

POLICE POWERS

People experiencing homelessness interact regularly with the police and are often vulnerable to the abuse caused by police acting beyond their powers. This chapter examines the role of police in the keeping of the peace and the processes and procedures for making complaints against police when they act beyond the scope of the powers awarded to them under statute.

Table of Contents

2. Police Powers	2
2.1 Introduction	2
2.2 Requests for information	2
2.3 Conduct of searches	3
2.4 Arrest	6
2.5 Rights upon arrest.....	7
2.6 Identification parades	9
2.8 Fingerprinting	12
2.9 Forensic sampling	14
3 The Independent Third Person.....	17
3.1 Introduction	17
3.2 The role of the ITP	17
3.3 Failure to procure assistance of the ITP.....	17
4. Complaints against Police	18
4.1 Introduction	18
4.2 Complaints in the first instance	18
4.3 Complaints to the Ethical Standards Department	18
4.4 Office of Police Integrity.....	20
4.5 Ombudsman Victoria.....	22
4.6 Criminal or civil action against police officers	22
4.7 Victims of Crime Assistance Tribunal.....	22
5. Contacts	23
5.1 Victoria Police Ethical Standards Department	23
5.2 Office of Police Integrity.....	23
5.3 Ombudsman Victoria.....	23
5.4 Australian Federal Police.....	24

1. Introduction

The role of police officers is to maintain the peace by ensuring that people comply with the law. In order to carry out this function, police are given a range of powers in addition to those enjoyed by other citizens. These powers arise under both legislation and the common law. Some of the most commonly encountered powers of the police are set out in section 2 of this chapter.

However, in some circumstances police officers may act beyond the scope of their powers or otherwise abuse their position as members of the police force. Individuals who experience homelessness and are otherwise disadvantaged may be vulnerable to such abuse and may require assistance in dealing with the police.

There is a range of ways in which people may get such assistance. For example, people who may otherwise have difficulty in understanding their interactions with the police may obtain assistance from the Independent Third Person (**ITP**) (see section 3 below).

A person who is aggrieved by police action also has a range of options in relation to that conduct. There are various ways in which members of the community can complain about police action, and these are discussed in section 4 below.

2. Police Powers

2.1 Introduction

Police officers have a range of powers that they may exercise against members of the public. In investigating the possible commission of offences, a police officer may request information from suspects and others (see section 2.2 below), and may conduct searches of people or premises (see section 2.3 below). If the investigation results in a person being accused of the offence, then the police have rights of arrest (see sections 2.4 and 2.5 below).

The police also have powers that may be used in investigating offences and result in the creation of evidence against an accused. Evidence may be obtained through questioning (see section 2.5 below), the use of identification parades (see section 2.6 below), taking photographs (see section 2.7 below), fingerprinting (see section 2.8 below) and taking forensic samples (see section 2.9 below). The rules of evidence will govern whether or not such evidence is admissible in court. However, a client may also have a legitimate complaint against the police if they are subject to such procedures and are aggrieved by the conduct of the police, even if there are no issues surrounding the use of evidence obtained (see section 4 below).

2.2 Requests for information

In general, no person is obliged to answer police questions.

The major exception to this rule is the power of police officers to obtain the name and address of any person that they reasonably believe has committed, is about to commit, or may be able to assist the investigation of, an offence.¹

¹ *Crimes Act 1958* (Vic) (**Crimes Act**), s 456AA.

The police officer making the relevant request must inform the person of the grounds of their belief in sufficient detail to allow that person to understand the nature of the offence or suspected offence. The police must also tell a person their name, ID number, police station and rank (and in writing if asked), or they can be fined.

Additionally, a person is required to provide police with their name and address in some specific situations, including:

- if the person is driving a car, motorbike or boat or riding a pushbike (as well as providing the police with a driver's licence, if relevant);
- if the person is on any form of public transport, on public transport property; and
- if the person is in a hotel or licensed premises.

There are also specific provisions that may require people to provide information under anti-terror laws; and there are specific provisions that apply to deportees and prohibited immigrants.

Ticket inspectors are also entitled to request the provision of a person's name and address if that person is on any form of public transport or public transport property (such as in a train or tram or at a stop).

2.3 Conduct of searches

Under the common law the general rule is that a police officer may not enter premises or search them without having either a warrant or the consent of the occupier. However, there are some cases where the police may search a person, or a person's home or vehicle, without having obtained a warrant.

Searches under warrant

In Victoria a Magistrate may issue a warrant on application by a police officer of or above the rank of Senior Sergeant if the Magistrate is satisfied that the premises contain:

- anything in respect of which an indictable offence has been, is being, or is likely to be committed;
- anything that there is reasonable ground to believe will provide evidence about the commission of an indictable offence; or
- anything that there is reasonable ground to believe is intended to be used for the purpose of committing any indictable offence against the person for which the offender may be arrested without warrant.²

The warrant would allow members of the police force to enter and search the premises and seize any such thing. The police officers would be obliged to comply with any terms of the warrant in conducting the search and seizure.

Search warrants may also be issued in specific circumstances, including:

- if a woman or girl is unlawfully being detained for immoral purposes;³
- if an extra-territorial offence has been, or is intended to be, committed;⁴

² Crimes Act, s 464.

³ Crimes Act, s 470.

- to search for explosives;⁵
- if a firearms offence may have been committed;⁶ and
- to recover stolen goods if larceny is reasonably suspected.

Some legislation under which warrants may be issued also sets out rules about how those warrants may be executed, including whether the use of force is allowed in the execution of a warrant. Accordingly, if a client has been the subject of a search under warrant, it is important that you find out on what ground that warrant was issued in order to determine whether the police properly exercised their powers of execution.

If the police have obtained a warrant to search premises, then this does not mean that they also have the power to search people on the premises. The police should have separate authorisation in order to search individuals in executing the warrant.

Searching a person without a warrant

Police have the power to search the body of, and the clothing and property in the immediate possession of, any person who has been lawfully arrested (see section 2.4 below in relation to powers of arrest). This power is restricted to searches that are reasonably believed to be necessary to ensure the safe custody of the person, the safety of police officers or to preserve evidence with respect to the offence for which the person has been arrested.

The types of searches which may be performed are a strip search, full search and a pat down search. Regulations apply to the manner in which each type of search must be conducted.

Additionally, a police officer may search any person's body upon arrest for a federal offence if it is reasonably believed that the person is in possession of any evidence relating to the offence.⁷ The types of searches that the police may perform in relation to a suspected federal offence are a frisk search, ordinary search and strip search. Each type of search must be performed in accordance with the relevant legislative procedures.

There is also specific legislation empowering police officers to search a person suspected of being in possession of illegally imported substances or items,⁸ a person in possession of an unlicensed or prohibited firearm, a prohibited weapon, a controlled weapon or a dangerous article in a public place,⁹ and a person on board, or about to board, an aircraft in respect of any offence involving the safety of the aircraft.¹⁰

Searching a person's home without a warrant

In Victoria the police have the power to enter and search any place without a warrant if it is believed on reasonable grounds that a person may be found who:

⁴ Crimes Act, s 341.

⁵ Crimes Act, s 466.

⁶ *Control of Weapons Act 1990* (Vic), s 11.

⁷ *Crimes Act 1914* (Cth) (**Commonwealth Crimes Act**), ss 3ZE, 3ZF and 3ZG.

⁸ *Customs Act 1901* (Cth).

⁹ A knife or any other article that could be used as a weapon would fall within this power. *Control of Weapons Act 1990* (Vic), s 10; *Firearms Act 1996* (Vic), s 149.

¹⁰ Crimes Act, s 469A.

- has committed a serious indictable offence¹¹ in Victoria;
- has committed an offence elsewhere which, if committed in Victoria, would be an indictable offence;
- has escaped from legal custody; or
- is in the process of committing a serious indictable offence.¹²

The police may use reasonable force in order to gain entry to the premises to be searched.

Additionally, the police have the power to enter and search any premises for a person believed to have breached the *Crimes (Family Violence) Act 1987* (Vic), provided that the police officer in question either has permission to enter from an occupier of the premises or has a reasonable belief that the person:

- has assaulted or threatened to assault a family member;
- is on the premises in breach of an intervention order; or
- is breaching the peace or is likely to do so.¹³

The police also have the power to enter and search:

- the premises of any person who, in the past five years, has been convicted of handling stolen goods or any offence involving dishonesty and punishable with imprisonment, or
- premises that have in the past 12 months been occupied by a person who has been convicted of handling stolen goods in the past five years.¹⁴

There are also specific search provisions relating to illegal prostitution services. A police officer is entitled to search any premises outside office hours if the police officer reasonably believes that a person is carrying on a prostitution service at the premises and that relevant evidence will be lost if entry to the premises is delayed.¹⁵

Searching a person's vehicle without a warrant

Police officers are entitled to search any moveable vehicle without a warrant if they believe, on reasonable grounds, that:

- anything relevant to an indictable offence is in or on that vehicle;
- if the search is not done at the time, then the thing will be concealed, destroyed or lost; and
- the circumstances are serious and urgent.

Any search to be conducted without a warrant and in a public place must be completed as quickly as possible and using no more force than necessary.

¹¹ A serious indictable offence is defined as meaning any offence for which the law provides for imprisonment for life or for five years or more, and includes offences such as theft (Crimes Act, s 325).

¹² Crimes Act, s 459A; Commonwealth Crimes Act, ss 3ZE, 3ZF and 3ZG.

¹³ *Crimes (Family Violence) Act 1987* (Vic), s 18A.

¹⁴ Crimes Act, s 92(2).

¹⁵ *Prostitution Control Act 1964* (Vic), s 64.

Police may search any person or vehicle that is in a public place if there are reasonable grounds for suspecting the presence of drugs (see below).

Searches to prevent terrorist acts

Under Commonwealth legislation a police officer may conduct a search of a person's body, personal property or vehicle if the police officer reasonably believes that the person will conduct a 'terrorist act'.¹⁶ The police are entitled to use reasonable force in carrying out such a search, although they are not entitled to detain a person longer than is reasonably necessary to conduct the search.

A 'terrorist act' is defined to include any threat of violence or threat of damage to public infrastructure that is made with the intention of coercing a government or intimidating the public. Peaceful protests and industrial actions are not considered terrorist acts.

Searches with regard to suspected drug use

A police officer may search any person or vehicle in a public place if they reasonably believe the person to have a drug of dependence in their possession or in the vehicle. The police are entitled to seize any drug of dependence or any instrument suspected to have been used in manufacturing the drug of dependence found during the search.¹⁷

A police officer may search a person, as well as any vehicle, package or thing in that person's possession, if the person is in a public place and the police officer has reasonable grounds to suspect that the person:

- is under the age of 18 years;
- has in their possession a 'volatile substance' (or item used to make a volatile substance); and
- is in the act of inhaling, or will inhale, the volatile substance.

A police officer may also search a person if the officer reasonably suspects that the person intends to provide a volatile substance to a person under the age of 18 years.¹⁸

A **volatile substance** includes any plastic solvent, lighter fluid, paint thinner, aerosol propellant, gasoline or other petroleum product.

2.4 Arrest

In Victoria a person may be arrested only in accordance with legislation authorising the arrest or under a warrant.¹⁹ A warrant may be issued to authorise police officers to arrest a specific person.

A police officer may arrest a person without a warrant if the officer believes on reasonable grounds that the person has committed an indictable offence in Victoria or committed an offence elsewhere that, if committed in Victoria, would be an indictable offence.²⁰ The police must tell a person that they are under arrest unless it is not practical for them to do

¹⁶ Commonwealth Crimes Act, ss 3UB and 3UD.

¹⁷ *Drugs, Poisons and Controlled Substances Act 1981* (Vic), s 82.

¹⁸ *Drugs, Poisons and Controlled Substances Act 1981* (Vic), ss 60E and 60F.

¹⁹ Crimes Act, s 457.

²⁰ Crimes Act, s 459.

so (eg: the person is being violent towards them). A person must go with a police officer if they are arrested. A person can choose whether to go to the police station if the police ask them to accompany them without arresting them.

The police may use force to prevent the commission, continuance or completion of an indictable offence or to assist in arresting a person committing or suspected of committing any offence so long as the police officer believes on reasonable grounds that the force is necessary and not disproportionate to the objective.²¹ If a person tries to stop the police from arresting them, they can be charged with 'resisting arrest'.

The police also have the power to arrest a person they believe the person is mentally ill and:

- the person has recently tried to hurt him or herself or someone else; or
- the police believe the person may try to do so.

In these cases the police must have doctor examine the arrested person. The doctor (or a CAT team) may recommend that the arrested person be admitted to hospital voluntarily. Police can take the person to hospital in those cases, but only where there is no one else to do so, and the person is at risk of harm.

2.5 Rights upon arrest

A person arrested within Victoria and taken into custody on suspicion of committing an offence must either be released or brought before a Justice or a Magistrates' Court within a reasonable time. If it is not practicable to bring the suspect before a Justice or a Magistrates' Court within 24 hours of their being taken into custody, then the suspect should be released on bail (see section 2.10 below).

In Victoria a suspect must be questioned within a reasonable time. There is no single definition of a **reasonable time** at law; rather, it depends on the facts of the particular case, including:

- the time needed to bring that person to court;
- the number of offences and their complexity; and
- the need for police to prepare further questioning.

Conversely, if a person is suspected of committing a Commonwealth offence, then police will have a maximum of only four hours in which to carry out the investigations and then either release the suspect or take them before a court. This period is reduced to two hours if the suspect in question is either under 18 years of age or an Aboriginal or Torres Strait Islander. These limited investigation times may be extended only upon application to a Magistrate.

Before being questioned, a person generally has a right to contact a lawyer as well as a friend or relative. The police must provide a private space for a person to make these calls. The police may prevent a call to a friend or relative if it may:

- help a person involved get away;
- result in evidence being lost or changed; or

²¹ Crimes Act, s 462A.

- put other people in danger, when it is a driving matter involving alcohol or drugs.

A person has the right to access an interpreter if they cannot understand or answer the questions police put to them.²² The police pay for the interpreter. Unless the questioning relates to driving offences involving alcohol or drugs, if the police don't provide an interpreter when required, the information a person provided cannot be used as evidence in court.

Questioning

A person is entitled to rely on the privilege against self-incrimination. This means that they are not required to answer any question asked of them. However, there are some exceptions, including the need to provide their name and address (as set out in section 2.2 above). Further, the person is not obliged to participate in any type of identification parade (see section 2.6 below), nor to re-enact any alleged crime for filming. However, suspects are required to agree to be photographed for the purpose of identification (see section 2.7 below).

Police officers have obligations relating to their questioning in order to ensure that people being interviewed do not fabricate evidence. Interviewees must be cautioned by the police that they are not legally obliged to answer questions. The caution used by police is:

'I must inform you that you are not obliged to say or do anything but anything you say or do may be given in evidence.

Do you understand that?

I must also inform you of the following rights. You may communicate with or attempt to communicate with a friend or relative to inform that person of your whereabouts. You may communicate or attempt to communicate with a legal practitioner'.

The police must not pressure, or offer any inducements to, the person being questioned to convince them to respond. The rules of evidence govern what use can be made of information provided to the police by a suspect. The following principles apply to police questioning for indictable offences (these are serious offences often heard before a judge and jury):

- the police must tape-record (and provide the person with a copy):
 - the police caution; and
 - any questions they ask a person, as well as their answers.
- A person can make a 'no comment' interview. In this case, a person should reply 'no comment' to all questions except identification questions.

For summary offences, such as 'drunk in a public place', the police do not have to tape record what a person says for it to be used as evidence against them. The police can write down questions they ask a person and their answers. This information can be used as evidence in court.

²² Crimes Act, ss 464C and 464D.

If a person is under 18, a parent or guardian must be with them before questioning commences. If the parent or guardian is unavailable, an independent person must sit in on the questioning. The only exception to this is if police believe:

- Another person is involved in the offence and may get away; or
- Waiting for an independent person may cause danger for other people.

The *Major Crime (Investigative Powers) Act 2004* (Vic) allows the use by police of coercive powers in order to require a person to answer questions relating to organised crime offences.

2.6 Identification parades

An identification parade involves surrounding the accused with a number of people bearing a sufficient resemblance to the accused.²³ A witness is then asked to identify the accused.

In Victoria it is necessary for the police to obtain a suspect's consent to participate in an identification parade. A suspect is not obliged to participate in an identification parade and has the right to refuse to participate in one. If a person was forced to take part in an identification parade, then almost certainly any related evidence flowing from it would be excluded in court (that is, there is a judicial discretion to exclude unlawfully or unfairly obtained evidence).²⁴

However, there is no immunity from identification. If a suspect refuses to participate in an identification parade, then the fact of refusing to participate may be admissible evidence against them, not because an inference of guilt can be drawn from the refusal but to establish why less satisfactory means of identification were used by investigating police. Accordingly, if a suspect refuses to participate in a parade, then police can still seek to have the suspect identified by other legitimate means, provided that there is nothing unlawful, improper or unfair in the method chosen.²⁵

Before an identification parade is conducted, no photographs of the suspect should be given to the witness.²⁶ Victoria Police's *Operating Procedures Manual* sets out the Police Commissioner's Instructions (**the Instructions**) as to how identification parades are to be conducted. The Instructions provide a basis for determining whether proper procedures are, or have been, applied in a particular case. Equally, compliance with the Instructions does not mean the identification parade is immune from challenge. An identification parade is always open to challenge if the accused instructs it was unfair because of the make-up of the parade. Indeed, there is always a chance of mistaken identity in an identification parade.

The Instructions provide that, before the parade is conducted, suspects should be informed that:

- they have the right to have a legal representative, friend or relative present;

²³ *Alexander v The Queen* (1981) 145 CLR 395, 428 per Mason J.

²⁴ *R v Clune* [1982] VR 1, 910.

²⁵ *R v Haidley and Alford* [1984] VR 229, 232, 244, 253, 255.

²⁶ *Alexander v The Queen* (1981) 145 CLR 395, 355 per Gibbs CJ.

- they may stand wherever they wish in the parade and can change position after each witness has viewed the parade;
- they may object to people chosen or arrangements made;
- unless they or someone else objects, a photograph will be taken of the parade; and
- at the conclusion of the parade they should be asked if they are satisfied with the arrangements made.

The Instructions further provide that:

- the request to a suspect to participate in an identification parade should be recorded on tape;
- the parade should be conducted in a location with favourable viewing conditions and suitable security;
- participants must be of the same general appearance as the suspect;
- generally, only one suspect should be included in an identification parade and there should be a minimum of eight other people;
- two suspects should be placed in a parade only if the suspects are of roughly similar appearance and a minimum of 12 other people participate;
- police may not participate in the parade unless the suspect is a police member;
- names and addresses of participants should not be recorded;
- parades should be conducted by an officer or sub-officer experienced in conducting identification parades; and
- a witness viewing a parade may ask to hear people in the parade speak, may view people from any angle they wish and can request to see the participants moving.

Commonwealth law

A parade can be held only at the request of a police officer if the suspect agrees. A suspect may also request that a parade be held and a parade must then be conducted if it is reasonable in the circumstances to do so.²⁷ The conduct of identification parades under Commonwealth law is governed by section 32ZM of the Commonwealth Crimes Act.

In relation to suspects aged between 10 and 18 years, an identification parade must not be held unless:

- the written consent of the suspect and their parent, guardian or some other person capable of representing their interests is first obtained; or
- the written consent of one of them is obtained and a Magistrate orders that the parade be held.²⁸

Police cannot hold an identification parade for a suspect who is aged under 10 years.

²⁷ Commonwealth Crimes Act, s 32ZM(1). The matters relevant to determining whether it is reasonable to hold a parade are set out in s 32ZM(2).

²⁸ The matters to be taken into account by a Magistrate in deciding whether an identification parade should be held involving an underage suspect are set out in Commonwealth Crimes Act, s 32ZN.

A parade cannot be held that includes a suspect who is incapable of managing their affairs unless a Magistrate orders that it be held.

2.7 The power to photograph

In Victoria it is generally permissible for police to take a photograph of a suspect without their consent. However, it appears that the power at common law to compel a person to submit themselves to photography is limited to the purposes of identification. This means that police cannot take photographs of, for example, injuries or other markings that might indicate guilt, without a suspect's consent.²⁹

The *Operating Procedures Manual* includes instructions for police in relation to photographing suspects. The instructions provide that direct means of identification such as through an identification parade are preferred to other means of identification such as photographs. Generally, witnesses can be asked to examine photographs of a suspect only if:

- the suspect has refused to participate in an identification parade;
- a police officer merely has a suspicion about the identity of an offender; or
- it is not practicable to hold an identification parade.

Witnesses must not be shown photographs for identification purposes if a suspect is available and an identification parade or other means of direct identification is practicable.

There are various provisions of Victorian statutes that require a person to submit to photography. These are chiefly designed to record the identity of prisoners and offenders who have been sentenced to community service orders. However, the photographs may also be used for the purposes of photo-identification in the course of police investigations. All prisoners must be photographed under section 28 of the *Corrections Act 1986* (Vic). This must occur as soon as possible after a prisoner's reception into a prison. Photographs such as these may be disclosed to a police officer if the disclosure is made to assist them in performing their official duties.³⁰

Commonwealth law

In certain circumstances police officers of the rank of Sergeant or higher have the power to take 'identification material' (which includes taking a photograph) from a suspect who is being held in relation to a Commonwealth offence. A suspect can be photographed either if they provide their written consent or without their consent if the police officer reasonably believes that taking the photograph will:

- establish who the suspect is;
- identify the suspect as the person who has committed the relevant offence or some other offence; or
- provide evidence in relation to the relevant offence or some other offence.³¹

²⁹ *R v Ireland* (1970) 126 CLR 321.

³⁰ *Corrections Act 1986* (Vic), s 30(3)(d)

³¹ Commonwealth Crimes Act, s 3ZJ.

Police can use reasonable force to take a photograph under these provisions.

If a person is found guilty of a Commonwealth offence, then the presiding Judge or Magistrate may make an order requiring the person to attend at a police station to be photographed, or an order allowing a Constable to attend and photograph the person.³²

2.8 Fingerprinting

Under section 464K of the Crimes Act, police may fingerprint a person aged over 15 years if the person is believed on reasonable grounds to have committed, been charged with, or summonsed to answer a charge for an indictable offence or summary offence referred to in Schedule 7 to the Crimes Act.³³ Police can use reasonable force to take the fingerprints if the person refuses to give them voluntarily, provided that the use of force is authorised by a senior police officer. In these circumstances, a police officer of the same gender as the person to be fingerprinted, and who is not involved in investigating the offence, must, if practicable, take the fingerprints.³⁴ Fingerprints can be taken by means of a digital fingerscan, or by any other means.

When taking a person's fingerprints, the police must inform them of the following matters in language likely to be understood by them:

- the purpose for which the fingerprints are required;
- the offence which the person is believed to have committed or with which the person has been charged or for which the person has been summonsed to answer a charge;
- that the fingerprints may be used in evidence in court;
- that if the person refuses to give their fingerprints voluntarily, then the police may use reasonable force to obtain them; and
- that if the person is not charged with a relevant offence within six months, is charged but the charge is not proceeded with or the person is found not guilty of the offence or any other relevant offence before the end of that period, then the fingerprints will be destroyed.³⁵

The definition of **relevant offence** in section 464O of the Crimes Act defines the limits of the purposes for which the fingerprints can be used. The fingerprint evidence can be used in relation to the offence in respect of which the fingerprints were taken, as well as for any other offence arising out of the same circumstances, and any other offence in respect of which the fingerprints have probative value.

If the person is not charged with a relevant offence within six months of the fingerprint being taken, or if the person is found not guilty of a relevant offence, then the fingerprint

³² Commonwealth Crimes Act, s 3ZL.

³³ Schedule 7 summary offences are (1) a summary offence where the maximum penalty (whether for a first or subsequent offence) is or includes a period of imprisonment; (2) an offence under the *Court Security Act 1980* (Vic), ss 3(2) and 3(4); (3) an offence under the *Control of Weapons Act 1990* (Vic), s 6(2); (4) an offence under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), s 36A; (5) an offence under the *Police Regulation Act 1958* (Vic), s 97; and (6) an offence under the *Prevention of Cruelty to Animals Act 1986* (Vic), ss 20, 23 and 35(6).

³⁴ Crimes Act, s 464N.

³⁵ Crimes Act, s 464K.

record must be destroyed, unless the police apply to the Magistrates' Court or the Children's Court for an order extending the period within which fingerprints can be kept.³⁶

The police cannot take a person's fingerprints for minor offences such as littering or jaywalking.

Fingerprinting for identification purposes

Under section 464NA of the Crimes Act, police may take a fingerscan for the purposes of identifying a person aged over 15 years if they are present at a police station, or have been remanded in custody, in relation to a charge for an indictable offence or summary offence referred to in Schedule 7 to the Crimes Act.³⁷ Before fingerscanning a person, the police must inform the person, in language likely to be understood by them, that the fingerscan is being taken only for the purpose of identifying the person and that it is inadmissible as evidence.³⁸

Fingerprinting children

A person aged under 15 years cannot be fingerscanned for identification purposes.

Police can neither request, nor compel, a child aged under 10 to provide their fingerprints.³⁹

Police can fingerprint a child aged between 10 and 15 years only if the child is reasonably believed to have committed, been charged with, or been summonsed to answer a charge for an indictable offence or a Schedule 7 summary offence.⁴⁰ The fingerprints cannot be taken unless:

- both the child and their parent or guardian consent to the fingerprints being taken; or
- the Children's Court has ordered that the fingerprints be taken.⁴¹

The information that must be given to the child, and the parent or guardian of the child, and other matters relating to the fingerprinting of children are set out in sections 464L, 464O and 464P of the Crimes Act.

Commonwealth law

There is a range of different bases upon which persons may be fingerprinted in relation to offences against Commonwealth laws. These include:

- if a person is in lawful police custody, with the suspect's informed consent. If a police officer believes the suspect is an Aboriginal or Torres Strait Islander, then there are additional requirements that must be met before informed consent can be obtained. In particular, the suspect cannot be asked to consent to having their fingerprints

³⁶ Crimes Act, s 464O.

³⁷ Above n 33.

³⁸ There are further requirements in relation to fingerscanning set out in the Crimes Act, s 464NA. Fingerscans can be retained for use in a database if not required to be destroyed under s 464O.

³⁹ Crimes Act, s 464L(1).

⁴⁰ Above n 33.

⁴¹ Crimes Act, s 464L.

taken unless they have an 'interview friend' present. This can be a relative, legal practitioner or a representative of an Aboriginal legal aid organisation;⁴²

- if a person is in lawful police custody and refuses to consent, but a senior officer is satisfied that:
 - there are reasonable grounds to believe that the suspect committed an indictable offence;
 - there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed a relevant offence; and
 - the fingerprinting is justified;⁴³
- on the order of a Magistrate. A child between the age of 10 and 18 years or an adult who is unable to understand the general nature and effect and purposes of fingerprinting, or who is incapable of indicating whether or not they consent to being fingerprinted, can have their fingerprints taken only if a Magistrate makes an order (unless their parent or guardian consents to their fingerprints being taken as a volunteer and the person does not resist);⁴⁴
- on offenders;⁴⁵ and
- if the person has volunteered and gives their informed consent.⁴⁶

There are particular procedures and rules in relation to the fingerprinting of suspects to ensure that the suspect is informed of their rights and the uses to which their prints may be put.⁴⁷

2.9 Forensic sampling

Police in Victoria have the power to request a suspect to undergo a forensic procedure if:

- there are reasonable grounds to believe that the results of the procedure will tend to confirm or disprove the suspect's involvement in an indictable offence; and
- the suspect is either suspected on reasonable grounds of having committed the offence, has been charged with the offence, or has been summonsed to answer to a charge for the offence.

Forensic procedures include both **intimate procedures** (that is, a sample of blood, pubic hair or saliva, a genital, anal or breast swab, a mouth scraping and a dental impression) and **non-intimate procedures** (that is, a sample of hair, from under the fingernail or any swab or sample taken from an external part of the body other than the anus, genitals or breasts).

A forensic procedure may only be conducted with the informed consent of the suspect, if a Magistrates' Court order has been obtained,⁴⁸ or if a senior police officer authorises a

⁴² Commonwealth Crimes Act, Division 3 of Part ID.

⁴³ Commonwealth Crimes Act, Division 4 of Part ID.

⁴⁴ Commonwealth Crimes Act, Division 5 of Part ID.

⁴⁵ Commonwealth Crimes Act, Division 6A of Part ID.

⁴⁶ Commonwealth Crimes Act, Division 6B of Part ID.

⁴⁷ Commonwealth Crimes Act, Division 6 of Part ID.

non-intimate sample to be taken from a person not under 17 years of age.⁴⁹ The requirements for informed consent are set out in the Crimes Act and include (among other things) informing the person in language likely to be understood by them:

- of the purpose and offence for which the procedure is required;
- that they may refuse to undergo the procedure; and
- that the information obtained may be placed on a DNA database and may be used in other investigations.

Under s 464V of the Crimes Act, the police can apply for an interim order directing a person to have a forensic sample taken (other than the taking of a blood sample). The police must reasonably believe that the sample or evidence sought to be obtained is likely to be lost or destroyed if the procedure is delayed until the final determination of the application.

If a person is found guilty of the offence in relation to which the forensic procedure is carried out (or a related offence), then the police may, within a period of six months from the final determination of any appeal, apply to the court for retention of the sample.⁵⁰ If such an application is not made within the prescribed time frame, then the sample must be destroyed.⁵¹

Children under 10 years of age cannot be requested to undergo a forensic procedure.

If police seek a forensic procedure from a child between the ages of 10 and 17 years who is suspected of, charged with, or summonsed to answer a charge for, involvement in an indictable offence, then they must obtain an order from the Children's Court. The court can make such an order only in certain circumstances.⁵²

Commonwealth law

The law in relation to forensic sampling in the investigation of Commonwealth offences is set out in Part ID of the Commonwealth Crimes Act, and largely mirrors the procedures set out in the Victorian legislation. Many of the provisions that apply to fingerprinting (see section 2.8 above) also apply to forensic procedures, given fingerprinting is considered to be a type of non-intimate forensic procedure.

The Commonwealth Crimes Act imposes time limits for carrying out forensic procedures, depending on how the procedure is authorised,⁵³ and also imposes special requirements in relation to obtaining the informed consent of Aborigines and Torres Strait Islanders. These are the same requirements that apply to taking a fingerprint from such a person (see section 2.8 above), including that the person is entitled to have an 'interview friend' present while undergoing the procedure.

⁴⁸ See Crimes Act, s 464T.

⁴⁹ See Crimes Act, ss 464SA-464SB.

⁵⁰ Crimes Act, s 464ZFB.

⁵¹ Crimes Act, s 464ZFC.

⁵² See Crimes Act, s 464U.

⁵³ See Commonwealth Crimes Act, s 23WC.

Samples must be destroyed as soon as practicable following an acquittal or a finding that the suspect committed the offence but no conviction is recorded, or after 12 months following the issue of a warrant. An application may be made to extend this period.⁵⁴

It is an offence for police to record or retain identifying information on the Commonwealth DNA database system after the forensic material is required to have been destroyed.

2.10 Bail

In Victoria a person being held in custody in relation to an offence of which they are accused is generally entitled to be granted bail if it is not practicable to bring them before a Bail Justice or the Magistrates' Court within 24 hours after they are taken into custody, or pending a hearing of their case.⁵⁵ Bail means that a person is released from custody if they undertake to go to court to face the charges against them.

The *Bail Act 1977 (Vic)* details the circumstances in which applications for bail can be made and the factors that a court or Bail Justice (when the court is closed) must consider in deciding whether to release a suspect on bail or whether to refuse to do so. Bail may be refused in some circumstances, depending on the type of offence or the possible adverse consequences of releasing the person on bail.⁵⁶

The police have the power to grant bail in some circumstances. A person who is arrested and cannot practicably be brought before a Bail Justice or the Magistrates' Court within 24 hours after they are taken into custody is entitled to be released on bail, except in the case of certain offences.⁵⁷ If the police do not think that bail is appropriate for a person, they must be taken to court, where the person can apply for bail themselves and the court will decide.

If a person is alleged to have committed an offence against certain provisions of the *Summary Offences Act 1966 (Vic)*, then a police officer of the rank of Sergeant or above or the officer in charge of a police station may release the person upon payment of a cash deposit and must notify the person of the requirement for them to appear before a court. The deposit must not exceed \$50 and must be an amount that the police officer considers reasonable as security for the payment of any penalty that may be imposed as punishment for the offence that the person is alleged to have committed.

Bail, when granted, may be subject to a variety of conditions regarding the undertaking that must be given by or on behalf of the accused (for example, whether a security, surety or deposit of money must be provided to the court or whether no security is required). The court is required to consider the forms of bail sequentially, from least stringent to most stringent, in order to ensure that an applicant will be granted the most appropriate form of bail.⁵⁸ Most applicants are bailed on their own undertaking, without the need to surrender any money or security.

A person who fails to appear when they have been released on bail may be imprisoned for up to 12 months.⁵⁹

⁵⁴ See Commonwealth Crimes Act, Division 4 of Part 1D.

⁵⁵ *Bail Act 1977 (Vic)*, s 4(1).

⁵⁶ *Bail Act*, s 4(2).

⁵⁷ *Bail Act*, s 11.

⁵⁸ *Bail Act*, s 5.

⁵⁹ *Bail Act*, s 30.

3 The Independent Third Person

3.1 Introduction

The Independent Third Person (ITP) program is coordinated by the Office of the Public Advocate (OPA).⁶⁰

The ITP provides help, in their dealings with police, to children (under 17 years of age) and to anyone with a mental illness or some form of cognitive impairment (including brain injury, intellectual disability or various forms of dementia).

The ITP does not provide legal advice but is available to provide support and assistance where any communication or comprehension difficulties have the potential to arise.

3.2 The role of the ITP

The ITP is a trained volunteer who has experience of those with mental illness or cognitive impairment. ITPs are registered with OPA and are required to attend regular training sessions to remain current about mental health issues.

An ITP is independent of the police and does not offer legal advice or representation. This means that anything said to the ITP, including admissions made by the person dealing with police, can be used as evidence in court. However, an ITP can help to put a person in touch with a legal adviser if they require one.

If an ITP is requested by an interviewee or the police, then they will spend some time beforehand talking to the interviewee to explain the ITP's role. They will explain the process which is to follow, including setting out the rights of the interviewee, depending on the reason they are being interviewed. For example, if the person is being interviewed as a suspect, then the ITP will advise them that they have the right to obtain legal advice and the right to refuse to answer questions.

During the interview, the ITP will be present to assist with issues that may arise, such as ensuring that the person understands the questions and does not become confused or upset.

3.3 Failure to procure assistance of the ITP

Victoria Police operating procedures require a police officer to contact an ITP if they plan to interview someone with a mental illness or cognitive impairment. This requirement applies whether the person is being interviewed as a victim, a suspect or a witness.⁶¹

If you have a client who may benefit from the assistance of an ITP, then you should ensure that they are made aware of their right to procure the assistance of an ITP.

Failure by police to comply with this procedure may be a potential ground for a complaint against the police (see section 4 below).

⁶⁰ See <http://www.publicadvocate.vic.gov.au>.

⁶¹ See *Protocol between Victoria Police and the Department of Human Services Mental Health Branch 2004* at <http://www.health.vic.gov.au/mentalhealth/police/protocol-police.pdf>.

4. Complaints against Police

4.1 Introduction

There are several options available to a person who wishes to complain about their treatment by police. Complaints can range from minor concerns such as rudeness or inaction, through to serious allegations such as corruption or assault.

It is important that a complaint be made promptly and in as much detail as possible, as this will have an effect on whether it is ultimately upheld.

There are both internal and external complaints-handling procedures available, depending on the nature of the complaint.

4.2 Complaints in the first instance

The first option when making a complaint is to raise it with the officer in charge of the relevant police station. The relevant police station can be identified if the matter complained of took place at a police station or, if not at a police station, if the police officer who is the subject of the complaint was identified as being attached to a particular station (for example, on documents such as an infringement notice provided to the person by that police officer).

The complaint may be made verbally or in writing. If made verbally, then the complainant should ask the police member taking the complaint to make a note of it, including all necessary details such as the date, time and nature of the incident and any subsequent action taken.

The complaint should be made to the officer in charge, who is likely to be a Sergeant or Senior Sergeant. A duty Inspector should also be on call and available to respond to complaints.

This method of lodging a complaint will apply in most cases where there are issues about rudeness, tardy response times or inaction by the police.

However, there will be situations where it will not be appropriate for a complaint to be made in this way, for example:

- if the complainant is not comfortable approaching the police at the station (for example, if the officer with whom a complaint should be lodged may be the officer whose conduct is complained of);
- if an unsatisfactory response is received at this level; or
- if the matter is more serious.

Under these circumstances the matter may be referred to either an internal or external police complaints body.

4.3 Complaints to the Ethical Standards Department

The *Police Regulation Act 1958 (Vic)* gives the Chief Commissioner the ultimate responsibility for investigating police members and taking any necessary disciplinary action. However, in practice, a unit within the force known as the Ethical Standards Department (**ESD**) carries out this role on a day-to-day basis.

A complaint to the ESD will involve police investigating themselves. This may not be an appropriate avenue if the conduct in question concerns issues of independence or accountability.

The ESD examines internal and external complaints made against police members and has broad powers to compel members and witnesses to give evidence. If the complaints made are upheld, then the ESD can recommend action to be taken against the police member, including disciplinary charges or other proceedings.

The internal disciplinary procedure is closed to the public and the complainant does not participate in this hearing. The sanctions available under the internal disciplinary procedure range from a formal reprimand through to dismissal.

A complaint to the ESD should be made as soon as possible after the incident to ensure that it can be investigated while the memories of potential witnesses are still fresh.

However, because the ESD is obliged to investigate any complaints received straight away, making a complaint immediately may not be appropriate if charges have been laid against the complainant in connection with the incident that is the subject of the complaint. This is because making the complaint may result in a more aggressive prosecution of the complainant by the police. Under such circumstances, you may either:

- delay lodging the complaint until after the complainant's court case. However, this course of action carries the risk that if part of the defence in that case relates to police misconduct, then the fact that a complaint has not been lodged may be cited as evidence that these claims are being fabricated to help the person in their case; or
- use the external complaints process under which a complaint may be lodged straight away but kept confidential and not investigated until the conclusion of any proceedings, by lodging the complaint with the Office of Police Integrity (see section 4.4 below).

Investigation of complaints by the ESD

All written complaints received by the ESD are reviewed by a classification committee, a group of between four and six police officers who meet daily to review complaints and determine how they will be handled.

As part of this process, the committee looks at:

- whether the complaint is capable of investigation;
- where the complaint is best directed;
- who will investigate the complaint; and
- what procedures need to be followed in the investigation.

The committee will write back to the complainant, advising them of the outcome of its determination. If the complaint is to be pursued, then the letter will advise of the next steps in the process and the estimated time frame for this action.

Minor complaints, such as those involving rudeness or inaction by police, are likely to be handled under the Public Incident Resolution procedure administered by the Assistant Commissioner (Ethical Standards). Victoria Police operating procedures require this

type of complaint to be handled quickly (that is, within one to three weeks). Resolution options include meetings between the complainant and the officer involved, as well as warning notices issued to the police member for minor breaches of procedure.

More serious complaints are investigated by an officer assigned to look into the complaint. The initial investigation generally involves one or more lengthy interviews between the person making the complaint and the investigating officer. The investigator can then consult other witnesses and call for other evidence, including legal, medical and other relevant specialist evidence.

Once the investigation has been conducted, the matter is referred back to the officer-in-charge of the ESD who will then determine whether or not the complaint has been substantiated. If the complaint is substantiated, then the police will make a decision on the appropriate disciplinary procedure to be followed. The outcome is reported back to the complainant.

Access under the *Freedom of Information Act 1982* (Vic) may be given to police records relating to inquiries undertaken by the ESD, which may be useful in challenging the outcome of any review or investigation.

How to complain to the ESD

The best way to make a complaint is in writing. This gives the complainant the chance to express themselves in their own words and reduces the margin for error or confusion associated with an oral complaint.

The complaint should contain as much detail as possible, including the date and time of the incident, the names and ranks of the police officers involved and the names and addresses of any witnesses to the incident. Details of any conversations should also be recorded using direct speech.

If the incident involves a physical injury, then the complaint should contain a full description of the injury, including photographs taken as soon as possible after the event and when any emerging symptoms (for example, bruising or swelling) become visible. Any doctor's report setting out medical attention sought or provided should also be included.

The ESD can arrange for photographs to be taken and can also refer a complainant to a doctor (unconnected with the police) who specialises in examining injuries to allow a medical report to be prepared.

Complaints to the ESD may be sent to:

Victoria Police Ethical Standards Department
World Trade Centre
637 Flinders Street
MELBOURNE VIC 3005

4.4 Office of Police Integrity

The Office of Police Integrity (**OPI**) is an organisation independent of police, with the Director, Police Integrity, reporting directly to the Victorian Parliament. The OPI was set

up under the *Police Regulation Act 1958* (Vic) with the aim of detecting, investigating and preventing police corruption and serious misconduct.

The OPI receives and investigates complaints about police behaviour, including matters involving police practice and procedure.

The OPI refers a number of the complaints it receives back to the police for investigation (to either the ESD or the relevant police district) and can also reinvestigate a complaint already examined by the police.

The OPI accepts anonymous complaints, although the extent to which these can be verified is then limited.

Investigation of complaints by the OPI

As with the ESD, a complaint to the OPI is first considered under an assessment process to classify whether it falls within the OPI's jurisdiction and, if so, what the next steps are.

Complaints that are considered trivial, vexatious or in bad faith may be dismissed. The OPI may also determine that a complaint does not warrant further investigation if it has been made more than one year after the incident and there is no good reason given for the delay in lodgment. The OPI does have the discretion to accept a complaint at the time of an incident but delay investigation pending the outcome of charges laid relating to that incident.

The OPI may refer the complaint to the ESD to investigate and then can review the way in which that complaint is handled.

The person making the complaint will be advised in writing what course of action the OPI has recommended.

Complaints of a minor nature should usually be resolved within two months of the complaint being lodged. More serious complaints involving extensive investigation may take considerably longer. The OPI has an enquiries officer who can handle questions about the progress of an investigation.

How to complain to the OPI

Complaints can be made to the OPI in several ways, including in person, by telephone, by email or in writing to:

Office of Police Integrity
GPO Box 4676
MELBOURNE VIC 3001

The OPI prefers to receive complaints in writing, as it maintains an electronic database of complaints. There is a complaints form available that can be posted out on request, or downloaded from the OPI website at <http://www.opi.vic.gov.au>.

The complaint should contain as much detail as possible, including relevant dates, times, locations, names of those involved (including police officers and witnesses), photographs and any supporting medical documentation.

Concerns about the outcome of an OPI investigation

If a complainant is not satisfied with the outcome of an OPI investigation, then they can request an internal review. This involves an OPI officer who had no previous involvement with the complaint reviewing the investigation to decide whether all avenues of inquiry have been exhausted.

The complainant will be advised of the outcome of this review process. If they are still dissatisfied with the outcome, then they may decide to complain to the Ombudsman.

Records relating to investigations by the OPI are exempt from freedom of information laws.

4.5 Ombudsman Victoria

Complaints about the conduct of Victoria Police, including the outcome of matters referred to the ESD or the OPI, can be made to the Ombudsman Victoria. The office of the Ombudsman is independent of police and has powers to conduct its own investigations.

When receiving complaints directly (that is, in the first instance) the Ombudsman's office may refer the matter for investigation to the police.

4.6 Criminal or civil action against police officers

Summary criminal proceedings relating to complaints such as assaults can be brought by individuals in the Magistrates' Court. However, they need to be proved beyond reasonable doubt and therefore require a substantial amount of evidence.

The risk in launching a private prosecution is that if it fails, the complainant will have to pay the defendant's costs.

In civil matters, although the evidentiary burden is lower (that is, the standard of proof is on the balance of probabilities), a person suing police will still require solid independent evidence of the matter complained of, including photographs, medical reports and statements of witnesses, in order to succeed. Again, there is the risk that if the case is unsuccessful the person bringing the action will have to pay the costs of the police involved. If they do succeed, then they will be entitled to damages but the amounts involved are not great unless there was a very serious injury.

4.7 Victims of Crime Assistance Tribunal

A person who is injured by police may seek compensation through an application to the Victims of Crime Assistance Tribunal (**VOCAT**). The victim must have complained to the police about the incident before making an application to VOCAT.

Compensation is available even if no charges are brought against police and is payable for medical expenses, loss of income and damage to personal property such as clothing. As with applications to court for compensation, the amounts awarded are not substantial. VOCAT is also entitled to consider an individual's criminal history, which may have a negative effect on an application that relates to criminal activity by the applicant.

For more information about applying for compensation through VOCAT, see Chapter 7 of this Manual.

Compensation may also be obtained under the *Sentencing Act 1991* (Vic). If an officer is convicted of a criminal offence, then the person against whom the offence was committed may seek an order for compensation. This must be done before the officer involved is sentenced.

4.8 Complaints against the Australian Federal Police

Complaints may be made about the actions of individual Australian Federal Police (**AFP**) members or about policy and/or procedural issues associated with the AFP.

Complaints can be made to the AFP directly or to the Commonwealth Ombudsman. The Ombudsman will generally intervene only if the complaint has previously been raised with the AFP.

For minor complaints, there is a conciliation process under the AFP's Workplace Resolution Program.

More serious matters are referred to the Internal Investigations Division (**IID**) and a report detailing the actions taken by the IID must be forwarded to the Ombudsman's office for independent review. If the Ombudsman is not satisfied with the IID's investigation of the complaint, then the Ombudsman may ask the IID to re-examine the complaint, or the Ombudsman can undertake their own investigation.

As with complaints to Victoria Police, a complaint should be made as soon as possible and within a year of the incident to maximise the chances of it being pursued.

Complaints should be directed to:

Australian Federal Police
383 La Trobe Street
MELBOURNE VIC 3000

or

Commonwealth Ombudsman
Level 10
2 Lonsdale Street
MELBOURNE VIC 3000

5. Contacts

5.1 Victoria Police Ethical Standards Department

World Trade Centre
637 Flinders Street
MELBOURNE VIC 3005

5.2 Office of Police Integrity

GPO Box 4676
MELBOURNE VIC 3001
Website: <http://www.opi.vic.gov.au>

5.3 Ombudsman Victoria

Level 9, 459 Collins Street
(North Tower)

Melbourne 3000
DX: 210174
Tel: (03) 9613 6222
Toll Free: 1800 806 314
Fax: (03) 9614 0246
Email: ombudvic@ombudsman.vic.gov.au
Website: <http://www.ombudsman.vic.gov.au>

5.4 Australian Federal Police

383 La Trobe Street
MELBOURNE VIC 3000

or

Commonwealth Ombudsman

Level 10
2 Lonsdale Street
MELBOURNE VIC 3000

6. Disclaimer

This Manual is intended to be used as a resource that introduces different areas of law and provides guidance on how an issue might be addressed. The Manual is not intended to be advice on any particular matter. Readers should not act on the basis of any material in the Manual without obtaining advice relevant to your own particular situations. The authors and publishers expressly disclaim any liability to any person in respect of any action taken or not taken in reliance on the contents of this Manual.

The law in this edition of the Manual is correct as at 30 June 2008