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14 August 2013

To: Victoria Police Community Consultation

LIBERTY VICTORIA SUBMISSION TO VICTORIA POLICE COMMUNITY CONSULTATION ON FIELD CONTACTS AND CROSS-CULTURAL TRAINING

Liberty Victoria is grateful for the opportunity to make this submission to the Victoria Police Community Consultation on Field Contacts and Cross-Cultural Training.

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty is actively involved in the development and revision of Australia's laws and systems of government. Further information on our activities may be found at www.libertyvictoria.org.au.

I INTRODUCTION

Victoria Police has a vital role in securing the safety of all Victorians and making our communities stronger. In carrying out their duties, Victoria Police members are often subject to difficult conditions and choices. However, there is a strong perception in culturally and linguistically diverse (CALD) communities that Victoria Police members use racial profiling as a policing technique. This has been the topic of heated debate. However, the recent Federal Court case of *Haile-Michael & Ors v Commissioner of Police & Ors*¹ provides a background to the consultation that must be acknowledged. Further, the

¹ *Haile-Michael & Ors v Konstantinidis, the Chief Commissioner of Victoria Police, the State of*

evidence of Professor Ian Gordon in that case demonstrated that there was an empirical foundation to the complaint that people from CALD communities were being disproportionately and arbitrarily subject to the exercise of police powers.

This submission largely focuses on questions fifteen to twenty of the consultation, relating to issues of racial profiling and perceived bias by Victoria Police. In a letter provided to Liberty Victoria dated 23 July 2013, Victoria Police responded to several questions that we raised related to training. That correspondence was most helpful and we thank Victoria Police for their timely response. The response is attached as an annexure to this submission.

Most importantly, in that correspondence it was acknowledged that with regard to training of Victoria Police members:

Racial profiling as an unlawful policing or illegitimate policing technique is a tenet of the Human Rights module of the Introduction to Contemporary Policing.²

Liberty Victoria is heartened that Victoria Police accepts that racial profiling is an unlawful or illegitimate policing technique, and that this forms a tenet of training. We understand that this training was introduced in 2009, and there are many serving officers who have not undertaken this training, and who occupy senior positions within police stations and within the governance of Victoria Police.

As such, Liberty Victoria's submission aims to examine ways this principle can be strengthened and applied consistently and rigorously across Victoria Police.

The submission will provide a legal analysis of racial profiling by drawing from international human rights norms and a cross-jurisdictional analysis. Recommendations have been made to address police education, data collection and community cohesion to support Victoria Police officers in carrying out their duties within a recognised human rights framework pursuant to their obligations under the *Charter of Human Rights and Responsibilities Act 2006*.

Victoria & Ors – Federal Court proceeding number VID 969 of 2010. See further: Community Law, http://www.communitylaw.org.au/flemingtonkensington/cb_pages/files/Haile%20Michael%20Joint%20Statement.pdf at 3 August 2013.

² Letter from Ms Andrew Minack, Director, Corporate Strategy and Governance, Victoria Police, 23 July 2013, Q/A 8.

A Recent media reporting conflict between police and community

The media's coverage of Operation Molto uncovered misconceptions within Victoria Police about racial profiling. In several interviews, Chief Commissioner Key Lay has been reluctant to characterise the Operation as an instance of racial profiling, arguing instead that persons were targeted because they were suspects, not merely because of their race.³ In the same interview the Chief Commissioner denied racial profiling existed in Victoria Police and argued that a discussion over whether Operation Molto was or was not racial profiling was not a helpful one but rather one of "semantics".⁴

In an interview with the Australian Broadcasting Corporation (ABC), the Chief Commissioner acknowledged that within Operation Molto some members of the police force were overzealous, and that the execution of the Operation was poor. However, the Chief Commissioner maintained that it was legitimate to target "young African men" who were "suspects".⁵ Further, the Chief Commissioner claimed that Victoria Police would not target people simply because of their race and argued that there was evidence to suggest that persons of African descent were committing crimes and that where such evidence is present, it is legitimate to direct police resources towards those suspects.⁶

Such statements appear to demonstrate reluctance within Victoria Police to take responsibility for racial profiling and to acknowledge that there may be some members of Victoria Police who do regard such techniques as legitimate and that it may play a role in some policing operations.⁷ Such issues have been reflected in several media reports and academic journals.⁸

³ Interview with Key Lay, Chief Commissioner of Victoria Police and Daniel Haile-Michael, (Africa Media Australia, 22 May 2012); Jeff Waters, 'Secret Police Operation 'targeted' African-Australians' *ABC News*. <http://www.abc.net.au/news/2013-03-08/secret-police-operation-targeted-african-australians/4561566> at 3 August 2013.

⁴ Interview with Key Lay, Chief Commissioner of Victoria Police and Daniel Haile-Michael, (Africa Media Australia, 22 May 2012).

⁵ Jeff Waters, Interview with Key Lay, Chief Commissioner of Victoria Police, (Television Interview, 5 April 2013).

⁶ Ibid.

⁷ Satyanshu Mukherjee, 'Ethnicity and Crime', (Research Paper, No: 117, *Australian Institute of Criminology: Trends and Issues in Crime and Criminal Justice*, May 1999) 1.

⁸ Emilia Michael, 'Alleged Police Discrimination Against Particular Ethnic Groups', Research Memorandum, *Liberty Victoria*, (2010).

In response to the recent incidents at Sunshine and Bairnsdale police stations involving racist stubby holders, the Chief Commissioner told the ABC that acts of “overt racism” would be met with significant action by Victoria Police.⁹

While this is a necessarily strong response, the statement is also illustrative of a failure to perceive of the complexity of racism and its ability to manifest in non-overt ways. Examples include stopping persons of certain ethnic groups more often than persons of other ethnicities, and the extent to which racial profiling and police practices geared towards certain ethnic groups can have adverse impacts on relations between police and that ethnic group.

Other incidents that have occurred over the last decade are also cause for concern about interactions between police and CALD communities.¹⁰

Taken together, the reluctance to acknowledge the existence of racial profiling and the misunderstanding of the different ways in which racism can manifest in police practices underscores the need for better education within Victoria Police.

Similarly, as demonstrated by the public outcry in the *Daniel Haile-Michael* case and over Operation Molto, there needs to be better community understanding about the way in which information taken during a field contact is recorded so that Victoria Police can better assess and account for the extent to which ethnicity is a relevant consideration when police officers exercise powers.

While the Chief Commissioner has asserted that people in the community will not be targeted “simply because of their ethnicity”,¹¹ it is unclear in light of Operation Molto whether there have been actual changes to police responses to complaints regarding persons of certain ethnicities and racial profiling within Victoria Police.

⁹ Anthony Kelly, ‘Lets help Victoria Police beat racism’ (11 July 2013), Human Rights Law Centre, < <http://www.hrlc.org.au/lets-help-victoria-police-beat-racism>> at 3 August 2013.

¹⁰ SEEAAC Submission to VEOHRC African Young People Research (2009) in Emilia Michael, ‘Alleged Police Discrimination Against Particular Ethnic Groups’, Research Memorandum, *Liberty Victoria*, (2010) ; Farah Farouke, ‘According threatened as refugees struggle with police’, *The Age*, (Victoria), 30 November 2007, < <http://www.theage.com.au/news/national/accord-threatened-as-refugees-struggle-with-police/2007/11/29/1196037074824.html>> at 3 August 2013.

¹¹ Waters, above n 5.

B Challenges in policing public space in relation to ethnic minorities

The use of police powers that rely on stereotypes has been linked to increased levels of conflict between police and community members.¹² Further, police powers to stop and search are disproportionately used on those who frequent public space and shared spaces such as public transport. This results in certain groups being over-represented and therefore being more adversely affected by the exercise of police powers.¹³

The case of *Daniel Haile-Michael & Ors v Nick Konstantinidis & Ors* coheres with the literature that in Victoria many ethnic minority groups have poor relations with police.¹⁴ Indeed, studies have shown that race is the strongest ‘demographic predictor’ of poor attitudes towards police.¹⁵ Further, there is a possibility that people known to police are being targeted and labelled as ‘trouble makers’ on the basis of perceptions rather than actual behaviour at the time of being intercepted. Such an approach does not reduce crime.¹⁶ It does, however, alienate minority groups and prevent the engagement and participation of many groups in the broader community.

II DEFINITION

An analysis of the use and prevalence of “racial profiling” depends on its definition. For the purposes of this submission, racial profiling is defined as any police-initiated action or use of police power that is principally based upon the race, ethnicity or national origin of a person or group rather than the person or group’s particular behaviour.¹⁷ Ultimately, racial

¹² Tamara Walsh, Taylor, Monica ‘You’re not Welcome Here: Police Move-on Powers and Discrimination Law’ (2009) 30(1) *UNSW Law Journal*, 151-152. See also Youthlaw Submission to the National Human Rights Consultation Committee, ‘Young People Having their say about Human Rights’ (15 June 2009), 19.

¹³ James Farrell, ‘All the Right Moves? Police ‘move on’ powers in Victoria’ (2009) 34 (1) *Alternative Law Journal*, 21.

¹⁴ Mukherjee, above n 6, 1; Cherney, Adrian and Murphey, Kristina ‘Fostering cooperation with the police: How do ethnic minorities in Australia respond to procedural justice-based policing?’ (2011) 44(2) *Australian & New Zealand Journal of Criminology*, 235.

¹⁵ Diane Sivasubamian, and Jane Goodman-Delahunty, “Ethnicity and trust: perceptions of police bias” (2008) 10(2) *International Journal of Police Science & Management*, 389.

¹⁶ There is no empirical evidence that demonstrates people from a particular ethnicity have a higher offender rate than those who do not. See further: Open Society Justice Initiative, “Reducing Ethnic Profiling in the European Union – A Handbook of Good Practices”, 27, <http://www.opensocietyfoundations.org/publications/reducing-ethnic-profiling-european-union-handbook-good-practices> at 3 August 2013.

¹⁷ Ramirez, D. et al ‘A Resource Guide on Racial Profiling Data Collection Systems’ *US Department of Justice*, November 2000, <https://www.ncjrs.gov/pdffiles1/bja/184768.pdf>, at 13 August 2013.

profiling ‘denies equal protection to people simply because of a distinguishing characteristic such as race, not because of illegal acts’.¹⁸

III HUMAN RIGHTS AND INTERNATIONAL LAW

A. *The Victorian Charter of Human Rights and Responsibilities Act 2006*

Racial profiling is unlawful under both international and domestic human rights law.

Institutions and organisations that perform functions of a public nature on behalf of the State are obliged to protect and give due consideration to human rights. *The Victorian Charter of Human Rights and Responsibilities Act 2006* (the Charter)¹⁹ binds the Government in its dealings with the community by placing obligations on ‘public authorities’. Section 4(1)(d) of the Charter expressly defines ‘public authority’ as including Victoria Police.

Importantly for this consultation, s 38(1) of the Charter provides that public authorities must not act in a way that is incompatible with a human right or, in making a decision, fail to give proper consideration to a relevant human right.

The practice of racial profiling breaches s 8 of the Charter, and in particular the human right of a person to enjoy his or her human rights without discrimination, the right to equality before the law and the equal protection of the law without discrimination, and the right to equal and effective protection against discrimination.²⁰

“Discrimination” is defined in s 3(1) of the Charter as “discrimination (within the meaning of the *Equal Opportunity Act 2010*) on the basis of an attribute set out in s 6 of that Act”. Section 6(m) of the *Equal Opportunity Act 2010* defines “race” as an attribute.

Further, in a police operational setting the practice of racial profiling typically engages the rights of freedom of movement (section 12), privacy (section 13), freedom of expression

¹⁸ Lindsay Wise, ‘People Not Equal: A glimpse into the use of profiling and the effect a pending U.N Human Rights Committee Case May Have on United States Policy’ (2008) 14, 2 *Washington and Lee Journal of Civil Rights and Social Justice*, 304.

¹⁹ *The Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic).

²⁰ For discussion of this right, see *Victorian Police Toll Enforcement v Taha; State of Victoria v Brookes* [2013] VSCA 37, [209]- [213] (Tate JA).

(section 15) freedom of association (section 16), and the right to liberty and security of person (section 21).

When a person is made subject to the exercise of police powers such as when being stopped and/or searched, and this is done on the basis of race and not on the basis of her or his conduct, this will necessarily involve an arbitrary limitation of the person's right to privacy and freedom of movement that reflects an unjustified limitation of the person's right to enjoy such rights without discrimination. It constitutes inequality before the law.

Liberty Victoria submits that, as a public authority, Victoria Police must provide mechanisms that ensure any such breaches of human rights are identified and remedied, and that all police (including those who have not undertaken the human rights module to the *Introduction to Contemporary Policing* course) are expressly directed that racial profiling is unlawful.

B. International law

Australia is a signatory to several international instruments that support equality and anti-discrimination. For example, the *International Convention on the Elimination of All Forms of Racial Discrimination* 1966 (ICERD) prohibits discrimination by having the nations commit "to engage in no act or practice of racial discrimination against persons, groups of persons, or institutions and to ensure that all public authorities ... shall act in conformity with this obligation."²¹ The *International Covenant on Civil and Political Rights* 1966 (ICCPR) also prohibits discrimination.²²

C. Case study: Lecraft v Spain

The community consultation panel also has the advantage of drawing from recent international human rights jurisprudence to guide their understanding of the unlawfulness of racial profiling.

²¹ Art. 2(1), International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature Dec. 21, 1965, 660 U.N.T.S. 212, 218.

²² Article 26 notes that: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The United Nations Human Rights Committee provided a clear position on the unlawfulness of racial profiling as a police practice in the 2009 case of *Lecraft v Spain*.²³

The case related to an incident that occurred on 6 December 1992, when Ms Rosalind Williams arrived at the Valladolid Campo Grande railway station in Spain, with her husband and son. As Ms Williams, who was black, was exiting the train station, a National Police officer approached her and asked her to produce her identity document. The police officer did not ask her husband, son, or any other passengers on the platform for their identity documents. Williams and her husband enquired what the reason was and were told that officers were obliged to check the identity of persons who “looked like her.” The officer also stated that he was simply obeying an order of the government which called on National Police officers to conduct identity checks, and in particular of “persons of colour”.

The UN Committee considered whether racial profiling was discriminatory and found that “it is generally legitimate to carry out identity checks for the purposes of protecting public safety and crime prevention or to control illegal immigration”,²⁴ however;

*...when the authorities carry out these checks, the physical or ethnic characteristics of the persons targeted should not be considered as indicative of their possibly illegal situation in the country. Nor should identity checks be carried out so that only people with certain physical characteristics or ethnic backgrounds are targeted. This would not only adversely affect the dignity of those affected, but also contribute to the spread of xenophobic attitudes among the general population; it would also be inconsistent with an effective policy to combat racial discrimination.*²⁵

The Committee therefore held that Ms Lecraft was singled out only because of her racial characteristics, and this was the decisive factor for suspecting unlawful conduct which is a violation of Article 26 of the ICCPR. That Article provides:

²³ Human Rights Committee, *Rosalind Williams Lecraft v Spain* Communication No. 1493/2006 (CCPR/C/96/D/1493/2006).

²⁴ Human Rights Committee, *Rosalind Williams Lecraft v Spain* Communication No. 1493/2006 (CCPR/C/96/D/1493/2006), 7.2.

²⁵ *Ibid.*

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Human Rights Committee expressed the view that in order to remedy the violation of the Covenant the Government of Spain was obliged to ensure that its officials do not repeat the kind of acts made against Ms Lecraft.²⁶

It should be emphasised that s 8 of the Victorian Charter is based on Article 26 of the ICCPR. It should also be noted that pursuant to s 32(2) of the Charter, “[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.” To that end, it is submitted that the decision of *Lecraft v Spain* is persuasive and likely to be regarded by Victorian Courts as correct.

IV CROSS JURISDICTIONAL ANALYSIS

While there is very limited information from which to undertake a comprehensive analysis on the use and prevalence of racial profiling in Victoria, an analysis of comparative jurisdictions may provide guidance to the panel.

International data suggests that racial profiling is not an isolated experience.²⁷ Both the American (USA) and British (UK) experiences reflect that other common law jurisdictions have had to respond to the issue of police powers being disproportionately used on persons of CALD communities.²⁸

²⁶ Specifically including a remedy by way of an apology to Ms Lecraft, Human Rights Committee, *Rosalind Williams Lecraft v Spain* Communication No. 1493/2006, 9. (CCPR/C/96/D/1493/2006), 7.

²⁷ See the Racial Profiling Resource Centre <http://www.racialprofilinganalysis.neu.edu/index.php> at 3 August 2013; Open Society Justice Initiative, "Reducing Ethnic Profiling in the European Union – A Handbook of Good Practices" <http://www.opensocietyfoundations.org/publications/reducing-ethnic-profiling-european-union-handbook-good-practices> at 3 August 2013; Ontario Human Rights Commission, 'Paying the price: the human cost of racial profiling', *Inquiry Report*, Canada, 2003.

²⁸ See for example, 'Statistics on Race and the Criminal Justice System 2007/8', *Ministry of Justice* United Kingdom, http://www.stamp-it-out.co.uk/docs/stats_race_criminal_justice_system_0708.pdf at 3 August 2013.

A. USA

In the late 1990s the United States media was reporting heavily on stories of racial profiling and several key cases arose from the intense public outcry. *Wilkins v Maryland State Police*²⁹ was one of the first cases that relied upon empirical evidence of racial profiling. In that case, by using data released by the police force pursuant to settlement, it was found that people of African American descent constituted 79.2 percent of drivers searched, but those who were eventually found to be violating the law accounted for just 17.5 percent.³⁰

The US Department of Justice's 'Resource Guide on Racial Profiling Data Collection Systems' noted that instances of racial profiling by US police were heavily tied to the high discretion of US Police.³¹ 'High discretion stops' involve those who look suspicious but are not involved in any specific criminal violations. It was found that unless these interactions are documented, such stops create an environment that allows for the use of stereotypes to go undetected. In contrast, low discretion 'stops' varied in place and context and were based on externally generated information, such as a reports of a crime and description provided by a victim, or a recorded speeding.³²

In 2009, the State of Vermont released a report addressing the ongoing issue of racial or 'bias-based' policing.³³ The committee made two important recommendations that the police agencies in Vermont begin traffic stop data reporting, and secondly, that the Vermont Police Academy expand training to 'anti-biased policing'. The report found that training related to 'biased-based' policing was insufficient and noted that Vermont police officers were only provided with two hours of 'diversity training' and that officers may never revisit the topic over the course of their career.³⁴

²⁹ *Wilkins v Maryland State Police*, CCB93483, (Maryland Federal District Court, 1993).

³⁰ As documented in Steven J Muffler, *Racial Profiling: Issues Data, and Analyses* (2006), 63.

³¹ Ramirez et al, above n 17, 9.

³² Ramirez et al, above n 17, 9.

³³ Brian Jones, 'Bias-Based Policing in Vermont' (2011) 35, *Vermont Law Review* 925.

³⁴ 'Racial Profiling in Vermont', (2008) Vermont Report to US Commission on Civil Rights Recommendations, < <http://www.usccr.gov/pubs/VTRacialProfiling.pdf>> at 3 August 2013.

B. UK

Following a period of civic unrest in London in the 1970s and early 1980s, the Metropolitan Police Service (MPS) created a program to monitor the race and ethnicity of persons searched and stopped by the police. The program was required to trace and monitor police activity and address questions about police legitimacy and ethnic bias. In 1991, the *Criminal Justice Act* was passed which required the home secretary to publish ‘such information necessary to assess the existence of racial discrimination in police practices.’³⁵

The resulting Macpherson Report recommended that when an officer records information about stops and searches, the record must also detail the reason for the stop, the outcome and the self-identified ethnicity of the person.³⁶ The philosophy underpinning the police searches also underwent a change, toward emphasising the quality rather than the quantity of the searches. This was encouraged by focusing on the percentage of searches that resulted in arrests for serious offense and ultimately resulted in an improvement in search productivity.³⁷ By collecting data information, the MPS were able to identify officers engaging in ‘best practice’ as well as officers whose search patterns were dubious.

C. Summary

As noted by Ramirez et al, there are important lessons that can be drawn from the experiences of comparative jurisdictions. First, the manner in which searches are conducted greatly influences the resulting animosity surrounding police action. Thus the manner in which a search is conducted may be a major cause of particular complaints or dissatisfaction. Secondly, searches that are conducted in response to specific incidents are ‘low discretion’ searches and yield better results in terms of the likelihood of racial profiling occurring. While both the USA and the UK continue to have high incidents of

³⁵ Marion FitzGerald, Sibitt Raw. *Ethnic Monitoring in Police Forces: A Beginning*, London, England: Home Office, Research and Statistics Directorate, 1997, 12.

³⁶ ‘*The Macpherson Report – Ten Years On*’ House of Commons, Home Affairs Committee, United Kingdom (2009), <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/427/427.pdf>, at 3 August 2013.

³⁷ Overall number of arrests and searches dropped by nearly 33% among the selected pilot sites. See Marion FitzGerald, *Searches in London, Interim Evaluation of Year one of the Program of Action*, London, England: Home Office August 1999, 21.

racial profiling being alleged against their police forces,³⁸ both Governments have acknowledged the existence of the issue and have put processes in place to understand and attempt to prevent its occurrence.

V LETTER FROM VICTORIA POLICE

In a detailed letter dated 23 July 2013 and responding to specific questions raised by Liberty Victoria, Victoria Police confirmed that it has in place several modules in training that focus on CALD communities and human rights issues, including the issue of racial discrimination.

As noted above, Victoria Police have stated that racial profiling as an unlawful policing technique is addressed in the human rights module of the introduction to contemporary policing course. Liberty Victoria understands that this has been incorporated into training since July 2009.

Liberty Victoria is pleased to note the training under the ‘community encounters’ component is mandatory and must be completed by all police recruits in order to successfully complete training. However, it is submitted that there are several ways in which Victoria Police’s position can and should be strengthened.

VI RESPONSE TO LETTER: TRAINING

Training that provides adequate guidance and support is vital to reduce instances of racial profiling in practice. Training should explain applicable legal standards and provide practical examples of the correct and incorrect use of police powers in the specific context of racial profiling. Such training should be complemented by supervision that ensures that officers are applying the principles learned in their training in their daily operational practice.

A Recommendation: Improving training

There are several ways in which the training modules detailed in the letter from Victoria Police to Liberty Victoria could be improved.

³⁸ Vikram Dodd, ‘Minorities stopped disproportionately in decade after Macpherson report’, (22 April 2013), <http://www.guardian.co.uk/law/2013/apr/22/ethnic-minority-britons-stop-search-white> at 3 August 2013.

First, training on racial profiling should be provided to all officers, not only officers joining Victoria Police since July 2009. This is of fundamental importance given that Victoria Police is a hierarchical organisation where younger recruits rely on the experience, knowledge and direction of more senior officers, many of whom would have started their career prior to 2009 and who would not have been expressly taught that racial profiling is an unlawful policing method.

Secondly, racial profiling should be given primacy in training as a discrete issue, rather than forming part of a limited discussion under a broader module. Police training should be comprehensive in this regard and address the impermissibility of racial profiling through assessed exercises. This should include training as to why racial profiling breaches human rights norms, and it should consider the effect of racial profiling on CALD communities and their relationship with the police.

Thirdly, refresher courses on the unlawfulness of racial profiling practices should be provided to Police officers throughout their careers. Training should 'not merely encompass cultural diversity, but provide meaningful methods of policing without bias'.³⁹ It should explain not only why racial profiling adversely affects the quality of encounters between police and the community, but also why it is a poor policing technique in terms of preventing crime.

Specifically, training should remind officers about the standards of 'reasonable suspicion' and the factors that constitute it.⁴⁰ Training in this area should be ongoing to ensure that all police officers, not just officers who were trained after the introduction of the *Introduction to Contemporary Policing* course, are directed that racial profiling is unlawful. This would also ensure that Victoria Police's positive work towards more effective training is implemented at all levels of the force so that it can be reinforced within stations by officers of all ranks.

³⁹ Jones, above n 33, 943.

⁴⁰ Liberty Victoria notes that it has previously made comments on issues relating to the suspension of the need for police to form a 'reasonable suspicion' under certain circumstances under the *Control of Weapons Act 2010* (Vic), following the introduction of the *Control of Weapons Amendment Act 2010*. Liberty Victoria notes the acknowledgement by the Victorian Government that such powers were expressly incompatible with human rights, meaning that pursuant to s 7(2) of the Charter the reforms were not "demonstrably justified in a free and democratic society"; The Minister for Corrections, Statement of (in)Compatibility to the *Control of Weapons Amendment Bill 2010*, Victorian Hansard, 27 May 2010, 2000. Liberty Victoria again stresses the potential harm of such a regime to marginalised and CALD communities. See further: <http://www.libertyvictoria.org/node/132>.

VII RESPONSE TO LETTER: EVIDENCE AND DATA

Based on the experience of comparative jurisdictions such as the USA and the UK, it is clear that empirical evidence is required in order to better comprehend the issues associated with racial profiling. Further, there is considerable public confusion about what can be lawfully requested of members of the public by police and the limits of police powers. Without having comprehensive data as empirical evidence, several questions arise. Are police questioning people about subjects unrelated to the reason they were intercepted? Did the officer request permission to search the individual? Did the officer explain what the individual was obliged to do and what they what not obliged to do? How long did the encounter last? Was there a probative reason for the interaction or was it based on stereotypes including race? The answers to such questions are vital in order to understand the prevalence of racial profiling and how it may be experienced in practice.

A Current problems with police data collection

There is a belief in the Australian community that ethnic minorities and new migrant populations are over-represented in crime.⁴¹ There is little data about the relationship between crime and ethnicity available in Australia. However, the data that is available in regards to ethnicity and crime strongly suggests that there is not a causal connection between ethnicity and crime. In fact, some academics have suggested that, as a result of this lack of data, there is too much room in policing for pervasive community attitudes and racism, especially given data collected by police on ethnicity during field contacts and subsequently contained in the LEAP database are derived from the perceptions of individual officer.⁴²

The data that is available suggests that the crime rates for any ethnicity are no higher in the second or third generations after migration than the rates of the Australia-born population.⁴³ However, current place of birth and imprisonment statistics still do not support a correlation between ethnicity (other than Anglo-Australian) and crime, with the

⁴¹ Jock Collins, 'Ethnic Minorities and Crime in Australia: Moral Panic or Meaningful Policy Response' (2005) Paper to a Public Seminar organised by the *Office of Multicultural Interest*, Western Australia.

⁴² Mukherjee, above n 7, 1.

⁴³ *Ibid.*

majority of prisoners citing country of birth as Australia.⁴⁴ Indeed, ‘place of birth’ does not necessarily correlate with ethnicity, nor does it reflect the amount of exposure an offender or prisoner has had to Australian society, which has been shown to militate against offending.⁴⁵

Similar findings are echoed in studies conducted in Sydney that suggest only a small proportion of any ethnic group is ‘criminal’. The statistics in this study supported the proposition that individuals rather than groups or cultures, despite the persistent community perception and discourse, were “criminal”⁴⁶.

Liberty Victoria submits that a focus on race and ethnicity in policing ignores the statistical data that does not suggest a correlation between ethnicity and crime. However, Liberty recommends that police should have a method of consistently reporting and recording ethnicity in field contacts to gain a better understanding of the extent to which ethnicity motivates police action and the use of police powers.

The recent case of *Haile-Michael and Others*⁴⁷ has provided the panel with very concerning statistics that support the conclusion that racial profiling is a common and real issue for many in the Victorian community. Professor Ian Gordon noted that between 2006-2009, people of African ethnicity in the Flemington and North Melbourne area were over two times *more likely* to be stopped by police than other groups despite having a lower crime rate.⁴⁸ Professor Gordon’s findings cohere with earlier studies. A 2007 study found people from non-English speaking backgrounds were three times more likely to experience intolerance and discrimination by police in Victoria than those from Australian backgrounds.⁴⁹

⁴⁴ Australian Bureau of Statistics, *Prisoner Characteristics Australia: Country of Birth*, 28 June 2013, Australian Bureau of Statistics, <http://www.abs.gov.au/ausstats/abs@.nsf/Products/3E793E6707402CCACA257B3C000DC8F8?opendocument>, at 3 August 2013.

⁴⁵ Mukherjee, above n 7, 2.

⁴⁶ Collins, above n 41, 12.

⁴⁷ *Haile Michael & Ors v Konstantinidis, the Chief Commissioner of Victoria Police, the State of Victoria & Ors* – Federal Court proceeding number VID 969 of 2010.

⁴⁸ I Gordon, Statistical Commentary on Federal Court of Australia Proceeding VID No 969 of 2010.

⁴⁹ Gabrielle Berman, ‘Institutional Racism in Victoria: Always and Everywhere a Different Phenomena Policing: A Case Study’ (2008) in H.Babacan and N.Gopalkrishnan (eds.) *The Complexities of Racism: Proceedings of the Second International Conference on “Racisms in the New World Order”*, University of Sunshine Coast, Caloundra, 119.

B Recommendation: Using data effectively

While improving data collection methods is important, the data must be used effectively to examine the underlying reasons for racial profiling. Crucially, data reporting would assist the Victoria Police and courts to identify instances where race was inappropriately being used as the basis of investigatory work.

This means that officers should document not merely the bare *fact* of the self-reported ethnicity of the person, but also the probative *reason* for why the person for subject to the attention of police.

Further, 'data collection and distribution demonstrates transparency and builds trust among citizens'.⁵⁰ To that end, the community must have access to knowledge about their rights and duties with Police. In situations 'where interpreting information about police practices involves making value judgments, shutting out the community threatens the legitimacy of the project'.⁵¹

Care must also be taken to ensure that personal information is kept confidential and only used to protect the community from unlawful practices such as racial profiling, and that members of the public can have confidence that when data is collected it is not misused in a manner that breaches their right to privacy. Individuals should of course have the right to not disclose their ethnicity if that is their preference.

VIII RESPONSE TO LETTER: TRANSPERANCY

Unfair treatment by police, and the perception of such treatment, causes persons from culturally and linguistically diverse backgrounds to feel insecure in their communities and undermines their relations with police.⁵² As studies by the Flemington & Kensington Community Legal Centre have demonstrated, this often leads to persons from CALD communities forming a negative opinion of the community they live in (outside their

⁵⁰ Jones, above n 33, 945.

⁵¹ Brandon Garrett, 'Remedying Racial Profiling' (2002) 33 *Columbia Human Rights Law Review*, 41.

⁵² Cherney and Murphey, above n 14, 238.

ethnic community). Similarly, persistent confrontation with police leads to increased fear of police, limiting the protective role of Victoria Police in these communities.⁵³

A Recommendation: Avoiding unfair treatment and increasing procedural fairness

A 2011 study conducted by researchers from Griffith University and the University of Queensland found that procedural justice and perceptions of police performance influenced the perception of police legitimacy across all communities.⁵⁴ Among ethnic minorities, police legitimacy was in turn a predominant factor predicting willingness to cooperate with police.⁵⁵ This is supported by earlier literature that found police legitimacy was needed for compliance with the law and a negative perception of and lack of trust in the police force undermined trust and faith in the justice system as a whole.⁵⁶

The literature underscores just how essential a procedurally fair model of policing, especially in face-to-face relations with the community, is for producing positive attitudes towards police. However, the 2011 study suggests that the construction of a procedurally fair model of policing for ethnic minorities needs to engage substantively with these communities to afford them a ‘voice’ in the decision making processes of Victoria police.⁵⁷

This desire is reflected in the settlement agreement reached in *Daniel Haile-Michael* and is fostered through this community consultation.

Further, Victoria Police should be commended for the programs run by the Multicultural Advisory Unit (MAU), the first of its kind in Australia. However, the fact that this Unit was disbanded and replaced by the network of liaison officers at Regional Divisions is troubling given the success the MAU had enjoyed and the less centralised nature of the

⁵³ Tamar Hopkins in Emilia Michael, ‘Alleged Police Discrimination Against Particular Ethnic Groups’, Research Memorandum, *Liberty Victoria*, (2010), 7.

⁵⁴ Cherney and Murphey, above n 14, 251.

⁵⁵ *Ibid.*

⁵⁶ Sivasubramaniam and Goodman-Delahunty, above n 15, 388.

⁵⁷ Cherney and Murphey, above n 14, 252.

new model.⁵⁸ There is a need for substantive and continued engagement between Victoria Police and CALD communities.

Victoria police have incorporated similar kinds of changes successfully in the past. The Office of Police Integrity's review of the Victoria Police Aboriginal Strategic Plan 2003-2008 found that for the program to be more effective, mainstream practices surrounding drug and alcohol abuse had to be tailored to Koori communities. The reporter recommended that police work closely with Koori elders to determine the kinds of practises that would be appropriate. This coheres with the above discussion of the need for CALD communities to be given an instrumental 'voice' in the construction of procedurally fair police practises.⁵⁹

B Increasing the public's understanding of police powers

The above discussion supports the conclusion that there needs to be a greater understanding of police powers in CALD communities to combat negative attitudes towards police. Similarly, police actions and record keeping regarding ethnicity needs to be more transparent to allow researchers to determine whether ethnicity is influencing police contact with individuals. A lack of understanding of police practices, coupled with perceptions of unfair treatment, erodes confidence in police among culturally and linguistically diverse communities whose relations with police have been poor in the past and continues to be strained.

The community should be made aware of how police officers may legitimately form a "reasonable suspicion" with regard to a suspect. The examples provided in the Victoria Police Training Manual do not adequately describe such circumstances and the extent to which these may differ between circumstances, locations and, indeed, persons.

Further, the process that police officers undertake when preparing a field contact report is presently unclear to the broader community and is in need of greater transparency.

⁵⁸ Josh Gordon, 'Racial alert over ethnic policing bid' *The Age*, (Victoria), 24 May 2011, <<http://www.theage.com.au/victoria/racial-alert-over-ethnic-policing-bid-20110523-1f0ua.html>> at 3 August 2013.

⁵⁹ Michael Strong, 'Talking Together – Relations between Police and Aboriginal and Torres Strait Islanders in Victoria', (Review of Victoria Police Aboriginal Strategic Plan 2003-2004, Office of Police Integrity, 2008) 53.

C Protective Services Officers on public transport

Further, there is significant confusion in the community concerning the powers of PSOs to stop people and request information.

The Age reported earlier this year that PSOs had recorded the names and details of 29,000 Victorians.⁶⁰ The article speculates about the extent to which this information is gathered to demonstrate work to superiors or for criminal record checks. It is unclear however the extent to which PSOs are making it clear to community members that in many circumstances there is no obligation on them to provide any personal information to PSOs. It is likely that most members of the public do not know of their right to decline the request and are unaware that their details can be cross-referenced against LEAP records, even where they are not suspected of any wrongdoing.⁶¹

The experience detailed in the article of Mr Baljiit Thind is demonstrative of the above point. Mr Thind asked PSOs repeatedly why his ID was required, they responded merely that they needed it and failed to advise him that he was not under an obligation to provide personal information.

The potential for such practices to be viewed as arbitrary undermines the extent to which PSOs will be able to establish legitimacy in the community, including CALD communities.

It is vital that PSOs receive the same training as Victoria Police officers concerning the unlawfulness of racial profiling, and that this training is regularly reinforced for serving officers. The interaction between PSOs and members of CALD communities should also be comprehensively documented to guard against racial profiling in practice.

⁶⁰Vince Chadwick, 'PSOs asking too many questions' *The Age*, (Victoria), 27 April 2013, <<http://www.theage.com.au/victoria/psos-asking-too-many-questions-20130426-2ik8z.html>> at 3 August 2013.

⁶¹ Ibid.

VIII CONCLUSION

Truly effective policing is achieved when police are able to both protect the community from crime and respect human rights and civil liberties. Racial profiling is a discriminatory practice that stigmatically and arbitrarily shames members of CALD communities and damages the relationship between such communities and the police.

It is vital that all police are taught, and regularly reminded, that racial profiling is an unlawful and illegitimate as a policing technique. It is vital that, in an hierarchical organisation such as Victoria Police, senior police are trained that racial profiling is unlawful, and it is not left to new recruits to attempt to introduce institutional change.

Moreover, it is imperative that all police are taught that, as a policing technique, racial profiling is ineffective. In practice it constitutes a poor use of police resources that only succeeds in damaging police and community relations.

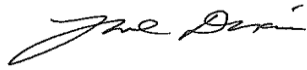
When law enforcement practices are seen to be biased or disrespectful, the most marginalised groups in the community will feel alienated and stigmatised and accordingly be less willing to trust police officers, report crimes, participate in problem-solving activities, be witnesses in criminal proceedings and otherwise support police. By implementing a coherent, clear and strong position against racial profiling in policing, Victoria Police can build upon its foundation of human rights training as provided to recruits. The message that racial profiling is unlawful, illegitimate and ineffective should be implemented both internally, in terms of police training and policing methods, and expressed externally to the broader community.

Liberty Victoria wishes to acknowledge the valuable work undertaken by Young Liberty for Law Reform (YLLR) in preparing this submission, including the very considerable assistance provided by Ms Gemma Leigh-Dodds and Ms Brittany Myers.

Thank you for the opportunity to make this submission. If the panel has any questions with regard to this submission, or if we can provide any further information or assistance, please do not hesitate to contact the President of Liberty Victoria, Ms Jane Dixon SC, or the Vice-President, Mr Michael Stanton, or the Liberty Victoria office on 9670 6422 or info@libertyvictoria.org.au. This is a public submission and is not confidential. We hereby

authorise Victoria Police to use whole or parts of the submission we have provided for publishing as you require and consent to our name being published.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jane Dixon', with a stylized, cursive script.

Jane Dixon SC
President, Liberty Victoria

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