clearly addresses the accountability and association concerns underpinning. This might be achieved by a requirement that where police contacts take place in the context of the exercise of statutory power *and* in the context of ordinary law enforcement activities, an FCR must be recorded identifying that contact by the members involved.

### **1.9 Person Warning Flags**

A PWF will inform to a high degree the manner in which police will engage with an individual. As such we submit it should be based on credible, objective, factual information, and should be made subject to mandatory review and supervisory responsibility by a senior member.

We are aware that a PWF can include information of significant value to police members in engaging with members of the community. Some of the information stored under a PWF is health information as governed by the *Health Records Act 2001* (Vic)<sup>24</sup> which sets out a statutory framework that is binding on Victoria Police<sup>25</sup>. Within that framework, in the absence of consent, collection of health

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<sup>24</sup> Section 3

<sup>25</sup> Section 10

information by or on behalf of a law enforcement agency may occur where 'the organisation reasonably believes that the collection is necessary for a law enforcement function.'<sup>26</sup>

We note that different rules apply in relation to rights of access, data quality, data security, and the collection of health information.

#### **1.10 Recommendations in relation to Person Warning Flags**

**Recommendation 7** – Presence in an area of high incidence of drug related crime should not be sufficient to generate a 'drug association' PWF.

**Recommendation 8** - Attendance at an overdose must not be used as an occasion to generate a 'drug association' PWF.

**Recommendation 9** - Attendance at or presence in the vicinity of a primary health care facility providing services to drug users, including at a needle and syringe program, must not be used as an occasion to generate a 'drug association' PWF.

**Recommendation 10** – Reliance on health information contained in a PWF are relied upon to enhance the safety of the person affected and the police members engaged.

**Recommendation 11** – Protocols for obtaining and managing health information are assessed for consistency with the applicable legal framework set out in the Health Records Act 2001 (Vic).

#### **1.11 Responses to questions**

*1. What sort of behaviour do you think should be considered as suspicious enough to warrant a Field Contact Report? What sort of behaviour don't you think should be considered as suspicious enough to warrant a Field Contact Report?*

As outlined above, we submit that FCRs should be warranted only where statutory thresholds are met, or where interventions by police are authorised by statute, such as stop and search, move on directions, and searches of vehicles.

We acknowledge that not all these instances are going to be appropriate triggers to an FCR, and that, for example where charges are laid, the information may become redundant.

We submit that to the extent the VPM, and indeed the terms of this consultation, imply that the power to obtain personal details is not bound by law, that is an incorrect approach.

Grounds supporting this view are – the rule of law; the arbitrary, discriminatory and inconsistent practice attached to unfettered discretion in the hands of office holders; enhancing community engagement and trust in PSOs and police; lawfulness, reasonableness, proportionality, and purpose of derogation from protected rights under the Charter; obligations under the IPA; the tort of misfeasance in public office; context of expanded police powers and public order offences, and the capacity of illegitimate engagement on discriminatory bases to functionally criminalise communities.

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<sup>26</sup> Health Records Act 2001 (Vic) Schedule 1 Principle 1.1(g) – 'law enforcement function' is defined exhaustively within section 3 of the Act.

Features which clearly do not form grounds to warrant an FCR are – presence in an area where there is a high incidence of crime, race/ culture/ colour, age, the fact that persons may congregate as a group, homelessness, choice of clothing, a health condition.

The performance of duties in the role of PSO or police member should not be judged against the number of FCRs submitted.

*2. What do you think police or PSOs should say to someone when they have stopped them to record a field contact?*

Police or PSO's should identify the circumstances justifying the seeking of details and be obliged to record the same with specificity. It is incumbent on police and PSOs to make clear the distinction between a request for voluntary information, and a request that is mandated by law in an investigatory law enforcement function. As identified above, an FCR should only be able to be generated where statutory thresholds are met, or actions interfering with protected rights are engaged in under law.

*3. What information do you think is reasonable for police or PSOs to record when filling out a Field Contact Report?*

An FCR should provide sufficient detail for assessment of the appropriateness of the contact to be made against objective criteria and against the lawful power exercised in the relevant instance. Information recorded must be factual and credible. Police and PSOs should be provided training that makes clear that members of the public may seek access to FCRs under Freedom of Information laws. Regular monitoring of FCRs should incorporate supervisory responsibility, provision of feedback to police and PSOs, and accountability for the quality and credibility of information recorded.

*4. How confident do you feel that personal details recorded for a field contact are deleted from the police database if they are found to be unsubstantiated? How can Victoria Police increase your confidence?*

We submit there is no basis for confidence for this proposition. An FCR generated as a result of reasonable suspicion, whether founded or not, is not going to be destroyed. Given the suspicion is not judged against objective criteria the threshold is extremely low for generating an FCR, and as outlined above, we would submit for the quality of the intelligence gathered. The person affected will be impacted by that record in any future engagement with police and PSOs.

The terms of the VPM Policy Rules themselves identify that intelligence will be retained.

*5. What do you think police can do to make sure recording details on a Field Contact Report is fair and appropriate?*

Training should be provided on maintaining records limited to factual and credible information. Training should also be provided that intelligence loses value over time. There should be supervisory monitoring and accountability in relation to the details recorded on an FCR.

*6. Are you aware of your legal rights and/or responsibilities regarding the provision of your name and address to police or PSOs?*

As outlined at length above, there is a lack of clarity around rights and responsibilities regarding provision of personal information. Given the authority and power attached to the office of PSO and police member, it is incumbent on the member in the field to have a clear understanding of the limits of power to obtain personal information.

A failure on the part of an individual to voluntarily engage with police and PSOs should not form grounds for suspicion or further attention. The standing order should be amended to make clear that the scope of authority to obtain personal information remains within the ambit of the law. The reasonable belief that a person has committed or is about to commit an offence should be capable of clear articulation presumably by the member of PSO involved. Where contact occurs under a different statutory provision, the source of that power should also be capable of clear articulation. Where contacts occur with members of the public wherein statutory thresholds are not met, and the contact is voluntary to assist in a legitimate law enforcement activity, this should be identified to the person.

*11. In what circumstances do you feel it is appropriate for police or PSOs to ask for a community member's name and address other than for a field contact report?*

Police and PSOs can ask questions of members of the public that may be relevant to their investigations. Recording details of contacts may be an important part of the duties of a police member in accounting for their movements and actions through day book entries, running sheets and the like. Eliciting information from the public can also serve an important function in the prevention of crime or may serve to clear an individual of suspicion.

A key distinction is between circumstances where information has merely been requested by police, in which case there is no obligation to respond to the request, and circumstances where individuals are required to provide confirmation of personal information. It is for the police member or PSO to ensure there is clarity as to why and when details should be obtained, and to ensure requests are made within the scope of statutory power, or in relation to a legitimate and specific law enforcement purpose. Police and PSOs should be forthcoming regarding the scope of their power and duties in engaging with the community in this regard.

*12. What can police and PSOs do to reassure community members when being stopped by police officers or PSOs?*

As outlined above, we submit police and PSOs are not empowered to stop people to obtain personal details save as authorised by law. Community members would be reassured if the practice did not continue.

*13. What can police or PSOs do to reassure community members of the difference between taking names and addresses and initiating a 'field contact'?*

There will be a range of circumstances where it is fairly evident why personal details are being obtained from members of the community – for example, where they have witnessed a crime, receive documentation from police, provide information to police voluntarily, or where they are stopped in circumstances where it is believed they are committing a crime or about to commit a crime.

Police and PSOs should identify and communicate the nature of the contact, its purpose and its relationship to the relevant law enforcement purpose.



## **2 Policing of Alcohol, Drugs and Public Order Offences – Positive and Negative Experiences**

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The terms of this community consultation seek feedback on positive and negative experiences with PSOs and police. A strong focus of service delivery for FLS, along with other community legal centres, is in relation to low level offending, often associated with poverty, homelessness, mental health, and drug/ alcohol dependence.

Our submissions derive from a therapeutic jurisprudence perspective that seeks to engage with underlying causes of offending to reduce recidivism, and to improve health, wellbeing and community engagement. We are further informed by a harm reduction and poverty law perspective, wherein policing of the community is informed and reinforced by structural inequality, and wherein the long term costs/ benefits of law enforcement approaches are central concerns.

### **2.1 Positive experiences**

There are a broad range of positive experiences to report between police and community in the City of Yarra.

From our service delivery perspective these relate primarily to policing practices and exercise of discretion that takes into account the complex problems affecting some portions of the community, and engagement with health and community sector in supporting therapeutic responses.

The following examples are just a few, and relate primarily to common sense approaches taken to behaviors that are generally directly attributable to homelessness, mental health, drug and alcohol dependence and poverty.

It would be incorrect to say there is consistency across the board, and in particular, there are periods wherein policing operations targeting public order offences appear to capture a broad range of low level offending where we would submit alternative interventions would be more beneficial to the community over time.

- Regular attendance of police members including senior command at the Yarra Drug Health Forum, contributing to dialogue around harm reduction, prevention and treatment as an alternative framework for responding to community harms related to drug and alcohol dependence.
- Relationship building between harm reduction services and local police through enhancing understanding of the work and health/ harm reduction imperatives of health agencies working in the City of Yarra.
- Relationships developed through the Neighbourhood Justice Centre with community/ health sector, community members and police to enhance understanding and dialogue directed to prevention, and to addressing the causes of interactions with the criminal justice system.
- Referrals of persons by police to community sector/ health agencies to receive assistance in relation to the underlying causes of behaviours giving rise to engagement with the criminal justice system.

- Community education and engagement programs with newly arrived communities providing information and guidance about laws operating in Australia that may affect them (for example, driver education programs through the New Hope foundation)
- Exercise of discretion not to issue infringements or charge community members with low level offences such as public drinking or drunk in a public place, and reliance on requests and directions instead, presumably taking into account particular factors such as homelessness, poverty and mental health that are likely contributing factors to the community members presence in public space, reliance on alcohol, and likely inability to pay the infringement.

#### *Case studies*

- Person engaged in conduct captured by summary offence beg alms - directed by police member to provide confirmation of attendance at welfare agency in lieu of being charged. Person experiencing homelessness and serious mental health issues.
- Person endeavouring to stop using heroin in possession of suboxone without a current prescription (suboxone incorporating an antagonist to opiates). No charges laid by police member who conducted search, presumably on basis that the person apprehended was endeavouring to address drug dependence issues, and public interest not served by laying a charge in all the circumstances.
- Numerous instances of exercise of discretion not to issue infringements/ charge persons with drunk in a public place or drinking in a public place, electing to engage in communication and/or issue directions to achieve analogous outcomes. (Equally there are numerous instances of different approaches adopted discussed further below).
- Proper engagement with the VPM in relation to policing activity in the vicinity of NSPs (engagement is not uniform and is dealt with further below).
- Drug diversion and diversion recommendations in recognition that a prior for a drug related offence can inhibit work prospects substantially, and that incorporation of a therapeutic component more likely to support health wellbeing and community connectedness outcomes than a criminal law engagement.
- Welfare checks where individuals conduct suggests adverse mental health condition as opposed to an intention to engage in criminal behavior.

### **2.1 Negative experiences**

We express concern that many of the most negative manifestations of heavy handed policing approaches in relation to drug and alcohol use are driven by media and short term political goals, and are known to be inconsistent with the knowledge and experience in terms of achieving long term change and improving community outcomes of reduced crime and behavior change.

We submit Victoria Police has an important role to play in supporting progressive policy approaches that are evidence based and support marginalised communities, long term health and welfare objectives, and harm reduction in the community in relation to drugs and alcohol. We note in relation to the issues raised below that these have derived primarily through case work, but have been raised also through the Yarra Drug Health Forum.

#### *Case studies*

- Aboriginal person homeless, alcohol dependent and has mental health problems. Issued with infringements for drunk in a public place that amount to thousands of dollars. No funds to make payments and limited ability to engage with lawyers and criminal justice processes.
- Persons with significant acquired brain injuries issued with infringements for drinking in a public place that amount to thousands of dollars. Unable to engage with services consistently or to alter the behavior.
- Young African males often stopped and assessed as drunk in Fitzroy area. Believed reason they were stopped as opposed to other persons who had been drinking was as a result of race. On one occasion situation escalated and proceeded by arrest - allegations of excessive use of force, and large range of public order offences prosecuted. Charges ultimately withdrawn.
- Large number of individuals alleging discriminatory policing in terms of being prosecuted whilst in company of others who are not. Frequent escalation in context where persons do not believe they are doing anything ostensibly 'wrong' – for example, walking home, using public transport, leaving licensed premises, waiting for taxis.
- Surveillance by undercover and uniformed police of persons entering and exiting community health services where needle syringe programs operate
- Searches of persons in the immediate vicinity of community health services operating needle and syringe programs
- Reports from members of the community that they believe they have been identified through attendance at community health services
- The routine taking of photographs of service users in the absence of arrest or charges
- People experiencing multiple name and address checks in the vicinity of services and their homes
- During policing operations court mandated clients unable to attend as a result of levels of police harassment
- Staff having to organise off site appointments in order to ensure clients maintain connection

- Routine attendance by police at overdoses where ambulance staff are in attendance
- Unmarked police vehicles parked in the vicinity of primary health care services
- Confiscation of clean, unused syringes by police in the course of searches where no drugs are found
- Policing operations where offenders are encouraged to engage in low level trafficking to undercover members over a sustained period leading to more serious charges, likely imprisonment, and an inability to divert these same low level offenders into therapeutic sentences that may address underlying causes of offending (i.e. drug dependence)
- Search operations of all persons entering residential estates regardless of whether they reside there or not

### **2.3 Public order offences and policing for the 'perception of safety'**

We note that over the past five years there has been a significant expansion in scope and prosecution of public order offences. This has been accompanied by a cultural shift wherein policing operations/ presence to improve 'perception of safety' have expanded greatly. Community advocates have expressed concerns regarding these shifts on previous occasions on the basis of discriminatory impacts and infringements of basic civil liberties, and we will not reiterate these in this context.

However, we believe there needs to be significant additional training to ameliorate the negative impacts that expanded discretionary based prosecution of low level public order offences can cause. Training and monitoring against the requirements of anti-discrimination legislation needs to be a focus for recruits and existing members, given police and PSOs are individually and collectively accountable within the legal framework that has been passed by parliaments.

The exercise of discretion to arrest/ issue infringements for public order offences where there are clear underlying issues with a close nexus to the relevant conduct - most significantly mental health, drug and alcohol dependence, homelessness - should be addressed within the VPM. We submit in most cases there is simply no effective outcome or community benefit derived by responding through the punitive responses provided for by the criminal justice system.

As a community legal service working in an area of gentrification, we submit it is not appropriate for police prosecution of public order offences to be used as a tool to delegitimise the use of public space by some and not others. The subjective concept of 'amenity' is too loose to form the foundation for law enforcement operations. Policing operations should remain focused upon the legitimate objective of community safety, and should critically assess the manner in which law enforcement approaches are contributing to those ends.

Reporting on prosecutions of public order offences by race, age, homelessness, mental health would in our submission assist in providing an evidence base to assess discriminatory impacts and public utility over time in terms of addressing community concerns.

## **2.4 Drunk in a public place**

Prosecution for drunk in a public place forms the context for a large proportion of complaints received by FLS, and in particular, complaints wherein discrimination and excessive use of force is alleged. The prosecution of drunk in a public place, without accompanying conduct relevant to community risk or harm, is perceived as a selectively and somewhat arbitrarily prosecuted offence. This is particularly evident in an entertainment precinct such as Melbourne Central Business District and the City of Yarra, where thousands of people are potentially captured by the offence on any particular evening. We note that there is no threshold beyond the observation and perception of the relevant police member as to whether a person has reached a threshold wherein they should be assessed to be 'drunk', and no additional criteria by which the decision whether or not to prosecute, whether by infringement, arrest or both, is objectively assessed.

The bulk of prosecutions arising in our case work appear counter intuitive – for example, people apprehended waiting for public transport/ taxis or walking home, people experiencing homelessness and alcohol dependence, often in combination with mental health problems. The over-representation of African and Aboriginal members of the community is marked, as are reports of excessive use of force and allegations of discrimination in the context of arrests for drunk in a public place. We are unable to assess racialised trends more broadly, but it nonetheless raises questions given the demographic of persons who generally consume alcohol in the City of Yarra.

It is our strong belief that 'drunk in a public place' without an additional misconduct element should not be a criminal offence. The retention of such an offence, which relies completely on the exercise of discretion by the relevant member as to whether conduct should be dealt with through law enforcement intervention, creates fertile ground for discriminatory impacts, causing community harms and a break down in the rule of law and attendant relationships of trust between police and the community. We note that connections between poverty, race, prosecution of drunk in a public place, and harms to the community have been the subject of long term debate at a State and Federal level. In particular, the Royal Commission into Aboriginal Deaths in Custody<sup>27</sup> made the recommendation '[t]hat in jurisdictions where drunkenness has not been criminalised, governments should legislate to abolish the offence of public drunkenness', whilst The Parliament of Victoria Drugs and Crime Prevention Committee Inquiry into Public Drunkenness has made recommendations that sections 13, 14 and 16 of the Summary Offences Act 1966 (Vic) be repealed, and that 'a new public order offence must not be considered as a replacement for the repeal of public drunkenness offences'.<sup>28</sup>

We submit at minimum that the public interest would be served through incorporation of additional objective criteria, which provide a meaningful basis for a criminal law response to guide decision making in prosecutions of drunk in a public place. As addressed above, policy guidance, training and monitoring in the exercise of discretion to achieve compliance with anti-discriminatory laws is

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<sup>27</sup> (1987-1991) Recommendation 79

<sup>28</sup> Final Report (June 2001) - Recommendations 3, 4, 5 & 7.

required where broad discretions are retained. Obtaining compliance in the field with the terms of the *Racial Discrimination Act 1975* (Cth), the *Equal Opportunity Act 2010* (Vic) and the *Racial and Religious Tolerance Act 2001* (Vic) requires significant attention, as do responses at a structural and supervisory level to allegations of non-compliance.

Further to that, peer reviewed analysis of the evidence between the relationship between alcohol related violence and prosecutions of drunk in a public place should be undertaken.

## **2.5 Begging offences**

We believe that the offence beg alms, in the absence of any aggravating conduct, is an entirely inappropriate offence to retain in a community that is for a large part charitably inclined.

We submit that, in the absence of repeal, which is outside the ambit of this inquiry, strict adherence to protocols that protect vulnerable people in the community who have not engaged in aggressive or harassing conduct should be adopted in decision making with the laying of charges for beg alms.

## **2.6 Policing of drug users**

As outlined above, policing in the vicinity of community health centres providing services to drug users is an area of concern in the City of Yarra and other 'hot spots' across Victoria.

Relevant primary health care services provide general and AOD counseling, court support, case management, pharmacotherapy, referral to external support services, food banks, therapeutic group activities, access to telephones and internet, and community development activities encouraging engagement with local community. For some clients attendance is court mandated as a condition of sentencing and/ or bail.

The public interest in preventing the transmission of blood borne viruses and in addressing underlying causes of offending in a health framework is very high. It is inappropriate for these objectives to be marginalised as a result of the illegal status of drug use per se. The capacity of the criminal justice system to effectively address drug dependence and behaviors associated with problematic drug use is limited. The community interest in preventing transmission of the hepatitis C virus and HIV/ AIDS engages the right to life, not just of drug users, but of their families, children and the community broadly.

We acknowledge the complexity of responding to community needs, particularly in the housing estates, where density of population, limited space, and concentration of residents with complex social needs is a perennial problem. We are aware through reports directly from residents that trafficking from within and around estates is a significant contributor to problems facing some portions of the local community we serve.

We submit there is little formal accountability where operational approaches are inconsistent with the VPM Guidelines and Procedures Drug Programs and Services. A frequent explanation for policing conduct that is non-compliant is that the members involved are not locally based.

Education around the community interest in supporting harm reduction work, and accountability around compliance with the terms of the VPM, should be a central component of training to all police given the substantial resources allocated to policing of drug users. The balance struck within

the VPM, consistent with the terms of the National Drug Strategy, the rights of persons accessing health services in a confidential setting, should be promoted to the level of a policy rule. Accountability lines should be clearly established where violations of the VPM take place in terms of who has operational responsibility for the conduct of police who do not ordinarily work in a particular location.

We further raise the concern that routine attendance at overdoses by police is a significant disincentive to ambulance call outs. The significance of that operational approach in terms of long term community harm cannot be overstated. A person present at the time of an overdose is more likely than not to be a drug user themselves, or else the family member of a drug user. We would welcome the opportunity to engage further on this particular issue, as there are clearly a number of stakeholder's interests engaged in this interface. Additionally, as stated above, a drug association PWF should not be generated as a result of a call out.

## **2.7 Release of Criminal Record Information in relation to low-level offending**

We note that the release for ten years (five years in the case of a minor) of any finding of guilt for an offence, including prove and dismiss dispositions and no conviction records, means that the consequences of engagement with the criminal justice system have long term effects in terms of forming a significant barrier to employment. This is particularly the case in relation to priors for drug offences, but also for a range of public order offences, wherein the stigma attached to the relevant offence may be prohibitive to future community engagement particularly obtaining gainful employment.

We submit that the Criminal Record Information Release Policy should be amended so that it is consistent with the principles of the *Sentencing Act 1991* (Vic), in particular section 8 and section 70. We note the terms of section 8 (1) identify as follows: '[i]n exercising its discretion whether or not to record a conviction, a court must have regard to all the circumstances of the case including —

- (a) the nature of the offence; and
- (b) the character and past history of the offender; and
- (c) the impact of the recording of a conviction on the offender's economic or social well-being or on his or her employment prospects.

Section 8(2) provides '[e]xcept as otherwise provided by this or any other Act, a finding of guilt without the recording of a conviction must not be taken to be a conviction for any purpose.'

We further note that section 76 in providing for an unconditional dismissal states that '[a] court, on being satisfied that a person is guilty of an offence, may (without recording a conviction) dismiss the charge.'

We submit that it is entirely inappropriate that Victoria Police should undermine the long term operation of provisions of the *Sentencing Act 1991* (Vic) and the principles engaged by decision makers of the Court, in choosing to release information by an independent mandate, contrary to law enacted by the Parliament.

## **2.8 Recommendations in relation to drugs, alcohol and public order offences**

**Recommendation 12** – Victoria Police provide for VPM guidance, training and monitoring in relation to the exercise of discretion in prosecuting ‘public order’ offences, having regard to State and Federal anti-discrimination law and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

**Recommendation 13** – Victoria Police report on data against protected attributes under anti-discrimination legislation in relation to the prosecution of public order offences.

**Recommendation 14** – The VPM Policy Rules incorporate objective criteria relevant to community safety objectives to guide decision making in the prosecution, whether by infringement or charge, of ‘drunk in a public place’.

**Recommendation 15** – The VPM Policy Rules incorporate guidance for the decision to prosecute the offence of ‘beg alms’.

**Recommendation 16** - VPM Guidelines and Procedures Drug Programs and Services are incorporated instead as Policy Rules.

**Recommendation 17** – The release of criminal record information by Victoria Police is reviewed and amended for consistency with section 8 and 76 of the *Sentencing Act 1991* (Vic), relating to the release of no conviction and unconditional dismissal records.



### 3 Police Complaints

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#### 3.1 Negative Engagement with Complaints Processes

FLS is unable to attest to positive engagement with the complaints system. We have not to date had a complaint substantiated. We outline examples of unsubstantiated complaints below. Many of the clients we work with are vulnerable in a range of ways. Often they are unable to engage with the sizeable project of bringing a police member to account, and are unable to carry associated risks in terms of increased police attention, more vigorous prosecution, additional charges. Where a complainant has priors for example, or is charged in relation to the incident, or was under the influence of alcohol or drugs, the chances that their version of events will be countenanced, or that the substantive legal issues will be given close consideration, may diminish somewhat. Given the extremely low level of substantiation of police complaints, it is not generally recommended as worthwhile by staff at FLS, or by criminal lawyers working on behalf of accused persons generally.

We articulate particular patterns/ concerns as follows.

In our experience, responses to complaints are cursory, and often do not outline in any detail the investigatory process that has been undertaken. Where for example assaults are alleged, or injuries have been suffered by the complainant, we submit this is unsatisfactory.

The focus of ESD appears to be on 'resolution' of complaints. This fails to incorporate accountability opportunities, and functionally puts the onus on the complainant, or their solicitors, to continually agitate or escalate complaints. This does not assist to locate ESD it as a body with independent responsibility for the professional conduct of members, receiving information from the community and acting on the same as opposed to functioning within an adversarial paradigm.

The practice by ESD of opposing production under summons of relevant complaint investigations, where clear legal precedent exists identifying the material should be made available to defence, further contributes to an appearance of partisan positioning. This is particularly the case where the investigation relates to the precise set of circumstances out of which the charges arise.

The communication of an ESD complaint and content to police members concerned and/or to the informant charged with preparing the brief and/ or to the local station prior to formalizing of statements and authorizing of relevant charges functionally compromises the integrity of both the complaint investigation and prosecution of charges.

Given no substantive investigation is likely to be conducted in most cases, and the process engaged will generally involve simply obtaining a response from the member regarding the complaint, it is difficult to see what loss there would be to the integrity of the investigation in relation to a routine complaint. Whilst this would cause some delay, the consistent perception of criminal defence lawyers, and advice provided consistent with that perception, that lodging a complaint may lead to an escalation and multiplication of charges, would be in some measure addressed.

Maintaining strict separation between complaints and criminal prosecutions would discourage the belief, whether founded or not, that collusion and punitive prosecution is a routine outcome of an ESD complaint.

### *Case studies*

- Member of FLS staff observed arrest of older male heavily inebriated. In the course of arrest observed legs of male in the door of the divvy van, which was being leant on at the time, and heard screaming from inside the van. Staff member immediately made detailed report regarding details of incident, location, time of incident, other witnesses, and requesting that the apprehended male be examined for injuries as he would be in custody. Sometime later was contact by telephone by ESD member identifying an explanation as follows: police members had accidentally sprayed capsicum spray in their own faces at the time of the incident, male had never lodged a complaint in relation to the incident, and previously in the day been engaged in racist abuse at a school. Received correspondence identifying complaint not substantiated.
- Woman arrested for drunk in a public place whilst in company with her child. Reason put forward was concern for the safety of her child. A number of civilian witnesses so concerned in relation to the violence associated with the arrest that they attended the police station to provide statements. Statements identified that the child had been tangled in the arrest process. The female was taken into custody and charged with offences including resist police, assault police, use insulting language. Female had broken ribs as a result of the arrest process, and was not given opportunity to enquire after the welfare of her child for a number of hours whilst in custody. Child had been left at the scene in company with a company whom female had only just met. Reason provided for approach to arrest for drunk in a public place was concern for welfare of the child. Two additional witness statements obtained by police some months after the incident from security staff working in the general area reporting the police members acted appropriately. Woman issued a complaint whilst in custody. Complaint initially found partially substantiated, until it was realised that the police member using indecent language in footage provided by member of the public was in fact a different police member at the scene. Member who had engaged in relevant conduct of using indecent language resigned. Charge of indecent language retained against woman. ESD opposed production of the complaint investigation at contest mention, and female elected to plead as she wanted to move on and focus on care for her child. Reported her young child had extremely severe and ongoing anxiety issues subsequent to the event. Complaint not substantiated.
- Complaint issued at local station member in response to an arrest in the hallway of housing commission premises, on the basis that the person arrested was a resident and the hallway immediately outside his residence was not a public place within the meaning of the Summary Offences Act. Meeting time organised for FLS staff member to attend with complainant at police station. Discussion took place wherein FLS staff was told legal advice had been sought from the VGSO by police. In the morning prior to the meeting, received stating complainant was in custody for similar offending. Confirmed advice had not been received from VGSO at that time in relation to whether the charges would hold. Complainant withdrew complaint.

- Complaint lodged with ESD and forwarded to local station level. Person had sustained significant injury, and relevant witnesses at the scene not interviewed. Charges, brief and statements of police members involved in incident finalised after complaint had been lodged with ESD. Request for record of when ESD complaint forwarded to local station unable to be provided. Complaint found not substantiated. Court hearing resulted in dismissal of all charges save one. Findings of unlawful assaults made in the course of hearing against police member. No further action taken on ESD complaint file subsequent to hearing, until enquiry made to identify whether the formal outcome had been amended some months later. After further complaint lodged and media coverage of the case, complaint referred out of ESD for further investigation.

### **3.2 Responses to questions**

10. How confident are you in the process for reporting unfair treatment by police or PSOs? How can Victoria Police help you to be more confident in this process?

We endorse the submission of Flemington Kensington Community Legal Centre in advocating for a body independent of Victoria Police to investigate complaints about Victoria Police.

In the existing framework we make the following submissions.

It is the responsibility of ESD and senior command to respond thoroughly, decisively, and in an impartial manner, to complaints of relevance to the professionalism of police members and PSOs in performance of their duties, to complaints that involve the safety and wellbeing of the community and suspects/ accused persons/ persons in custody, and to complaints alleging discriminatory and vilifying conduct.

In relation to a work force the size of the Victoria Police, and with the powers and responsibilities of Victoria Police, there is simply no place in our submission for the presumption that misuse of power, discriminatory policing, and professional misconduct does not routinely occur. The ability for members of the community and advocates to engage meaningfully in making reports providing relevant intelligence and evidence to support accountability and monitoring is directly related to the effectiveness with which ESD can perform its function.

The generation of use of force forms remains an issue of accountability deriving from FLS case work. There should be clarity and accountability in the submission of use of force of forms in all cases where force has been used, not just cases where 'equipment' has been used.

We submit that where police members and PSOs are consistently found to be engaged in incidents of policing initiated by public order offences wherein repeat allegations of resist police and assault police arise, this should function as an alert that further de-escalation and communication training is required, additional support and supervision should be adopted by senior members, as an accountability measure both in relation to the safety of the relevant member and the community.

In the field, there does not appear to be sufficient consideration given to the impacts on children of policing operations. This is common sense, consistent with the rights of the child, and absolutely crucial given how important it may be for a child to view the police as a source of protection who

can be contacted in an emergency. This is likely to be particularly important for children whose parents have regular engagement with police members and PSOs.

We submit confidence would be enhanced if the following recommendations were followed.

### **3.3 Recommendations in relation to handling of police complaints to increase confidence**

**Recommendation 18** - The fact and nature of a complaint lodged with ESD is not communicated to the members concerned, to the informant charged with preparing the brief, or to the local station where the incident has taken place, until such time as the relevant members have formalised their statements and authorized relevant charges. An exception stands where it is in the interests of preservation of evidence to act otherwise.

**Recommendation 19** - ESD does not oppose production of relevant complaint investigations in the course of proceedings where no public interest grounds against production can be meaningfully entertained.

**Recommendation 20** – The VPM should articulate the circumstances in which a VPM must be produced by defining ‘use of force’. Accountability in relation to the production of all use of force forms, not just those where critical incidents have occurred, should be monitored and reported against by senior members.

**Recommendation 21** – Where police or PSOs are engaged in a number of incidents where they have force used against them or used force against a member of the public, de-escalation and communication training should be mandated and supervisory accountability measures introduced.

**Recommendation 22** – The VPM incorporate Policy Rules relating to the welfare and secondary impact on children of arrest processes, use of force, as well as questioning and searches.