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VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA  
GENERAL DIVISION**

**No: VID969/2010**

**NOTICE OF FILING**

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**Note**

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### **Third Report of Professor Chris Cunneen**

Professor Chris Cunneen, Professor of Justice and Social Inclusion, The Cairns Institute, James Cook University.

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31 January 2013

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### **BACKGROUND**

1. This report addresses issues raised in the Eighth and Ninth Respondent's expert reports and comments on a training package delivered by Victoria Police. My Third Report relates to the following Proceeding: **Daniel Haile-Michael & Ors v Nick Konstantinides & Ors, Federal Court of Australia Proceeding No. VID 969 of 2010.**
2. I have previously provided two reports in relation to the Proceeding. This Third Report provides comments on:
  - the Eighth and Ninth Respondents' first expert report by statistician Dr John Henstridge
  - the Eighth and Ninth Respondents' second expert report by statistician Dr John Henstridge
  - the Eighth and Ninth Respondents' first expert report by Professor Andrew Goldsmith
  - the Eighth and Ninth Respondents' second expert report by Professor Andrew Goldsmith
  - a power point presentation understood to have formed part of a training package delivered to about 1,000 Victoria Police members over five years.
3. The relevant background context and information for this Third Report, such as my original letter of instructions and my own background and qualifications, are dealt with in the First Report. In this Report I use the same terms as those in the First and Second Report and assume that these terms are familiar to someone reading this Third Report. In addition to the list of documents noted in the First and Second Reports, I have been provided with:
  - Letter by email 7 December 2012 from Mr Peter Seidel with the Eighth and Ninth Respondents' first expert report by statistician Dr John Henstridge
  - Letter by email 11 December 2012 from Ms Elyse Hilton with attached powerpoint presentation
  - Letter by email 12 December 2012 from Ms Elyse Hilton with the Eighth and Ninth Respondents' first expert report by Professor Goldsmith
  - Letter by email 17 January 2013 from Ms Elyse Hilton with the Eighth and Ninth Respondents' second expert report by statistician Dr John Henstridge, and Outline of Evidence of Craig Darragh

- Letter by email 23 January 2013 from Ms Elyse Hilton with the Eighth and Ninth Respondents' second expert report by Professor Goldsmith
  - Report of Dr John Henstridge titled 'Expert Opinion. Haile-Michael & Ors v Konstantinidis & Ors Federal Court of Australia Proceeding No. 969/2010', dated 5<sup>th</sup> December 2012
  - Two documents titled 'Instructions.pdf' and 'Further Instructions.pdf' which detail instructions to Dr Henstridge from Norton Rose Australia
  - Report of Dr John Henstridge titled 'Expert Opinion. Haile-Michael & Ors v Konstantinidis & Ors Federal Court of Australia Proceeding No. 969/2010', dated 21<sup>st</sup> December 2012, including a letter from Norton Rose detailing further instructions and a document titled 'Outline of Evidence of Craig Darragh'
  - Report of Professor Andrew Goldsmith titled 'Opinion relating to Haile-Michael & Ors Federal Court of Australia Proceeding no. 969/2010', dated 10<sup>th</sup> December 2012
  - Report of Professor Andrew Goldsmith titled 'Opinion relating to Haile-Michael & Ors Federal Court of Australia Proceeding no. 969/2010', dated 18<sup>th</sup> January 2013, including a letter from Norton Rose detailing further instructions
  - A powerpoint report titled 'African/Sudanese Community Cross Cultural Advice' which is understood to be part of a training package delivered to Victoria Police.
4. I was provided with the guidelines for expert witnesses providing evidence in the Federal Court. I have read, understood and complied with these guidelines in the preparation of this Report.

#### **OPINION ON MATTERS RAISED IN DR HENSTRIDGE'S FIRST EXPERT OPINION**

5. I confine my comments to responding to questions 8, 9 and 10 of Dr Henstridge's expert opinion (Paras 51-59) which respond specifically to my findings in my First and Second Reports. However by way of introduction I note that Dr Henstridge's opinion does not substantially contradict the findings of Professor Gordon, notwithstanding that Dr Henstridge does not find the level of statistical significance as great as that demonstrated in the various tests undertaken by Professor Gordon.
6. As a general point I note that my instructions in preparing my First Report were, *inter alia*, to identify the key indicia of racial profiling and to answer the question, 'Are the statistical findings of Professor Gordon *consistent* with the indicia of racial profiling in policing?' (Para 2, First Report). I was not requested to consider the existence of direct causality between racial identity and police intervention. The latter is a fundamentally different question and unlikely to be answered completely conclusively given the difficulty in agreeing on or controlling for all the possible causal variables, or conducting a 'randomised clinical trial' (Henstridge Report, Para 35).
7. In response to Question 8, Dr Henstridge agrees that 'African/Middle Eastern offenders were more likely to have field contacts in general and "person check" field contacts in particular than non-African Middle Eastern offenders. The differences between the groups were shown to be statistically significant' (Henstridge Report, Para 52). However,

he cautions against accepting my opinion that this evidence ‘further supports the view that police are engaging in racial profiling’ (Henstridge Report, Para 53(c)).

8. Dr Henstridge correctly notes that he, Professor Gordon and I are limited by the paucity of information contained in the Police LEAP data. However, I note in reaching the conclusions regarding racial profiling in Paras 65 and 67 of my First Report, there was important additional information read in conjunction with the greater likelihood of ‘field checks’ and ‘person checks’ for African/Middle Eastern offenders. In particular ‘African/Middle Eastern males had on average fewer offences than males from ‘other’ ethnic backgrounds. It would not appear to be the case that African/ Middle Eastern (LEAP) males are coming into police contact for person checks because they are *as individuals* more prolific offenders than males from other ethnic backgrounds’ (Para 65, First Report). I concluded, based on the data presented in the LEAP files, that ‘the frequency of police stops cannot be attributed to greater offence profiles’ (Para 65, First Report).
9. In response to Question 9(a) Dr Henstridge finds that the ‘Remarks’ in File 4 are ‘likely to be statistically significant’ but not ‘as significant’ as presented by Professor Gordon (Henstridge Report, Para 55(b)). In his response to this question, Dr Henstridge does not disagree with my opinion that the ‘Remarks’ in File 4 ‘were not randomly attributed to African/Middle Eastern (LEAP) males, but represent a distinct pattern’.
10. In response to Question 9(b) Dr Henstridge is critical of my First Report in two respects. He argues that the statistical evidence does not automatically lead to the conclusion that ‘race is a primary determinant underlying the remarks recorded by police’ and that I assume that ‘association implies causation’. Secondly he is critical of my failure to ‘explore alternative explanations’ (Henstridge Report, Para 56). Dr Henstridge also raises this criticism in a number of parts of his report (Henstridge Report, Paras 53, 59b).
11. In relation to the first point in the response to Question 9, I note that throughout my First Report I avoided discussion of causation because it was not appropriate given both my instructions to consider the *consistency of the evidence* with racial profiling and with the limited nature of the data which was available. As I noted above in Para 6, in my opinion on the basis of the research that has been conducted particularly in the USA on racial profiling, it is unlikely that a scientific model of causality will be satisfied. At best a finding as to whether racial profiling has occurred will be based on a combination of quantitative data and qualitative material, both of which are likely to have shortcomings. In particular the quantitative data is likely to be restricted by a range of administrative and technical factors relating to the organisation collecting the data. In my reports, I have limited myself to the quantitative data analysis which was provided to me and made comment on whether that data is consistent with racial profiling.
12. The notion that race is ‘a primary determinant’ is not a causal argument. A ‘determinant’ in decision-making can refer to a ground, a reason or an occasion for making a decision. The fact that it is ‘a’ determinant does not exclude other reasons. I argue that it is a ‘primary’ reason because it is shown *on the basis of the data* to be statistically significant. For this reason I conclude that ‘the evidence *suggests* racial profiling’ (First Report, Para 71).
13. In relation to the second point in the response to Question 9, I note I did not ‘explore alternative explanations’ because I was responding specifically to the data provided and

their potential *consistency* with the indicia of racial profiling. I was not presenting a speculative discussion or academic treatise on the general dynamics and nature of racial profiling. Such speculation seemed unhelpful when the main focus of consideration in my report was whether certain actions recorded in the LEAP data base are consistent with racial profiling. There may be other variables influencing police decisions, and I do note that evidence showed that the offence profiles presented in the LEAP data showed African/Middle Eastern males had fewer offences than the other group.

14. I also note that other variables or explanations may be linked directly to, or are consistent with racial profiling. For example, Dr Henstridge offers 'location' as a potential variable to explain the over-representation of African/Middle Eastern males in the data (Henstridge First Report, paras 36b, 58a). I note that in my First Report I drew attention to the concerns of the Western Australian Law Reform Commission and the NSW Ombudsman about the use of police move-on powers involving Aboriginal people (First Report, paras 22-26). In these matters the concern with racial profiling related to Aboriginal people being moved-on because of their presence in particular public places. Location was a key factor, but a primary reason for the intervention was seen to be the presence of a racial/ethnic group in specific locations. Thus location is important in understanding police intervention but in these examples it needs to be considered as directly connected to the racial/ethnic background of the individuals who are the subject of police attention. Similar issues have been raised in the US literature in relation to police stops of African Americans in predominately white neighbourhoods.<sup>1</sup> In these examples, 'location' is part of the policing process of racial profiling. It is not a separate explanation to racial profiling, *but a part of the activity of racial profiling*.
15. I note that in the relation to the current matter, no information was provided to me about location, so I was unable to legitimately make any comment about its potential influence on police decision-making.
16. In response to Question 10, Dr Henstridge comments on Paras 59 and 72 of my First Report. He has trouble reconciling my comments in the following statement:

The statistical evidence on over-representation of African/ Middle Eastern (LEAP) males in the LEAP files provides, at least within an 'operational' definition of racial profiling, an evidentiary base for the occurrence of racial profiling by police of the specified group from the Flemington and North Melbourne areas. In other words, the over-representation of African/ Middle Eastern (LEAP) males of the specified age group provides some evidence that racial profiling is occurring. This evidence alone, however, is relatively inconclusive because individual African/ Middle Eastern (LEAP) males *may* be more prolific offenders than males from 'other' ethnic backgrounds (emphasis added, First Report, para 59).

17. The reference to an 'operational' definition of racial profiling refers particularly to the US literature where some experts have suggested that over-representation of racial minorities

<sup>1</sup> For example Meehan and Ponder (2002) show a clear pattern of increased police investigation and stops of minority drivers in predominately white and more well-to-do neighbourhoods. Thus minorities who are out of place are viewed as symbols of danger in majority communities. Meehan, Albert, and Michael Ponder (2002) 'The Ecology of Racial Profiling African American Motorists', *Justice Quarterly*, 19:399-430.

in police stops is enough in itself to prove racial profiling (First Report, para 51). In my opinion, a level of over-representation is likely to be a minimum threshold for which we might consider the existence of racial profiling. In other words, if the racial or ethnic group under consideration were not over-represented in police stops it would be difficult to demonstrate racial profiling was occurring (hence my reference to ‘an evidentiary base for the occurrence of racial profiling’). However, by itself such over-representation is ‘relatively’ inconclusive – it tells us something about the extent of contact of the racial or ethnic group with police, but not about other factors. One of the more important factors will be whether the particular group are more likely to be ‘prolific offenders’. The later evidence presented in my First Report showed clearly individual African/ Middle Eastern male offenders were involved in fewer offences than male offenders of other ethnic backgrounds, despite being more frequently stopped (First Report, para 72).

18. In response to my Para 72 (First Report) Dr Henstridge comments that although my ‘observations on the Police LEAPS are correct’, I do not explicitly consider alternative explanations and that I assume the associations must be caused by racial profiling. As I noted above, my First and Second Reports did not involve speculation on the possible range of influences on police decision-making (about which I had no evidence in this matter) nor did it seek to proffer a causal analysis of racial profiling. Its primary objective was to consider the indicia of racial profiling and whether the evidence presented was consistent with the indicia. I found that the evidence was consistent with racial profiling.
19. I note in passing that nowhere in Dr Henstridge report is there any indication that he views the evidence presented in either Professor Gordon’s or my Reports as being *inconsistent* with racial profiling.
20. I note that the key indicia of racial profiling outlined in my First Report (at Para 17) are:
- Police initiating contact by stopping, searching, questioning or requiring individuals to ‘move-on’ on the basis of the individual’s race or ethnicity.
  - Police harassment or the use of excessive force against individuals on the basis of their race or ethnicity.
  - The adverse use of police discretion on the basis of race or ethnicity in relation to the use of arrest and charge rather than process by summons, or, in the case of juveniles, the failure to use diversionary options such as warnings, cautions or youth justice conferences.
  - Police initiating contact on the basis of perceptions of membership of racial and ethnic ‘gangs’.
- The occurrence of any one of the above may constitute racial profiling.
21. I note further that neither Dr Henstridge nor Professor Goldsmith are critical of these indicia, or offer an alternative set of indicia.

## **OPINION ON MATTERS RAISED IN PROFESSOR GOLDSMITH’S FIRST EXPERT OPINION**

22. In this section of my Report I respond to the Opinion of Professor Goldsmith, specifically his answers in Paras 8-68 to seven questions put by Norton Rose Australia.

23. In response to Question 1, Professor Goldsmith outlines what he considers to be the relevant variables which should be presented when assessing whether police officers are engaged in a practice of racial profiling (Goldsmith Report, Paras 8-16).
24. In general I agree with the long list of potentially relevant variables identified by Professor Goldsmith (Goldsmith Report, Paras 9 & 14). I note that these are much broader than the relevant variables presented by Dr Henstridge in his report (Henstridge Report, Para 42), However, I do not believe these to be an exhaustive set of variables, nor do I believe such a list could be developed *a priori*. Indeed as Professor Goldsmith appears to acknowledge, 'a definitive answer to which variables overall would be relevant to the interactions specified is not possible without a more detailed understanding of particular interactions' (Goldsmith Report, Para 14). In addition, as I noted above in Para 6, the identification of 'relevant variables' to explain racial profiling as a direct and incontrovertible 'cause' will always be open to the criticism that certain variables were ignored in the analysis. Even if all potential variables were agreed upon, there is the added methodological difficulty of controlling for all these variables.
25. I also note that Professor Goldsmith prefers to use the term 'racial bias' rather than 'racial profiling' (Goldsmith Report, Para 12 and associated footnote). I think this adds an unnecessary confusion to the discussion because these are not synonymous terms and cannot be used interchangeably. As I noted in my First Report, I regard 'racial bias' as a broader term than racial profiling. As such, racial bias may or may not include racial profiling. For example an officer might be racially biased without engaging in a practice of racial profiling. As a concept, 'racial bias' also tends to direct attention to a psychological assessment of individual bias, rather than an assessment that might consider institutional policies and practices or police cultures which can underpin racial profiling (for example, policies and practices related to stop and searches or the use of move-on powers).<sup>2</sup>
26. Question 2 requires Professor Goldsmith to assess whether my expert report considers all the 'relevant variables' in answering the question whether the statistical findings of Professor Gordon are consistent with the indicia of racial profiling. I note here my response above in Paras 6 & 11 to Dr Henstridge. I was requested to identify the indicia of racial profiling and to consider whether the statistical findings of Professor Gordon were *consistent* with the indicia.
27. Professor Goldsmith disagrees with my opinion that the statistical evidence on over-representation is 'relatively inconclusive' (Goldsmith Report, Para 18). I have responded to this criticism above in Para 17. I also note that Professor Goldsmith finds that the evidence of over-representation 'is consistent with the *possibility* that racial profiling has taken place' (Goldsmith Report, Para 20).
28. The data analysed by Professor Gordon showed that African/ Middle Eastern males had on average fewer offences than males from 'other' ethnic backgrounds. Professor Gordon

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<sup>2</sup> Hollinsworth notes that racism is often confused with bias or prejudice (which are explained in terms of individual pathology). However, 'racism is not primarily a psychological or person attribute but is much more a relationship of domination and subordination, of inclusion and exclusion. We can identify different forms of racism including interpersonal, institutional, ideological and systemic.' Hollinsworth, D. (1992) 'Cultural Awareness Training, Racism Awareness Training or Anti-racism?: Strategies for Combating Institutional Racism', *Journal of Intercultural Studies*, vol 13, no 2, p.40.

finds the difference to be statistically significant. Dr Henstridge applies a different statistical test and finds the difference to be 'suggestive of a statistical difference' (Henstridge Report, Para 27). In my First Report I concluded from Professor Gordon's analysis that 'it would not appear to be the case that African/ Middle Eastern (LEAP) males are coming into police contact for person checks because they are *as individuals* more prolific offenders than males from other ethnic backgrounds' (Para 65, First Report). I draw this conclusion on the basis of the data showing that African/ Middle Eastern males have fewer offences recorded against them than the other group and the difference is statistically significant. In my opinion this a reasonable inference to make on the basis of the data. Professor Goldsmith (Goldsmith Report, Para 23) prefers to speculate that police may be biased in their recording on the LEAP system of offending behaviours by members of both groups. That is, police are either (or both) less likely to record offending behaviour by African/ Middle Eastern males or more likely to record offending behaviour by the other group. Police recording practices will never be a simple reflection of 'reality'. However, there is no specific evidence for Professor Goldsmith's assumption of bias in relation to the available data. Indeed, if we were to engage in speculation of police bias in relation to recording offending behaviour we could equally speculate bias in the other direction: that police are *more* likely to record offending behaviour against African/ Middle Eastern males than others.

29. Professor Goldsmith offers three reasons to account for why African/Middle Eastern offenders were more likely to have field contacts in general and 'person check' field contacts in particular than non-African Middle Eastern offenders: citizen reports to police; policing operations; and, police unfamiliarity with members of one group (Goldsmith Report, Paras 25-32). I note that these are largely speculative with little evidence presented as to why they are specifically relevant to the matter. I also note that citizen reports to police, policing operations, and police unfamiliarity with members of one group are not in themselves inconsistent with the racial profiling. I discuss this inter-relationship further below.
30. In relation to citizen reports to police, Professor Goldsmith notes that he 'perused' the contents of File 4 'Remarks' and 'there are frequent entries suggesting police have responded in particular cases on the basis of information provided by members of the public' (Goldsmith Report, para 29). The contents of File 4 were not available to me so I cannot assess the strength of this conclusion. However, it is clear that an in-depth, systematic analysis was not undertaken.
31. It is worth noting that public reporting of offences is not independent of race/ethnicity. US research has indicated that offences committed by African Americans are more likely to be reported to police (referred to as victim selection bias) and/or are more likely to lead to arrest once reported (referred to as criminal justice system selection bias).<sup>3</sup> Hindelang's research also finds that there is differential reporting. When rape and robbery are committed by African Americans, victims are more likely to report than when the offences are committed by whites.<sup>4</sup> The important point is that citizen reports need to be considered as influenced by race. Police as professionals need to assess reports,

<sup>3</sup> Walker, Samuel, Spohn, Cassie and Miriam DeLone (1996) *The Color of Justice. Race, Ethnicity and Crime in America*, Wadsworth Publishing, Belmont, pp.44-45.

<sup>4</sup> Hindelang, Michael, (1978) 'Race and Involvement in Common Law Personal Crimes', *American Sociological Review*, 43: 93-109



particularly if those reports relate to more minor public order offences or behaviour that falls below the threshold of criminal offending (eg young people congregating in public places). The ability to independently assess citizen reports free from racial stereotypes of certain groups is an important part of police professional training and should be seen in the context of training about the problems of racial profiling (see discussion below in training).

32. The second point of Professor Goldsmith relates to particular targeted policing operations as a possible explanation for the over-representation of African/Middle Eastern males in the data (Goldsmith Report, Para 30). He refers to certain police operations ('Molto, Holland and others'). I have not been provided with any information relating to these operations. However, I note there are at least two ways in which specific police operations can reflect racial profiling. Firstly, targeted police operations may be based directly on certain racial assumptions. An example of this was the 1990 Redfern Raid (Operation Sue) which targeted the Aboriginal community in Redfern and was justified on the basis of race. The process of targeting, searching and stopping Aboriginal people was neither random nor incidentally connected to their place of residence. The finding of the Federal Race Discrimination Commissioner in this instance was that 'the so-called Redfern raid... constituted a significant act of racist violence against the Aboriginal community'.<sup>5</sup>

33. The second way in which specific police operations can reflect racial profiling is through institutional racism. In his inquiry into the London Metropolitan Police's response to the death of Stephen Lawrence, Sir William Macpherson described institutional racism as:

The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.<sup>6</sup>

34. Institutional racism draws attention to the way the organization operates to produce differential treatment based on race. It is the broader policy, practices and culture of the organization which is the focus rather than simply the individuals who represent it. The targeting of police operations in particular areas and the ways in which they are carried out can lead to the targeting of racial minorities within those areas. As Brunson has noted in relation to the US:

A considerable body of research has examined the social ecology of policing and the disproportionate effects of police practices and misconduct on black citizens. These studies document a wide range of harms to residents of disadvantaged neighbourhoods, including unparalleled experiences of being suspected and stopped, irreverence, arrests, the unjustified use of physical and deadly force, officer misconduct, as well as slower response times and fewer police services. Moreover, it

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<sup>5</sup> Human Rights and Equal Opportunity Commission (1991) *Racist Violence. Report of the National Inquiry into Racist Violence in Australia*, Australian Government Printing Service, Canberra, p.387

<sup>6</sup> Macpherson, W. (1999) *The Stephen Lawrence Inquiry Report*, Home Office, London. Para 6.34.

is specifically young black men who are disproportionately encumbered by these adverse experiences.<sup>7</sup>

35. While the types of misconduct referred to above are carried out by individual police officers, it is the broader institutional framework which allows this type of policing to occur relatively unchecked, and often justified simply on the basis of 'responding to crime'. The problem of racial profiling becomes firmly embedded within the organizational framework, while simultaneously relations between police and the specific community are marked by mutual hostility and suspicion.
36. The third point relates to the degree of police familiarity or unfamiliarity with members of one racial or ethnic group. Professor Goldsmith suggests that it may be the relative unfamiliarity of police with African/Middle Eastern males that leads police to stop and question them more frequently. He refers to the general policing literature on police construction of 'suspicion' or 'suspicious characters'. There is indeed substantial literature on police constructions of 'symbolic assailants' and criminal suspects dating back to the 1960s. The point that has been equally well recognised is that the construction of suspicious characters and the search for 'departures from the normal' are also racially constructed. Police suspicion becomes defined as coextensive with racial or ethnic characteristics independent of any particular individual behaviour beyond, for example, frequenting a public place, or being from a racial minority in a white neighbourhood. Being a member of a racial minority group becomes (under particular circumstances) a cause for suspicion in itself. The 'young black male' in particular has become the archetype of the criminal offender.<sup>8</sup> The construction of suspicion and the search for 'departures from the normal' become part of the process through which racial profiling is operationalized. In summary I disagree with Professor Goldsmith's view that these factors offer an alternative explanation to racial profiling. In my opinion they may be *part of the process of racial profiling*.
37. Professor Goldsmith raises the possibility of demeanor and hostility towards the police as an explanation for certain findings in the data, including the over-representation of African Middle Eastern males in File 3 (Goldsmith Report, para 32) and the more frequent use of the term 'negative attitude' in File 4 in relation to African Middle Eastern males (Goldsmith Report, para 41). He posits these factors as alternative explanation to racial profiling.
38. As noted above, there is considerable research literature spanning at least 50 years which shows that police form stereotypical views about the criminality of particular racial and ethnic groups and use these cues in their routine police work. Piliavin and Briar noted in their landmark study in the 1960s that demeanor towards police is affected by police treatment, particularly of minority groups.<sup>9</sup> Brunson notes that one of the most

<sup>7</sup> Brunson, Rod (2010) 'Beyond Stop Rates. Using Qualitative Methods to Examine Racially Biased Policing', in Stephen Rice and Michael White (eds) *Race, Ethnicity and Policing. New and Essential Readings*, New York: New York University Press, pp222-223

<sup>8</sup> Meaghan Paulhamus, Robert Kane and Alex Piquero (2010) 'State of the Science in Racial Profiling Research' in Stephen Rice and Michael White (eds) *Race, Ethnicity and Policing. New and Essential Readings*, New York: New York University Press, p.240. See also

<sup>9</sup> Piliavin, Irving and Briar, Scott (1964) 'Police Encounters with Juveniles' *American Journal of Sociology*, Vol 70, No 2. Bayley, David and Harold Mendelsohn (1969) *Minorities and the Police*. New York: Free Press.

consistent findings in the US research on attitudes towards police is that citizen distrust and dissatisfaction is more prevalent among African Americans than whites, and that these negative attitudes towards police 'stem from unpleasant (voluntary and involuntary) police encounters'.<sup>10</sup> Importantly, Weitzer and Tuch note that 'race and personal experience with racial profiling are among the strongest and most consistent predictors of attitudes towards the police'.<sup>11</sup> Similarly Paulhamus et al note, 'we know that black and Hispanic interactions with officers and perceptions of being profiled by police lead to a diminished perception of officer legitimacy'.<sup>12</sup> The important point that arises from this literature is that demeanour and potential hostility towards police is not independent of racial profiling. Far from being an alternative explanation to racial profiling, it can be considered *a possible outcome of racial profiling*.

39. I also note the information provided in my First Report concerning the results of a Melbourne survey of young people (First Report, Paras 43-44). In summary the survey found, *inter alia*, that:
- Young men of African descent experienced frequent encounters with the police compared with young males of Australian descent
  - Young men of African descent were slightly more likely than their Australian-born counterparts to experience heavy-handed treatment by the police
  - Young men of African descent were considerably more likely to report a negative impact as a result of the police behaviour they experienced
  - In reference to their most recent encounter with police, almost half of the young men of African descent strongly felt that they were stopped by the police because of their race.
40. In my opinion, the results of the Melbourne survey might explain a particular demeanour towards police which itself arises from the experience of interactions with police. This view is strongly supported by the US literature on racial minority attitudes towards police.
41. Professor Goldsmith discusses the 'Remarks' contained in File 4 and is critical of the analysis I provide in my First Report (Goldsmith Report, Paras 33-42). Professor Gordon had found that the percentage of field contact remarks containing one or more of the five terms in question ('gangs', 'no reason', 'nil reason', 'move on' and 'negative attitude') was greater for field contacts associated with males from African/ Middle Eastern ethnicity than either males from 'other' ethnic backgrounds or in contacts that involved a mixed group of both African/ Middle Eastern (LEAP) and 'other' ethnic background males. The disparity was highly statistically significant (Gordon Report, para 134). Dr Henstridge does not dispute that the disparity is statistically significant but does 'doubt the level of statistical significance claimed by Professor Gordon' (Henstridge Report, Para 31d). Based on the evidence, my conclusion was that, because of the statistical significance of the disparity, 'the remarks were not randomly attributed to African/ Middle Eastern (LEAP) males but represent a distinct *pattern*' (First Report, Para 71).

<sup>10</sup> Brunson, *op cit*, p.222

<sup>11</sup> Weitzer, Ronald and Steven Tuch (1999) 'Race, Class and Perceptions of Discrimination by the Police', *Crime and Delinquency*, 45:494-507.

<sup>12</sup> Paulhamus et al *op. cit* p.245. There is substantial literature that racial profiling can lead to feelings of harassment, alienation and perceptions of police injustice. See also Glover, Karen (2008) *Citizenship, hyper-surveillance, and double-consciousness: Racial profiling as panoptic governance*. In M. Deflem (ed.), *Surveillance and Governance: Crime Control and Beyond*. Bingley, UK: Emerald/ JAI Press.

Professor Goldsmith disagrees with my conclusion that there is a distinct pattern (Goldsmith Report, Para 37-38). I find this perplexing because the meaning of statistical significance is that observations are not distributed randomly or by chance, that is that they reflect a pattern.

42. Both Professor Goldsmith and I do not offer any comment on the use of the term 'gang' given its uncertain meaning. Professor Goldsmith also makes no comment on the use of 'move-on' so it is unclear whether he agrees or not with my conclusion that 'the disparate identification of this [move-on] as a reason for contact involving African/ Middle Eastern (LEAP) males may reflect a racially-based attitude that males from this ethnic group are more "likely to breach the peace" or "endanger the safety of other persons" than other groups' (First Report, Para 70).
43. Professor Goldsmith is critical of my analysis of the terms 'nil reason', 'no reason', and 'negative attitude' in the context of disparate use in relation to African/ Middle Eastern males. I simply make the point here that I have applied what I see as a common sense interpretation to the data: if the police had a reason for the contact they would have entered it into the available field.
44. In relation to the use of the term 'negative attitude', Professor Goldsmith speculates that 'it might indeed be because members of one group react more in a hostile fashion towards police interactions'. We have no evidence to prove or disprove this point. However, as I have noted above in Para 38 such a negative attitude may itself arise from racial profiling and the sense of injustice which arises from frequent use of police stops.
45. In Question 3 Professor Goldsmith was requested to consider whether Census data was a reliable and sufficient benchmark against which to identify the presence of racial profiling. I agree generally with Professor Goldsmith's conclusion on the insufficiency of Census data for benchmarking in relation to racial profiling (Goldsmith Report, Paras 43-45 and my Para 13-14 in this Report). However, I think we both agree that Census data provides evidence in relation to disparity of police contact (Goldsmith Report, Para 47).
46. In the context of the insufficiency of Census data, I note Dr Henstridge's positive comments on my approach to the Census data in my First Report.

'In his paragraph 72 Professor Cunneen considers the evidence contained within the Police LEAPS data, without reference to external data such as the Census.

a. By considering the information entirely within the Police LEAPS data, Professor Cunneen avoids the problem of comparison with an inappropriate base such as the Census. By focusing on, for example, offenders, he also reduces the possible effect of one explanatory factor' (Henstridge Report, Para 59).

47. In Question 4 Professor Goldsmith was asked to comment on what reliable and sufficient benchmarking should be used for racial profiling. He provides a general academic discussion on the problems of benchmarking, noting that 'there is no clear agreement in the scholarly literature on what a reliable and sufficient benchmark for racial profiling in policing might look like' (Goldsmith Report, Paras 46 and footnote 20). While I agree there is no clear agreement on benchmarking, the US courts in a number of racial

profiling cases have accepted the available benchmarks or relied on corroborating evidence beyond the statistics.<sup>13</sup>

48. Professor Goldsmith suggests the use of multiple data sources and multiple analytical techniques and a triangulation of research findings (Goldsmith Report, Para 50). If we were engaged in establishing a research program for analysis of racial profiling this would be the useful, although still unlikely to satisfy a scientific model of causation.
49. In Question 5 Professor Goldsmith was asked, 'Do you agree with Professor Cunneen's conclusion, expressed in paragraph 71 on page 17 of his report, that "race is the primary determinant underlying the remarks recorded by police for an intervention"?' I note that this question significantly misquotes my report in respect to the reference to 'the primary determinant'. What actually appears in my First Report is that 'race is a primary determinant'. I have responded to the meaning of this point further in Para 12 of this Report.
50. I also note that Professor Goldsmith, while he disagrees with my conclusion, acknowledges that 'I [Professor Goldsmith] accept that it is *possible* that race is a significant factor or the primary determinant in explaining some or all of the disparities being considered. However there are a range of other possible explanations for those disparities that cannot be discounted' (Goldsmith Report, Para 51). I take this to mean that he finds the evidence presented in Professor Gordon's and my Reports as being consistent with (and certainly not inconsistent with) racial profiling.
51. I have no comments to make on Professor Goldsmith's responses to either Question 6 or 7.

#### **OPINION ON MATTERS RAISED IN DR HENSTRIDGE'S AND PROFESSOR GOLDSMITH'S SECOND EXPERT OPINIONS**

52. Dr Henstridge's second expert opinion provides analysis of further data provided to him from the LEAP database relating to the formal processing of individuals for offence categories of robbery, armed robbery and assault in the Flemington or North Melbourne area between 1 January 2005 and 31 December 2008. This data is analysed in relation to African/ Middle Eastern males and males of 'other' backgrounds. The data is compared to 'File 3 Field Contact Reports' in Professor Gordon's First Report.
53. In my opinion the central problem with Dr Henstridge's analysis is the issue he acknowledges in Paragraph 13 of his Second Report which is the problematic comparison between File 3 data analysed by Professor Gordon and the new LEAP data (CD1-6). In respect of File 3 and CD1-6, Dr Henstridge states that 'it is highly likely that some of the individuals are in common. This means that the assumption of statistical independence is no longer appropriate' (Henstridge Second Report, Paras 13a & b). We have no information as to whether 'some individuals' refers to a few or the majority. We simply do not know what the relationship is between the individuals in File 3 and the LEAP data

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<sup>13</sup> Withrow, B. and Dailey, J. (2012) 'Racial Profiling Litigation: Current Status and Emerging Controversies' 28 *Journal of Contemporary Criminal Justice* 137-138

(CD1-6). Dr Henstridge acknowledges that 'with the information available it is not possible to conduct a test that it strictly correct' (Henstridge Second Report, Para 13d). However he proceeds as if the 'independence' assumption is satisfied, that is that there are no common individuals in the two data sets.

54. Professor Goldsmith uses the data presented in the Henstridge Second Report to draw a number of conclusions. In my opinion there a number of problems with his conclusions.
55. First, Professor Goldsmith distinguishes the formal processing of arrest, summons, caution, penalty notice, official warning and warrants in the new LEAP data CD1-6 from File 3 Field Contact Reports. He argues that File 3 is typically related to intelligence gathering and 'often unrelated to particular instances of formal processing of individuals' (Goldsmith Second Report, Para 7). He cites the outline of evidence of Darragh, para 10 to support this contention. However there is nothing in the Darragh outline of evidence which supports the view that the two data sets are unrelated. In my view Person Checks and other reasons given for Field Contact Reports might also give rise to formal processing (for example, official warnings or penalty notices).
56. A second problem arises from the data sets CD1-6 upon which Dr Henstridge's and Professor Goldsmith's analysis is based. Data is provided on all forms of formal processing (arrest, summons, caution, penalty notice, official warning and warrants), on individual's charged, and with a proven offence before the court. The analysis shows that African/Middle Eastern males are over-represented in each group. However, what is significant is the absence of information on the relative use of these different forms of processing for each racial/ethnic group. It may be the case that African/Middle Eastern males are more likely to be proceeded against by way of arrest and charge, than summons, and are less likely to be cautioned or receive an official warning than other groups for the particular offences in question. As I noted in my First Report (Paras 10, 27-32), adverse use of police discretion in decisions about the type of formal processing can have significant consequences in terms of court outcomes and acquiring a criminal record.<sup>14</sup> The impact of adverse police decisions in formal processing has been well documented in relation to Aboriginal young people and adults (Cunneen First Report Paras 10, 18-32). As I noted in my First Report (Para 48), adverse use of police discretion on the basis of race or ethnicity is an indicia of racial profiling.
57. A third problem arises in Professor Goldsmith's conclusion that 'relative offending levels is likely to be a significant variable in explaining the disparities recorded' (Goldsmith Second Report, Para 15). This conclusion is based on the analysis of the data in files CD1-6, despite the problems of comparing that data with File3. What we do know from the analysis of Professor Gordon and myself in our First Reports is that African Middle

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<sup>14</sup> Fagan et al (1994) indicate that, 'even small racial effects at the earliest decision points are amplified to larger and significant differences at later stages, where the consequences are more serious and potentially harsher. Farrell and Swigert (1978) and McCarthy and Smith (1986) examine the cumulative effects of individuals' prior offense histories. The earliest, most trivial biases... can begin the process of building a prior record. The accumulation of arrests then results in a greater probability of referral to court, and in turn influences later decisions, especially dispositions. If the prior offense history itself is the product of differential decision-making, then minor or non-significant racial differences are masked in their contributions to later decisions'. Fagan, J., Slaughter, E. and Harstone, E. (1994) 'Blind Justice? The Impact of Race on the Juvenile Justice Process' in Baker, D. (ed) *Reading Racism and the Criminal Justice System*, Canadian Scholars Press, Toronto, p. 104.

Eastern offenders are more likely to be stopped for person checks than offenders from other ethnic backgrounds, although they have fewer offences than other male offenders. We also know from the analysis of File 5 that the percentage of police 'Involvements' with African Middle Eastern males who were classified as offenders was lower than for the 'other' group (Gordon Second Report, Para 18).

58. The final point I make in relation to Professor Goldsmith's Second Report is that, even if we accept the analysis of the data in CD1-6, it is not inconsistent with the occurrence of racial profiling. The data in CD1-6 is related to individuals who were formally processed by police for a small number of offences. The substance of racial profiling complaints both in Australia and internationally has been the use of police stop and search powers against minority groups. As I noted in my First Report (para 10), the research literature shows that typically the 'hit rate' (that is the rate at which a stop and search leads to arrest) is lower for racial minorities who are the subject of racial profiling than for the general population. In other words, if majority populations were stopped and searched with the same frequency as the minority group, police would have greater success with more arrests.<sup>15</sup> It may well be the case that African/Middle Eastern males are over-represented in the data presented in CD1-6 precisely because of racial profiling. The limitations of the data provided in CD1-6 do not allow us to draw conclusions either way.

#### **OPINION ON MATTERS RAISED IN THE TRAINING PACKAGE TITLED 'AFRICAN/SUDANESE COMMUNITY CROSS CULTURAL ADVICE'**

59. I was provided with a power point presentation understood to have formed part of a training package titled 'African/Sudanese Community Cross Cultural Advice' and delivered to about 1,000 Victoria Police members over five years.
60. Preliminary to a discussion on the training package I note the following.
61. Research has suggested that racial profiling can be partly understood within the context of police subcultures, where police come to regard profiling as part of their work.<sup>16</sup> As noted previously, police form stereotypical views about the criminality of particular racial and ethnic groups and use these cues in their routine police work.<sup>17</sup> Satzewich and Shaffir (2009) in their more recent study of Canadian police found that officers saw racial

<sup>15</sup>There is widespread agreement in the literature that racial profiling does not 'work' in terms of police effectiveness. 'As a practice, racial profiling and the academic tests of its robustness have produced little evidence as to its effectiveness as a policing tool' (Paulhamus et al, p.245).

Harcourt (2010: 508) argues that racial profiling is likely to be counterproductive to the law enforcement objective of reducing crime and 'may actually increase the overall societal rate of offending'. He argues for randomization in police responses. Harcourt, Bernard (2010) 'Moving Beyond Profiling. The Virtues of Randomization' in Stephen Rice and Michael White (eds) *Race, Ethnicity and Policing. New and Essential Readings*, New York: New York University Press.

<sup>16</sup> Chan, Janet. (2011) 'Racial Profiling and Police Subculture' 53 *Canadian Journal of Criminology & Criminal Justice* 75. Alpert, Geoffrey P., Roger G. Dunham, and Michael R. Smith (2007) Investigating racial profiling by the Miami-Dade Police Department: A multimethod approach. *Criminology and Public Policy* 6: 25-55.

<sup>17</sup> For example, Piliavin and Briar, op.cit. Bayley, David and Harold Mendelsohn (1969) *Minorities and the Police*. New York: Free Press.

profiling as part of their work, and that racial appearance was a factor taken into account when deciding to intervene.<sup>18</sup>

62. A leading international experts on police culture, Professor Janet Chan (2011) in summarising the literature has noted that studies of racial profiling recommend initiatives such as having an explicit policy of not permitting racial profiling, training and educating officers on the impact of racial profiling, and initiating disciplinary action where racial harassment and discrimination occur.<sup>19</sup> White (2010) in his discussion on preventing racial profiling includes the importance of police supervision, administrative policies and early warning systems to prevent racial profiling.<sup>20</sup> In short these changes require an integrated organisational response to the problem.
63. The 'African/Sudanese Community Cross Cultural Advice' training package I was provided with contains 21 slides. For ease of reference I have numbered these slides consecutively.
64. There are several preliminary socio-demographic slides on Africa and the Horn of Africa including geography and population.
65. The majority of the training package slides present largely negative characterisations and stereotypes of African/Sudanese young men.
66. Slide 11 titled 'Working with African/Sudanese Community' presents uniformly negative interactions (including the following list: 'anti-social behaviour', 'armed robberies', 'alcohol/drugs', 'domestic violence' and 'sexual assaults'). The slide suggests there is no positive interaction between the African/Sudanese community and the police.
67. Slide 12 titled 'Working with African/Sudanese Young Men' presents six dot points, only one of which might be seen as positive ('very passionate about sport'). Negative stereotypes include: 'develop a strong warrior ethic', 'will openly challenge anyone who threatens them regardless of potential consequences', 'struggling to find identity', 'following American Rap/ Black American Gang culture [including] the belief that police are their enemy', and 'no longer following cultural traditions of "respecting their elders"'. The image presented in the dot points reflects a racial stereotype of deculturated, violent, anti-authority young males.
68. Slide 13 titled 'Working with African/Sudanese People', subtitled 'The basic interaction (Non Offence)', begins by stating 'Consider that this individual may (sic) you are dealing with may have suffered at the hands of authority. So they may already have a preconceived, strong dislike of YOU!'. A similar point is made in Slide 19 under the title 'Final Words of Advice' where it states 'That despite not knowing you, they may hate you'. In my opinion, the presentation of this stereotypical view of African/Sudanese

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<sup>18</sup> Satzewich, Vic and William Shaffir (2009) Racism versus Professionalism: Claims and Counter-claims about Racial Profiling. *Canadian Journal of Criminology and Criminal Justice* 51: 199–226. <sup>18</sup> Chan, op cit.

<sup>19</sup> Chan, op cit, p77.

<sup>20</sup> White, Michael (2010) 'Preventing Racially Biased Policing through Internal and External Controls', in Stephen Rice and Michael White (eds) *Race, Ethnicity and Policing. New and Essential Readings*, New York: New York University Press.



people, formalised in a training package, could negatively prejudice police officers against members of the group in their day-to-day contact.

69. Slide 14 titled 'Working with African/Sudanese People', subtitled 'Street interaction (Possible Offence)', begins by stating 'Always treat any individual of any cultural background with caution and exercise your operational safety principles'. The slide states subsequently 'With cultural issues taken into consideration, treat the individual as you would anyone else (Respect/Tolerance)'. In my opinion the problem is that no positive cultural characterisations of African/Sudanese males are presented in the training package. The overwhelming weight of the cultural stereotypes presented are negative. The information provided depicts a male dominated culture which dislikes/hates authority, is uncooperative and will resort to violence. In this situation taking cultural issues or background 'into consideration' could justify racial profiling on the basis that cultural characteristics are seen as criminogenic.
70. Slide 18 titled 'Current Issues Facing GD Members' has five dot points which again reinforce stereotypes of violence and dishonesty, and also include a view that African Sudanese males use race and ethnicity to their own advantage. These points include:
- Evidence that female [police] members, and non-physically-intimidating members may be challenged eg physically, stand over, etc
  - Evidence that individuals will become aggressive to be (sic) avoid supplying information or apprehension
  - Evidence that race or skin colour is highlighted as reason for police interaction
  - Evidence that formal complaints have been forwarded to OPI's office and Human Rights and Equal Opportunity Commission
  - Evidence that individuals claim not to be carrying id and supply false id.
71. In my opinion the training package is unlikely to counteract problems associated with racial profiling. Indeed the nature of the stereotypes presented could well have the opposite effect of justifying racial profiling given the overwhelmingly negative image of African/Sudanese young men which is presented.
72. I have no knowledge of any training for Victorian Police, either at the police academy, through field training or through in-service training that specifically deals with racial profiling.
73. I have made all the inquiries that I believe are desirable and appropriate and no matters of significance that I regard as relevant have, to my knowledge, been withheld from the Court.



Professor Chris Cunneen  
31 January 2013