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1 September 2017

Dear Commissioner,

Re: Submission into the Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islanders

Police Accountability

I am one of a group of academics whose report, commissioned by the Flemington & Kensington Community Legal Centre in Victoria, recommends strategies for the monitoring of stop, search and move on powers exercised by Victoria Police officers in order to prevent racial profiling.

The academics who contributed to and whose recommendations are represented by this report are:

- Professor Janet Chan (UNSW)
- Professor Chris Cunneen (UNSW)
- Tamar Hopkins (PhD Candidate ANU)
- Dr Clare Land (Victoria University)
- Dr Raul Sanchez-Urribarri (La Trobe)
- Dr Victoria Sentas (UNSW)
- Associate Professor Leanne Weber (Monash)

A copy of this report attached to this letter.

Racial profiling is a practice where police consciously or otherwise, disproportionately target Indigenous and Torres Strait Islanders and racial minorities for law enforcement attention in the absence of reasonable grounds.

Racial Profiling and Over-incarceration

Racial profiling contributes to the over-incarceration of Indigenous and racial minority communities through a number of mechanisms. In Canada, Wortley and Owusu-Bempah argue that 'racial differences in police stop and search activities directly contribute to the

overrepresentation of black people in the Canadian criminal justice system.'[1] In the United Kingdom, May et al found that proactive police decisions about who to stop and search affected the entry of about one quarter of young people into the criminal justice system: black people were searched seven times the rate of their white counterparts and 28% of black youth were arrested as a result of pro-active policing, while this was the arrest pattern for 19% of white youths. [2] Another US study[3] found that merely experiencing a stop by police raises the likelihood of future engagement with the criminal justice system.[4] This research uncovers grave consequences for over-policed communities: the mere existence of racial disparities in police stops becomes a contributing factor in future racial disparities in incarceration rates even if the initial stop does not result in arrest. Furthermore as Bernard Harcourt models mathematically, targeting any group for law enforcement attention has a 'ratchet effect' on the prison population. He argues that targeting one group results in more people from that group being arrested than people in other groups. This means that the arrested, convicted and imprisoned population becomes skewed towards the targeted group. If this then informs decisions about where to focus police resources, it further accelerates the distortion, acting like a ratchet.[5]

In Australia, police are not required to collect data on the ethnic background of who they stop and search or move on, or the reasons for their intervention. This is despite recommendations for them to do so in Victoria[6] and in 2006 by the Western Australian Law Reform Commission.[7]

Ethnic data collection across the justice, health and education sectors is widely becoming understood as a critical first step in understanding and preventing systemic forms of racism.[8]

On 31st August 2017 the UN CERD Committee recommended that Canada implement race data collection across police forces in order to monitor racial profiling.[9]

Terms of Reference 12 (2,3,4) to your inquiry refer are directly relevant to the issue of data collection and monitoring by police working with Indigenous communities.

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[1] Scot Wortley & Akwasi Owusu-Bempah (2011) The usual suspects: police stop and search practices in Canada, *Policing and Societyy*, 21:4, 395-407.

[2] Tiggey May, Tracey Gyateng and Mike Hough, 'Differential treatment in the youth justice system' (Equality and Human Rights Commission, 2010) v.

[3] Robert D. Crutchfield et al, 'Racial Disparity in Police Contacts' (2012) 2(3) *Race and Justice* 179, 196.

[4] Stephanie A. Wiley and Finn-Aage Esbensen, 'The Effect of Police Contact' (2013) 62(3) *Crime & Delinquency* 283, 299, 300.

[5] Bernard E Harcourt, *Against Prediction, Profiling, Policing and Punishing in an Actuarial Age* (University of Chicago Press, 2007) 147-149.

[6] See for example, Cultural and Indigenous Research Centre Australia, 'Victoria Police: Review of Field Contact Policy and Processes, Final Report, November 2013' (Cultural and Indigenous Research Centre Australia , 2013).

[7] Law Reform Commission of Western Australia, 'Aboriginal Customary Law. The Interaction of Western Australian Law with Aboriginal Law and Culture. ' (2006) 212, 213.

[8] Ontario Human Rights Commission, 'Under Suspicion: Research and Consultation Report on Racial Profiling in Ontario' (Ontario Human Rights Commission, 2017) 93.

[9] http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fCAN%2fCO%2f21-23&Lang=en

Q 12-2 states: "How can police officers entering into a particular Aboriginal or Torres Strait Islander community gain a full understanding of an be better equipped to respond to the needs of that community".

Q 12 -3 "Is there value in police publicly reporting annually on their engagement strategies, programs and outcomes with Aboriginal and Torres Strait Islander communities that are designed to prevent offending behaviours?"

Q 12-4 "Should police that are undertaking programs aimed at reducing offending behaviours in Aboriginal and Torres Strait Islander communities be required to: document programs; undertake systems and outcome evaluations and put succession planning in place to ensure continuity of the programs?"

Understanding the different types of policing experienced by different racial and ethnic communities requires regular public reporting of ethnic differences in police stop, search and move on interventions.

This data will enable an evaluation about whether policing is both proportionate and necessary across the entire community or whether it is contributing to over-incarceration rates of some communities.

Such data is collected in the UK and parts of the US and Canada (see the attached report).

Given that police use of stop, search and move-on powers have been linked to a reduction of police legitimacy and a series of harms, including loss of self-esteem, alienation and criminalisation, close monitoring of this power is essential to ensure it is neither excessive nor unjustified.

I recommend that that the Commission consider the entire report *"Monitoring Racial Profiling"* and its recommendations and, in particular, its recommendations that police be required to:

1. Collect and make public the following data for all stops, searches and directions to move on including:
    a. reason for the stop (before the stop is initiated) or decision to direct a person to move on;
    b. record of any relevant suspect profile or intelligence report;
    c. officer-perceived ethnicity;
    d. reasons to conduct any search (including searches by consent, statutory and database searches such as warrant checks, car registration, immigration status, etc.),
    e. outcome, including items seized, cautions, infringements, arrest, charges, moved on, no further action,
    f. use of force (if any),
    g. officer-perceived age of the person (within a 10 year range),
    h. officer-perceived gender of the person,

i. stop location,
j. time and date,
k. length of stop,
l. name of the person (where available)[10],
m. if in a car, the presence of passengers and perceived ethnicity of passengers; if on the street, the presence of companions and perceived ethnicity of companions,
n. whether the driver was asked to leave the vehicle,
o. whether a call for back-up was made[11],
p. for vehicle stops, state of residence of the driver as recorded on the person's driver's licence,
q. officer number, rank, station, operation (if relevant), vehicle code (if relevant),
r. prosecution outcome (if relevant) when available.

Furthermore the ALRC should consider recommending that:

2. All police decisions to initiate contact with a member of the public where that person is being investigated in relation to a possible offence or where a direction to move on is being considered be limited to situations where the officer has *reasonable grounds to believe* the person has committed an offence.

3. All police decisions to initiate contact with members of the public for the purpose of investigation be subject to internal and external monitoring.

Thank you for considering this letter and the attached report.

Your sincerely,

[redacted]

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Australian Legal Practitioner

[10] A unique number identifier is all that is necessary for data analysis.
[11] n. and o. are data collection suggestions made in Rob Tillyer, Robin Engel and Jennifer Cherkauskas, 'Best practices in vehicle stop data collection and analysis' (2010) 33(1) *Policing: An International Journal of Police Strategies & Management*

Monitoring Racial Profiling

Introducing a scheme to prevent unlawful stops and searches by Victoria Police

A report of the Police Stop Data Working Group

Photo by Charandev Singh

Photo by Charandev Singh

Monitoring Racial Profiling - Introducing a scheme to prevent unlawful stops and searches by Victoria Police

A report of the ***Police Stop Data Working Group***

Primary researcher and author: Tamar Hopkins

Members of Working Group (in alphabetical order):

Professor Janet Chan (UNSW),
Professor Chris Cunneen (UNSW),
Tamar Hopkins (PhD candidate ANU)
Dr Clare Land (Victoria University)
Dr Raul Sanchez-Urribarri (La Trobe University),
Dr Victoria Sentas (UNSW)
Associate Professor Leanne Weber (Monash)

The Police Stop Data Working Group would like to thank Sally Reid (Victoria Equal Opportunity and Human Rights Commission), Islamic Council of Victoria, Maki Issa, Daniel Haile-Michael, Flemington & Kensington Community Legal Centre, Kot Monoah, Dr Berhan Ahmed (African Think Tank), Leanne Sargent and David Broderick (Victoria Police), Clyde Sharady (African Media Association), Nesam Macmillan (Melbourne University) and Fiona Dowsley (Victoria Crime Statistics Agency) for their advice at various stages of this report. Thanks to the working group for its detailed comments, suggestions and debate on a topic that is an emerging area of inquiry in Australia. This work incorporates and is enriched by the working group members' comments and suggestions

This report and its recommendations represent the views of the ***Police Stop Data Working Group***

Secretariat: Lauren Caulfield, Police Accountability Project,
Flemington & Kensington Community Legal Centre

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Photographs by Charandev Singh taken at Black Lives Matter rally, Narrm (Melbourne), 17 July 2016

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Executive Summary

This report examines eight key practical issues involved in the implementation of a racial profiling data collection scheme in Victoria, Australia and makes 20 recommendations. It is written in response to:

- The settlement in *Haile-Michael v Konstantinidis* (Federal Court, Melbourne, 2013);
- A series of critical recommendations arising from a 2013 review of Victoria Police's field contact policies;[1]
- Victoria Police's policy commitment to a prohibition on racial profiling;[2]

Victoria Police's ongoing commitment to exploring data collection and monitoring systems set out in its *Equality is not the Same* Three Year Report.[3]

The intention of this report is to make researched, best practice recommendations to Victoria Police and the Victorian Government for the establishment of an effective racial profiling monitoring and prevention scheme.

The report's recommendations arise following a systematic review of the specialised literature and references to the following international data collection sites:

- **Metropolitan Police** – London, UK.
- **Kingston Police** – Kingston, Ontario, Canada.
- **Ottawa Police** – Ottawa, Canada.
- **New York Police Department**, NYC, USA.
- **Ferguson Police Department**, Missouri, USA
- **Baltimore Police Department**, Maryland, USA.
- **Minneapolis**, Minnesota, USA.
- **Melbourne**, Victoria, Australia.

The issues are explored in eight separate chapters, as follows:

1. What is Racial Profiling? What terms and definitions should a data collection scheme use to identify and monitor the incidence of 'racial profiling' and 'reasonable grounds' for police-initiated contact in Victoria?
2. Why is it important to monitor racial profiling? What are the problems associated with monitoring it and how can these be resolved?
3. How can issues of identifying race or ethnicity be resolved?
4. How should reasons for stops and searches be recorded?
5. What data needs to be recorded by police?
6. Who should be responsible for collecting, analysing and making public the data? Should data collection be a trial or an ongoing practice? What is the frequency that data should be reported?
7. What is the risk that data collection could be used to enhance rather than undermine race/crime stereotyping? How do we minimise these risks?
8. What enforcement requirements for data collection should be imposed, or consequences for non-recording? Should data collection be required under legislation?

The recommendations in this report represent the views of an expert academic working group commissioned by the Police Accountability Project of the Flemington and Kensington Community Legal Centre. The report incorporates the ongoing feedback and suggestions from the working group from September 2016 to May 2017.

Please note that references in this report to Victoria Police members and their powers in Victoria should be interpreted as including a reference to Protective Services Officers and their common law and statutory powers where applicable. Errors in the document are the responsibility of the author.

1. Cultural and Indigenous Research Centre Australia, '*Victoria Police Review of Field Contact Policy and Processes*' 2013, Victoria Police, recommendation 17.
2. Victoria Police, '*VPMP Human Rights Equity and Diversity Standards*,' 2015, Victoria Police, 2.
3. Victoria Police, '*Equality is not the same, Year Three Report*' 2016, Victoria Police, 30.


EQUALITY IS NOT THE SAME

Key Findings

Racial profiling is a practice whereby police, consciously or otherwise, systemically stop and search Aboriginal and Torres Strait Islander peoples and racial minorities on the basis of stereotypes rather than reasonable grounds to believe an offence has taken place. Racial profiling is a form of biased and discriminatory policing, and its implications and impacts of racial profiling are profound. According to Wortley and Owusu-Bempah 'racial differences in police stop and search activities directly contribute to the overrepresentation of black people in the Canadian criminal justice system.'[4] Racial profiling contributes to alienation[5] and negative health outcomes[6] in its targets. It is a key factor in the creation and perpetuation of a racial underclass and entrenching racial stratification in society.[7] Furthermore, 'unnecessary police contact undermines public support for police and undermines voluntary compliance.'[8] Racial profiling is a human rights violation with hugely significant implications (see Introduction).

Despite Victoria Police's policy prohibiting racial profiling, and that it is unlawful under the *Race Discrimination Act* 1975 (Cth), there are no effective mechanisms that monitor its occurrence in Victoria. Victoria's laws currently permit the stopping of pedestrians and vehicles without reasonable grounds. This leaves Victorians vulnerable to racial profiling. While Victoria Police policy now imposes a 'reasonable belief' standard on police officers before they submit a field report of their stops of pedestrians and vehicles, there is no requirement that the decisions to initiate stops meet this standard. Nor are there mechanisms for publicly reporting on whether these standards are being met or being applied consistently in the stopping of all racial/ethnic groups (see Chapter 1).

The benefits of transparent monitoring for the presence of racial profiling are clear: Communities are provided with information that can reinforce or dispel their concerns. Further, police managers, accountability institutions and the public are provided with information needed to ensure policy initiatives are being put into practice. For example, the monitoring of data on stop and search in New York has been followed by a dramatic reduction in stop and search[9] and crime rates continue to fall.[10] Similarly, transparency in police stopping practices in the UK has enabled the Equality Commission to take compliance action against a handful of problematic forces[11] (see Chapter 2).

There are a number of alternative methods for monitoring racial profiling by police forces. Methods such as benchmarking data against 'available populations' are circular and fail to address systemic and institutional forms of racial profiling. Other methods such as identifying disproportionality in stop and search rates against resident populations are useful in identifying the overall experience of different populations and should be undertaking for this purpose. However, the most useful methods for examining racial profiling involve an analysis of the outcomes or 'hit rate' of stops and searches in conjunction with an analysis of the presence of 'reasonable grounds' before a person is stopped and/searched (for a detailed analysis, see Chapter 2).

Consequently, a robust racial profiling monitoring scheme must be capable of capturing information relevant to demographics, outcomes and reasons for police intervention in all police-initiated street and vehicle interactions (see Chapters 4 & 5).

4. Scot Wortley & Akwasi Owusu-Bempah (2011) The usual suspects: police stop and search practices in Canada, '*Policing and Society*', 21:4, 395-407,

5. Alpa Parmar (2011) Stop and search in London: counter-terrorist or counter-productive?, '*Policing and Society*', 21:4, 369-382.

6. Yin Paradies, 'Racial Profiling and Health' 2013 http://www.communitylaw.org.au/flemingtonkensington/cb_pages/files/Yin%20Paradies%20On%20Racism,%20Racial%20Profiling%20and%20Health.pdf

7. Charles Epp, Steven Maynard-Moody, Donald Haider-Markel, '*Pulled Over, How Police stops define race and citizenship*,' 2014, University of Chicago Press, 15.

8. Ben Bowling & Leanne Weber (2011) Stop and search in global context: an overview, *Policing and Society*, 21:4, 486. See also the Coronial investigation into the *Death of Michael Atakelt* Coroners Court of Victoria delivered 28 August 2014.

9. New York Civil Liberties Union, '*Stop and Frisk Data*' 2016 <http://www.nyclu.org/content/stop-and-frisk-data>

10. Disaster Center, 'New York Crime Rates 1960-2015' accessed 2017 <http://www.disastercenter.com/crime/nycrime.htm>

11. Michael Shiner, *Regulation and Reform* in Delsol, Rebekah; Shiner, Michael (ed), Stop and Search, the Anatomy of a Police Power 2015, Palgrave Macmillan, 154

Photo by Charandev Singh

Essential to the scheme is the collection of the race or ethnicity of those stopped and searched *as perceived by the police officer*. It is currently optional for Victoria Police members to collect data on the perceived race or ethnicity of those they stop. A data collection scheme will require the collection of this information to become mandatory (see Chapter 3).

Data required for the scheme is largely *already* collected by Victoria Police on its L19 and L19C forms for stops, searches and the issuing of directions to move on. The scheme will require these forms to be completed on all occasions that police officers intervene to stop a person.

Both independent and internal police monitoring needs to be conducted to ensure that officers are recording their genuine reasons for stopping and searching people and that these are meeting the relevant initiation standard (see Chapter 4).

De-identified raw data should be provided to an external monitoring body such as a university research team (during the trial[12] and perhaps beyond[13]) and—if resourced through legislation and funding—potentially an agency such as the Australian Human Rights Commission, the Victorian Human Rights and Equal Opportunity Commission, or the Victorian Crime Statistics Agency for analysis and regular public reporting. This reporting is important for the purpose of identifying local and overall trends in stop and search patterns that may indicate unfair targeting or the application of lower standards for intervention against Indigenous or racial minorities and to permit external compliance action (see Chapters 6 and 8).

An effective racial profiling monitoring scheme requires effective regulation. An important method of regulation is for Victoria Police to develop key performance indicators that monitor the appropriateness and effectiveness of stops and searches, rather than their quantity. Are police stopping people based on reasonable grounds? Are stops and searches generating arrests?

In addition some important legislative amendments are required such as:

a) A legal requirement for the collection of relevant data;

b) A legal requirement for the data to be provided to an independent external agency for monitoring and regular public reporting;

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

d) A definition of 'reasonable grounds' and 'racial profiling';

e) Mechanisms for individual and systemic enforcement both within Victoria Police and externally by individuals and agencies such as the Victorian Human Rights and Equal Opportunity Commission or IBAC (see Chapter 8 and 1).

12. See for example the Ottawa Traffic Stop Race Data Collection trial https://www.ottawapolice.ca/en/news-and-community/Traffic-Stop-Race-Data-Collection-ProjectTSRDCP.asp

13. A group of academics from three universities including Arizona State University analyse data in Missouri for the Attorney-General on an ongoing basis: https://ago.mo.gov/home/vehicle-stops-report

Concerns have been raised by Victoria Police that the collection of data for a racial profiling monitoring scheme could damage the relationship between Victoria Police, Indigenous peoples and racial minorities in Victoria. However as demonstrated by the *Haile-Michael* case and numerous other reports[14], the relationship between Victoria Police and these communities is already damaged by racial profiling. A racial profiling monitoring scheme is not concerned with alleged crime rates of different racial and ethnic groups within Australia. Sensational reportage of crime rates has the capacity to generate stereotypes and entrench prejudicial attitudes. In contrast, a racial profiling monitoring scheme aims to identify bias in police practices by monitoring any unfair targeting or reduction in suspicion thresholds when police initiate street based criminal investigations into Indigenous people and ethnic minority Australians. The collection and reportage of this information offers the opportunity for police to both increase their efficiency and improve their relationships with the community (see Chapter 7).

This report recommends the implementation of a co-operative three-year racial profiling data collection trial and evaluation process, capable of extension in perpetuity.

We believe that the implementation of the 20 recommendations listed at page 12 of this report will assist in placing Victoria Police at the forefront of fair, effective and efficient policing efforts against racial profiling in Australia, making it a model for other states and federal agencies to replicate.

Finally, we note that a racial profiling data-monitoring and prevention scheme is only one of a number of strategies needed to reduce the likelihood of allegations made by the applicants in *Haile-Michael v Konstantinidis* from being made again. Additional strategies sought by the *Haile-Michael* litigants include independent investigation of police complaints and greater transparency of conduct within police stations and homes.[15]

'Myths and Facts summary: Working group responses to key objections to monitoring ethnicity data**:**

14 See for example, Ethical Standards Department Victoria Police and Department of Justice Indigenous Issue Unit, 'Koori Complaints Project 2006-2008' (2008), 11, Daniel Haile-Michael and Maki Issa, 'The more things change, the more they stay the same' (Flemington & Kensington Community Legal Centre, 2015), Harry Blagg et al, 'Systemic racism as a factor in the over-representation of Aboriginal people in the Victorian Criminal Justice System' (Victorian Equal Opportunity and Human Rights Commission, 2005) 112, 181.

15. This includes vast improvements in the effectiveness of FOI and the mandatory use of and access to CCTV in cells: communication with Maki Issa in February 2017.

Table 1 Key concerns and responses

Concerns	Response
1. Ethnicity data collection is not supported by the community.	14 key multi-cultural community groups and agencies in Victoria formally drove calls for ethnicity data collection by Victoria Police to monitor the existence of racial profiling.[16]
2. Data collection and reporting will harm community police relationships.	We have not found any examples of racial data collection harming police community relationships. To the contrary, greater transparency has been found to increase community trust, participation, engagement and reduce alienation.[17]
3. The community will reject police attempts to ask people to state their ethnicity.	Monitoring racial profiling involves collection of *police-perceived* ethnicity. There is no need for police to ask people to state their ethnicity.
4. Data collection will increase stereotypes about ethnic crime rates.	In contrast to the quarterly release of statistics by the Victoria Crime Statistics Agency which reports crime rates by country of birth, racial profiling data will provide information about whether any ethnic groups are being unnecessarily targeted in Victoria. Racial profiling data examines the effectiveness of police stops, not crime rates.
5. Data collection will increase the administrative burden on police	Data collection will involve police completing a modified L19 form every time they initiate a stop, search or move on. These forms will need to be monitored by supervisors and entered into the Victoria Police LEAP database. Until handheld mobile data entry technology becomes available to Victoria Police members, completing forms is the only way that Victoria Police can assure itself and the public that its members are following the Victoria Police Manual *VPMP – Human Rights Standards*. However rather than increase the burden on front-line police, by ensuring police meet a threshold before engaging in police-initiated interventions[18], police are likely to experience significant time savings as well as increased effectiveness (hit-rates).
6. Who will fund the trial, data analysis and publication?	Once in-principle agreement with Victoria Police has been reached to establish a data monitoring scheme, members of the working group will apply for an Australian Research Council Linkage Grant as well investigate other funding streams.

16. Letter to Victoria Police, 2016 http://www.policeaccountability.org.au/racial-profiling/whats-next-for-victoria-efforts-to-end-racial-profiling/>

17. Tom R Tyler, Phillip Ataba Goff and Robert J MacCoun, 'The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement' (2015) 16 *Psychological Science in the Public Interest* 75, 11.

18. Other than genuinely random drug testing at established testing stations and approaching witnesses.

Key recommendations

1. **We recommend that in 2017 Victoria Police, in collaboration with a funded academic working group and in consultation with impacted community groups and legal organisations and institutions (including Independent Broad-Based Anti-Corruption Commission ('IBAC'), Victorian Equal Opportunity and Human Rights Commission ('VEOHRC'), (Australian Human Rights Commission) ('AHRC'), and the Victorian Crime Statistics Agency 'VCSA'), implement a co-operative three-year racial profiling data collection trial and evaluation process, capable of extension in perpetuity (see Chapter 6).**

2. **We recommend that given its current use by Victoria Police and the Victorian community, Victoria Police should continue to use the term *racial profiling* to describe the policing conduct monitored by this data collection scheme (see Chapter 1).**

3. **We recommend that, in relation to its coercive or investigative work, Victoria Police adopt a broad definition of racial profiling which includes profiling on the basis of a range of stereotypes that result in discrimination: Racial profiling is making policing decisions that are not based on objective or reasonable justification, but on stereotypical assumptions. [19] In relation to decisions to stop, investigate, move-on, interview a person, fail to act and the exercise of coercive police powers more generally, racial profiling is an act or omission done by a police officer (*whether consciously or otherwise*) where, even partially, race, ethnicity, national origin, ancestry, religion, immigration or citizenship status or language [20] is a factor influencing the decision, except (other than in failure to act cases) where reasonable and objective information, relevant to locality and time frame, linking a particular person to an identified criminal incident, exists to justify that decision (see Chapter 1).**

4. **We recommend that Victoria Police clarify its *Contact Reporting and Intelligence Policy* to ensure that police possess a reasonable belief that an offence has occurred before they *initiate* a pedestrian and vehicle stop and not just to *submit* a field contact form. We further recommend that Victoria Police require police to record (in a readily retrievable form) their reasons for initiating *all* vehicle and pedestrian stops, searches (including consensual searches) and directions to move-on, not just those that result in a field contact report (see Chapter 1).**

5. **We recommend that Victoria Police's *Contact Reporting and Intelligence Policy* retains its intervention threshold as 'reasonable grounds to believe' but furthermore adopts a definition of 'reasonable grounds' similar to the UK's PACE Code A [2.2]. It should, however, continue to clarify that a location having a high incidence of crime should not be used as the sole criteria for initiation of a stop (see Chapter 1).**

6. **We recommend that Victoria Police collect data on all pedestrian and traffic stops, searches (including consent searches) and directions to move-on, and make the de-identified (raw) version of the unit record data obtained in this collection available to an external agency such as an academic research team, the Australia Human Rights Commission, the Victorian Equal Opportunity and Human Rights Commission or other statistical collection and research bodies [21] on a regular (such as three-monthly) basis (see Chapter 2).**

19. This sentence replicates the first sentence in Victoria Police's current definition.

20. While at this stage, we are proposing that Victoria Police undertake data collection on the basis of race/ethnicity, stereotyping can occur over a range of attributes that are worthy of monitoring as well.

21. Such as Australian Bureau of Statistics, Victorian Crime Statistics Agency, Universities, legal research groups and under FOI. NB Similar data is publicly available in New York and Ottawa.

7. We recommend that Victoria Police mandate it members to collect the following data for all stops, searches and directions to move on as part of the racial profiling monitoring and prevention scheme:

a) reason for the stop (before the stop is initiated) or decision to direct a person to move on (see Key Recommendation 11),

b) record of any relevant suspect profile or intelligence report;

c) officer-perceived ethnicity (see Key Recommendation 8 and 9),

d) reasons to conduct any search (including searches by consent, statutory and database searches such as warrant checks, car registration, immigration status, etc.),

e) outcome, including items seized, cautions, infringements, arrest, charges, moved on, no further action,

f) use of force (if any),

g) officer-perceived age of the person (within a 10 year range),

h) officer-perceived gender of the person,

i) stop location,

j) time and date,

k) length of stop,

l) name of the person (where available),[22]

m) if in a car, the presence of passengers and perceived ethnicity of passengers; if on the street, the presence of companions and perceived ethnicity of companions,

n) whether the driver was asked to leave the vehicle,

o) whether a call for back-up was made,[23]

p) for vehicle stops, state of residence of the driver as recorded on the person's driver's licence,

q) officer number, rank, station, operation (if relevant), vehicle code (if relevant),

r) prosecution outcome (if relevant) when available (see Chapter 5).

8. We recommend that Victoria Police require all members who initiate a stop, search or move-on direction to collect data on 'officer-perceived' ethnicity (see Chapter 3).

9. We recommend that prior to the trial, the Police Stop Data Working Group and Victoria Police co-evaluate the efficacy of the current ethnicity categories used by Victoria Police in their Field Contact Reports. Accepting the need for eight or less broad-brush identification categories that identify the groups most concerned about profiling, we recommend that the trial considers using the following ethnic background classification system and that Victoria Police modifies its ethnic appearance codes accordingly:

1. Aboriginal/Torres Strait Islander
2. African (Includes African Australia, African, Horn of Africa, African American, Caribbean)
3. Caucasian (Anglo, European origin, white South African, white NZ/Aus)
4. Middle-Eastern (Iran, Iraq, Syrian, Turkish, Palestinian, Lebanese, Egyptian, Afghani)
5. Pacific/South Sea Islander (includes Maori)
6. South-East Asian (Chinese, Vietnamese, Japanese, Malaysian, Burmese, Indonesian Etc)
7. Indian subcontinental (Pakistani, Indian, Bangladeshi)
8. Other (South-American, Jewish and other ethnic minorities)

(See Chapter 3).

22. A unique number identifier is all that is necessary for data analysis.

23. n. and o. are data collection suggestions made in Rob Tillyer, Robin Engel and Jennifer Cherkauskas, 'Best practices in vehicle stop data collection and analysis' (2010) 33(1) *Policing: An International Journal of Police Strategies & Management*

10. We recommend that during the course of the state-wide three-year trial period, researchers explore the issues involved in data collection and concerns of communities potentially impacted by police bias in categories such as:

a) sexual orientation,

b) mental illness,

c) physical disability,

d) employment status,

e) housing status,

f) gender (including transgender or gender non-conforming) (see Chapter 3).

11. a).We recommend that Victoria Police Officers record the reasons for *all* police-initiated stops (from information available before the stop is initiated) and searches (whether pedestrian or in a vehicle) in the form of a *free text* entry entered digitally or onto the L19 and L19C forms or equivalent. Key questions include:

i. ''What is your reason for stopping this person?' (*free text*);

ii. ''Do you believe [24] the person may have committed a crime/be about to commit a crime?' (Y/N) (If yes provide a drop down list for possible crimes suspected);

iii.''If yes, what are your reasons for holding this belief?' (*free text*)

iv. Include a record of the suspect profile/report if your reason is that the person fits a suspect profile description.

b) If a search (including consent, warrant, immigration, car registration search) occurs:

v. What is your reason for searching the person/vehicle? *(free text*)

c) If a direction to move on is given?

vi. What is your reason for issuing a direction to move to a person? *(free text*)

(See Chapter 4).

12. We recommend that during at least the first three years of the trial independent researchers monitor a sample of in situ officer stopping and searching reasons. To facilitate this research, we recommend that Victoria Police a) provide samples of audio recordings of police conversations and ESTA (emergency services) information police receive while in patrol cars and foot patrols to independent researchers; and b) facilitate independent researchers to conduct observational research to monitor in situ the reasons provided to people stopped, searched and issued with move on directions (see Chapter 4).

13. We recommend that if body worn cameras are trialled or used by Victoria Police during the three-year data collection trial period, Victoria Police facilitate the access of independent researchers to a sample of audio-visual footage to assess the reasonable and objective basis of police-initiated stops, searches and move on directions (see Chapter 4).

14. We recommend that independent research be undertaken to explore the views of people who are stopped, searched and moved on about the reasons for officer interaction (see Chapter 4).

24. The Victoria Police Contact and Intelligence Reporting policy requires a 'belief on reasonable grounds' for contact initiation.

15. We recommend that the Victorian Government resource an academic working group and then subsequently an agency such as a University, the Victorian Equal Opportunity and Human Rights Commission or the Australian Human Rights Commission to prepare and publish a quarterly aggregate account of the data collected by Victoria Police (recommendations 7 to 11). During the initial three-year trial period of the data scheme, the academic reference group in collaboration with Victoria Police should test and prepare meaningful aggregate data, conduct additional research and provide a public evaluation (see Chapter 6).

16. We recommend that pedestrian and local traffic data should be benchmarked[25] against *resident populations* drawn from the census for the purposes of estimating rates of police stops and searches for various groups; whereas highway traffic data, depending on the type of road, should be benchmarked using highway user surveys, modified 'drive to work' or driving age census data. We further recommend that in all cases, data be analysed against *hit rates* and an assessment of whether officers had *reasonable and objective belief* that an offence may have been committed when they first initiated their intervention (see Chapter 2).

17. We recommend that Victoria Police, as Australia's first law enforcement agency to recognise the harm caused by racial profiling and to prohibit it, initiates or builds upon its relationships with other police forces in Australia and overseas to improve its racial profiling monitoring strategies and to assist in their development across each Australian jurisdiction.

18. Victoria Police should use performance indicators that focus on the effectiveness of stop and search powers rather than the quantity of stops. For example stops should be judged on their arrest and prosecution outcomes and the seriousness of crimes that they detect (trafficking rather than drug use for example), and on stops performed on the basis of a reasonable belief that a crime has been committed.

19. We recommend that Victoria Police engage the Federal Law Crime and Community Safety Council to request that the Productivity Commission monitor the effectiveness and efficiency of police stops and searches.

20. We recommend that the Victorian Government should ensure the effectiveness of the scheme by legislating (where within jurisdiction):
    a) a legal requirement for the collection of relevant data (see Key Recommendation 7);
    b) a legal requirement for the data to be provided to an independent agency or research body for monitoring and quarterly public reporting;
    c) a legal *reasonable belief* standard before all street and vehicle stops are initiated (with the exception of truly random drug testing at designated stations and approaching witnesses);
    d) a definition of 'reasonable grounds' and 'racial profiling';
    e) a prohibition on 'consent searches';
    f) mechanisms for individual and systemic enforcement both within Victoria Police and externally by individuals and agencies such as the Australian Human Rights Commission and the Victorian Human Rights and Equal Opportunity Commission;
    g) legislating to ensure failure by police to collect data is a basis to exclude evidence under section 138 of the *Evidence Act 2008* (Vic) and to reverse the onus of proof on a claim of racial discrimination (see Chapter 8).

25. Benchmarking refers to a method of comparing stop rates of specific ethnic groups against their relative population in the community (odds ratio) or to the stop rate of a different ethnic group (disproportionality ratio) or against a population such as those at a particular location (available population).

Introduction

The problem of racial profiling

Racial profiling is a practice whereby police, consciously or otherwise, systemically target Aboriginal and Torres Strait Islander people and other racial and ethnic minorities for police-initiated contact in the absence of reasonable grounds.

Racial profiling is a form of biased and discriminatory policing with profound implications and impacts. According to Wortley and Owusu-Bempah 'racial differences in police stop and search activities directly contribute to the overrepresentation of black people in the Canadian criminal justice system.'[26] Racial profiling contributes to alienation[27] and negative health outcomes[28] in its targets. It is a key factor in the creation and perpetuation of a racial underclass and entrenches racial stratification in society.[29] Furthermore, 'unnecessary police contact undermines public support for police and undermines voluntary compliance.' [30] Racial profiling is a human rights violation with hugely significant implications. In recognition of the serious consequences of racial profiling, and consequent to a racial discrimination claim settled in the Federal Court of Australia[31], in 2015 Victoria Police introduced policies that banned racial profiling. Police subsequently stated:

> Victoria Police has completed significant work to ensure we do not racially profile in any form.[32]

Unfortunately, however, the police assertion that they do not racially profile people was not accompanied by data to prove it. Without data on whether racial profiling occurs in practice, it is not possible for police or anyone else[33] to dismiss ongoing community concerns about systemic racial targeting by police.

On one of the few occasions when data has been made available for independent analysis in Victoria, racial biases in stopping patterns have been clearly apparent. Specifically, in *Haile-Michael v Konstantinidis* a race discrimination claim by a group of African youths against members of Victoria Police, the Federal Court of Australia ordered the release of data that revealed that in the Flemington/North Melbourne region, 45.6% of all Victoria Police stops (field contacts) of young people were of African/Middle Eastern youth[34], and yet African/Middle Eastern youth constituted only 18% of the youth population in this region.[35] In other words, Victoria Police members stopped African/Middle Eastern youth 2.53 times more than their number in the population would suggest in this region between 2008-2010. These stops were *field contacts*. Field contacts are reports by Victoria Police members completed following interactions that do not lead to arrests, cautions or charges. A police stop might lead to a person being searched cautioned or charged but most do not. That is to say – to introduce a concept we will return to in this report – field contacts have a zero percent *hit rate*.

26. Scot Wortley & Akwasi Owusu-Bempah (2011) The usual suspects: police stop and search practices in Canada, '*Policing and Society*'*Society*, 21:4, 395-407.
27. Alpa Parmar (2011) Stop and search in London: counter-terrorist or counter-productive?, '*Policing and Society*'*Society,* 21:4, 369-382.
28. Yin Paradies, 'Racism, Racial Profiling and Health' 2013 < http://www.communitylaw.org.au/flemingtonkensington/cb_pages/files/Yin%20Paradies%20On%20Racism,%20Racial%20Profiling%20and%20Health.pdf>
29. Charles Epp, Steven Maynard-Moody, Donald Haider-Markel, '*Pulled Over, How Police stops define race and citizenship*,' 2014, University of Chicago Press, 15.
30. Ben Bowling & Leanne Weber (2011) Stop and search in global context: an overview, *Policing and Society*, 21:4, 486. See also the Coronial investigation into the *Death of Michael Atakelt* Coroners Court of Victoria delivered 28 August 2014.
31. *Haile-Michael v Konstantinidis*, Federal Court of Australia, Melbourne (settled February 2013).
32. http://www.theage.com.au/victoria/victoria-police-officially-prohibits-racial-profiling-20150923-gjt6bt.html#ixzz40wQmiSob
33. See for example Don Weatherburn, *Arresting Incarceration*, Aboriginal Studies Press, 2014, 53.
34. Ian Gordon, Expert Report 11 September 2012 filed in *Haile-Michael v Konstantinidis* [108].
35. Ian Gordon, Expert Report filed on 1 February 2013 in *Haile-Michael v Konstantinidis*, [11]

In order to assess the effectiveness of Victoria Police's new anti-racial profiling policies, Victoria Police must start to track and publicly report on the effectiveness of the exercise of their powers.

Research from both the UK and US indicates that racial disparities in stop and search rates increase as the exercise of police powers becomes more discretionary.[36] Furthermore, it appears that the lower the 'hit rate,' the higher levels of racial disproportion are apparent[37]. For example, in the UK, searches performed under section 60 of the *Criminal Justice and Public Order Act* require no reasonable basis. In 2015-2016, black people were searched 21 times more frequently than white people using these powers. On the other hand, searches conducted under the *Police and Criminal Evidence Act* have a reasonable grounds threshold. In the same period, black people were 3.6 times more likely than white people to be subject to these searches.[38] Furthermore, during 2015, searches had a 19% hit rate under PACE, but a 10% hit rate under CJPO (up from 3% the previous year). Consequently, it appears that the lower the intervention threshold police must meet in order to stop or search a person, the greater the risk of racial profiling. It is therefore critical that a monitoring scheme is established that guards against racial profiling in these circumstances.

36. Stopwatch 2015 http://www.stop-watch.org/news-comment/story/new-stop-and-search-statistics-2014-2015;. Charles Epp, Steven Maynard-Moody, Donald Haider-Markel, '*Pulled Over, How Police stops define race and citizenship*,' 2014, University of Chicago Press, 99.
37. David Harris, "*US Experiences with Racial and Ethic Profiling: History, Current Issues, and the future*" Critical Criminology (2006) 14: 213–239, 222, 223.
38. Stopwatch 2016 < http://www.stop-watch.org/your-area/area/metropolitan>

Chapter 1- What is Racial Profiling? Definitions and Terms

In this chapter we will explore the meaning and use of the term 'racial profiling' and its definition in the context of developing a data collection trial to identify and assess the incidence of 'racial profiling' in Victoria.

What is Racial Profiling?

While issues of racial bias arise in the very earliest accounts of modern policing in the United States, [39] the term 'racial profiling' was first used in the media in the *Los Angeles Times* in 1986 [40] where it was first associated with the use of drug courier profiles by police in conducting vehicle stops. [41] The first Federal legal case in the United States to use the term 'racial profiling' was in 1991. [42] In the UK, researchers tend to describe the problem as the 'disproportionate use' of 'stop and search' powers against 'Black and Ethnic Minority communities.' [43] The European Commission against Racism and Intolerance uses the term 'racial profiling' [44] but the term 'ethnic profiling' is also commonly used in Europe. [45]

But 'racial profiling' is not limited to intentional individual practices or overt organisational policies [46]that target racial minorities. [47] While proof of intent is a critical part of the criminal law, federal and state discrimination law condemns not just the purpose of an action, but its effect. [48] Indeed an action that has a discriminatory effect is unlawful in and of itself.

As Charles Epp and his co-authors argue, one of the 'faulty assumptions in the current debates on racial profiling…is the belief that racial disparities in police stops is the product of discriminatory *police officers* rather than an *institutionalised practice* that is inherently unfair and discriminatory.' [49] They argue that the search for discriminatory intent on the part on an officer is a distraction. [50] Instead it is the everyday conduct that is 'taken for granted' [51] by police agencies where the true problem exists.

Cognitive bias; the unconscious formation of stereotypical opinions about the criminality of certain ethnic groups, [52] is clearly a central player in the promulgation of the practices that underlie racial profiling. It is also the case that 'cognitive bias and stereotyping is a feature of police cultural knowledge that is not easily changed given the nature of police work as it is *currently structured*' [53] (emphasis added).

Consequently, while individual prejudice (conscious) and cognitive bias (unconscious) may be part of the problem, it is changing the *institutional or structural practices* that result in discrimination that must be the focus of a program working to eliminate racial profiling.

39. Keeanga-Yamahtta Taylor, 'From *#BlackLivesMatter to Black Liberation*,' (2016) Haymarket Books, 108,109.
40. Carol Archbold et al, 'Newspaper Accounts of Racial Profiling: Accurate Portrayal or Perpetuation of Myth' (2013) *Race and Justice* 3(4) 300-320, 308.
41. David Harris, "US Experiences with Racial and Ethic Profiling: History, Current Issues, and the future" Critical Criminology (2006) 14: 213–239, 215.
42. Shaun Gabbidon, Kakiesha Marzette, Steven Peterson, 'Racial Profiling and the Courts, An Empirical Analysis of Federal Litigation, 1991 to 2006,' 2007 *Journal of Contemporary Criminal Justice*, Vol 23(3), 226-238.
43. See for example, Rebekah Delsol and Michael Shiner, 'Stop and Search, the anatomy of police power' (2015) Palgrave Macmillan, UK, 4.
44. http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N11/Recommendation_11_en.asp
45. See for example https://www.opensocietyfoundations.org/projects/ethnic-profiling-europe
46. For example an 'Asian Crime Squad' that investigates Asian involvement in crime.
47. Holdaway S, 'Institutional Racism after Macpherson: An Analysis of Police Views,' 2006, *Policing and Society*, 16:4, 349-369 (in relation to institutional racism), Fridell L, 'Racially Biased Policing, A principled response' 2001, *Police Executive Research Forum*, 3-5; Lori Fridell 'Racially Biased Policing, A principled response' 2001, *Police Executive Research Forum*, 14
48. See for example *Race Discrimination* Act 1975 (Cth) s9.
49. Charles Epp, Steven Maynard-Moody, Donald Haider-Markel, *Pulled Over, How Police stops define race and citizenship*, 2014, University of Chicago Press, 6.
50. Ibid, 7.
51. Holdaway, S. 'Understanding the police investigation of the murder of Stephen Lawrence: A'mundane sociological analysis', 1999 *Sociological Research Online* , Vol. 4, no. 1. Available online at: http://www.socresonline.org.uk/4/lawrence/holdaway.html.
52. Janet Chan, 'Racial Profiling and Police Subculture' (2011) 53(1) *Canadian Journal of Criminology and Criminal Justice*,76.
53. Ibid 77.

Photo by Charandev Singh

Institutional practices include:

- Targeting policing in areas with higher numbers of ethnic minorities rather than responding to specific time framed crime reports (for example maintaining a higher police presence outside a night club with a larger number of African Australians than other clubs; or conducting high frequency patrols through a public housing estate with a high number of ethnic minorities). [54]
- Responding to 'crime' reports by people who are reporting 'race' not crime (i.e. a call to police because a group of young people appearing to be of African origin is congregating on the street). [55]
- Training that teaches police to intervene on the basis of a hunch, difference, unusual conditions, 'incongruence' or because a person is 'out of place' rather than a sufficiently objective justification (i.e. reasonable belief that an offence has occurred). [56]

Terminology

Terms that may be better than 'racial profiling' at broadly encompassing the institutional and systemic aspects of the biased and discriminatory policing we focus on may include 'racially biased policing' [57] 'racialised policing' [58] 'discriminatory policing', 'racially disparate policing' [59], 'over-policing', 'under-policing', 'institutional racism' and 'institutional bias'. Each term has a different history, currency, localised definitions and critique [60] and has been the subject of significant debate for the working group.

There are important arguments against using the term 'racial profiling' in considering data collection strategies. Firstly, on its face, it limits the examination of stereotyping by officers to questions of race rather than grappling with intersectional discrimination and prejudiced policing on the basis of factors such as gender identity, class and disability. Secondly, it is considered by some to be a dated and confusing term that is unnecessary in an Australian context, and that could lead to the same kinds of unnecessarily restricted thinking that has been documented in the US. [61] Finally, the term may disguise the role of racial profiling as a systemic and institutional practice, and lead some to consider that is relevant only to determining or exonerating individuals from blame. [62] The term 'biased or discriminatory policing' may indeed more appropriately and inclusively describe the policy and practical outcomes being sought in monitoring the impacts of prejudice and intersectional discrimination on policing.

On the other hand, there are important arguments for continuing to use the term racial profiling in Victoria. Firstly, and crucial in our considerations, Victoria Police use the term in their own policy documents. Secondly, the term 'racial profiling' is widely used by racialised communities [63] and their advocates across Victoria. The term came to prominence in Victoria through the case that initiated this research - the *Haile-Michael v Konstantinidis* litigation, which is widely referred to as a case about 'racial profiling'. Additionally, there is community based 'Racial Profiling Monitoring Project' in Victoria that uses the term in its name.

54. The issue of police hot-spots is discussed extensively below.
55. These are all examples reported to the Flemington & Kensington Community Legal Centre by its clients.
56. Charles Epp, Steven Maynard-Moody, Donald Haider-Markel, 'Pulled Over, How Police stops define race and citizenship,' 2014, University of Chicago Press, 40.
57. Fridell L, 'Racially Biased Policing, A principled response' 2001, Police Executive Research Forum, 3-5.
58. Claudio G. Vera Sanchez & Dennis P. Rosenbaum (2011) Racialized Policing: Officers' Voices on Policing Latino and African American Neighbourhoods, Journal of Ethnicity in Criminal Justice, 9:2, 152-178.
59. See for example, Philip Stenning, 'Ism and Ists: A slightly personal but not intentionally trivial comment on racial profiling,' (2011) 53(1) Canadian Journal of Criminology and Criminal Justice 113-117.
60. Lori Fridell 'Racially Biased Policing, A principled response' 2001, Police Executive Research Forum, 14;
61. Ibid.
62. Daniel Mears, 'Offending and racial and ethnic disparities in criminal justice, a conceptual framework for guiding theory and research and informing policy' 2016 Journal of Contemporary Criminal Justice, 32(1) 78–103.
63. See ABC News, http://www.abc.net.au/news/2015-11-12/melbourne-students-accuse-apple-store-of-racial-profiling/6936750, The term racialised communities refers to communities who are perceived as 'other' by the dominant group. The dominant group does not tend to think of itself in racialised terms. It is 'blind' to its own racial/cultural norms, hence the need, in Australia for example, for Whiteness studies.

Photo by Charandev Singh

Thirdly, while this report locates racialised discrimination in the context of intersectional and concurrent prejudices based on factors such as gender identity, sexuality, age, class and socioeconomic status, its focus is on monitoring racial bias, and examining the specific practice of racial profiling as a specific expression of biased and discriminatory policing. Thus, provided its institutional and systemic meaning are incorporated, the term racial profiling is fitting for the scope and focus of this research. Finally, racial profiling is a term widely used and recognised by the Australian media [64] even if the definitions for it are diverse, and it is thus useful for its consistency with popular commentary.

A critical point is that regardless of the term we adopt, the community will continue to use the term racial profiling. Unless we recommend that Victoria Police use it and define it in the most useful way possible it will continue to be used and misused (or misunderstood) by the media, community and police users.

A solution to this conundrum is for Victoria through its laws and police policy to adopt a consistent and inclusive definition of racial profiling that overcomes many of the concerns that have been raised.

Definitions of racial profiling

Victoria Police have a working definition for racial profiling as follows:

Racial profiling is making policing decisions that are not based on objective or reasonable justification, but on stereotypical assumptions about race, colour, language, ethnicity, ancestry or religion.

> Target or criminal profiling is the association of particular offences with patterns of behaviour of a suspect. Behaviour and/physical appearance such as ethnicity, clothing or frequented locations, can be included as part of that profile for the purpose of describing or identifying the suspect. What is excluded is using race, colour, language, ethnicity, ancestry or religion as the **primary reason** to stop, investigate or interview a person or make a policing decision. [65]

By defining racial profiling as 'decisions based on stereotypes', Victoria Police ensures that all types of police decision-making where stereotypes can be invoked comes under scrutiny. This is an important starting point as it builds awareness that stereotypes can operate across many aspects of policing operations. A drawback in the definition is however, the use of term 'primary reason'. By prohibiting race as the 'primary reason' for decision-making, the targeting of people for whom race is but one of several descriptors – such as the highly stereotypical profile 'young, black and male at a certain location' – may be permissible. Race in this example is only one of four descriptors. However the targets will all be black and race becomes determinative. Furthermore it allows a racially biased generalisation to dictate when police suspicions should arise. For example, in the very same location, as police are operating

64. http://www.huffingtonpost.com.au/john-coyne/does-racial-profiling-exist-in-australia/
65. Victoria Police 'VPMP – Human Rights Standards', 31/8/2015, VPM.
66. Example drawn from Michelle Alexander, 'The New Jim Crow' 2011, New Press NY 131.
67. Michelle Alexander, 'The New Jim Crow,' 2011, New Press, NY, 131.

using their profile, a group of Anglo youth may be dealing drugs and escape attention entirely. [66] In contrast, an individualised, time-limited description of a suspect such as a young white man in a red t-shirt, wearing a green backpack seen five minutes ago at the intersection of Elizabeth and Lonsdale streets provides objective and reasonable justification for the stopping of a person fitting this description close to this time and location. For this reason, using a 'sole' or 'primary reason' test for racial profiling has been subject to extensive criticism. [67]

A definition provided by the US National Association for the Advancement of Colored People (NAACP) addresses this issue:

> "A comprehensive definition [of racial profiling] would prohibit the profiling of individuals and groups by law enforcement agencies ***even partially*** on the basis of race, ethnicity, national origin, religion, gender identity or expression, sexual orientation, immigration or citizenship status, language, disability (including HIV status), housing status, occupation, or socioeconomic status except when there is trustworthy information, relevant to the locality and time frame, which links person(s) belonging to one of the aforementioned groups to an identified criminal incident." [68] [emphasis added]

Importantly, Australia's *Race Discrimination Act* 1975 (Cth) ('RDA') stipulates that an act can be racially discriminatory act where race is *only one* of a number of driving reasons. Furthermore it clarifies that race does not need to be the dominant or substantial reason for the act:

> "Where: (a) an act is done for 2 or more reasons; and (b) one of the reasons is the race, colour, descent or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act); then, for the purposes of this Part, the act is taken to be done for that reason. [69]

The current Victoria Police definition of racial profiling does not comply with this aspect of the RDA. [70] The definition we recommend (see recommendation 3 page 12) overcomes this concern.

The NAACP definition of racial profiling raises another interesting issue. Its definition of racial profiling prohibits profiling on the basis of a large number of factors that are susceptible to the formation of stereotypes. These factors go well beyond considerations of race and include factors relevant to sexuality, class and disability. This definition raises a critical point that goes to the heart of the concerns around racial profiling. Suspicions based on the stereotyping of an individual *for any* or, a combination of any *reasons* constitutes biased and discriminatory policing and is an unacceptable basis on which to police. In contrast, policing based on a reasonable, objective, time and location limited justification linking an individual to a specific report of criminal activity reduces the potential for stereotyping. The central issue is whether police possess a sufficient justification before they act.

The definition of racial profiling used by the US Department of Justice focuses on the need for police to focus on behavior or specific information before taking action. It uses the term 'relies on' rather than 'primary reason':

> "….racial profiling is defined as any police-initiated action that **relies** on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity." [71] [emphasis added]

For this definition to be compliant with Australia's RDA we would need to insert the words '*even partially*' before 'relies on'.

68. NAACP, 'Born Suspect: Stop and Frisk Abuses and the Continued Fight to End Racial Profiling in America,' 2014, NAACP, 52.

69. Section 18.

70. The recent case of Djime v Kearnes (Human Rights) [2015] VCAT 941 (26 June 2016) confirms at [70] that the Equal Opportunity Act 2010 (Vic) does not apply to police decisions to investigate a person for an offence.

71. Ramirez, 'A Resource Guide on Racial Profiling Data Collection Systems' 2000, US Department of Justice,3.

The definition of racial profiling used by the European Commission Against Racism and Intolerance is:

> "The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities." [72]

This definition repeats the formula of 'objective and reasonable' used by the NAACP definition as a trigger to justify policing intervention.

The Ontario Human Rights Commission defines racial profiling as:

> "any action undertaken for reasons of safety, security or public protection, that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place of origin, or a combination of these, rather than on a reasonable suspicion, to single out an individual for greater scrutiny or different treatment." [73]

This definition uses the term 'reasonable suspicion' and again refers to the concept of 'stereotypes'.

In keeping with section 18 of the RDA, and taking into account the NAACP concerns, the US Department of Justice's definition, and the European Commission Against Racism and Intolerance and Ontario Human Rights Commission definition, we recommend that Victoria Police adopt a working definition of racial profiling as follows:

> Racial profiling is making policing decisions that are not based on objective or reasonable justification, but on stereotypical assumptions. [74]
>
> In relation to decisions to stop, investigate, move-on, interview a person, fail to act and the exercise of coercive police powers more generally, racial profiling is an act or omission done by a police officer (*whether consciously or otherwise*) where, even partially, race, ethnicity, national origin, ancestry, religion, immigration or citizenship status, language [75] is a factor influencing the decision, except (other than in failure to act cases) where reasonable and objective information, relevant to locality and time frame, linking a particular person to an identified criminal incident, exists to justify that decision.

This definition requires that the police have reasonable and objective grounds before taking action. This is in keeping with Victoria's *Charter of Human Rights and Responsibility Act 2006*, which in s 7 requires limitations of rights to be 'demonstrably justified'. It is also in accordance with Victoria Police's *Human Rights, Equity and Diversity Standards Policy*:

> All policing decisions must be based on objective criteria indicating criminal activity and not generalisations based on stereotypes or a person's attributes such as race, ethnicity, culture, religion, ancestry, language, age, sexuality, mental ill health or disability. [76]

72. European Commission Against Racism and Intolerance, (2016) http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N11/Recommendation_11_en.asp [1].
73. Ontario Human Rights Commission (2016) <http://www.ohrc.on.ca/en/what-racial-profiling-fact-sheet>
74. This sentence replicates the first sentence in Victoria Police's current definition.
75. While at this stage, we are proposing that Victoria Police undertake data collection on the basis of race/ethnicity and potentially religion, stereotyping can occur over a range of attributes that are worthy of inclusion in the definition.
76. Victoria Police, '*VPM Human Rights, Equity and Diversity Standards Policy*' 2015, Victoria Police.

We must consider the following when making decisions:

1. What is the **reason** for acting? Under what law or authorisation are you acting?
2. Consider your **impact** Which human rights are relevant and will your actions protect or limit these rights?
3. It is **reasonable**? If your actions limit human rights, is the limitation reasonable and can it be justified in the circumstances?
   · Is the limitation authorised by law
   · Is it for a legitimate purpose
4. It is **necessary**? Is the limitation necessary and proportionate to the goal you are trying to achieve?
5. Is there a **less restrictive** option? Is there another reasonable way of achieving your goal that is less restrictive of human rights; can it be done better or differently?' [emphasis in original]

Victoria Police Policy on police decisions

Victoria Police policy requires police to make the following assessments before taking action[77]:

Victoria Police policies highlight the importance of being able to demonstrate objective, legal and reasonable grounds before taking any policing action. A data collection protocol that records whether the police actually possess a reasonable and objective basis for stopping a person in the form of LEAP reports, diary entries or a specific form is an essential requirement in monitoring police performance against these policies. This information will also assist researchers and police managers to identify the presence of stereotyping and discrimination,[78] and will also increase Victoria Police's productivity and efficiency.[79] As we will explore in Chapter 2, research demonstrates that the more stringent the threshold for police intervention, the more effective (the higher the hit rate) the police intervention is.[80] That is, the less time police spend on unproductive stops and searches, the more efficient they are.

The Victoria Police Manual Policy Rule – *Reporting Contact and Intelligence* requires police members to submit an electronic Field Contact Report (or L19 or L19C form if electronic forms are not available) when they stop and or search a person or vehicle on reasonable grounds. The form requires police to enter the reasons for their stop in the 'additional information' section. However, what happens to the recording of stops that do not meet the field contact form requirements, for instance, stops without reasonable grounds? These stops, the very stops at most at risk of racial profiling, don't appear to be recorded at all.

The Policy Basis and Legal Grounds for Police Interventions

It is worth flagging at this point that under current law in Victoria (similar to WA[81] and SA law[82]), and in contrast to Victoria Police *Human Rights, Equity and Diversity Standards* policy (and to NSW,[83] Qld[84] and NT law[85]), police may initiate vehicle stops *without* a reasonable and objective suspicion of an offence.[86] In contrast, in NSW police must suspect on reasonable grounds that they have the power to arrest a person in the car before they initiate a stop.[87] For reasons that will be discussed in detail below, this failure under Victorian law to require that police possess a reasonable belief of an offence increases the vulnerability of Victorian drivers and pedestrians to racial profiling, and other forms of stereotyping prohibited under Victoria Police policy.

Victoria Police's *Contact Reporting and Intelligence* policy establishes that, in most cases, police will require a 'reasonable belief' that an offence may have occurred before they submit a field contact. It appears however that Victoria Police do not require this justification *before* the initiation of a police contact. As we explain shortly, where a legal threshold applies, any belief or suspicion is required at *the time of contact*, rather than assembled afterwards.

77. Ibid.
78. Reasons are however subject to vulnerability to validity threats: Gelman, 'An Analysis of the New York City Police Department's Stop and Frisk Policy in the Context of Claims of Racial Bias,' 2007 *Journal of the American Statistical Association* 101 (479), 815.
79. Jeffery Fagan, '*Terry's Original Sin*' University of Chicago Legal Forum, 2016 No 101 2016:23-97.
80. Ibid.
81. *DPP v Kaba* [2014] VSC 52 (18 December 2014), [250]
82. *DPP v Kaba* [2014] VSC 52 (18 December 2014), [253]
83. *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW) s36A.
84. *Police Powers and Responsibilities Act 2000 (Qld) s 60, R v Purdon* [2016] QSC 128 (26 May 2016)
85. *DPP v Kaba* [2015] SCV 52, 14 December 2015.
86. *Traffic Act* (NT) s29AAB, police can stop cars randomly for drug and alcohol testing, but otherwise require suspicion.
87. s36A *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW)

While it appears from the L19 form itself that field contacts are intended to cover vehicle and street checks[88], the 2016 *Receipting Proof of Concept Evaluation Report* indicates that 'police field contacts [are] ….a much more limited and prescriptive form of contact'[89] than the full range of police- initiated vehicle and pedestrian contacts performed by police. Victoria Police have confirmed that there is a subsection of contacts that are not covered by Field Contact reporting form requirements.[90] It appears that these contacts may be entered into running sheets, but are not currently recorded in any Victoria Police database. It may be that there are a far greater number of these types of contacts than the contacts that get reported under the Field Contact policy. While there are no legal thresholds that apply to this subset of contacts, the *Victoria Police Human Rights, Equity and Diversity Policy* set out at page 22 of this report provides policy guidance. However, unless these stops are properly recorded, scrutinised and followed up, this begs the question as to how Victoria Police ensure that the *initiation* of all stops, searches and directions to move on are subject to the *Victoria Police Human Rights and Diversity Policy* and its prohibition on racial profiling? As Chan and Epp suggest, overcoming the everyday nature of cognitive bias and stereotyping within police agencies is a difficult task requiring structural change. The presence of policy guidelines and training alone is not sufficient to achieve this change.

Legal standards for police intervention

There are a number of legal thresholds that apply to various forms of policing intervention. In Victoria the highest standard is 'belief on reasonable grounds'. This is the mental state required by a police officer to arrest a person. The lessor threshold is 'suspect on reasonable grounds'. This applies to warrantless searches conducted for example, under section 10 of the *Control of Weapons Act 1990* (Vic).

In *George v Rockett*, the High Court of Australia examined the meaning of these thresholds. For a start, both mental states require the existence of objective facts:

"when a statute prescribes that there must be reasonable grounds for a state of mind – including suspicion or belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person.[91]

The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown.".[92]

In NSW where a 'suspects on reasonable grounds' threshold applies to vehicle stops, the NSW Court of Criminal Appeal in *R v Rondo*[93] has identified the following test:

(a) A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs covered by s.357E. A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.

88. Victoria Police Field Contact Report released under FOI 57210/17.

89. Victoria Police, *Receipting Proof of Concept Evaluation Report Victoria Police*, 20 December 2016, 10,11.

90. Communication with David Broderick 27/3/2017

91. *George v Rockett* (1990) 170 CLR 104 [8].

92. *George v Rockett* (1990) 170 CLR 104 [12].

93. *R v Rondo* [2001] NSWCCA 540 (24 December 2001) See also *Le v The State of New South Wales* [2017] NSWDC 38 at [126].

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(b) Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.

(c) What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest **at the time he did so**. Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole of the surrounding circumstances. (emphasis added)."

In considering a definition of reasonable grounds that might be workable in the context of moving towards the elimination racial profiling, it is essential that any definition clarifies that the 'reasonable person' who objectively assesses the facts is one whose decision is free from prejudice, cognitive bias or stereotyping.

The Victoria Police Manual – *Reporting Contacts and Intelligence Policy* requires Victoria Police members to form a belief on reasonable grounds that an offence has occurred before they submit a Field Contact form. The policy continues:

- "there should be observed behaviour causing suspicion or intelligence supporting the decision to submit a field report
- submission of a Field Contact Report should not be solely based on a person's location in an area with a high incidence of crime. There should be other information or factors that inform the decision to conduct a field contact."[94]

A literal reading of the Victoria Police Field Contact policy is that it only applies to the decision to submit a field contact. This means that the *initiation* of stops themselves could remain subject to bias and be without reasonable justification. And as we have noted, a whole class of stops are not covered by the Field Contact policy.

A definition providing additional guidance for reasonable grounds and addressing concerns around bias (but lacking clear guidance on the issue of location) is the one used in England's PACE Code A (2.2):

> "[t]here must be an objective basis for that suspicion based on facts, information, and/ or intelligence which are relevant to the likelihood of finding an article of a certain kind…Reasonable suspicion can never be supported on the basis of personal factors alone without reliable or supporting intelligence or information or some specific behaviour by the person concerned. For example, a person's race, age, appearance, or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other as the reason for searching that person. Reasonable suspicion cannot be based on generalisations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity."[95]

There are a number of police-initiated contacts that must be monitored as part of a strategy to reduce the risk of racial profiling. Namely, i) pedestrian and vehicle stops, ii) all forms of pre-custodial searches without warrant, and iii) directions to move on. Some of these actions have legal thresholds, other do not. The following table sets out the legal thresholds required for the initiation of a number of police activities in Victoria, NSW, UK, Canada and USA. These locations are identified because they are discussed during this report.

94. Victoria Police, VPMP- Reporting contact and intelligence 2015, Victoria Police, 2,3.

95. *Ben Bowling and Corretta Phillips 'Disproportionate and discriminatory, reviewing the evidence on police stop and search' 2007, Modern Law Review, 70 (6), 937.*

Table 1- Intervention Thresholds

Action	Legal threshold in Victoria	Legal threshold in NSW	Legal threshold in New York, USA	Legal threshold in Ontario, Canada	Legal threshold in UK.
Pedestrian Stop	No legal threshold, Field contacts VPM[96] requires – 'reasonable belief'[97] before a field contact form is submitted.	No legal threshold	Stop for non-investigative purpose: 'Objective, credible reason'.[98] Investigative stop: 'Reasonable Suspicion'[99]	No legal threshold	Reasonable suspicion except for section 60 *Criminal Justice and Public Order Act* where no threshold[100]
Power to Request Name and Address	Reasonable belief[101]	Reasonable suspicion	Reasonable suspicion	Reasonable belief[102]	Reasonable suspicion
Vehicle stop	No legal threshold[103] VPM requires ''reasonable belief' for submission of a Field Contact report.	Reasonable suspicion[104]	Probable cause[105]	No legal threshold	No legal threshold
Search without warrant	Reasonable suspicion	Reasonable suspicion	Reasonable suspicion	Reasonable suspicion	Reasonable suspicion
Consent search	No legal threshold[106]	No legal threshold	No legal threshold	No legal threshold	Unlawful[107]
Direction to Move On	Reasonable suspicion	Reasonable belief	No Power	No Power	Reasonable suspicion[108]
Arrest without warrant	Reasonable belief/finds committing	Reasonable suspicion	Reasonable belief	Reasonable belief	Reasonable suspicion

96. 'VPM' is an abbreviation for the Victoria Police Manual

97. Victoria Police Manual, VPMP -*Reporting Contacts and Intelligence* 9/05/16

98. *People v Debou* 40 N.Y.2d 210 (1976)

99. Terry Stops (investigative stops): Brian Withrow and Jeffrey Dailey, 'Racial Profiling Litigation, Current Status and Emerging Controversies,' 2012, *Journal of Contemporary Criminal Justice*, 28(2) 122-145, 127.

100. *Police and Criminal Evidence Act* (1984) UK Code A, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/414195/2015_Code_A_web-19-03-15.pdf

101. s456AA *Crimes Act* 1958 (Vic)

102. http://www.legalinfo.org/criminal-law/you-and-the-police.html#faq03

103. *DPP v Kaba* [2014] VSC 52 (18 December 2014), [239]., Victoria Police Manual, VPMP -*Reporting Contacts and Intelligence* 9/05/16

104. *Law Enforcement (Powers and Responsibilities)* Act 2002 (NSW) s36A.

105. Brian Withrow and Jeffrey Dailey, 'Racial Profiling Litigation, Current Status and Emerging Controversies,' 2012, *Journal of Contemporary Criminal Justice*, 28(2) 122-145, 125, (Whren).

106. Magistrates in Victoria tend to invalidate the lawfulness of a consent search if person not informed of their right to refuse: Neill Hutton (VicBar), '*Police Powers, how and why to challenge them*' PLE presentation VLA 9 February 2016.

107. Michael Shiner, *Regulation and Reform* in Delsol, Rebekah; Shiner, Michael (ed), Stop and Search, the Anatomy of a Police Power 2015, Palgrave Macmillan, 153.

108. S30 Anti-social Behaviour Act (2003) UK.

In Victoria, in addition to the presence or absence of criminal law thresholds, the *Race Discrimination Act* 1975 (Cth) applies to all policing activity described in Table 1.[109] With the potential exception of the use of move on powers, the *Equal Opportunity Act 2010* (Vic) is unlikely to apply to the bulk of the activities described in Table 1, but could apply to subsequent or previous decisions made by police that are characterised as a service to that person.[110] The *Charter of Human Rights and Responsibilities Act 2007* (Cth) and particularly sections 8 (right to equality before the law), 10 (protection from degrading treatment), 12 (freedom of movement) 13 (privacy and reputation) 17 (2) (right of a child to protection of best interests free from discrimination) and 21 (right to liberty and security of the person) may all be relevant to the policing activities described above, depending on the circumstances.

Recommendations

1. **We recommend that given its current use by Victoria Police and the Victorian community, Victoria Police continue to use the term *racial profiling* to describe the policing conduct monitored by this data collection scheme.**

2. **We recommend that, in relation to its coercive or investigative work, Victoria Police adopt a broad definition of racial profiling which includes profiling on the basis of a range of stereotypes that result in discrimination:**

Racial profiling is making policing decisions that are not based on objective or reasonable justification, but on stereotypical assumptions. [111]

In relation to decisions to stop, investigate, move-on, interview a person, fail to act and the exercise of coercive police powers more generally, racial profiling is an act or omission done by a police officer (*whether consciously or otherwise*) where, even partially, race, ethnicity, national origin, ancestry, religion, immigration or citizenship status or language[112] is a factor influencing the decision, except (other than in failure to act cases) where reasonable and objective information, relevant to locality and time frame, linking a particular person to an identified criminal incident, exists to justify that decision.

3. **We recommend that Victoria Police clarify its *Contact Reporting and Intelligence Policy* to ensure that police possess a reasonable belief that an offence has occurred before they *initiate* a pedestrian and vehicle stop and not just to *submit* a field contact form. We further recommend that Victoria Police require police to record (in a readily retrievable form) their reasons for initiating *all* vehicle and pedestrian stops, searches (including consensual searches) and directions to move-on, not just those that result in a field contact report.**

4. **We recommend that Victoria Police's *Contact Reporting and Intelligence Policy* retains its intervention threshold as 'reasonable grounds to believe' but furthermore adopts a definition of 'reasonable grounds' similar to the UK's PACE Code A [2.2]. It should however continue to clarify that a location with a high incidence of crime should not be used as the sole criterion for the initiation of a stop.**

109. See for example *Wotton v The State of Queensland* (No 5)[2016] FCA 1457.

110. *Djime v Kearnes (Human Rights)* [2015] VCAT 941 (26 June 2016), [70].

111. This sentence replicates the first sentence in Victoria Police's current definition.

112. While at this stage, we are proposing that Victoria Police undertake data collection on the basis of race/ethnicity, stereotyping can occur over a range of attributes that are worthy of monitoring.

Chapter 2. Why is it important to monitor racial profiling? What are the problems associated with monitoring it and how can these be resolved?

Aboriginal and Torres Strait Islander people as well as ethnic minority communities state that they are racially profiled.[113] Proving racial discrimination in individual cases, is however, no easy matter.

> Few if any police officers will admit they stopped a car because the driver was black.[114] If police are overtly racist in their dealings with the driver, in the absence of witnesses, it will be one word against another.[115]

Racial profiling has devastating impacts on individuals.[116] As a systemic practice however, it also has serious consequences for whole communities. Reducing the risks of racial profiling transcends individual cases. It involves community advocates, researchers, institutions and police working together to identify patterns of disproportionality make appropriate changes to policing practices and procedures. There is a growing awareness of the importance of data collection as a means to understand and address systemic forms of racism across a range of institutions.[117] A robust data collection program will help bridge the gap between community testimony and police policies, as it will enhance transparency and enable statistical analysis to examine broad trends across population groups and map individual cases within such tendencies.

In order to establish a scheme for the systematic measurement of racial profiling, several key questions must be asked: How can the presence of racial profiling be demonstrated from police contact data? In particular, what benchmarks should be used to assess racial disproportionality in police contacts? How can it be determined whether this disproportionality is a consequence of discrimination by police? In what follows, we rely on a wide range of literature to discuss best practices surrounding the quantitative, systematic assessment of racial profiling.

Our analysis of using *resident population* and *available population* benchmarks to assess disproportionality concludes that available population benchmarks are themselves discriminatory. After examining the research we determine that resident population benchmarking, in combination with *hit rate* and *reasonable grounds* analysis, offers the best method to indicate the presence of racial profiling. Starting with a discussion of disproportionality in police contacts, in the following paragraphs we will explore the research that leads us to these conclusions.

Assessing Disproportionality

One of the key debates in racial profiling literature centres on the question of whether racially disproportionate police stop data can demonstrate racial discrimination.[118] Does evidence of disproportionality in police stops signal a problem with policing in its own right? Or can racially disproportionate police stops be justified by disproportionate crime rates or some other factor?

Calculating disproportionality benchmarked against census populations

One method of assessing racial disproportionality in stop data is to divide the numbers of stops per racial group by resident populations and then to compare this stop 'rate' to rates for other racial groups. This comparison generates a 'disproportionality ratio'.[119]

113. *Inquest into the death of Mulrunji* COR 2857/04(9) 14 May 2010; *Inquest into the death of Thomas (TJ) Hickey* 289/2004 17 Aug 2004; Cunneen, C. (1990) *Aboriginal-Police Relations in Redfern: with Special Reference to the 'Police Raid'* of 8 February 1990 , Report Commissioned by the National Inquiry into Racist Violence, Human Rights and Equal Opportunity Commission, Sydney; Johnston, *'RCADIC National Report''*, V. 2, p 217; Smith, *Boys do you wanna give me some action*," 2010 Melbourne, Legal Services Board; *Hopkins, Complaints against police behaviour in Flemington, Victoria,* (2007) *AltLawJl* 9.

114. For a rare example where admissions are made see ABC, *Cop it Sweet* (TV Documentary, Redfern, Sydney,1992).

115. Tamar Hopkins, '*DPP v Kaba*, Racial Profiling and s59(1)(a) of the *Road Safety Act* 1986 Vic' 2015, 40 Alt Law Journal 247, 250; see also Brian Withrow and Jeffrey Dailey, 'Racial Profiling Litigation, Current Status and Emerging Controversies,' 2012, Journal of Contemporary Criminal Justice, 28(2) 122-145, 130.

116. Ontario Human Rights Commission, '*Inquiry Report. Paying the Price, the Human Cost of Racial Profiling*' 2003, OHRC 18-64.

117. Jennifer Yang, 'Ontario Government unveils 3 year plan to battle racism,' The Star, 7 March 2017 < https://www.thestar.com/news/gta/2017/03/07/ontario-government-unveils-3-year-plan-to-battle-racism.html>

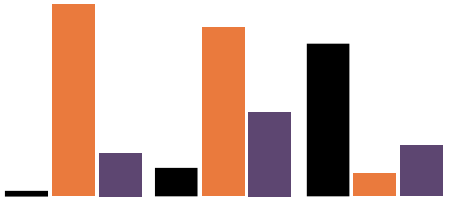
118. Joel Miller 'Stop and Search in England, A reformed tactic or business as usual' (2010) *Brit J Crim* 50, 959.

119. Equality and Human Rights Commission, 'Stop and Think' 2010, EHRC, 23.

Photo by Charandev Singh

Example: Let us assume that area X has a resident population of 1000, 2% of whom are Black, 80% of whom are white and 18% of whom are Asian. Assume further that of 100 police stops over a given period, black people are stopped 10% of the time, white people 60% of the time and Asians 30% of the time.

Table 2 –Population Data for Area X



	Population	Number of stops	Stops per capita
Black	20	10	0.5
White	800	60	0.075
Asian	180	30	0.167

From this data we can calculate the following disproportionality ratios:

Black disproportionality ratio: 6.7 (black/white)

Asian disproportionality ration: 2.2 (Asian/white)

These disproportionality ratios based on resident populations tell us that in Area X, black people are 6.7 times more likely to be stopped by police than white people. A corresponding statement can be made for Asians. Thus, in this case, the proportion is calculated vis-à-vis the white resident population.

A different ratio used by researchers in Canada and the United States is called the 'Odds Ratio'. This is calculated for a particular racial group by calculating the number of stops experienced by that group as a proportion of all stops, and dividing this figure by the number of this group expressed as a proportion of the whole population.[120] A result of 1:0 represents no over-representation, above 1:0 is an over-representation, while below is an under-representation.[121]

So, for Area X, the 'Odds Ratios' are:

Black 10/100, divided by 20/1000 = 5.00

Asian 30/100 divided by 180/1000 = 1.67

White 60/100 divided by 800/1000 = 0.75

According to Lamberth odds ratios from 1.0 to 1.5 are viewed as benign, odds ratios between1.5 to 2.0 are of concern and those above 2.0 are indicative of racial targeting.[122] Clearly we need to know more about the stops before we can be conclusive about whether the cause for the disparity is racial profiling. But according to Lamberth, figures in these ranges should trigger concern.

In the Victorian *Haile-Michael* litigation, the applicants' expert Professor Ian Gordon found that African/Middle Eastern youth comprised 18% of the population in Flemington North Melbourne, but 45.6% of the field contacts between 2008 and to 2010.[123] This gives an odds ratio of 2.53 and is well into the zone suggested by Lamberth as indicative of racial profiling. Furthermore, we know that these stops, being field contacts, had no 'hit rate'. Consequently we know this odds ratio is not the result of higher rates of arrests or cautions, but instead high levels of unproductive police interventions.

The preceding ratios are calculated against *resident* populations. There are two concerns about using resident populations as a benchmark for studying racial profiling. The first issue relates to the accuracy of using census population figures to represent the population in the area of study. The second issue is a more complex question

120. Steven Wolfson, 'Racial Profiling in Texas Department of Safety Traffic Stops: Race Aware or Race Benign,' 8 Scholar 117 2005-2006, 179. See also John Lamberth, *Traffic Stop Data Analysis Project, the City of Kalamazoo, Department of Public Safety,* 2013, John Lamberth Consulting, < http://mediad.publicbroadcasting.net/p/michigan/files/201309/KDPS_Racial_Profiling_Study.pdf> 29; Scot Wortley and Lysandra Marshall, *Bias Free Policing: The Kingston Data Collection Project. Final Results* 2005, < https://qspace.library.queensu.ca/bitstream/1974/8655/1/Bias%20free%20policing%20-%202005%20-%20Wortley%20-%20Policy.pdf> 11.

121. John Lamberth, *Traffic Stop Data Analysis Project, the City of Kalamazoo, Department of Public Safety,* 2013, John Lamberth Consulting, < http://mediad.publicbroadcasting.net/p/michigan/files/201309/KDPS_Racial_Profiling_Study.pdf> 29;

122. Ibid.

123. Ian Gordon, '3rd Expert Report' 31 January 2013, FCA, VD 969/2010, *Haile-Michael v Konstantinidis*,[15].

Photo by Charandev Singh

about whether census figures represent the groups that police target. We will return to this second issue at length shortly.

The central issue relating to the accuracy of using census figures is that rapid changes in populations can take place in relatively short periods of time. Moreover, there are longstanding problems of census accuracy with respect to certain populations and particularly in the case of populations with variable availability of housing. However there are methods of adjusting for these inaccuracies. For example, in the UK where data is made public each month, an otherwise unexplainable constant increase or decrease in disproportionality of stop data as the years after the census date go by, provides a good indication that there is a change in the resident population.[124] It is also sometimes possible to use more current population estimates to modify the census figures.[125] While these concerns are serious, they can be addressed at the moment of interpreting results.[126]

The other more complex concern with census benchmarks, according to critics, is that they are not useful in assessing the existence of racial discrimination by police. Critics suggest that more appropriate benchmarks (or denominators) exist, such as the populations of those who commit traffic violations or those who are 'available' to be stopped. As we will see, each of these benchmarks has its own particular set of challenges. Others suggest that the assessment of discrimination should be made through analysing conduct that occurs after a stop has taken place (e.g. length of stop, the decision to search, the use of force). Another line of reasoning suggests that it is the justification threshold used before a stop is initiated (such as the presence of reasonable suspicion or higher) and the outcome of a stop (hit or arrest rate) that offer the best methods to assess the presence of discrimination.[127]

In this next section, we will examine the merits of these approaches and their application to Australia. We will then look at how issues of benchmarking are dealt with in our comparison sites.

Available Population

Joel Millerand Lori Fridell have argued that the racial backgrounds of those stopped by police should be compared (benchmarked) against the populations that are 'available' to be stopped by police and not against resident populations (such as census data) in order to determine the presence of disproportionality that could be caused by bias. [128, 129] Given Victoria Police's interest in both of these studies,[130] it is important we examine both of these approaches and discuss their application in Victoria, Australia.

Firstly it is worth noting that there are different concerns that impact on benchmarks when looking at traffic and pedestrian stops.[131] In the US, with notable exceptions[132], most of the research has focussed on measuring bias in traffic stops.[133] In contrast, much of the UK research concerns pedestrian stops.[134] Indeed traffic stop data is not subject to monitoring in the UK.[135] Accordingly we deal with these two types of stops separately.

124. Communication with Rebekah Delsol on 29 November 2016, NB in the UK, the census occurs every 10 years. In Australia the census occurs every 5 years.
125. Equality Commission, (2013) '*Stop and Think Again*' 24.
126. See for eg Ian Gordon, '3rd Expert Report' 31 January 2013, FCA, VD 969/2010, *Haile-Michael v Konstantinidis*, Thanks to Dr Raul Sanchez-Urribarri for his assistance with this section
127. Delsol, *Addressing Ethnic Profiling by Police* 2009 Open Society Justice Initiative, 25. David Harris, "*US Experiences with Racial and Ethic Profiling: History, Current Issues, and the future*" Critical Criminology (2006) 14: 213–239, 222, 223.
128. Joel Miller, Profiling Populations Available for Stops & Searches, *Policing & Reducing Crime Unit*, London, 2000.
129. Lori Fridell, '*By the numbers, a guide for analysing race data from vehicle stops*', 2004, Police Executive Research Forum.
130. Victoria Police, '*Victoria Police Receipting Pilot Proposed Methodology*' 2014, 35.
131. Miller 2000, above n 21, 25.
132. See eg Gelman, 'An Analysis of the New York City Police Department's Stop and Frisk Policy in the Context of Claims of Racial Bias,' 2007 *Journal of the American Statistical Association* 101 (479).
133. Scot Wortley and Lysandra Marshall, *Bias Free Policing: The Kingston Data Collection Project. Final Results* 2005, https://qspace.library.queensu.ca/bitstream/1974/8655/1/Bias%20free%20policing%20-%202005%20-%20Wortley%20-%20Policy.pdf> 81.
134. One of the reasons for this may be that in the UK, traffic stops do not require reasonable grounds.
135. Rebekah Delsol, Michael Shiner, '*Stop and Search, The Anatomy of a Police Power,*' 2015, Palgrave Macmillan, 195.

Traffic stops

The idea that people who are 'available' to be stopped by police are not representative of a resident population makes sense in *highway* traffic stop situations. For example, the population of people on the Hume Highway near Benalla is not a representative sample of the population around Benalla - many will be drivers from Melbourne or Sydney. Indeed, it is highway traffic stops where the concept of 'available' populations originated.[136] In the US Federal pattern and practice claim brought by the US DOJ in *State of New Jersey v Pedro Soto* (1996), the court accepted that surveys of the racial make-up of users on the New Jersey Turnpike was an appropriate benchmark to assess racial bias.[137] The court also accepted a second benchmark, the racial make up of those who drove above the speed limit.[138] To develop that second benchmark, researchers drove four miles above the speed limit and counted the numbers of people from different racial backgrounds who passed them or who they passed.[139] Since this case however, and possibly as a consequence of police agencies becoming more involved in interpreting stop data,[140] the benchmarking issue in relation to traffic stops has become even more complicated. For example, researchers have surveyed the race of drivers who are involved in traffic collisions[141] and the race of drivers who have traffic offences.[142]

There are a number of assumptions behind the benchmarks used in the US. A critical issue at this point in the discussion is that police pull people over because they are allegedly violating traffic laws. Consequently, US researchers are concerned to establish whether there is bias in officer decisions about whom, *among traffic violators*, to pull over. However, in Victoria, traffic intercepts are not dependent on a traffic violation having occurred. In Victoria, in accordance with *Kaba*[143], police are entitled to pull anyone over for a 'routine intercept' to conduct a licence and registration check. Consequently traffic violations are not necessarily the trigger for police interception. For this reason alone, alleged violations are not an appropriate benchmark in Victoria.

Lori Fridell, working in the US recommends that the monitoring of traffic stops must control for the following issues:

1. Differences in racial mix of road users;
2. Differences in the racial mix of traffic violators;
3. Differences in racial mix of people of various ages;
4. Differences in the racial mix of road users at 'hot spots'.[144]

In the following section we will discuss the problems with these controls.

Racial mix of road users

The demographics of road users, particularly on highways, may not reflect census demographics for local areas. However for local traffic, the racial demographic of car owners or licence holders may be an appropriate benchmark. In parts of the US, car owners nominate their ethnicity when registering. In Australia, it may be possible to determine the ethnic make-up of populations within the driving age (18 to 80) from census data to act as a benchmark. Alternatively, it may be possible to conduct roadside research on the demographic of highway road users to create a benchmark, as was done to create the first benchmark in the New Jersey Turnpike case.

136. David Harris, 'US experiences with racial and ethnic profiling' 2006, *Critical Criminology* 14, 230.

137. Ibid, 232.

138. William Buckman, John Lamberth, 'Challenging racial profiles, attacking Jim Crow on the Interstate' 3 *Rutgers Race & L. Rev.* 83 2001,99.

139. Four miles was chosen by the researchers as this was the point at which police policy was to enforce the speeding law: Joseph Kadane, John Lamberth, 'Are blacks egregious speeding violators at extraordinary rates in New Jersey?' *Law Probability and Risk* 2009 (8), 142.

140. Withrow, 'Racial Profiling Litigation: Current Status and Emerging Controversies' 2012 *Journal of Contemp Crim Justice* 28 (2), 137, 138.

141. Mosher, 'Methodological Issues in Bias Policing Research with Applications to Washington State Patrol, 2012, 35 *Seattle U. L. Rev.* 769, 782.

142. Measurements of the races of those with traffic offences are as potentially subject to racial bias as stops: See for eg David Harris, 'US experiences with racial and ethnic profiling' 2006, *Critical Criminology* 14, 218. 6% of offenders are identified:,Ben Bowling, Corretta Phillips 'Disproportionate and discriminatory, reviewing the evidence on police stop and search' 2007, *Modern Law Review*, 70 (6), 948.

143. *DPP v Kaba* [2014] VSC 52 (18 December 2014).

144. Lori Fridell, '*By the numbers, a guide for analysing race data from vehicle stops*', 2004, Police Executive Research Forum, 27.

However, a significant concern with research of road users is that road user demographics are variable.[145] Consequently, variations from day to day or time to time may reduce the effectiveness of observational data as a benchmark. Concerns about demographics of road users is less of a problem in local streets where road users are more likely to be local. Consequently resident census data can be used as a benchmark.[146]

Demographics of traffic violators

Using the racial demographic of traffic violators as a benchmark raises significant issues. Firstly, as discussed, a traffic violation is not necessarily a trigger for a traffic intercept in Victoria, rendering this measure irrelevant in our context.[147] Secondly, the racial demographics of people with traffic violations is a figure that is itself susceptible to officer bias.[148] For example, if the police are in fact targeting ethnic minority drivers, one would expect more traffic violations to be recorded against them. Similarly if police position themselves in places with higher numbers of ethnic minority drivers, one would expect them to charge more ethnic minority drivers. Consequently, traffic offence rates are not a neutral benchmark.[149] Finally as noted by Judge Schleindlen in her decision in *Floyd*:

> "I reject the testimony of the City's experts that the race of crime suspects is the appropriate benchmark for measuring racial bias in stops. The City and its highest officials believe that blacks and Hispanics should be stopped at the same rate as their proportion of the local criminal suspect population. But this reasoning is flawed because the stopped population is overwhelmingly innocent — not criminal. There is no basis for assuming that an innocent population shares the same characteristics as the criminal suspect population in the same area."[150]

Controlling for age

Fridell argues that if there is a link between age and poor driving, then police in areas where minority racial populations have larger numbers of younger people are more likely to stop larger numbers of racial minorities than other areas.[151] Firstly, as Fridell points out, it is unknown if there is a link between age and poor driving. Furthermore, as with crime statistics on race, police statistics found showing a link between age and poor driving may be subject to claims of officer bias in themselves.[152] Additionally, stopping people,on the basis of age, or targeting areas frequented by young people is also a form of unlawful discrimination. It would be unconscionable to justify police conduct on the basis of one form of discrimination and not another. Further, because traffic intercepts in Victoria are not necessarily triggered by poor driving, controlling for age (on the basis that young people are more likely to commit offences) is not necessary. There is however, a final point to be made here. There is an intersectional stereotyping relationship between age and race.[153] Rather than controlling for age, research needs to measure whether there is an increase in *unjustified interceptions* by police in areas where there are intersecting risks of stereotyping. Collecting data on age will enable this analysis.[154]

145. Joel Miller & MVA, '*Profiling populations available for stop and search*' 2000, Home Office, Policing and Reducing Crime Unit, 54.

146. For example a benchmark could be census populations of those within the driving age.

147. See *DPP v Kaba* [2014] VSC 52 (18 December 2014).

148. Ben Bowling, Corretta Phillips 'Disproportionate and discriminatory, reviewing the evidence on police stop and search' 2007, Modern Law Review, 70 (6); eg David Harris, 'US experiences with racial and ethnic profiling' 2006, *Critical Criminology* 14.

149. Ben Bowling, Corretta Phillips 'Disproportionate and discriminatory, reviewing the evidence on police stop and search' 2007, Modern Law Review, 70 (6), 949; eg David Harris, 'US experiences with racial and ethnic profiling' 2006, *Critical Criminology* 14, 218.

150. Floyd v The City of New York, Opinion and Order 8/12/13, 8.9.

151. Lori Fridell, '*By the numbers, a guide for analysing race data from vehicle stops*', 2004, Police Executive Research Forum, 21.

152. Car accident and death rates by age might be at less at risk of bias claims, but we won't know the race of the person who caused the injury/death.

153. Victor Rios, '*Punished, Police the Lives of Black and Latino Boys*', 2011, New York University Press, 72,73.

154. Comparing racial groups by age group in census data was the method used by Professor Ian Gordon in *Haile-Michael v Konstantinidis*.

Controlling for the racial mixture at hotspots

Fridell notes that there may be a higher concentration of ethnic minorities at traffic intercept hotspots. Consequently she and others argue that stop data generated at these places must be benchmarked against the racial mix of those available to be stopped at hot-spots in order to analyse the existence of officer bias. There is however, an inherent circularity in this argument. This issue is discussed in detail below in relation to the UK study by Joel Miller & MVA (2000) on pedestrian stops.

To flag the key issue however, before we consider benchmarking for higher numbers of ethnic minorities at police 'hot spots', we must consider the possibility that the location of police 'hot spots' with higher ethnic minorities is the consequence of racial discrimination rather than sound, objective policing. Indeed studies have shown that:

a) police 'hot spots' are not necessarily high crime areas;[155]

b) high-crime areas are not necessarily areas where the crime rates are caused by crimes that are 'susceptible' to stop and search tactics;[156]

c) targeting stop and search in areas with high ethnic minorities leads to resentment, and is counter-productive to people's willingness to cooperate, and policing objectives;[157]

d) 'hit rates' (ie the rate of arrests) of ethnic minorities are *lower* than those of whites in hot spots indicating a lower standard of suspicion is being applied when police stop minorities;[158]

e) studies of police indicate that they frequently don't have accurate information about where high-crime areas are and instead police according to their own knowledge, which could be based on stereotypes rather than relevant facts;[159]

f) 'hot spots' mask 'the historical choices of police to prioritise street crimes over other offences and target particular neighbourhoods rather than others'[160]

g) targeting areas of higher ethnic minorities results in disproportionality even if they can be 'justified';

h) studies based on researchers present with police when they stop vehicles and pedestrians indicate there is often little objective evidence used by police when they decide to stop someone. Much of the decision-making is based on stereotypes.[161]

As a consequence, attempting to benchmark populations at police hot spots renders the study blind to these critical forms of institutional racial bias.

By attempting to control for factors that may themselves be subject to bias, Fridell's work fails to address the broader and institutionalised racism of 'everyday policing.'. It also has reduced applicability in the Victorian context where, under law, reasonable suspicion is not required for the initiation of field contacts (pedestrians) and routine vehicle intercepts.[162]

155. Joel Miller & MVA, *Profiling populations available for stop and search* 2000, Home Office, Policing and Reducing Crime Unit, 65; Rebekah Delsol 'Effectiveness' in Rebekah Delsol and Michael Shiner, *Stop and Search*, the anatomy of police power (2015) Palgrave Maclillan, UK, 91,92.

156. Joel Miller & MVA, *Profiling populations available for stop and search* 2000, Home Office, Policing and Reducing Crime Unit, 65.

157. Alpa Parmar (2011) Stop and search in London: counter-terrorist or counter-productive?, *Policing and Society,* 21:4, 369-382, Ben Bowling & Leanne Weber (2011) Stop and search in global context: an overview, *Policing and Society*, 21:4, 486. Ben Bradford, 'Unintended Consequences' in Rebekah Delsol and Michael Shiner, *Stop and Search, the anatomy of police power* (2015) Palgrave Maclillan, UK, 108.

158. Andrew Gelman, Jeffrey Fagan & Alex Kiss (2007) An Analysis of the New York City Police Department's "Stop-and-Frisk' Policy in the Context of Claims of Racial Bias, *Journal of the American Statistical Association*, 102:479, 821.

159. Paul Quinton, 'Race Disproportionality and Officer Decision-Making' in Rebekah Delsol and Michael Shiner, *Stop and Search, the anatomy of police power* (2015) Palgrave Maclillan, UK, 62. Jennifer E. Cobbina, Akwasi Owusu-Bempah & Kimberly Bender (2016) Perceptions of race, crime, and policing among Ferguson protesters, *Journal of Crime and Justice*, 39:1, 213.

160. Paul Quinton, 'Race Disproportionality and Officer Decision-Making' in Rebekah Delsol and Michael Shiner, *Stop and Search, the anatomy of police power*'(2015) Palgrave Maclillan, UK, 61.

161. Ibid, 70-75.

162. Under Victoria Police policy, reasonable belief is required.

Photo by Charandev Singh

As we will come to, rather than controlling for non-specific and stereotyping factors like generalised ethnic crime rates, a more precise assessment of whether racial targeting is occurring is possible through a close analysis of the rates of unjustified stops and hit-rate analysis. This requires police to accurately document their reasons for stopping individuals.

Pedestrian stops

In 2000 in London, England, Miller conducted a study where he explored the differences between resident populations and populations who frequented metropolitan police 'hot spots'. His study showed that police 'hot spots' had a much larger number of young men from ethnic minority backgrounds than the resident population.[163] Like Fridell, Miller concluded that the benchmark used to assess discrimination should be this 'available' population rather than the resident population.

There is however, as described above, a circularity to this proposition. If individual police are targeting racial minorities (racial profiling), their 'hot spots' will be areas frequented by ethnic minority populations. Or if standard police 'hot spots' are also areas with high ethnic minority populations, they will stop more ethnic minorities, even if there is no individual intention of police to target minorities.

Miller, noting this concern, clarifies the importance of police ensuring their 'hot spots' are justified in terms of local crime problems.[164]

There is however circularity on this issue too. In addition to the reasons mentioned in relation to traffic hot-spots:

a) There are likely to be a higher number of arrests at places where police target than places they don't, thus increasing 'crime rates' in those areas;

b) Hot spots are blind to 'white collar' crimes and exacerbate the criminalisation of poverty;[165]

c) A focus on street crime [public] skews police attention towards those who lack access to private property and ignores crime conducted in private;

d) Some of the crime 'problem' around the 'hot-spot' may be police-initiated: eg fail to give name and address, offensive language, resist, hinder police;

Furthermore, local high crime areas may be made up of less visible crimes such as family violence and may not reflect crime areas where crimes are 'susceptible to stop and search'.[166] Furthermore stop and search tactics in areas of high ethnic minorities may actually reduce community trust in police in these areas and be counterproductive.

Miller's study noted that police did not always target areas with high 'crime' rates and that when disparity occurred between the crime rate and the 'hot spot', police were targeting, police were *found to be targeting high minority populations.*[167] Consequently when police were not stopping people in proportion to what might be predicted from crime rates, their increased activity seemed to be because the population has a high proportion of ethnic minorities. Interestingly this corresponds to the findings in the Flemington *Haile-Michael* data. Police in Flemington were targeting Africans despite their lower involvement in crime.[168] It also corresponds with findings in New York, USA that showed minorities were most frequently stopped and frisked in areas of low crime.[169]

A further methodological concern with Miller's study concerns how to account for areas where high frequency stops occurred. Where a site is subject to numerous stops, Miller's study weights (increases) its available population figures to reflect the population ratios at high frequency stop locations.[170] This has the effect however of exacerbating the circularity: those who are available to be stopped are those who are stopped – a circular justification for stop practices.

163. Joel Miller & MVA, '*Profiling populations available for stop and search*' 2000, Home Office, Policing and Reducing Crime Unit, 7.

164. Joel Miller & MVA, '*Profiling populations available for stop and search*' 2000, Home Office, Policing and Reducing Crime Unit, 8.

165. Other than domestic violence, the crimes listed are all poverty crimes, John Eck et al, *Mapping crime understanding hotspots*, 2005 US DOJ, 5.

166. Joel Miller & MVA, *Profiling populations available for stop and search* 2000, Home Office, Policing and Reducing Crime Unit, 74.

167. Joel Miller & MVA, *Profiling populations available for stop and search* 2000, Home Office, Policing and Reducing Crime Unit, 8, 63, 64.

168. Ian Gordon Expert Report, Haile-Michael v Konstantinidis 2012 <www.policeaccountability.org.au>

169. David Harris, 'US experiences with racial and ethnic profiling' 2006, *Critical Criminology* 14, 222.

170 Joel Miller & MVA, *Profiling populations available for stop and search* 2000, Home Office, Policing and Reducing Crime Unit, 30.

Available population studies tell us a lot about the types of populations that police target. For example the population in Holland Court Flemington (a public housing estate with a high ethnic minority population) will be quite different to Pinoak Crescent Flemington (a well-to-do street close by) and different again outside 333 Collins St (a high-end commercial building in Melbourne City) or 140 Exhibition St (Victorian Government offices in Melbourne).

Miller finds that, by and large, in the policing areas he studied, people are stopped in proportion to their availability. If anything, this highlights the need to understand the structural conditions leading to racial profiling, rather than framing this problem as merely an individual form of racism.

Census Benchmarks

The following example supports the view that census benchmarks *are* in fact an appropriate tool capable of revealing unfair and discriminatory policing:

Let us assume that the police set up a patrol car on a small street at the centre of *a high crime area* with crimes *susceptible to stop and search tactics*. Let us assume that this high crime area is in a neighbourhood with a high ethnic minority population. Assume that the police stop people in direct proportion to the racial groups of those who walk along a street in that neighbourhood. As a consequence, a higher proportion of people who are stopped will be from ethnic minority communities than from the wider (non-targeted) community. According to Miller, this is non-discriminatory.

However, far from a 'benign' and inevitable cost of doing business, the consequence of hot-spotting areas with high numbers of ethnic minority residents results in 'situational' discrimination.[171] The effect is that a large number of innocent people from ethnic minority backgrounds are policed, many of them repeatedly. Indeed some innocent ethnic minority individuals will experience regular, sometimes daily, stopping.[172] Furthermore, overall innocent ethnic minorities have a greater chance of being stopped than white people. The outcome is intensely disproportionate on those individuals and communities and, even if done in the most even-handed and mild manner, leads to injustice and an arbitrary state interference. Indeed, the police practice of conducting routine stops at 'hot spots' with high numbers of ethnic minorities must be understood as a form of 'institutionalised' racism resulting in feelings of 'exclusion, resentment, distrust of the police, alienation, social and political disenfranchisement.'[173]

As Judge Scheilder notes:

> "While a person's race may be important if it fits the description of a particular crime suspect, it is impermissible to subject all members of a racially defined group to heightened police enforcement because some members of that group are criminals."[174]

In recognition of this and despite arguing for the use of 'available populations' as a benchmark, Miller concludes: "Forces should continue to compile measures of disproportionality based on residential population figures as these still provide a measure of the outcomes of stops and searches and represent the actual experiences of those from minority ethnic backgrounds."[175]

He further states that "Per capita measures can be taken as a reasonable estimate of different ethnic group's overall experience of the use of the power to stop and search."[176]

171. Ibid.

172. Tamar Hopkins, 'Complaints against police behaviour, Flemington, Victoria 2006' 2007 *Alternative Law Journal* 32 (1), 32.

173. Ben Bowling, Leanne Weber, '*Stop and Search in global context: an overview*,' in Weber, Bowling, 'Stop and Search, Police powers in a global context,' 2013 Routledge,133; Charles Epp, Steven Maynard-Moody, Donald Haider-Markel, '*Pulled Over, How Police stops define race and citizenship*,' 2014, University of Chicago Press, 6.

174. Floyd v City of New York, Opinion and Order, 8/12/13, p10,11

175. Joel Miller & MVA, '*Profiling populations available for stop and search* 2000, Home Office, Policing and Reducing Crime Unit, 8.

176. Bowling 2007, 945.

census benchmarks offer the most neutral baseline on which to assess the potential for racial discrimination and particularly for institutional racism

Summary on the issue of available populations

Available population arguments make most sense in the highway traffic situation where the concept originated. However in local settings, 'hot spots' distort populations to reflect the 'usual suspects'[177] and in particular, racial minorities. Consequently, and provided that appropriate adjustments are made for rapid changes in populations and other inaccuracies, census benchmarks offer the most neutral baseline on which to assess the potential for racial discrimination and particularly for institutional racism. This is particularly the case in Victoria where, under law, pedestrian and vehicle stops don't require reasonable suspicion. Furthermore census benchmarks are readily available to researchers.

Higher levels of detail about why stops occur can subsequently be explored through internal comparisons between rates by individual officers policing the same region, or by comparing disproportionality or odds ratios from region to region.[178]

As we will see in the next section, greater qualitative detail can be explored through examining police reasons for stops and outcomes.

Post-stop police conduct

Writing in the US, Novak observes, "Perhaps because of the frustration surrounding the benchmarking controversy, increasingly research has focussed on post-stop decision making."[179]

Fallik and Novak identify four points where an assessment of non-neutrality can be made:

1). The decision to stop;

2). The decision to search; and

3). The decision to arrest/use force/issue an infringement/caution.

4). The outcome or hit rate.[180]

There is a cumulative effect at each of the three decision-making points. Discrimination can occur at any stage in the police stop. Furthermore, discrimination at an earlier point is not justified by subsequent lawful conduct. For example, if the decision to stop was racially biased, a subsequent objectively reasonable decision to search is tainted by the original illegality. Similarly a justifiable stop could be subsequently followed by a racially suspect 'consent' search where no reasonable basis exists. Consequently monitoring whether racial profiling has occurred requires an analysis of the reasonableness *at each step* of the police encounter.

The greatest potential for racial bias occurs when police discretion is highest.[181] In the US, the decision to search carries with it the highest discretion: once the police have conducted a lawful stop they can conduct a search by 'consent' or under *Whren*.[182] On the other hand, in the US it is police stops that require significant justification (probable cause for vehicle stops[183] and reasonable suspicion (*Terry*) for pedestrians[184]). In contrast, under Victorian law, stops require no justification, but police must have reasonable suspicion to lawfully conduct statutory searches.[185] Consequently, along with consent searches[186], the decision to stop is the intervention with the highest level of discretion.

177. Juan José Medina Ariza (2014) Police-initiated contacts: young people, ethnicity, and the 'usual suspects', Policing and Society, 24:

178. Lori Fridell, 'By the numbers, a guide for analysing race data from vehicle stops', 2004, Police Executive Research Forum, 143.

179. Fallik, 'Editors Introduction, Special Issue on Racial Profiling,' 2012 Journal of Contemporary Criminal Justice 28(2), 121.

180. Fallik and Novak, 'The decision to search: Is race or ethnicity important', 2012 *Journal of Contemporary Criminal Justice 28*(2), 147.

181. Lori Fridell 'Racially Biased Policing, A principled response' 2001, *Police Executive Research Forum*, 131.

182. Brian Withrow and Jeffery Dailey, Racial profiling litigation: current status and emerging controversies' 2012 *Journal of Contemporary Criminal Justice* 28(2) 125.

183. Ibid, 126. But note the issue of pre-text stops.

184. Ibid, 127.


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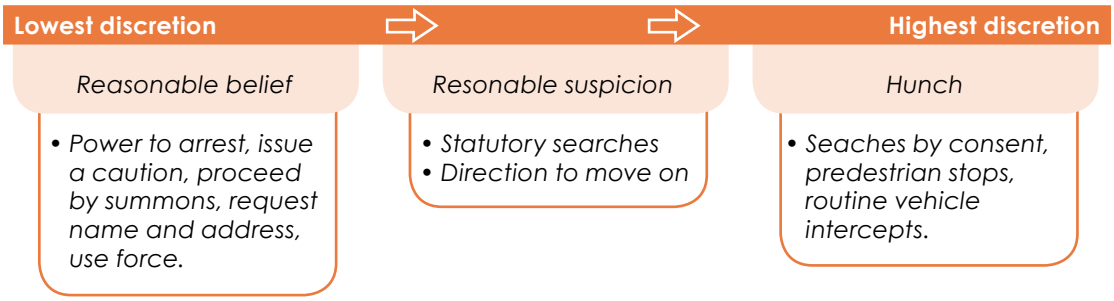
Figure 1 -Discretion Thresholds under Victorian law[187]



Currently Victoria Police can conduct pedestrian stops and vehicle intercepts without a statutory requirement for reasonable suspicion or belief: *DPP v Kaba.*[188] Contrastingly, Victoria Police policy has, since 2015, imposed a higher standard, namely a 'reasonable 'belief' requirement for the submission of field contacts (both vehicle and pedestrian). This policy does not apply however to the initiation of pedestrian and vehicle stops. And regardless, there has been no data collection to monitor the standards police are actually applying. Furthermore, stops for which no field contact report is made are completely discretionary.[189] While police must possess reasonable belief before they compel a person's name and address in pedestrian stops, [190] many people will be unaware that they are not under a legal compulsion to provide their details. Police stops therefore involve high discretion, with the maximum risk of racial bias and need the greatest level of monitoring. Because of the absence of a legal requirement in Victoria that police have reasonable grounds, benchmarking these stops on the basis of offending rates makes less sense than in the US. It is also the case in Victoria that 'consent' searches are highly discretionary. Consequently the decision to initiate a 'consent' search offers an important opportunity to explore the presence of racial bias, and should also be monitored. In addition to reasons raised earlier, because the initiation consent searches require no objective grounds, there is no reason to consider benchmarking them against offending levels.

The critical strategies for post-stop monitoring to detect racial profiling assess the presence of *reasonable grounds* and stop outcome or *'hit rate'*.[191]

Using Reasonable Suspicion or Hit Rates

Miller argues that disproportionality in stop rates should be judged on, "the nature of intelligence or information informing officer practice, in particular the ethnic breakdown of suspects".[192] Our definition of racial profiling excludes people stopped where there is a reasonable basis to do so: that is when a person is stopped in circumstances where they are believed to be engaging in criminal behaviour or fit a specific and time-limited suspect description. For this reason, the most important control that needs to be monitored is the presence of *reasonable grounds* before a stop is initiated. This is because stops initiated with clear, objective, reasonable belief of criminal offending are less likely to be the consequence of racial bias.[193] While Miller's study was not able to conduct this analysis,[194] subsequent studies have shown that the higher the legal threshold required to initiate police action, the better the law enforcement outcome (in terms of both controlling crime and uncovering contraband).[195]

After examining reasons provided for stopping individuals in New York, Jeffery Fagan found that even the standard of 'reasonable suspicion' was too low to generate reasonable hit rates and have an impact on crime control. His study found that the higher threshold of 'probable cause' was achieving the best outcomes, ie stopping a person when it was 'more likely than not that a person had committed a crime'.[196] His research provides an evidence base to impose a 'reasonable belief' stop standard on police in Australia. This would be the same standard as applied to a decision to arrest a person. This is in fact the current standard Victoria Police has adopted in its field contact policy. Given Fagan's findings,

185. See for example section 81 *Drugs Poisons and Control Substances Act 1991* (Vic).

186. *Searches by (alleged) consent occur in many jurisdictions including Australia: see for eg DPP v Pringle* [2015] VCC 702 (29 May 2015).

187. Author's diagram

188. [2014] VSC 52 18 December 2014.

189. Victoria Police, '*Receipting Prove of Concept Evaluation Report,*",' 2016, Victoria Police, 4,10; Victoria Police, '*VPMP Reporting Contact and Intelligence*' 2015 Victoria Police.

190. Section 456AA *Crimes Act* 1958 (Vic).

191. Gelman, 'An Analysis of the New York City Police Department's Stop and Frisk Policy in the Context of Claims of Racial Bias,' 2007 *Journal of the American Statistical Association 101* (479), 815.

192. Joel Miller & MVA, '*Profiling populations available for stop and search*' 2000, Home Office, Policing and Reducing Crime Unit, 24.

193. David Harris, 'US experiences with racial and ethnic profiling' 2006 *Critical Criminology* 14, 223.

194. Joel Miller & MVA, '*Profiling populations available for stop and search*' 2000, Home Office, Policing and Reducing Crime Unit, 26.

195 Fagan, Jeffrey, 'Terry's original sin' (2016) *The University of Chicago Legal Forum* 43, 75-79. See also Jayne Mooney and Jock Young, 'Policing Ethnic Minorities: Stop and Search in North London' in Alan Marlow and Barry Loveday, *'After Macpherson; Policing after the Stephen Lawrence Inquiry,'* 2000, Russell House Publishing, 85; Rebekah Delsol, 'Berne Presentation' 2016, Powerpoint Presentation.

196. Fagan, Ibid, 52,53.

Photo by Charandev Singh

we recommend Parliament should legislate a *reasonable belief* standard before all street and vehicle stops are initiated (with the exception of truly random drug testing at designated stations and approaching witnesses).[197]

If we analyse the rates of people by race stopped in the *absence* of 'reasonable and objective information, relevant to the locality and time frame, which links person(s) to an identified criminal incident'[198] it becomes unnecessary to consider whether different racial groups feature higher or lower in suspect profiles reported to police. Where police have a clear, objective, time-limited suspect profile from a victim and they stop someone who meets that description, their policing is justified. Instead what we are interested in measuring is whether racial bias impacts on the *hunches* police use to initiate a stop or conduct a consent searches.

A major concern with using the presence of reasonable grounds as a benchmark or control is that its meaning can vary from officer to officer and police force to police force.[199] Consequently, despite the absence of a legal requirement that police have reasonable grounds before they stop a pedestrian or driver in Victoria, for the purpose of our research, and Victoria Police policy, it is important we operate with a fixed definition of reasonable belief and that police officers provide sufficient detail about their decision-making process for researchers to assess against that definition.[200]

Hit rates

A related method of detecting racial disproportionality is through assessing hit rates. Mooney and Young argue that stops must be judged in terms of yield: Firstly, are stops generating arrests for serious crimes (eg trafficking rather than drug possession charges)? Secondly, are they leading to high levels of arrests/summonses and successful prosecutions?[201]

2015 statistics from the UK show that searches conducted *without* reasonable suspicion requirement have significantly lower hit (arrest) rates: 2% rather than 12%.[202] They also impact more disproportionately on minority populations.[203] Harris, observing similar patterns in the US, concludes that the lower hit rate on minority populations is indicative of a lower standard being used to justify the initiation of police contact. In place of an objective standard, biases are being used to justify police decision-making.[204] This conclusion is supported by other studies.[205]

Given that low hit rates demonstrate a waste of police resources and are highly suggestive of socially divisive outcomes such as alienation, rather than measuring the number of stops police conduct, institutions such as the Productivity Commission and Victoria Police command would be well advised to measure the hit rates of stops and their resulting prosecution outcomes in assessing effective policing outcomes.

197. See also Tamar Hopkins, '*DPP v Kaba*, Racial Profiling and s59(1)(a) of the *Road Safety Act* 1986 Vic' 2015, 40 *This is from our suggested definition of racial profiling.* 249-251.

198. This is from our suggested definition of racial profiling.

199. Ben Bowling and Corretta Phillips 'Disproportionate and discriminatory, reviewing the evidence on police stop and search' 2007, *Modern Law Review*, 70 (6), 938.

200. See our Recommendation 4 and 10.

201. Jayne Mooney and Jock Young, 'Policing Ethnic Minorities: Stop and Search in North London' in Alan Marlow and Barry Loveday, '*After Macpherson; Policing after the Stephen Lawrence Inquiry,*' 2000, Russell House Publishing, 85.

202. Stopwatch 2015 <http://www.stop-watch.org/news-comment/story/new-stop-and-search-statistics-2014-2015>

203. Ibid.

204. David Harris, 'US experiences with racial and ethnic profiling' 2006 *Critical Criminology* 14, 223.

205. See for eg; Nicola Persico & Petra E. Todd (2008) The Hit Rates Test for Racial Bias in Motor-Vehicle This is from our suggested definition of racial profiling. Searches, *Justice Quarterly,* 25:1, 37-5. But this study contains questionable assumptions about elasticity within racial groups see Bernard E Harcourt, Against Prediction, *Profiling, Policing and Punishing in an Actuarial Age* (University of Chicago Press, 2007), 137, 138, Andrew Gelman, Jeffrey Fagan & Alex Kiss (2007) An Analysis of the New York City Police Department's "'Stop-and-Frisk' Policy in the Context of Claims of Racial Bias, *Journal of the American Statistical Association*, 102:479, 821.

assessing hit rates and particularly the justification that police used to initiate contact are critical indicators of the presence of bias and are fundamental components of an effective data collection scheme.

Hit rates or arrest rates can be calculated by dividing the number of people arrested fined, or cautioned by the number of people stopped: they don't need a benchmark. They can be compared across policing areas and racial groups.

Finally, it is possible to imagine a situation where police are operating with both a reasonable suspicion threshold, but are also engaging in racial profiling. For example, they are focussed only on Pacific Islander Australians who are reasonably believed to have committed an offence.[206] Consequently, it remains important, even with post stop analysis, to record overall disproportionality ratios.

In summary, assessing hit rates and particularly the justification that police used to initiate contact are critical indicators of the presence of bias and are fundamental components of an effective data collection scheme.

Table 3 - Benchmarking at International example sites

City	Which Benchmarks are used?
London, UK	Stops and searches benchmarked against the census.[207] Arrest rate (hit rate) data provided by age, gender, ethnicity and reason.[208]
Ottawa, Canada	Traffic stops benchmarked against 'drive to work' census information. Outcome and reasons for stop also used to further develop understandings in the data (Trial).[209] Raw data released on the Ottawa Police website.
Kingston, Canada	Stops benchmarked against the census adjusted for age, gender and residency and to some extent 'availability' (Researchers collected data on the race of road users). (Trial)
New York	Raw data (including race, age, reason, location, whether force used and how etc) released publically on website in excel data spread-sheet. [210] It can then be assessed by researchers as they wish.
Ferguson	Data benchmarked against census data. Data includes arrests and search rates. Traffic stop data is raw, with information about location, age, gender, outcome.
Baltimore	Vehicle stop data analysed along with vehicle registration data (race is collected when vehicles are registered). Data is presented as a percentage of total stops, total outcomes etc no benchmarking used. Nothing conclusive can be said about the data as it is presented.[211]
Minneapolis	No data available
Melbourne	*Haile-Michael* data benchmarked against census, adjusted for age, and outcome.

206. See ibid, Harcourt 2007 for the harms this form of policing creates.

207. See for eg Met Police, *Barking Dagenham Stop and Search Report* August 2016 http://www.met.police.uk/foi/pdfs/priorities_and_how_we_are_doing/borough/barking_dagenham_stop_search_mon_report_august2016.pdf

208. Ibid.

209. Lorne Foster, Les Jacobs, Bobby Siu, '*Race Data and Traffic Stops in Ottawa 2013-2015*' 2016 Ottawa Police Service.

210. New York Police Department, Stop, Question and Frisk reports, http://www.nyc.gov/html/nypd/html/analysis_and_planning/stop_question_and_frisk_report.shtml

211. https://goccp.maryland.gov/wp-content/uploads/traffic-stop-report-2016.pdf

Discussion

While theoretical arguments are made that stop data should be benchmarked using methods such as availability and crime rates, as Table 2 (above) indicates, in practice at our international comparison sites stop data is generally presented in its raw form or benchmarked against census populations. While resident benchmarks are meaningless in places such as Federation Square where the available population will not match the local resident population, census data is an appropriate benchmark across broader, more residential areas and enjoys other advantages as commented above.

As the Ottawa Traffic data collection scheme shows, even traffic data can be assessed for racial profiling against census data. In the Ottawa Race Data and Traffic Stops research released in 2016, York University researchers benchmarked traffic stops against the census population of those who indicated that they drove to work during a particular week.[212] The researchers indicated that the potential concerns in using this benchmark were that it, a) did not include those who drive for other purposes such as recreation or driving children to school and so forth, b) was not time limited (i.e. different people will use roads depending on time of day and week/ weekend) and, c) matched officer perceived race (collected at the time of stop) against self-identified race (collected in the census).[213] By adjusting for these issues, 'drive to work' or driving age population as used as a benchmark in Maryland US, provides a workable and inexpensive benchmark when analysing traffic stops.

Resident population critic Joel Miller agrees that over a large population a resident population benchmark "does describe the overall experience of different ethnic communities. For example it reminds us that being black means you get stopped and searched more often."[214]

One way to overcome the issue of benchmarking is to present data in its raw form, as occurs in New York, Ottawa and to some extent, Baltimore. It is then up to research agencies to draw conclusions from the data. However as we will discuss later in this report, raw data is largely meaningless unless resources are used to properly and effectively analyse it. Locally this analysis could be conducted by a body such as a University, the Australian Human Rights Commission or the Victorian Equal Opportunity and Human Rights Commission.

Recommendations

1). We recommend that Victoria Police collect data on all pedestrian and traffic stops, searches (including consent searches) and directions to move-on and make the de-identified (raw) version of the unit record data obtained in this collection available to an independent external agency such as an academic research team, the Australia Human Rights Commission, the Victorian Equal Opportunity and Human Rights Commission and other statistical collection and research bodies[215] on a regular (such as three-monthly) basis.

2). We recommend that pedestrian and local traffic data should be benchmarked[216] against *resident populations* drawn from the census for the purposes of estimating rates of police stops and searches for various groups. On the other hand, highway traffic data, depending on the type of road, should be benchmarking using highway user surveys, modified 'drive to work' or driving age census data. We further recommend that in all cases the data be analysed against *hit rates* and an assessment of whether officers had *reasonable and objective belief* that an offence may have been committed when they initiated their intervention.

212. Lorne Foster, Les Jacobs, Bobby Siu, '*Race Data and Traffic Stops in Ottawa* 2013-2015' 2016 Ottawa Police Service.

213. Ibid 51,52.

214. Joel Miller & MVA, '*Profiling populations available for stop and search*' 2000, Home Office, Policing and Reducing Crime Unit, 84.

215. Such as Australian Bureau of Statistics, Victorian Crime Statistics Agency, Universities, legal research groups and under FOI. NB Similar data is publicly available in New York and Ottawa.

216. Benchmarking refers to a method of comparing stop rates of a specific ethnic groups against their relative population in the community (odds ratio) or to the stop rate of a different ethnic group (disproportionality ratio) or against a population such as those at a particular location (available population).

Chapter 3. How can issues of identifying race or ethnicity be resolved?

What racial/ethnic categories should be recorded by police and how? Should those stopped be asked to identify their racial/ethnic background, or should police be asked to record their perceptions? One of the key questions in implementing a racial profiling data collection scheme is how best to determine the race / ethnicity of people contacted by police in the field. This is a practical question off which many theoretical and cultural complexities potentially hang. However, we submit that there is a relatively straightforward way to resolve this question, which in fact captures the most salient data.

At the outset of this chapter, it is important that we acknowledge that '[r]ace is both an empty category and one of the most destructive and powerful forms of social categorisation.'[217] While race/ethnicity can also be an important positive source for affirming self and group identity, it is the negative race-crime stereotype that we focus on in this report. In this context, applying a race or ethnicity label to someone can inflict on the person a series of stereotypes that may have no intrinsic basis. Whoever has the power to define a person's race or ethnicity may also influence the stereotypes that may then be associated with that person.

Comparative cases

The endeavour to prevent racial profiling involves examining how police perceive and stereotype people and the consequences this has on those people. The UK is one of the few jurisdictions where individuals are asked by police to nominate their ethnicity. The Metropolitan Police state on their website:

> Everyone who is stopped or stopped and searched will be asked to define his or her ethnic background. You can choose from a list of national census categories that the officer will show you.
>
> You do not have to say what it is if you don't want to, but the officer is required to record this on the form. The ethnicity question helps community representatives make sure the police are using their powers fairly and properly.[218]

In some US states, a person's race/ethnicity (such as Hispanic status) is recorded on their driver's licence or car registration, which police can view in stop and search contacts, and transpose to their field contact records.

Key debates

The issue of whether police should ask for race/ethnicity details or record their perception is contentious. On the one hand, it is argued that police are not necessarily competent to accurately judge a person's race or ethnicity. Questions are also raised about the police capacity to classify people of mixed ancestry. For example, in the UK, some community groups were in favour of providing self-identified data as it gave them some sense that at least police get that detail correct.[219]

On the other hand, it is argued that asking police to request ethnic identify during potentially fraught stop situations may exacerbate the stopped person's sense of violation and intrusion into their privacy.[220] Such a data collection scheme would require police to encourage people to 'consent' to providing information to police in circumstances where no obligation exists to provide those details. This raises ethical questions.

However, the key issue is that while asking people to identify their own race/ethnicity may increase the accuracy of data on the race/ethnicity of those who are stopped[221], it does not provide in formation on the perceptual basis upon which police decided to stop the person. Ultimately the issue is not the stopped person's actual race/ethnicity but whether police perceptions of ethnicity (or other identity criteria) are being used to unfairly criminalise individuals and groups.

According to Engel et al:

> "The use of officers' perceptions of drivers' race/ethnicity is an acceptable method for examining racially based policing. Officers may incorrectly perceive drivers' actual race

217. Rustin, M. 1991. 'Psychoanalysis, racism and anti-racism.' In *The Good Society* and Rebekah Delsol, '*Berne Presentation*' 2016, Powerpoint Presentation *the Inner World*, London: Verso, 57.

218. http://content.met.police.uk/Article/Frequently-Asked-Questions/1400009364853/1400009364853

219. Communication with Rebekah Delsol on 28 November 2016.

220. See for example comments by Deputy Commissioner Steendam, reported by the ABC 20 December 2016 http://www.abc.net.au/news/2016-12-20/victoria-police-consider-introducing-race-data-collection/8101430te

221. One can imagine circumstances where people may decide not to provide police with accurate details.

Photo by Charandev Singh

and/or ethnicity. This possible misperception, however, is irrelevant for data collection analyses that seek to explain officer decision-making. Accusations of racial profiling are based on the presumption that officers treat minority citizens differently. Therefore, proper data collection efforts must identify officers' perceptions of the race/ethnicity of the driver, not the driver's actual race/ethnicity."[222]

In our view, in order to accurately measure officer bias, a racial profiling data collection scheme best meets its objectives if it collects data on the perceived ethnicity ('ethnic appearance') of the people police stop.

This raises a potential concern during the evaluation of disproportionality and odds ratios, but does not affect the analysis of *hit rate* or *reasonable grounds* by perceived race. This is because disproportionality and odds ratios rely on the comparison of police-perception data against self-reported data (census data). The first point is that, as explained by Engel et al above, it is quite justified to compare perception data to self-reported ethnicity data, provided this is done transparently. This is done successfully in the Ottawa Traffic Stop Data Project[223], as well as in Kingston (Canada)[224] and in Baltimore[225] and Ferguson[226] (US). Another option for managing the different data sets is to test the error rates in officer perception. This could be done by generating a baseline / benchmark data set on officer capacity to assign ethnicity into a small number of categories, measured against self-assessment by individuals into the groups that make up those categories in an experimental setting. We assume that the smaller number of categories that are used, the more accurate the police perception data will be. We will return to this issue later in this chapter.

In 2013, a review commissioned by Victoria Police into their Field Contact procedures recommended that Victoria Police should:

"Revise field contact reporting procedures so that:

- Reporting on ethnic appearance is a mandatory field. The VPM should provide clear guidance to Victoria Police members that 'ethnic appearance' is a required field of the field contact report. Procedures for the entry of VP Form L19 into the LEAP database should be amended to make ethnic appearance a mandatory field of the form.
- Clear guidance is provided on the codes to be used in the ethnic appearance field in the VPM. Codes could be developed based on external stakeholder input and an assessment of approaches used in other jurisdictions, and it may also be valuable to review the current criteria included in the ethnic appearance data item to review common codes and completion rates. It would also be important to design the codes with consideration of the criterion to be used as the comparator."[227]

In 2015, Victoria Police imposed a discretionary requirement on police to record their perceptions of the ethnicity and physical description of those they stop in their field contact records.[228] We agree with the 2013 Report that for the data collection scheme to function, the recording of ethnic appearance now needs to become mandatory.

What categories should be provided for police to record a person's ethnic appearance in Victoria? Ethnicity is a complex question[229] and each jurisdiction where police collect ethnicity data employs a different set of categories depending on the ethnic make-up of their population.

222. Robin S. Engel , Rob Tillyer , Charles F. Klahm IV & James Frank (2012) From the Officer's Perspective: A Multilevel Examination of Citizens' Demeanor during Traffic Stops, *Justice Quarterly*, 29:5, 650-683, 668, (fn 7).

223. Lorne Foster, Les Jacobs and Bobby Siu, 'Race Data and Traffic Stops in Ottawa, 2013-2015, A report on Ottawa and the Police Districts' (York University Research Report, 2016)

224. Scot Wortley and Lysandra Marshall, 'Bias Free Policing: The Kingston Data Collection Project Final Results' (Toronto University - Power Point Presentation, 2005)

225. Department of Public Safety and Correctional Services, 'Report to the State of Maryland on Law Eligible Stops' 2007, http://www.mdle.net/traffic/07menu.htm

226. Missouri Attorney-General, 'Vehicle Stop Information Form' (2004) https://ago.mo.gov/docs/default-source/public-safety/vehiclestopssampleform.pdf?sfvrsn=2

227. Cultural and Indigenous Research Centre Australia, '*Victoria Police Review of Field Contact Policy and Processes*' 2013, Victoria Police, recommendation 21.

228. Victoria Police, 'VPMP, *Recording Contacts and Intelligence*,' Victoria Police 2015.

229. Some researchers use three questions to determine racial background: country of birth, language spoken at home and self-identified ethnic background. In Australia there is an official three-part definition of an Indigenous person: Indigenous heritage, self-identification and community-identification. In Canada, a person is not officially Indigenous unless they are registered as a 'status Indian' under the *Indian Act* RCS 1985 (Can).

How is ethnic appearance recorded at our comparison site?

Table 4 – Comparison of ethnicity categories recorded at International sites

City	Is the data Officer Perceived or Self defined	Ethnicity categories recorded
London, UK	Both officer perceived and self-defined ethnicity recorded	Drop-down list from the census, but data and then collated into **four** categories: **White** = White British, White Irish, White Gypsy or Irish Traveller, and any other White Background. **Black** = Black or Black British, Caribbean, African, Mixed White and Black Caribbean, Mixed White and Black African, and any other Black Background **Asian** = Asian or Asian British Indian, Pakistani, Bangladeshi, Mixed White and Asian and any other Asian background. **Other** = Chinese, Arab, and any other Ethnic Group (NB – a 'Middle Eastern' category is being proposed.)
Ottawa, Canada	Officer perceived ethnicity	**Seven** categories of race collected. 1.Aboriginal; 2.White; 3.Black; 4.East Asian/Southeast Asian; 5.South Asian; 6.Middle Eastern 7.Other
Kingston, Canada	Officer perceived	**Eight** categories 1. Aboriginal; 2. White; 3. Asian; 4. South Asian; 5. Hispanic; 6. Black; 7. West Asian; 8. Other.
New York	Officer perceived, unless details recorded on ID card.	Race codes in the data include: B,W,Q,P,Z, A, I[230]
Ferguson	Officer Perceived	**Six** categories: 1.Black; 2. White; 3. Hispanic 4. American Indian; 5 Asian; 6. Other;[231]
Baltimore	Officer Perceived	**Five** categories: 1. White; 2. African American; 3. Asian; 4. Hispanic; 5.Other.
Minneapolis	No public data available. Only information available is from a 2003 study.[232]	

230. I haven't been able to find an explanation for these codes. Presumably B – black, W- white, A- Asian, I-American Indian/Indigenous.

231. http://www.theatlantic.com/technology/archive/2014/08/how-much-racial-profiling-happens-in-ferguson/378606/: Stats show black women more likely to be stopped than black men in vehicle stops

232. http://www.twincities.com/2016/07/08/data-dive-racial-disparities-in-minnesota-traffic-stops/

How does Victoria Police record ethnic appearance?

Victoria Police currently use 15 partially overlapping and confusing codes to record ethnic appearance.[233] For example there are three codes that could be used for a person of African appearance (African, African/Mideast [though this code has the words 'don't use' written after it] and Black). However the Field Contact Policy Guide for Victoria Police Educators approves the use of 8 descriptors:

1). Aboriginal /Torres Strait Islander appearance;
2). Asian appearance;
3). African appearance;
4). Caucasian appearance;
5). Indian Sub-Continental appearance;
6). Mediterranean/Middle-Eastern apperence;
7). Pacific Islander/Maori appearance;
8). South American appearance.

These appearance categories are stipulated by the Australian and New Zealand Police Advisory Authority for use during releases of information to the media.[234] It is clearly important that Victoria Police to modify its ethnic appearance codes to reflect the ethnic appearance categories it directs its members to collect.

How should Victoria Police record ethnic appearance?

The Australian and New Zealand Police Advisory Authority currently used by Victoria Police may be a reasonable starting point for a data collection scheme, because they may reflect, in a pragmatic way, the salient categories. In Victoria where there is a high level of diversity in the ethnic backgrounds of its residents, it would be possible to create a long list of ethnicities for police to choose from. However, the more categories, the more room there is for error on the part of the person making the decision. The fewer and broader the categories, the more accurate the perception is likely to be.

From the comparison of international sites in Table 4 above, we can see that in the UK police work towards four options, in Kingston Canada, police were given eight options, in Ottawa, Canada, Police had seven options, in New York, the police appear to have at least seven options, in Ferguson there are six options while in Baltimore, there are five options. Eight options appears to be the maximum number of groupings used at our international sites. This may reflect a limit on perception accuracy.

What basis should be used to determine ethnicity grouping in Victoria? There are three organising principles that appear as credible options for the Victoria Police data collection trial to use in determining ethnicity grouping:

Organising Principle 1 – Incarceration rates

We could draw categories from existing data sets on ethnicity and incarceration rates. ABS data on the countries of birth of prisoners (sentenced and un-sentenced)[235] reveal that in 2015, Victorian prisoners were overwhelmingly born in Australia. Vietnamese and New Zealanders are the highest categories of the groups born overseas. The next highest group are those born in the UK, then in China. However, while some of these categories may tell us something about ethnicity, other categories do not. For example, the New Zealanders may be ethnically Anglo-Saxon, Maori, or perhaps Chinese or Somali; and those born in Australia could be of any ethnicity. If Victoria's stop and search data collection scheme was to reflect ethnic population categories that had a statistically significant level of interaction with the prison system, ABS data suggests that we may, for example, need to differentiate a number of categories within the category 'Asian.' In other words, the category 'Asian' would not be meaningful, but 'Vietnamese', 'Chinese (and Hong Kong)' and 'Indian born' people, and 'other Asian' (ie a broader group of people other less-incarcerated Asian groups) may.

233. Ethnic appearance codes released under FOI 57210/17
234. Field Contact Policy Guide for Victoria Police Educators, released under FOI 57210/17.
235. http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02015?OpenDocument

Based on information from the 2015 ABS Victorian prisoner data, a potential system could be:

1. **Caucasian** (Anglo European origin, white South African, white NZ/Aus)
2. **Aboriginal/Torres Strait Islander**
3. **Pacific/South Sea Islander** (includes Maori, Samoan, Fijian etc)
4. **Chinese (incl. Hong-Kong)**
5. **Vietnamese**
6. **Indian (incl. Sri Lankan)**
7. **Asian other (**Japanese, Malaysian, Burmese, Indonesian)
8. **Middle-Eastern** (Iran, Iraq, Syrian, Turkish, Palestinian, Lebanese, Egyptian, Pakistani, Afghani, Bangladeshi)
9. **African** (Includes African Australian, other African, African American, Caribbean)
10. **Other (**South American, Eastern European and other ethnic minorities)

Organising Principle 2 – Allegations of Racial Profiling

Another way to organise ethnicities is to group people in terms of whether they have raised concerns about being racially profiled. For example, individuals of African, Aboriginal and Torres Strait Islander, Pacific Islander and Lebanese ethnic origin raised issues of racial profiling at a 2013 People's Hearing into Racialised Policing in Melbourne.[236] Using racial profiling concerns as an organising principle, a potential system could be:

1. Anglo-saxon/European
2. Aboriginal/Torres Strait Islander
3. Pacific Islander
4. Lebanese
5. Other

However, this system could be vulnerable to change over time and may not provide longevity. For example in 1999, 28% of Vietnamese youth in Melbourne studied by White et al reported police harassment.[237] Clearly 18 years ago it would have been necessary to include a separate category for Vietnamese.

Organising Principle 3- Groupings to reduce police-perception error rate

Another way to organise ethnicities is to ask police to divide people into two categories: white and non-white. This would provide the simplest classification system with the potentially lowest error rate. A slightly more complex system would be the one used in the UK: 'black', 'Asian' and 'white' involving three categories or possibly 'black', 'Asian', 'white' and 'Middle-Eastern', involving four. This classification system could be made more complex by testing police capacity to differentiate further between groups. It could be as follows:

1. black
2. Asian
3. white
4. Middle-Eastern

The major drawback following this organising principle exclusively is its lack of capacity to support police efforts to reduce any unnecessary targeting of over-policed groups such as Aboriginal and Torres Strait Islander people.

236. Individuals from these ethnic backgrounds spoke at the People's Hearing organized by Imara and FKCLC in 2013 in Melbourne.

237. Rob White et al, 'Ethnic Gangs in Australia, Do they exist? Report No. 1 Vietnamese Young People' (Australian Multicultural Foundation, 1999), 35.

Discussion

Through exploring these organising principles, the underlying issues become clear. The purpose of a data monitoring system is to explore whether or not broad groups raising concerns about racial profiling such as people with Indigenous, Pacific Islander, African and Middle-Eastern backgrounds are more, less or equally likely to be treated as suspicious than others. The scheme needs to be simple for police in the field and yet capable of identifying any underlying patterns of over-policing of those who are raising concerns. For practical purposes, there is no point in separating out groups that the majority of first year policing graduates will not be able to differentiate between.

Accepting the need for broad-brush identification categories, with eight as the maximum number, capable of identifying the groups most concerned about profiling, a classification system that could work in Victoria is:

1. **Aboriginal/Torres Strait Islander**;
2. **African** (Includes African Australia, African, Horn of Africa, African American, Caribbean)
3. **Caucasian** (Anglo, European origin, white South African, white NZ/Aus)
4. **Middle-Eastern** (Iran, Iraq, Syrian, Turkish, Palestinian, Lebanese, Egyptian, Afghani)
5. **Pacific/South Sea Islander** (includes Maori)
6. **South-East Asian** (Chinese, Vietnamese, Japanese, Malaysian, Burmese, Indonesian Etc)
7. **Indian Subcontinental** (Pakistani, Indian, Bangladeshi)
8. **Other** (South-American, Jewish and other ethnic minorities)

This turns out to substantively reflect the current Victoria Police (ANZPAA) descriptors and closely resemble the system chosen in Ottawa. When assessing census data to create a comparator, the relevant population group would include all the potential ethnic groups that are classified to fit within that category.[238]

One person we consulted suggested that the drawing up of ethnic appearance categories requires the consent and consultation of different groups within Victoria. We disagree with this suggestion for two reasons. Firstly, in contrast to the collection of Aboriginal and Torres Strait Islander data in the criminal justice system, this data collection strategy does not involve police asking people for their race/ethnicity. Secondly, the capacity for police to assign ethnic appearance with reasonable accuracy is not a question of consent, it is empirical. Thirdly, Victoria Police are already making decisions about ethnic appearance for the purpose of their Field Contact forms.

We recognise, however, that community consultation is required to ensure that the ethnic appearance categories used are relevant for addressing the needs of communities raising concerns about racial profiling. Victoria Police, agencies such as the Cultural and Indigenous Research Centre and community groups such as Imara undertook such a consultation in the review process leading up to the *Equality is not the Same* report in 2013. As a consequence, data about the groups who are expressing concerns about over-policing is available to Victoria Police now.

238. These categories can also be tested experimentally in the trial.

Religious Profiling

Preliminary discussions with the CEO of Islamic Council of Victoria and the Chief Operations Officer of Australian Muslim Women's Centre for Human Rights indicates that there is considerable interest in collecting data about whether there might be a police bias against Muslim Victorians. Anti-Muslim bias was an issue raised in a number of the Flemington police complaints between 2006 and 2010[239]. A 2016 Essential Poll indicates an anti-Muslim bias exists across a substantial portion of the Australian population. The poll found that 49% of Australians support a ban on Muslim immigration to Australia.[240] Consequently we have considered the issue of asking police to record their perception of a person's religion when they decide to stop individuals. Moreover, Victoria Police currently list religion as a category against which stereotyping is not permitted. Data collection will be helpful to Victoria Police so that they can determine whether or not they are upholding this commitment.

Interestingly, from our research, it appears that there are no stop and search data collection schemes that directly collect data on religious profiling. However, the Ottawa Traffic Data collection trial found that people perceived to be 'Middle Easterners' were the most disproportionately stopped group in Ottawa. They were stopped at a very significant odds ratio of 3.3. This indicates a significant anti-Muslim bias may be operating in the Ottawa Police Department. Rebekah Delsol, a UK racial profiling specialist for the Open Justice Initiative, agrees that the Middle-Easterner category may well operate as a proxy for collecting data on the profiling of Muslims.[241] In the UK, data collection schemes are being adjusted to ensure data on 'Middle-Easterners' can be assessed for this purpose.[242]

As Leanne Weber notes, perceptions of culture and religion (correctly or otherwise) are frequently bound up in notions of ethnicity.[243] While the collection of proxy data such as 'Middle Eastern looking' will give us some indicators about the profiling of Muslims, and is worth exploring, it will not cover the full complexity involved in the profiling of Muslim Victorians. For example, it will not cover African Muslims. As Victoria Sentas notes, monitoring the over-policing of Muslims is more complex than the conventional indicators of street based policing allow. Profiling Muslims involves the use of a multitude of profiles such as 'converts' and those who appear 'vulnerable to extremism' and occurs in a number of non-street based locations such as at houses, mosques and in social media.[244] Consequently, neither the direct collection of data on police perceptions of religion at the street level nor proxy data will encompass the full extent of Muslim profiling. While similar arguments could be made in relation to all forms of profiling, it is acutely the case for Muslims.

While limitations on the conclusions drawn from data generated from a category such as "Middle Eastern" exist, we recommend that "Middle-Eastern", rather than a separate category for "Muslim" should be part of the classification system.

239. Personal knowledge of the primary author and researcher Tamar Hopkins, former Principal Solicitor, Flemington & Kensington Community Legal Centre.
240. http://www.essentialvision.com.au/ban-on-muslim-immigration
241. Conversation on 29 November 2016.
242. Email from Rebekah Delsol on 7 December 2016.
243. Comment from Leanne Weber 2 December 2016.
244. Comment from Victoria Sentas 24 January 2017.

Intersectional discrimination

As the discussion of the profiling of Muslims reveals, stereotyping occurs in a complex way across various identity categories. This is called intersectionality.[245] For example, discrimination on the basis of age, ethnicity, poverty, gender, mental illness and sexuality all may intersect to increase the likelihood of police targeting a person or to change the way targeting occurs[246]. Recognising the operation of intersectional discrimination requires a 'holistic approach'.[247]

Ideally a monitoring scheme would be able to capture all the factors (or police perceptions of them) that may contribute to an increased risk of unfair policing attention.[248]

One consideration in collecting data against these intersecting categories is the availability of census data as a benchmark. The ABS collects census data on physical disability, mental illness, occupation, and housing. It also collects data on same-sex couples. It would not however, identify the sexuality of people not living together or who are not in a relationship at the time of census. However, as discussed previously, assessment of *hit rates* and *reasonable grounds* to stop do not require census benchmarking and can be directly compared. For example, we may find that the hit rate or basis for suspicion is lower for people who Victoria Police members perceive as gay, lesbian or transgender than others. As a consequence, collecting data concerning these categories would still provide valuable information about potential biases to researchers, institutions and managers working towards their elimination.

Recommendations:

1). We recommend that Victoria Police require all members who initiate a stop, search or move-on direction to collect data on 'officer-perceived' ethnicity.

2). We recommend that prior to the trial, the Police Stop Data Working Group and Victoria Police co-evaluate the efficacy of the current ethnicity categories used by Victoria Police in their Field Contact Reports. Accepting the need for eight or less broad-brush identification categories that identify the groups most concerned about profiling, we recommend that the trial considers using the following ethnicity classification system and that Victoria Police modifies its ethnic appearance codes accordingly:

1. **Aboriginal/Torres Strait Islander**
2. **African (Includes African Australian, other African, African American, Caribbean)**
3. **Caucasian (Anglo, European origin, white South African, white NZ/Australian)**
4. **Middle-Eastern (Iran, Iraq, Syrian, Turkish, Palestinian, Lebanese, Egyptian, Afghani)**
5. **Pacific/South Sea Islander (includes Maori)**
6. **South-East Asian (Chinese, Vietnamese, Japanese, Malaysian, Burmese, Indonesian Etc)**
7. **Indian Subcontinental (Pakistani, Indian, Bangladeshi)**
8. **Other (South American, Jewish and other ethnic minorities)**

3). We recommend that during the course of the State-wide three-year trial period, researchers explore the issues involved in data collection and concerns of communities potentially impacted by police bias in categories such as:

- **a. sexual orientation;**
- **b. mental illness;**
- **c. physical disability;**
- **d. employment status;**
- **e. housing status;**
- **f. gender (including identities such as transgender or gender non-conforming)**

245. Kimberle Crenshaw, 'The urgency of intersectionality' Tedtalks Oct16, < https://www.ted.com/talks/kimberle_crenshaw_the_urgency_of_intersectionality>

246. Andrea Ritchie and Delores Jones-Brown, 'Policing race, gender and sex: A review of law enforcement policies' *Women and Criminal Justice* (2017) 27, 21.

247. Keina Yoshida, 'Towards intersectionality in European Court of Human Rights: The Case of B.S. v Spain,' *Fem Leg Stud* (2013) 21, 196.

248. See for example the definition of racial profiling used by NAACP, '*Born Suspect: Stop and Frisk Abuses and the Continued Fight to End Racial Profiling in America*,' 2014, NAACP, 52.

Chapter 4. How should reasons for stops and searches be recorded

What reasons for stopping individuals should be recorded? How can we maximise reliability of the data for the purpose of identifying racial profiling?

The purpose of requiring police to record reasons is to permit analysis about whether there was a reasonable justification for a stop and or search. As discussed earlier, UK and US research reveals a pattern that the more reasonable and objective the police decision to initiate a stop, the higher the hit rate, and the lower the rates of disproportionality.

As noted above, it is lawful for police to stop cars and pedestrians in Victoria without a reasonable suspicion of illegality. However, under the Victoria Police *Human Rights* policy set out at page 32 above, Victoria Police officers are required to consider a number of issues before deciding to stop a person.

Consequently, asking Victoria Police members to record their reasons to stop a person is aligned with this policy. The remaining question is what is the best way for these reasons to be recorded?

One way to record reasons is to provide a number of boxes from which officers can select the best fitting reason. This method is most useful for quantitative data collection purposes (see for example the criticism made of Chicago Police Department's data).[249]

However, this method has the potential to radically over-estimate the number of stops made with a reasonable suspicion or alternatively leave us with data that is meaningless about the true basis of the stop, as was case with the 2015 Victoria Police Receipting Proof of Concept pilot. The Victoria Police pilot allowed police to select from four extremely generic categories as a reason for the stop:

- Welfare;
- Community Safety;
- Road Safety; and
- Receipt requested.

This information provides no meaningful information about the reasonableness of the stop.

The method that will provide the most useful qualitative data, but the one that will require the most input from police and from researchers, is to require police to enter data into a *free text field*. Victoria Police's Field Contact form already has a free text 'Additional Information' field for this purpose. This is also the method used in New York where, "[t]he UF-250 form has a place for the police officer to record the 'Factors which caused officer to reasonably suspect person stopped (include information from third persons and their identity, if known)."[250] Using information from these forms, US researchers have been able to identify whether stops were conducted with or without reasonable suspicion.[251] It is important to note that police are **currently** required to record this type of information when filling in their electronic or paper L19 and L19C Field Contact reports and diary entries. All that is required to ensure capacity for data collection about the basis for stops is to make the form mandatory for all stops, not just field contacts, and to adjust the forms to include the specific questions that we recommend. This proposal does not create any greater work, time or administrative burden to front line police than the requirements presently in existence.

Questions could include:

- What is your reason for stopping this person? (*free text*);
- Do you believe the person may have committed a crime/be about to commit a crime? (Y/N) (If yes provide a drop down list for possible crimes suspected);
- If yes, what are your reasons for holding this belief? (*free text*)
- Include a copy of the suspect profile if your reason is that the person fits a suspect profile description.

249. https://sunlightfoundation.com/blog/2015/03/02/stop-and-frisk-in-4-cities-the-importance-of-open-police-data-2/

250. Gelman, 'An Analysis of the New York City Police Department's Stop and Frisk Policy in the Context of Claims of Racial Bias,' 2007 *Journal of the American Statistical Association* 101 (479), 816.

251. Ibid.

Photo by Charandev Singh

If a search is then conducted, the same set of questions could be asked with regard to the search. These questions should, in particular, be asked for high discretion 'consent' searches.

It would be possible to devise a method for asking tick-box questions for some issues (such as perceived race) and having a list of potential crimes selected from a drop-down list, while leaving issues like reasons for suspicion being free text.

One of the reasons given for stopping a person that generates high levels of concern in the community is they, 'fit the description' of a subject profile.[252] If police do give this as a reason for stopping a person, it is also critical that they record the origin and the content of the suspect profile they used.

In New York, where extensive data analysis has been conducted on reasons for stops, Fagan found that where officers gave sufficient detail it was possible to characterise their reasons for stopping individuals into three categories: likely to be unlawful (ie without a reasonable basis), approaching reasonable suspicion (possible basis to suspect that a crime has occurred) and approaching probable cause (ie probable basis to believe a crime has occurred). He found that the closer a stop approached the 'probable cause' standard, the less likely it was racially based, the higher its 'hit rate' and higher its impact on overall crime rates.[253] Fagan's study provides evidence to support Victoria Police's current a 'reasonable belief' rather than 'reasonable suspicion' standard before a Field Contact report is submitted.

To ensure an effective data monitoring scheme, it is important that researchers and police managers are able to conduct similar analysis on the reasons used by Victoria Police members to stop, search and direct people to move on.

In addition to monitoring what officers record on paper (or digitally) as their reasons for stopping individuals, there are three other methods that could be used to assess whether police hold a reasonable and objective basis to conduct a stop. One method is to put observers in police vehicles or on the beat to record officer's decisions to stop.[254] While police may modify their conduct in the presence of an independent observer, Paul Quinton's UK study showed that police still exhibited racial biases in the presence of researchers (revealing the 'business as usual' nature of these biases). It may also be possible to provide researchers with live ESTA calls (police communication) and to place audio recorders in cars or on police to monitor what is communicated.

A second method of monitoring police reasons for stopping a person is through studying information provided from body-worn cameras with audio-visual capacity. We have not yet identified studies that have used body worn cameras to monitor the reasons given by officers wearing body-worn cameras to stop and search individuals. However two studies conducted in the US have found that officers who wear body-worn cameras are less likely to conduct stop and frisks, are less likely to initiate the use of force and are less likely to attract complaints, than officers without cameras. According to Howard Wassaman officers with body worn cameras may 'think more carefully about whether they have sufficient cause to stop and frisk or arrest before initiating citizen encounters.'[256] So while it appears that body-worn cameras may modify (improve) police conduct, given Quinton's study revealing bias in the presence of observers, body worn cameras could still reveal institutional 'business as usual' biases impacting police decision making. There are additional issues however that need to be addressed in considering using BWC to monitor police decision-making. Firstly, there are a host of regulatory issues involved to ensure against police switching the camera off before an incident. Secondly, legislation or VPM instructions may be required to ensure the police agree to release the footage to the monitoring authority

252. For example, Kot Menoah, oral presentation, Racial Profiling Forum, Melbourne University 8 December 2016.
253. Fagan, Jeffrey, 'Terry's original sin' (2016) *The University of Chicago Legal Forum* 43, 75-79
254. Paul Quinton (2011) 'The formation of suspicions: police stop and search practices in England and Wales', *Policing and Society*, 21:4, 357-368
255. Howard Wassaman, 'Moral Panics and Body Cameras' (2015) 92 *WashULReview*, 838..
256. People seeking access to their own images via FOI confront overwhelming obstacles seeking footage of themselves.

or researchers, and to those whose images are captured in the footage[257]. Thirdly there are considerable privacy issues involved including those related to the expanding use of face recognition software.[258] It should be possible to resolve some of the issues around privacy for the purpose of this study through the use of carefully drafted confidentiality undertakings and the use of university based data storage facilities.[259]

A third method is by asking the person stopped for their account of what occurred. This would require police to provide contact details of people they stop to researchers and for those people to consent to participating in research.[260] Alternatively, legal challenges to police decisions can provide civilian accounts of the reasonableness of the stop and search. Additionally further specific research could be done similar to Smith & Reside (2010)[261],Dolic (2011)[262] and Haile-Michael and Issa (2014)[263] or Charles Epp and others (2014

Recommendations:

1). We recommend that Victoria Police Officers record the reasons for *all* police-initiated stops (from information available before the stop is initiated) and searches (whether pedestrian or in a vehicle) in the form of a *free text* entry entered digitally or onto the L19 and L19C forms or equivalent. Key questions include:

a. If a stop occurs:

i. ''What is your reason for stopping this person?' (*free text*);

ii. ''Do you believe[264] the person may have committed a crime/be about to commit a crime?' (Y/N) (If yes provide a drop down list for possible crimes suspected);

iii. ''If yes, what are your reasons for holding this belief?' (*free text*)

iv. Include a record of the suspect profile/report if your reason is that the person fits a suspect profile description.

b. If a search (including consent, warrant, immigration, car registration search) occurs:

v. What is your reason for searching the person/vehicle? (*free text*)

c. If a direction to move on is given?

vi. What is your reason for issuing a direction to move to a person? (*free text*)

2). We recommend that during at least the first three years of the trial, independent researchers monitor a sample of in situ officer stopping and searching reasons. To facilitate this research, we recommend that Victoria Police a) provide samples of audio recordings of police conversations and ESTA (emergency services) information police receive while in patrol cars and foot patrols to independent researchers; and b) facilitate independent researchers to conduct observational research to monitor in situ the reasons provided to people stopped, searched and issued with move on directions.

3). We recommend that if body worn cameras are trialled or used by Victoria Police during the three-year data collection trial period, Victoria Police facilitate the access of independent researchers to sample audio-visual footage to assess the reasonable and objective basis of police-initiated stops, searches and move on directions.

4). We recommend that independent research be undertaken to explore the views of people who are stopped, searched and moved on about the reasons for officer interaction.

257. Kaleb Cox, 'The case fore and against body worn cameras, PAP, 13 May 2015, http://www.policeaccountability.org.au/commentary/the-case-for-and-against-police-body-worn-cameras/

258. Concerns raised by Janet Chan on 23 January 2017.

259. Strategy suggested by Associate Professor Leanne Weber.

260. Rebecca Smith & Shane Reside, 'Boys Do you wanna give me some action' 2010, Springvale Monash Community Legal Centre, Victoria.

261. Zrinjka Dolic, 'Race or Reason,' 2011, Flemington & Kensington Community Legal Centre, Victoria.

262. Daniel Haile-Michael, Maki Issa, 'The more things changes the more they stay the same,' 2015, Flemington Kensington Community Legal Centre, Victoria.

263. Charles Epp, Steven Maynard-Moody, Donald Haider-Markel, 'Pulled Over, How Police stops define race and citizenship,' 2014, University of Chicago Press

264. The Victoria Police Contact and Intelligence Reporting policy requires a 'belief on reasonable grounds' for field contacts.

Chapter 5. What data should be collected by police?

Photo by Charandev Singh

Victoria Police currently record a large amount of data on their field contact forms. Almost all the data required to inform a proper assessment about stops, searches and move on directions is *already collected* on these forms. Data that is **not** currently collected on field contact forms is marked in **bold**. With the inclusion of these few additional items, all that is then required is for data collection at the time of the stop to be mandatory and extended to all stops.

Recommendation:

We recommend that Victoria Police mandate it members to collect the following data for all stops, searches and directions to move on as part of the racial profiling monitoring and prevention scheme:

a. reason for the stop (before the stop was initiated) or decision to direct a person to move on (see Key Recommendation 11);

b. record of any relevant suspect profile or intelligence report;

c. officer perceived ethnicity (see Key Recommendation 8 and 9);

d. reasons to conduct any search (including searches by consent, statutory and database searches such as warrant checks, car registration, immigration status etc)

e. outcome, including items seized, cautions, infringements, arrest, charges, moved on, no further action,

f. use of force (if any),

g. officer perceived age of the person (within a 10 year range),

h. officer perceived gender of the person,

i. stop location,

j. time and date,

k. length of stop,

l. name of the person (where available)[265],

m. if in a car, the presence of passengers and perceived ethnicity of passengers; if on the street, the presence of companions and perceived ethnicity of companions;

n. Whether the driver asked to leave the vehicle,

o. Whether a call for back-up was made[266],

p. For vehicle stops, state of residence of the driver as recorded on the person's driver's licence;

q. Officer number, rank, station, operation (if relevant), vehicle code (if relevant).

r. Prosecution outcome (if relevant) when available (see Chapter 5).

265. A unique number identifier is all that is necessary for data analysis.

266. n. and o. are data collection suggestions made in Tillyer, Engel and Cherkauskas, above n

Photo by Charandev Singh

Chapter 6. Collation, Analysis and Public Reporting

Who should be responsible for collecting, analysing and making public the data? Should data collection be a trial or an ongoing practice? What is the frequency that data should be reported? What are the lessons that we can draw from each of our international sites?

How is the data processed and analysed at our comparison sites?

Table 5- Comparison of data collection and analysis at international sites

City	Who collects and reports on the data?
London, UK	Metropolitan Police in conjunction with the Home Office produce monthly aggregate reports per borough and publish these on their website.[267]
Ottawa, Canada.	Data at the end of 2-year data collection period was given to the Ontario Human Rights Commission and York Research Team. It was then released in a raw form as well as a benched marked study on the Ottawa Police website. (Trial period 2 years, but note Ottawa Police have agreed to continue data collection).
Kingston,Canada	University of Toronto Research team headed by Scot Wortley (Trial period 1 year)
New York	Raw data released annually on NYPD website, New York Civil Liberties Union. Thoroughly analysed by the Plaintiff's expert in *Floyd v the City of New York*, ongoing analysis under court appointed monitoring process.
Ferguson	Missouri Attorney-General[268] Attorney General works with researchers from three different universities to prepare the data.[269]
Baltimore	Maryland Statistical Analysis Centre.[270] Analysis does not permit understanding of racial biases.
Minneapolis	Not released publically
Melbourne	One off release of raw data in accordance a court order to plaintiffs in *Haile-Michael v Konstantinidis* who paid for data to be analysed by expert Professor Ian Gordon of the Melbourne University.

267. http://www.met.police.uk/foi/units/stop_and_search.htm
268. https://ago.mo.gov/docs/default-source/public-safety/2015agencyreports.pdf?sfvrsn=2
269. https://ago.mo.gov/home/vehicle-stops-report
270. http://goccp.maryland.gov/crime-statistics/

Photo by Charandev Singh

In Ottawa and New York, raw data is released to the public as a consequence of a litigation settlement. The Ottawa release was mandated for a two-year period, with the police agreeing to continue the data collection, while the New York agreement was for ongoing release. The New York data is highly specific, providing detailed information about individuals stopped including exact location, age, weight, eye-colour, race, charges, date, time, outcome, reason for stop, use of force etc. The data is specific enough for it to be possible for an individual to identify themselves in the data.

In New York, problematically, until the court appointing monitoring that occurs post *Floyd* there were no resources dedicated to analysing the data released by the NYPD. Furthermore with data released on an annual basis, it is impossible to monitor trends as they appear month by month. This means it is harder for agencies to explore and influence officer and agency behaviour when biases are apparent.

The Ottawa Traffic Monitoring Project released information about: Stop district, outcome, reason, perceived gender, perceived ethnicity, perceived age (within a 10 year range), and whether the person is an Ottawa resident (this would be available on the driver's licence). The raw data does not provide a date, time or location. It consequently would be impossible to identify any individual from the data. This data was then analysed and benchmarked by York University.

The Metropolitan Police, in conjunction with the Home Office in the UK release highly accessible, ongoing, benchmarked, monthly data on a per capita basis. They also provide arrest rates (hit rates) against age, ethnicity and gender. This provides a regular way to track each police borough and allows comparison between boroughs. The release of this 'processed' data is immediately useful to the broader community.

In the Victorian *Haile-Michael* case, the Federal Court ordered that raw data be released to a researcher who was able to analyse the data under a strict confidentiality undertaking. It provides a snapshot of stopping patterns in Flemington and North Melbourne between 2008 and 2010.

In Minneapolis, data is collected but not released publicly, while in Baltimore, data is released publicly, but not benchmarked in a way that enables conclusions about the presence of bias in officer stop rates. In Missouri, data is analysed annually by a team of university researchers and then published on the Attorney-General's website.

Drawing from these case studies a number of observations can be made. Firstly, once off trials are not sufficient to guard against racial profiling. Data collection must occur on an ongoing basis. It might be useful to start the process through a three-year trial to test and improve the creation of a robust, appropriate data collection system, but this should then be extended in perpetuity. Secondly, raw, annual data by itself is not helpful. Regularly published (quarterly), public, benchmarked, aggregate data allows police agencies, government, institutions and the public to engage with and monitor police activities across regions. Research agencies could also conduct close analysis to undercover patterns of racial profiling including disparities between individual officers and police operations or regions. This level of detail would allow increased capacity to monitor and prevent racial profiling.

There are a number of agencies within Victoria and beyond that could be resourced to analyse and release aggregate data.

- Victoria Police;
- Victorian Crime Statistics Agency;
- Independent Broad-based Anti-Corruption Agency;
- Victorian Equal Opportunity and Human Rights Commission;
- Australian Human Rights Commission;
- Australian Bureau of Statistics;
- Independent academic working group (potentially resourced through government funding, an ARC Linkage grant or equivalent).

At this stage we propose that during the three year pilot, Victoria Police release raw , privacy-protected data to an independent academic working group who will work in consultation with Community Legal Centres, Victorian Equal Opportunity and Human Rights Commission, the Australian Human Rights Commission, the Minister for Multi-cultural Affairs and the Victoria Police to test and perfect effective strategies to benchmark, analyse and release data to the public. We then propose that the Victorian Government fund the ongoing capacity of an agency such as the Victorian Equal Opportunity and Human Rights Commission, a University or the Victoria Crime Statistics Authority to aggregate, benchmark and publish data on its website. We further envisage an ongoing role for the data aggregating and publishing agency to work in consultation with Victoria Police, Flemington Kensington Community Legal Centre, Victorian Aboriginal Legal Service, Aboriginal Family Violence Prevention Service, Victoria Legal Aid, Youth Law, Federation of Community Legal Centres and other community groups and legal organisations during the trial and beyond, to reduce racial profiling as revealed by the data and conduct further research as required.

In our view, in the long-term and with adequate funding, an agency such as VEOHRC or the Australian Human Rights Commission is likely to be the appropriate body to monitor and release the data because of its powers and standing with the community in relation to anti-discrimination and human rights. Furthermore, the AHC and VEOHRC are human rights bodies that are likely to maintain the trust and respect of the community in relation to the release of police-initiated stop data.

Recommendations

1). We recommend that in 2017 Victoria Police, in collaboration with a funded academic working group and in consultation with impacted community groups and legal organisations and institutions (including Independent Broad-Based Anti-Corruption Commission ('IBAC'), Victorian Equal Opportunity and Human Rights Commission ('VEOHRC'), (Australian Human Rights Commission) ('AHRC'), and the Victorian Crime Statistics Agency 'VCSA'), implement a co-operative three-year racial profiling data collection trial and evaluation process, capable of extension in perpetuity.

2). We recommend that the Victorian Government resource an academic working group and then subsequently an agency such as a University, the Victorian Equal Opportunity and Human Rights Commission or the Australian Human Rights Commission to prepare and publish a quarterly aggregate account of the data collected by Victoria Police (recommendations 7 to 11). During the initial three-year trial period of the data scheme, the academic reference group in collaboration with Victoria Police will test and prepare meaningful aggregate data, conduct additional research and provide a public evaluation.

Chapter 7. Risks of Data Release

What is the risk data collection could be used to exacerbate rather than undermine race/crime stereotyping? How do we minimise any risks?

Releasing data detailing the crime rates of different ethnic groups is a divisive and contested exercise and has caused considerable concern in Melbourne.[271] There is only one benchmark that would require the gathering of this type of information – benchmarking against violations by ethnicity. We have recommended *against* using this benchmark in Victoria. However, data showing the prisoner (sentenced and un-sentenced) rates by country of birth is available on the Australian Bureau of Statistics website.[272]

Releasing data about per capita disproportionality ratios or odds ratios in stop and search rates, on the other hand, shines the spotlight back at policing practices, particularly when coupled with analysis of reasons for stops and hit rates. This has the potential to confirm or allay community suspicions in relation to racial profiling. There is considerable concern that Victoria Police do racially profile African, Indigenous and Muslim members of our community.[273] Confirming or allaying these suspicions is a critical exercise in ensuring transparency, fairness and accountability in policing.

The Victoria Police *Receipting Proof of Concept Evaluation Report* released on 20 December 2016 stated:

> "It needs to be noted that several community stakeholders supported the introduction of receipting but were simultaneously concerned by the collection of ethnicity data. Some stakeholders advised that such a practice could be counter-productive in terms of maintaining and building community relationships, and recommended further public debate and discussion on whether the collection of ethnicity data at the point of contact is the only means of establishing whether racial profiling was occurring."[274]

On 9 June 2016, 14 organisations, including many impacted by racial profiling wrote to the Chief Commissioner of Police supporting a race data collection scheme to monitor racial profiling.[275] These groups were:

- African Communities Foundation Australia;
- African Think Tank;
- Ethnic Communities Council of Victoria;
- Federation of Community Legal Centres;
- Flemington Kensington Community Legal Centre;
- Islamic Council of Victoria;
- Oromo community Association in Victoria;
- Somali Community Inc;
- South Sudanese-Australia Youth Association in Victoria Inc;
- South Sudanese Community Association in Victoria;
- Victorian Aboriginal Legal Service;
- Victorian Council of Social Services;
- Victorian Equal Opportunity and Human Rights Commission;
- Youthlaw.

The signatories to this letter evidence the overwhelming community support for a race data collection scheme in Victoria. In our view, the data collection scheme we have proposed for Victoria Police, with meaningful data released on a three monthly basis through the VEOHRC can only be of benefit to the community and Victoria Police.

271. http://www.sbs.com.au/news/article/2016/03/15/south-sudanese-group-condemns-damaging-media-coverage-melbourne-cbd-brawl

272. http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2014~Main%20Features~Country%20of%20birth~7

273. See for eg, Max Chalmers, "'Aboriginal Journalist Who Reports on Racial Profiling Racially Profiled on the way to work,",' 19 November 2015, *New Matilda*, https://newmatilda.com/2015/11/19/aboriginal-journalist-who-reports-on-racial-profiling-racially-profiled-on-the-way-to-work/; Martha Azzi, 'Muslim charity furious after volunteers travelling to Stereosonic music festival to preach against drug use were stopped and searched by 100 police and a SWAT TEAM' 30 November 2015, *Daily Mail Australia*, <http://www.dailymail.co.uk/news/article-3338150/Members-known-Muslim-charity-travelling-Stereosonic-music-festival-preach-against-drug-use-stopped-searched-100-police-SWAT-team.html#ixzz4SfxZlzQl >

274. Victoria Police, '*Receipting Proof of Concept Evaluation Report*,,' Victoria Police, 20 December 2016, 8.

275. See letter available at <http://www.policeaccountability.org.au/racial-profiling/whats-next-for-victoria-polices-efforts-to-end-racial-profiling/>

Concerns that studying race stop data may harm community relations with police have been made in relation to other data collection schemes. Professor Scot Wortley in responding to criticisms directed towards the Canadian Kingston, Ontario study, states:

> "There is [n]o evidence to suggest that the study has made things worse. The Community's response and letters of support to the Kingston Police Service from numerous race relations organizations from across Canada and the United States suggest that the study may have improved relations with minority communities.
>
> - The study has opened up avenues of discussion.
> - The Police Association and Melchers seem to suggest that we need to drop the issue and refrain from future research and monitoring.
> - What are the alternatives? How would they improve race relations? How would they evaluate the effectiveness of race relations programs?"[276]

Wortley raises some critical points: How can the effectiveness of Victoria Police's racial profiling policy be tested unlessit is monitored? The *Haile Michael* case shows that racial profiling is a threat to the integrity of policing in Victoria.

Through providing transparency in stop rates, the Victorian community can develop a greater understanding of the problem and agencies can work in an evidence-based way, with Victoria Police to prevent the institutionalised aspects of racial profiling. An example of the partnerships that can be formed as a consequence of transparency is the role of the UK Equality Commission in working with the Metropolitan Police to reduce disproportionate stopping rates.[277] Another example is the Open Justice Initiative and its work with police agencies in Spain and beyond.[278]

In concluding this chapter, it is important to recognise that there are segments of the media, police and civil society who tend to respond to any discussion about the problem of racial profiling by referring to alleged ethnic crime rates.[279] This conflation is an international pattern. For example, shortly after the publication of the UK Scarman Report the Metropolitan Police released statistics 'highlighting the stereotype of the black mugger' in an 'unprecedented use of official statistics in a manner that had clear political implications'.[280]

The Victorian Crime Statistics Agency already releases quarterly crime reports linking crime rates to places of birth.[281] The release of these statistics has resulted in negative press about ethnic communities.[282] In contrast however, monitoring racial profiling is focused on police-initiated contact, and does not involve referencing ethnic crime rates. Racial profiling research monitors the rates of disproportionate and unjustified policing by ethnicity. Policing without suspicion has nothing to do with crime rates. But it does waste police time, resources and actively degrades community police relationships.[283] A scheme that aims to reduce these outcomes is of substantial benefit to police and community alike.

276. Scot Wortley and Lysandra Marshall, '*Bias Free Policing: The Kingston Data Collection Project. Final Results*" 2005, < https://qspace.library.queensu.ca/bitstream/1974/8655/1/Bias%20free%20policing%20-%202005%20-%20Wortley%20-%20Policy.pdf> 91.
277. Equality Commission, 'Stop and Think, Again'Again 2013, UK < https://www.equalityhumanrights.com/en/race-britain/stop-and-think-again>
278. Rebecca Delsol, '*Addressing Ethnic Profiling by Police*,' 2009, Open Justice Initiative.
279. http://www.theage.com.au/victoria/liberals-racial-profiling-call-slapped-down-20170111-gtpwxk.html
280. Michael Shiner, *Regulation and Reform in Delsol*, Rebekah; Shiner, Michael (ed), Stop and Search, the Anatomy of a Police Power 2015, Palgrave Macmillan, 158.
281. https://www.crimestatistics.vic.gov.au/about-the-data/how-the-data-is-collected-and-processed
282. See for example, Jack Cade, *The Morning Mail,* 21/1/2017 <http://morningmail.org/sudanese-crime-control/>
283. Craig Futterman, Chaclyn Hunt and Jamie Kalven, 'Youth/Police Encounters on Chicago's South Side: Acknowledging the Realities' (2016) *The University of Chicago legal forum* 125

Chapter 8 What enforcement requirements for data collection should be imposed?

Table 6- Comparison of the legal basis for release of data at international sites

City	Basis for data release
London, UK	Legislative
Ottawa, Canada.	Initial trial from a settlement result. Ongoing collection is voluntary.
Kingston,Canada	Voluntary participation in a trial
New York	Court settlement order.
Ferguson	Legislated data collection and publishing.[284]
Baltimore	Legislated data collection and publishing.[285]
Minneapolis	No public data available. Only information available is from a 2003 study.[286]
Melbourne	Court ordered release to plaintiffs, public release of results as a result of a settlement agreement.

There are a range of strategies different jurisdictions have adopted to ensure collection and public release of meaningful data in relation to the presence of disproportionalities in police stop patterns. The best ongoing solution is to enact legislation (like the UK, Baltimore and Ferguson) that sets out the data to be collected, to whom it should be released and how frequently it should be publicly reported on. It is also important to have government funding to ensure the data is made meaningful when released to the public and to enable the effective monitoring and intervention by oversight agencies such as the AHRC or VEOHRC.

What should happen if police fail to collect data about their stops? It will only be obvious to management if police fail to collect data in stops and searches where an arrest is made. However, UK data indicates that arrests are made in less than 10% of stops where reasonable suspicion is required or less than 2% of stops where no suspicion is required.[287] It is thus critical that police managers ensure that data collection occurs in the 90-98% of stops that do not result in an arrest or charge. Body worn cameras may assist in the monitoring of recording. Another way to assist monitoring could be to ensure that receipts are issued when stops occur. This way the public can be sure a record is made of their contact with police, and that this will be followed up by police management and by the data collection scheme.

In 2016, Victoria Police released an evaluation of a trial they had conducted during 2015 issuing receipts to people who were stopped by Victoria Police members in four policing regions.[288] However, this evaluation did not provide any information about whether police were issuing receipts in all cases where the trial took place and for what reason people were being stopped.

The evaluation did not recommend the ongoing use for receipts by Victoria Police, however it did not consider them in the context of a data-monitoring scheme and as a form of accountability to that scheme as well as to the public.

In a recent article about regulation of stop and search schemes, Michael Shiner describes two primary regulatory mechanisms: internal police disciplinary and training systems and external remedial mechanisms such as litigation, complaint regimes and compliance enforcement. He argues that an effective regulatory scheme needs both internal and external enforcement strategies.[289]

284. NAACP, *Born Suspect: Stop and Frisk Abuses and the Continued Fight to End Racial Profiling in America,* 2014, NAACP, 49.
285. Ibid.
286. http://www.twincities.com/2016/07/08/data-dive-racial-disparities-in-minnesota-traffic-stops/
287. Rebekah Delsol, '*Berne Presentation*' 2016 Powerpoint presentation, (slide 7).
288. Victoria Police, '*Receipting Proof of Concept Evaluation Report*' 2016 Victoria Police.

Victoria Police needs to create a clear role for managers to monitor the effectiveness of the police stops and searches through creating key performance indicators that judge stops and searches in terms of yield and justification rather than number. For instance, are stops generating arrests for serious crimes (eg trafficking rather than drug possession charges)? Are they leading to high levels of arrests/summonses and successful prosecutions?[290] Managers should also reward and champion stops that occur on the basis of a reasonable belief that an offence has occurred and the completion of forms. Similarly, officers who engage in stops without sufficient justification should face reprimand.[291]

Simultaneously, the Victorian Government must ensure the existence of effective external enforcement mechanisms through empowering agencies such as the Victorian Equal Opportunity and Human Rights Commission and Australian Human Rights Commission to take compliance action against police where necessary, enabling effective remedies through an independent complaint scheme and supporting low cost litigation avenues for impacted individuals and communities, through funding community legal centres and Victoria Legal Aid. In addition, the Productivity Commission should be invited to analyse the effectiveness of the exercise of police power.

Because of the important role of the *Race Discrimination Act 1975* in making racial profiling unlawful in Victoria, the Victorian Government should either work with the Federal Government to empower the Australian Human Rights Commission to take compliance action against police where necessary or replicate the relevant RDA provisions into the *Equal Opportunity Act 2010*.

Close consideration should also be made to ban the use of consent searches has occurred in the UK[292].

Recommendations:

1). Victoria Police should use performance indicators that focus on the effectiveness of stop and search powers rather than the quantity. For example stops should be judged on their arrest and prosecution outcomes and the seriousness of crimes that they detect (trafficking rather than drug use for example) and on stops performed in the presence of a reasonable belief that a crime has been committed.

2). We recommend that Victoria Police engage the Federal Law Crime and Community Safety Council to request that the Productivity Commission monitor the effectiveness and efficiency of police stops and searches.

3). We recommend that the Victorian Government ensure the effectiveness of the scheme by legislating (where within jurisdiction):

a. a legal requirement for the collection of relevant data (see Key Recommendation 7);

b. a legal requirement for the data to be provided to an independent agency or research body for monitoring and quarterly public reporting;

c. a legal *reasonable belief* standard before all street and vehicle stops are initiated (with the exception of truly random drug testing at designated stations and approaching witnesses.)

d. A definition of 'reasonable grounds' and 'racial profiling';

e. A prohibition on 'consent searches';

f. Mechanisms for individual and systemic enforcement both within Victoria Police and externally by individuals and agencies such as the Australian Human Rights Commission and the Victorian Human Rights and Equal Opportunity Commission.

g. Legislate to ensure failure by police to collect data is a basis to exclude evidence under section 138 of the *Evidence Act 2008* (Vic) and reverse the onus of proof on a claim of racial discrimination.

289. Michael Shiner, *Regulation and Reform in Delsol*, Rebekah; Shiner, Michael (ed), Stop and Search, the Anatomy of a Police Power (Palgrave Macmillan, 2015), 147.

290. Jayne Mooney and Jock Young, 'Policing Ethnic Minorities: Stop and Search in North London' in Alan Marlow and Barry Loveday, '*After Macpherson; Policing after the Stephen Lawrence Inquiry*,' 2000, Russell House Publishing, 85.

291. See for eg the case study in Tiggey May, Tracey Gyateng and Mike Hough, 'Differential treatment in the youth justice system' (Equality and Human Rights Commission, 2010) 53.

292. Michael Shiner, *Regulation and Reform in Delsol*, Rebekah; Shiner, Michael (ed), Stop and Search, the Anatomy of a Police Power (Palgrave Macmillan, 2015) 153.

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