

**IN THE FEDERAL COURT OF AUSTRALIA (FCA)  
VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA  
GENERAL DIVISION**

**No: VID969/2010**

**NOTICE OF FILING**

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**DETAILS OF FILING**

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**File Number:** VID969/2010  
**File Title:** DANIEL HAILE-MICHAEL & ORS v NICK KONSTANTINIDIS & ORS  
**District Registry:** VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



★ **Date:** 15/10/2012

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*Warwick Soden*

**Note**

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## Opinion on Racial Profiling on Federal Court of Australia Proceeding No VID 969 of 2010

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

*Conjoint Professor, Law Faculty, UNSW. Adjunct Professor, Sydney Law School, University of Sydney. Adjunct Professor, Institute of Criminology, University of Victoria, Wellington, NZ.*

11 October 2012

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### BACKGROUND

1. The following report addresses the questions provided to me by Mr Peter Seidel of Arnold Bloch Leibler, Lawyers and Advisors in an email dated 13 September 2012. The questions relate to racial profiling and the 'Statistical Commentary on Federal Court of Australia Proceeding No. VID 969 of 2010' prepared by Professor Ian Gordon.
2. I have been asked to address the following questions.
  1. What is racial profiling? Please provide the basis of your opinion.
    - 1.1 What, if anything, is the difference between racial profiling and criminal profiling?
    - 2 Does racial profiling arise in policing in Australia? Please provide the basis for your opinion?  
If yes:
      - 2.1 How does racial profiling arise in policing?
      - 2.2 What are the indicia of racial profiling in policing?
      - 2.3 Does racial profiling affect individual police officers in determining how to carry out their policing functions (for example, forming a reasonable suspicion that a crime has been committed)? If so, how?
    - 3 Are the statistical findings of Professor Gordon consistent with the indicia of racial profiling in policing? Please provide the basis of your opinion. To the extent that this goes beyond your answers to the previous questions and the report of Professor Gordon, please explain why and how those other matters form the basis of your opinion.
3. I have been provided with the following documents.
  - Letter by email 13 September 2012 from Mr Peter Seidel titled 'Instructions.pdf'.
  - Letter by email 13 September 2012 from Mr Peter Seidel titled 'Retainer.pdf'
  - Report of Professor Ian Gordon titled 'Statistical Commentary on Federal Court of Australia Proceeding No. VID 969 of 2010' as a document titled 'Report of Professor Ian Gordon – redacted version.pdf'.
  - A document titled 'Professor Gordon's Instructions.pdf'.

- A document titled ‘Third Further Amended Statement of Claim – Clean Version[1].pdf’.
  - A document titled ‘Fifth to Seventh Respondents Second Further Amended Defence – Clean – Sealed Copy.pdf’.
  - A document titled ‘Defence of Eight and Ninth Respondents to the Third Further Amended Statement of Claim.pdf’.
  - A document titled ‘Orders 1 March 2012’.
  - A document titled ‘Federal Court Rules 2011, Part 23.pth any pdf’.
  - A document titled ‘Federal Court Practice Note CM 7 Expert Witness.rtf’.
  - An email from Ms Elyse Hitlon, Arnold Bloch Leibler with clarification of further details requested from Professor Gordon, dated 9 October 2012
4. I have no pre-existing relationship to the parties of the proceedings.
  5. 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.
  6. I am Professor of Justice and Social Inclusion at the Cairns Institute, James Cook University. I hold a conjoint appointment as Professor at the University of New South Wales Law Faculty, and adjunct Professorial positions at University of Sydney Law School and Institute of Criminology, University of Victoria, Wellington, NZ. My qualifications are BA, University of New South Wales 1976; Dip Ed, University of New South Wales 1977; MA, University of Sydney 1982; PhD, University of Sydney 2000. I am a member of the Australian and New Zealand Society of Criminology and the American Society of Criminology. I have worked as a research consultant with a number of Australian Royal Commissions and Federal Inquiries and with federal, state and local government agencies, including departments of communities, human services, attorneys-general, police and corrections. These are detailed further in the attached CV. I was Chairperson of the NSW Government’s Juvenile Justice Advisory Council 2001-2007, and a member of the New South Wales Taskforce on Child Sexual Assault in Aboriginal Communities 2003-2006. I am a member of the editorial boards of the following journals: *Australian Indigenous Law Reporter*, *Current Issues in Criminal Justice* and the *Australian and New Zealand Journal of Criminology*. I am a member of the international editorial boards of *Youth Justice*, *Crime Media Culture* and *Restorative Justice: an International Journal*. I have been the Chief Investigator on Australian Research Council Discovery and Linkage projects. I have authored or co-authored 14 books, 41 commissioned reports, 42 book chapters, 61 refereed journal articles and 14 non-refereed journal articles. Publications are detailed further in the attached CV. I have been regularly required to provide expert commentary to Australian and international media on criminal justice issues (I contributed to 44 news and current affairs media reports in 2011).

**QUESTION 1. WHAT IS RACIAL PROFILING? PLEASE PROVIDE THE BASIS OF YOUR OPINION.**

7. Racial profiling is a concept applied to police behaviour in their interactions with racial and ethnic groups. The concept originated in the USA and dates back approximately two decades. It began in the context of traffic stops by police, and gained prominence when a New Jersey judge commissioned a study to determine whether state troopers working on the New Jersey turnpike were guilty of racial profiling (*State of New Jersey v. Pedro*

*Soto*, 1996)<sup>1</sup>. In the *Soto* case the defendants alleged that the motivation for the traffic stop was racial profiling. The central legal question in most of the subsequent US cases has been whether the police have enforced the law to the benefit of all members of society or placed racial minorities at a special disadvantage.<sup>2</sup>

8. Racial profiling is the adverse use of police discretionary decision-making based on assumptions concerning the racial characteristics of individuals. It involves police making decisions to initiate contact with individuals on the basis of their race or ethnicity. These decisions typically involve police stopping, searching, questioning or requiring individuals to 'move-on' on the basis of their race rather than decisions based on reasonable suspicion. Racial profiling may be underpinned by perceptions that particular racial and ethnic minorities are members of (criminal) gangs. It may also involve harassment and the use of excessive force against individuals of particular racial or ethnic backgrounds. These discretionary decisions lack legal justification. Adverse use of police discretion on the basis of race can involve decisions after police intervention including the use of arrest and charge rather than process by summons<sup>3</sup>, or, in the case of juveniles, the failure to use diversionary options such as warnings, cautions or youth justice conferences.<sup>4</sup>
9. The US courts have generally ruled that the police may not stop individuals on the basis of race and ethnicity alone. The courts generally allow officers to consider race if used in combination with other factors to establish probable cause for a stop. Race can be considered if other factors can be articulated to establish reasonable suspicion.<sup>5</sup>
10. The international and domestic 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 the US the evidence indicates that Blacks and Latinos are more likely to be stopped than Whites even in areas where there are low crime rates and heterogeneous populations.<sup>6</sup> A leading US researcher in the area of racial profiling cites various studies which demonstrate that the 'hit rates' in random checkpoint searches for drugs and firearms are often more successful than the stop and searches of racial minorities.<sup>7</sup> The Australian literature demonstrates that police decisions for juveniles on the use of diversionary options may be determined by the race of the offender and not by accepted factors such as prior offending record, or the nature of the offence.<sup>8</sup> The higher courts have accepted that adverse police decision-making in relation to the use of diversionary options for Aboriginal juveniles can result in offenders

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<sup>1</sup> Withrow, B. and Dailey, J. (2012) 'Racial Profiling Litigation: Current Status and Emerging Controversies' 28 *Journal of Contemporary Criminal Justice* 122.

<sup>2</sup> Ibid.

<sup>3</sup> Behrendt, L., Cunneen, C. and Libesman, T. (2009) *Indigenous Legal Relations in Australia*, Oxford University Press, Melbourne. Fagan, J. (2010) Report of Jeffrey Fagan in the Matter of *David Floyd et al v. City of New York et al*, United States District Court, 08 Civ. 01034 (SAS).

<sup>4</sup> Cunneen, C. and White, R. (2011) *Juvenile Justice: Youth and Crime In Australia*, Fourth Edition, Oxford University Press, Melbourne.

<sup>5</sup> Withrow and Daily, op cit.

<sup>6</sup> Fagan op.cit.

<sup>7</sup> Fagan op.cit.

<sup>8</sup> Luke, G. and Cunneen, C. (1995) *Aboriginal Over-Representation and Discretionary Decisions in the NSW Juvenile Justice System*, Report to the Criminology Research Council, Canberra. Published by the Juvenile Justice Advisory Council, Sydney, January 1995.

having longer criminal histories than would be the case for non-Indigenous young offenders.<sup>9</sup>

### **What, if anything, is the difference between racial profiling and criminal profiling?**

11. Racial profiling and criminal profiling are fundamentally different concepts with different applications. Criminal profiling (or offender profiling) is an investigative tool to provide police with a psychological and social 'profile' or assessment of the offender. Criminal profiling involves inferring the likely characteristics of an offender from analysis of criminal behaviour and other factors associated with a crime or series of crimes. It can be used in the search for an alleged offender or offer advice in the interviewing of a suspect. Offender profiling is just one of a range of behavioural investigative techniques. The Australian Psychological Association notes that criminal profiling is one of a number of tools known collectively as 'criminal investigative analysis' (CIA).<sup>10</sup> Forensic psychologists may be involved in undertaking criminal profiling. More generally CIA involves using the knowledge base provided by the behavioural sciences. For example, the Victorian Police Behavioural Analysis Unit utilises an Australian Forensics Reference Group which has interdisciplinary membership drawn from the behavioural sciences. The group is involved in solving serious serial crime, particularly sexual/violent crime.
12. Criminal profiling can be contrasted with racial profiling by a range of factors.
  - Criminal profiling is based in the behavioural sciences. Racial profiling is based on the perceptions by police officers of offenders based on their racial appearance.
  - Criminal profiling involves the use of specialist police with training in the relevant area and behavioural science specialists. Racial profiling generally occurs among street-level general duties police.
  - Criminal profiling involves investigation of serious serial crime. Racial profiling tends to involve relatively more minor street offences.
  - Criminal profiling involves the consideration of a wide range of factors relating to particular crimes and potential offenders (in which race may or may not be a consideration). Racial profiling is based primarily on assumptions about race and crime.

### **QUESTION 2. DOES RACIAL PROFILING ARISE IN POLICING IN AUSTRALIA? PLEASE PROVIDE THE BASIS OF YOUR OPINION.**

13. At the outset I re-emphasise that the *concept* of racial profiling derives from the USA. In Australia the research literature on policing and race or ethnicity has tended to use concepts such as institutional racism, over-policing, racial bias, racist violence or racial discrimination.<sup>11</sup>

<sup>9</sup> *WO (a child) v The State of Western Australia*, Western Australian Court of Criminal Appeal, 2005.

<sup>10</sup> Australian Psychological Association, *Criminal Investigative Analysis in the Australian Context*, <http://www.psychology.org.au/publications/inpsych/context/>

<sup>11</sup> Cunneen, C. (2006) 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' *Current Issues in Criminal Justice*, vol 17, no 3, pp 329-346. There has been debate over whether the over-representation of Indigenous people in prison is caused by racial bias or higher levels of offending (Ibid.).

14. I note two further points in this context. Firstly, the definition of racial profiling as noted in Paragraph 8 can be understood as a subset of the broader concepts of institutional racism, over-policing, racial bias, racist violence or racial discrimination. Second, although the concept of racial profiling has been infrequently used in Australian research literature, there has been a very significant body of both academic literature and the findings from various commissions of inquiry, royal commissions and parliamentary inquiries which have identified the adverse use of police discretion on the basis of the perceived race of an individual. In other words, police actions which fall within the definition of racial profiling have been the subject of considerable documentation and findings within Australia.<sup>12</sup>
15. Based on the reasoning presented immediately above, in my opinion racial profiling does arise in policing in Australia. I present further evidence to support this proposition below.

**How does racial profiling arise in policing? Does racial profiling affect individual police officers in determining how to carry out their policing functions (for example, forming a reasonable suspicion that a crime has been committed)? If so, how?**

16. As questions 2.1 and 2.3 are related I have dealt with them jointly.
17. My area of research expertise has been primarily concerned with Aboriginal people and policing. The following discussion and examples I draw on in relation to racial profiling in Australia is drawn primarily from this expertise in Aboriginal / police relations. In my opinion the principles, the examples and the specific problems which arise in relation to racial profiling are applicable to other racial minorities where the facts of the case are similar. The extant literature on policing racial or ethnic minorities in Australia (other than Indigenous people) tends to be survey-based and relies less on analysis of statistical data of police decision-making. I also make reference to the findings of this literature.

*Racial Profiling and Police Decisions to Stop and Search*

18. There is evidence to show that racial profiling occurs in police decisions to stop and search individuals. By this I mean that police use race or ethnicity as a reason for selecting particular individuals to be subject to stop and search powers.
19. A well-researched example of racial profiling and the use of stop and search powers arises in relation to the *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (NSW). The legislation provides police with the power, inter alia, to search for prohibited implements (knives, scissors, and so on). A review of the legislation by the NSW Ombudsman showed that in the police use of the stop and search powers some 42% of searches were of individuals aged 17 years and younger, and the majority of all searches were for individuals aged 19 years or younger. The peak age group for police searches involved 15 to 19 year olds.<sup>13</sup> Searches of young people were also more likely to be ‘unproductive’ or unsuccessful than searches involving older individuals.<sup>14</sup>

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<sup>12</sup> Cunneen (2006) op.cit.

<sup>13</sup> New South Wales Office of the Ombudsman, (1999) *Policing Public Safety*, Office of the Ombudsman, Sydney, p.128

<sup>14</sup> Ibid.

20. A further evaluation of the use of the stop and search powers in the *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (NSW) in areas with large Indigenous populations showed wide disparity in its application. Search powers were used far more frequently in Aboriginal areas of the State. In towns with large Indigenous populations many of the searches are recorded as being ‘unsuccessful’ in failing to locate any prohibited implements. In Bourke and Brewarrina nearly 90%, and in Moree 95%, of searches were ‘unsuccessful’, in the sense that the person was not carrying a prohibited implement at the time.<sup>15</sup> In my opinion the fact that 9 out of 10 searches were ‘unsuccessful’ shows that police were not forming a reasonable suspicion that the individual was carrying a prohibited implement. Given that the highest rates of unsuccessful searches were in locations with large Indigenous populations, it is reasonable to conclude that ‘race’ was a primary consideration in the police decision to stop and search. Based on this reasoning I consider the use of the stop and search powers in relation to Indigenous people an example of racial profiling.

#### *Racial Profiling and Police Use of Move-On Powers*

21. An area of particular concern in relation to racial profiling has been the use of move-on powers by police which are targeted against racial or ethnic groups. I provide two examples: one from Western Australia, the other from New South Wales.

22. The Law Reform Commission of Western Australia found the following in relation to police use of move-on powers in Perth.

There are numerous accounts to suggest that move-on notices are being issued to Aboriginal people in inappropriate circumstances and that Aboriginal people are being disproportionately affected by this law. It appears that in some cases Aboriginal people are being targeted by the police for congregating in large groups in public areas even though no one is doing anything wrong ... The Commission is very concerned about the apparent discriminatory treatment of Aboriginal people with respect to move-on notices ... [B]ecause a move-on notice can be issued when a police officer reasonably suspects that the person is likely to commit an offence there is a large scope for misuse of police discretion.<sup>16</sup>

23. The concerns expressed by the Law Reform Commission of Western Australia clearly fit within a definition of racial profiling: race is being used by police to engage in discriminatory and adverse interventions and decisions.

24. In New South Wales the Ombudsman’s review of move-on powers in that State found that 22% of people given move-on directions were Indigenous people (who comprise approximately 2.2% of the State’s total population), and just over half of those were aged 17 years or younger.<sup>17</sup> The Ombudsman noted the following:

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<sup>15</sup> Chan, C. and Cunneen, C. (2000) *Evaluation of the New South Wales Police Service Aboriginal Strategic Plan*, Report Commissioned by the New South Wales Police and the New South Wales Office of the Ombudsman, Sydney, p.39.

<sup>16</sup> Law Reform Commission of Western Australia, (2006) *Aboriginal Customary Laws, Final Report*, Law Reform Commission of Western Australia, Perth, p.206

<sup>17</sup> New South Wales Office of the Ombudsman, (1999) op. cit., p.230.

It is not clear why such high numbers of Aboriginal and Torres Strait Islander people are subject to s 28F directions. The impact of the 'move on' power was of particular concern to the Western Aboriginal Legal Service, which argued that the power ...brings an otherwise law abiding person into contact with the police and criminal justice system. The evil of this increased contact is highlighted in townships of high Aboriginal populations where relations between police and community have historically (and justifiably) been very poor. The legal service added that any increased contact may further exacerbate the tensions in police relations with Aboriginal communities.<sup>18</sup>

25. An evaluation of the use of the legislation in areas with large Aboriginal populations showed wide disparity in the use of move-on powers. For example, police use of the move-on powers in Bourke and Brewarrina was at a rate 30 times higher than the State average (492.3 compared to 16.5 per 10,000 of the population).<sup>19</sup>
26. The concerns expressed by the NSW Ombudsman combined with the available evaluation data would indicate that race is being used by police to engage in discriminatory and adverse interventions and decisions. Based on this reasoning, in my opinion it is an example of racial profiling.

#### *Racial Profiling and the Use of Arrest v Summons*

27. Racial profiling can arise in police decisions relating to process by way of arrest and charge rather than proceeding by way of a summons. There is evidence that the race of an alleged offender influences whether arrest or summons will be used by police. The use of a summons is a less punitive way of bringing a person before the courts on a criminal charge than proceeding by way of arrest. Unlike proceeding by way of arrest, a summons does not normally involve being in custody or of having a bail determination.
28. The evidence is particularly strong in relation to race playing a part in how Indigenous people are processed by police. In many states, the evidence shows that Indigenous young people are more likely to be proceeded against by way of arrest and bail, and to be held in police custody, and less likely to be summonsed than non-Indigenous youth.
29. For example in Western Australia, a higher proportion of non-Indigenous youth (36%) were proceeded against by way of summons compared to Indigenous young people (21%). In New South Wales, Indigenous young people were nearly three times more likely to be proceeded against by way of arrest compared to non-Indigenous youth. In Queensland, the majority of Indigenous young people charged with an offence were proceeded against by way of arrest. For non-Indigenous young people the majority were proceeded against by way of a notice to appear in court.<sup>20</sup> Similar evidence in differential treatment is also apparent in relation to Indigenous adults.<sup>21</sup>
30. The problem of differential treatment on the basis of race is exacerbated when process by way of arrest over summons occurs in relation to minor summary offences. Attention was given to this problem in the Royal Commission into Aboriginal Deaths in Custody which

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<sup>18</sup> Ibid., p.232

<sup>19</sup> Behrendt, Cunneen and Libesman, op. cit. p.119

<sup>20</sup> Cunneen and White, op. cit. p. 184

<sup>21</sup> Behrendt, Cunneen and Libesman, op. cit. p.121

recommended that arrest be used as a last resort when deciding to commence criminal proceedings (Recommendation 87). The problem for Indigenous people is that police tend to use arrest for minor offences, and they tend to use it more frequently in their apprehension of Indigenous people than they do with non-Indigenous people.

31. In the matter of *Director of Public Prosecutions v Carr* the NSW Supreme Court found that

[I]t is inappropriate for powers of arrest to be used for minor offences where the defendant's name and address are known, there is no risk of him departing and there is no reason to believe that a summons will not be effective. Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear. The consequences of the employment of the power of arrest unnecessarily and inappropriately and instead of issuing a summons are often anger ... and an escalation of the situation leading to the person resisting arrest and assaulting the police.<sup>22</sup>

32. The police decision to use arrest and charge over summons, particularly for minor offences, on the basis of race is an example of racial profiling. The use of arrest rather than summons is a more punitive form of intervention and arises directly from police decision-making. Where these decisions are primarily made on the basis of the race of an alleged offender rather by way of a legal justification, then the result is adverse discrimination based on race. The concept of racial profiling captures this process of decision-making because the race of the alleged offender is the key criteria motivating police actions.

#### *Police Use of Excessive Force, Racist Violence and Racial Profiling*

33. The use of excessive force where it is based on the perceived racial or ethnic characteristics of an individual can also constitute racial profiling. In Australia the police use of excessive force justified by race has been considered in at least one instance as an act of racist violence.
34. In 1991 the Human Rights and Equal Opportunity Commission (HREOC) released its report of the National Inquiry into Racist Violence. Inter alia, the Inquiry found that racist violence against Aborigines and Torres Strait Islanders was endemic, nation-wide and very severe. The Federal Race Discrimination Commissioner at the time, Ms Irene Moss found that, "Aboriginal-police relations have never been good, but they have now reached a critical point due to widespread police involvement, in acts of racist violence, intimidation and harassment".<sup>23</sup>
35. In particular the Inquiry found that the 'Redfern raid' by police in 1990 constituted a significant act of racist violence against the Aboriginal community.<sup>24</sup> Justification for the raid was based on the perceived racial characteristics of Aboriginal people. NSW Police Commander Peate was reported as referring to the Redfern Aboriginal community as 'one breed' where normal surveillance and policing activities do not operate. Thus, a notion of 'race' was used as a prediction of particular social characteristics. Those social characteristics implied a social abnormality. The community itself was defined in a

<sup>22</sup> *Director of Public Prosecutions v Carr* (2002) 127 A Crim R 151; [2002] NSWSC 194 at 35.

<sup>23</sup> Moss, I. (1991) 'The Report of the National Inquiry into Racist Violence' *Aboriginal Law Bulletin* 1(49) p.5.

<sup>24</sup> *Ibid.*

particular manner rather than alleged criminals within the community. At an operational level, particular policing practices were legitimised on the basis of 'race'. The practices included surveillance, and a large scale policing operation (the Redfern Raid). The simultaneous execution of the search warrants and the number and type of police involved indicated that the policing operation was, from its inception, designed as an operation in relation to a particular community rather than a series of individuals. The use of force in the policing operation involved physical violence (alleged assaults on some individuals), psychological violence (many witnesses stated they were terrified) and violence to property (during forced entry into houses and during the conduct of searches).<sup>25</sup>

36. Police use of excessive force does not always form part of racial profiling. However, in situations where the use of force is coupled with and justified by perceived ideas about the race and/or ethnicity of individuals then it can be considered a part of the dynamics of racial profiling.

### *Racial Profiling and Racial and Ethnic Minority Groups*

37. In Paragraphs 18-36 I have provided my opinion on the major constituent elements of racial profiling in Australia through a consideration of the evidence relating to Indigenous people. As I noted in Paragraph 17 the evidence in relation to racial profiling and racial and ethnic minorities in Australia has not been as well documented or researched as that involving Indigenous peoples. However as I indicated previously the principles, the examples and the specific problems which arise in relation to racial profiling with Indigenous people are applicable to other racial minorities where the facts of the case are similar.
38. In addition, there is a body of research on racial and ethnic minorities and the police which provides some indication of the occurrence of racial profiling.
39. In a study of Vietnamese Australian youth and police relations in Melbourne, Lyons identified a range of factors that are relevant to racial profiling. These included:
- unwarranted targeting and harassment of Vietnamese young people in public spaces
  - high incidence of body search procedures used by police
  - denial of Vietnamese young people's legal rights
  - verbal, psychological, and physical mistreatment by police.<sup>26</sup>
40. It has been argued that the Lebanese community in Sydney is an example where differential policing occurs based upon perceptions of race and ethnicity.<sup>27</sup>

<sup>25</sup> 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.

<sup>26</sup> Lyons, E. (1995) 'New Clients, Old Problems: Vietnamese young people's experiences with police', in Guerra, C. & White, R. (eds) *Ethnic Minority Youth in Australia*, National Clearinghouse for Youth Studies, Hobart, p.170.

<sup>27</sup> Collins, J., Noble, G., Poynting, S. & Tabar, P. (2000) *Kebabs, Kids, Cops and Crime: Youth, Ethnicity and Crime*, Pluto Press, Sydney. Poynting, S. (1999) 'When "Zero Tolerance" Looks Like Racial Intolerance: "Lebanese Youth Gangs", Discrimination and Resistance', *Current Issues in Criminal Justice*, 11(1): 74-8.

41. A Victorian study found that African young people were over-policed and that this over-policing was based on race. The African young people talked about routine police harassment, as well as police hostility and aggression when they attempted to assert their formal rights.<sup>28</sup>
42. A recent study commissioned by the Flemington and Kensington Community Legal Centre provides extensive documentation of the particular issues faced by African young men in the Flemington area.<sup>29</sup> The study was a survey of 151 young people from diverse racial and ethnic backgrounds. I refer at length below to the results of this research because of its relevance to the issue of racial profiling.
43. The key findings of the Report were as follows:

Overall, young men of African descent experienced more difficulty with police than other youth, were less likely to have their rights respected, were more likely than other youth to feel that they experienced some form of inappropriate treatment by police and reported feeling racially targeted by the police.

Compared with other youth:

- Young men of African descent experienced frequent encounters with the police – they were considerably more likely to be stopped by the police within the past 30 days compared with young males of Australian descent (51.4% n18 compared with 34.2%, n13).
- Young men of African descent were slightly more likely than their Australian-born counterparts to experience heavy-handed treatment by the police. Their experiences were characterised by police using physical force (23.8%, n5 compared to 11.8%, n2), police threatening to use physical force (23.8%, n5 compared to 11.8%, n2) and police giving verbal insults (23.8%, n5 compared to 11.8%, n2). Accordingly, whilst no Australian-born males received a summons or infringement almost 20% of African-born males did and almost 15% of African-born males were charged by the police for minor offences compared with none of the male Australian-born participants.
- Young men of African descent were considerably more likely to report a negative impact as a result of the police behaviour they experienced, in contrast with young men of Australian descent. The responses that young men of African descent described included feeling “scared,” “angry,” “targeted,” “small and dumb,” and “cruelly treated.”

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<sup>28</sup> Smith, B. & Reside, S. (2010) ‘Boys, you wanna give me some action?’: Interventions into Policing of Racialised Communities in Melbourne. *A report of the 2009/10 Racism Project*. Springvale Monash Legal Service, Melbourne.

<sup>29</sup> Flemington & Kensington Community Legal Centre, (2011) *Race or Reason? Police Encounters with Young People in the Flemington Region and Surrounding Areas*, [http://www.communitylaw.org.au/flemingtonkensington/cb\\_pages/files/FKCLC%20report%20March%202011\\_small2.pdf](http://www.communitylaw.org.au/flemingtonkensington/cb_pages/files/FKCLC%20report%20March%202011_small2.pdf)

- In reference to their most recent encounter with police, almost half (47.6%, n10) of the young men of African descent strongly felt that they were stopped by the police because of their race.
- Youth of African descent were noticeably more likely than youth of Australian descent or any other ethnic group to worry about being stopped by police when walking alone down the street. Almost 30% (n19) of African-born youth responded 'not at all' to the question of being able to walk alone down the street without worrying about being stopped by the police, compared to only 1.8% (n1) of Australian-born youth.
- Youth of African origin were considerably more likely than youth of Australian descent to report being treated tougher than other people if they got into trouble with the police (73.2%, n41 compared to 42.6%, n26). Young men of African descent were more likely than their Australian-born counterparts to report being treated tougher than other people if they got into trouble with the police (52.8%, n19 compared to 28%, n7). Young women of African descent were significantly more likely to feel that they would be treated tougher by the police when compared to their Australian-born counterparts (56%, n14 compared to 16%, n5).<sup>30</sup>

44. The perceptions of youth of African origin outlined in the research above clearly indicate that they feel they are the subject of discriminatory treatment by police. Given the difference between their perceptions and those of other youth it is reasonable to conclude that this perception of difference in police treatment is consistent with racial profiling.
45. An important component of our understanding of policing of racial and ethnic minorities is perceptions about 'ethnic youth gangs'. Much of the current popular understanding of youth gangs worldwide is heavily racialised, and Australia is no exception. By this I mean that 'gangs' tend to be associated with racial and ethnic minorities, particularly young people. The popular 'panic' over ethnic youth gangs can lead to legislative change and changed police practices targeting particular young people. The congregation of Anglo-Australian young people is perceived as more benign than racial and ethnic groups of young people because of these racialised fears around gangs.<sup>31</sup>
46. In my opinion the evidence presented in Paragraphs 16-45 shows that the key components of racial profiling are existent in policing and that racial profiling does occur in Australian policing.

### **What are the indicia of racial profiling in policing?**

47. As noted previously in Paragraph 8 racial profiling is the adverse use of police discretionary decision-making based on assumptions concerning the racial characteristics of individuals.
48. The key indicia of racial profiling are:

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<sup>30</sup> Ibid.

<sup>31</sup> Cunneen and White, op. cit. pp.190-194.

- 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.

49. Racial profiling requires the demonstration of the discriminatory effects of police stops (or other discretionary decisions) based on a comparison between police stop data and an acceptable benchmark. Research notes that police are unlikely to admit that they intentionally target persons on the basis of their race, nor is there likely to be a formal written policy allowing or encouraging discrimination. As a result individuals alleging racial profiling are required to often rely on general statistical analysis of police behaviour to prove their cases<sup>32</sup>. Racial profiling while not the result official policy, is likely to be condoned or encouraged by more informal practice or aspects of police culture.<sup>33</sup> The selection of a benchmark against which to measure the extent of racial disparities in police decision-making will have a critical effect on any measurement of disparity.<sup>34</sup>
50. There is common acceptance of the definition of racial profiling as involving adverse police decisions on the basis of race. The indicia of racial profiling require that race is the factor which predicts police decisions over and above other considerations such crime, social conditions, economic conditions and police resources.<sup>35</sup>
51. There has been a distinction drawn between ‘operational’ definitions and ‘conceptual’ definitions. According to two prominent US writers on racial profiling, an operational definition of racial profiling alleges that over-representation of racial minorities in police stops is enough to prove racial profiling. A conceptual definition requires proof that the police knew the person’s race before requiring the stop and acted inappropriately on this information to initiate the stop.<sup>36</sup>

**QUESTION 3. ARE THE STATISTICAL FINDINGS OF PROFESSOR GORDON CONSISTENT WITH THE INDICIA OF RACIAL PROFILING IN POLICING? PLEASE PROVIDE THE BASIS OF YOUR OPINION. TO THE EXTENT THAT THIS GOES BEYOND YOUR ANSWERS TO THE PREVIOUS QUESTIONS AND THE REPORT OF PROFESSOR GORDON, PLEASE EXPLAIN WHY AND HOW THOSE OTHER MATTERS FORM THE BASIS OF YOUR OPINION.**

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<sup>32</sup> Withrow and Daily, op cit.

<sup>33</sup> Withrow and Daily, op cit. Janet Chan ‘Racial Profiling and Police Subculture’ (2011) 53 *Canadian Journal of Criminology & Criminal Justice* 75.

<sup>34</sup> Fagan op.cit

<sup>35</sup> Fagan op cit

<sup>36</sup> Withrow and Daily, op cit.

52. To answer this question I will begin by discussing the relevant findings provided in the statistical analysis by Professor Gordon. Professor Gordon's analysis is based on 6 excel files drawn from the LEAP database, namely '9.00001.xls', '9.00002.xls', '9.00003.xls', '9.00004.xls', '9.00005.xls', '9.00006.xls'. These files cover a four year period of police interactions (2005 to 2008) with males born in the six year period between 1 January 1987 and 1 January 1993. For ease of reference I refer to these as 'File 1', 'File 2', 'File 3', 'File 4', 'File 5' and 'File 6' respectively.
53. I agree with the reasoning by Professor Gordon that 'ethnic appearance' and 'racial appearance' are alternative labels for the same variable in the LEAP database (Gordon Report, para 92). For ease of discussion I will use the same terminology as Professor Gordon and refer to 'ethnic appearance' to cover both descriptors. Given the limitations of the LEAP data, I also agree with the reasoning behind Professor Gordon's combination of the LEAP categories of 'African/Mideast', 'Arab' and 'Black'. For ease of discussion I will use the same terminology as Professor Gordon and refer to the combined category of 'African/ Middle Eastern (LEAP)'.

### *Police Interactions*

54. Five files contain information on the number of individuals and interactions with Victoria Police: Files 1, 2, 3, 5 and 6. File 4 contains free text information relating to the interactions (field contacts) in File 3. Professor Gordon finds that *police interactions* associated with 'African/ Middle Eastern (LEAP)' males comprise 33.1%, 29.5%, 45.6%, 25.2% and 26.1% from each of the five files respectively (see Table 10 of Professor Gordon's Report). He finds that the 'Other' category comprises the remaining percentages.<sup>37</sup> Professor Gordon also finds that 'African/ Middle Eastern (LEAP)' males comprise 35.1%, 34%, 43%, 34.2% and 33% of *individuals* subject to police interactions from each of the five files respectively (see Gordon Report, Table 10).
55. To analyse the rates of police interactions with 'African/ Middle Eastern (LEAP)' males in the specified age group, Professor Gordon uses ABS 2006 census data and in particular the variable relating to 'ancestry'. I agree with the reasoning behind the selection of this Census data and the use of the variable 'ancestry' as the most meaningful base from which comparative rates can be drawn. For ease of discussion I will use the same terminology as Professor Gordon and refer to the combined ABS 'ancestry' category of 'African/ Middle Eastern (ABS)'.
56. Census data on age groups is divided into 5 year intervals. Three groupings (10-14, 15-19, 20-24) cover the specified age range of 10-24 years. For reasons explained in para 14 of Professor Gordon's Report, the most important age category for consideration is 15-19. Professor Gordon constructs a weighted average percentage of the three age groups of African/ Middle Eastern (ABS) males living in the Flemington and North Melbourne suburbs. On the basis these calculations, *the average weighted percentage of males in the specified age group and living in Flemington and North Melbourne who were of African/ Middle Eastern (ABS) ethnic background was 14.5%* (see Gordon Report, para 104).
57. Professor Gordon finds that on the basis of the relevant population in Flemington and North Melbourne, African/ Middle Eastern (LEAP) males are involved in disparate levels

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<sup>37</sup> Excluding missing cases, which in all files comprise between 4% and 10%, para 93(c).

of recorded police *interactions*. Across the five relevant LEAP files, the percentages of interactions involving African/ Middle Eastern (LEAP) males is much greater than 14.5%. The ratio of these percentages is 2.3, 2.0, 3.1, 1.7 and 1.8 respectively (Gordon Report, para 108). Within the discipline of criminology these are normally referred to as rate/ratios or, more commonly, levels of *over-representation*. Thus in File 1 police interactions involving African/ Middle Eastern (LEAP) males are 2.3 times more likely to occur than with other males. The greatest level of over-representation is in File 3 where police interactions involving African/ Middle Eastern (LEAP) males are 3.1 times more likely to occur than police interactions with other males in the specified age group. The lowest level of over-representation is in File 5 where police interactions involving African/ Middle Eastern (LEAP) males are 1.7 times more likely to occur than police interactions with other males in the specified age group. However, *police interactions involving African/ Middle Eastern (LEAP) males of the specified age group are over-represented in all five LEAP Files*. Further statistical analysis by Professor Gordon confirms that the disparate levels of contact are statistically significant and not consistent with random variation (Gordon Report, para 110).

58. Professor Gordon also analyses individual male persons referred to in the relevant five files and finds that African/ Middle Eastern (LEAP) males of the specified group constitute disparate proportions based on the population size. The ratio of percentages is greater: 2.4, 2.3, 3.0, 2.4 and 2.3. The greatest level of over-representation is in File 3. The level of disparity (or over-representation) is statistically significant across all five files (Gordon Report, para 117).

59. I conclude from this part of the analysis that

- police interactions involving African/ Middle Eastern (LEAP) males are over-represented in the ‘police interaction’ data.
- individual African/ Middle Eastern (LEAP) males are over-represented among all individual males the subject of those police interactions.
- 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.

#### *The Nature of Contact*

60. From the data in File 5, Professor Gordon was requested to provide analysis of Column H of the database which identifies ‘Involvement’. There are 9 different types of ‘Involvement’ and the majority (69% or 1,857 of the total 2,692 records) are listed as ‘Offender’ (Gordon Report, para 70). No complete list of the 9 ‘Involvement’ categories have been provided to me, nor their frequency, although Professor Gordon does mention other types include ‘Intent to Summons’, ‘Assist Inquiry’ and ‘Name Whereabouts’ (Gordon Report, para 120). Specifically, Professor Gordon was required to analyse whether there was disparity between the number of specified male persons identified as

African/ Middle Eastern (LEAP) and recorded as 'Offenders' and the number of 'Other' male persons similarly identified as 'Offenders'.

61. Professor Gordon found that in File 5 there were 50 individual African/ Middle Eastern (LEAP) male persons identified as offenders and 118 individual male persons of 'other' ethnic appearance identified as an offender. The average number of times an individual African/ Middle Eastern (LEAP) male person was identified as an offender was 7.8 times. Each time an individual person was identified as an offender there was an offence recorded as well. Therefore African/ Middle Eastern (LEAP) males had an average of 7.8 offences. The average number of times an individual male person of 'other' ethnic appearance was identified as an offender was 12.3 times, and thus had also had an average of 12.3 offences. The difference between the average number of offences for African/ Middle Eastern (LEAP) males and males of 'other' ethnic appearance was strongly statistically significant. The average number of offences was significantly lower for African/ Middle Eastern (LEAP) males than for persons of 'other' ethnic appearance (Gordon Report, para 122).
62. From the statistical evidence analysed in File 5 relating to offences it can be concluded that police contact with African/ Middle Eastern (LEAP) males classified as offenders is likely to involve individuals with less offences than male offenders of other ethnic backgrounds. On this basis it is reasonable to infer that African/ Middle Eastern (LEAP) male offenders are involved in fewer offences than male offenders of other ethnic backgrounds.
63. Professor Gordon was requested to conduct analysis of those specified males person identified in File 5 as 'offenders' and who were recorded as having one or more interactions in File 3, and determine whether there was any disparity between African/ Middle Eastern (LEAP) males and males of 'other' ethnic backgrounds. Professor Gordon found that 98% of African/ Middle Eastern (LEAP) males identified as 'offenders' in File 5 also appeared in File 3. Some 83.1% of males from 'other' ethnic backgrounds identified as 'offenders' in File 5 also appeared in File 3. Professor Gordon concluded that male persons from 'other' ethnic backgrounds were 8.5 times more likely *not to be recorded* in File 3 compared to African/ Middle Eastern (LEAP) males (Gordon Report, para 124).
64. I regard this result as being particularly important because the field contact types recorded in File 3 are clearly of a less serious nature. Some 87.9% of field contacts were 'person checks' and a further 5.2% were 'car checks'. Professor Gordon also provided specific analysis by ethnic background of those who type of contact was listed in File 3 as 'person checks'. Some 96% of the 50 African/ Middle Eastern (LEAP) males listed as offenders in File 5 had at least one 'person check' compared to 78.8% of offenders from 'other' ethnic backgrounds identified as 'offenders' in File 5. He concluded that offenders from 'other' ethnic backgrounds were 5.3 times more likely than African/ Middle Eastern (LEAP) offenders to *not be stopped* for a person check (Gordon Report, para 125). Professor Gordon found these disparities to be statistically significant (Gordon Report, para 127).
65. The linking of the evidence between Files 3 and 5, shows that African/ Middle Eastern (LEAP) males who are classified as 'offenders' are more likely to be stopped for person checks than male persons from 'other' ethnic backgrounds. This is evidence from the data

of racial profiling. The finding is particularly important when read in conjunction with the finding that African/ Middle Eastern (LEAP) males have 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. It is consistent with a 'conceptual' definition of racial profiling which requires that police are acting inappropriately in stopping and checking racial minority individuals on the basis of their race.

66. Professor Gordon also analysed the average number of field contacts identified in File 3 for African/ Middle Eastern (LEAP) males and males of 'other' ethnic backgrounds identified as offenders in File 5. There was an average of 12.6 field contacts for African/ Middle Eastern (LEAP) males compared to an average of 7.7 field contacts with males from 'other' ethnic backgrounds. The difference in the average number of contacts between the two groups was statistically significant (Gordon Report, para 128). More specifically Professor Gordon analysed the average number of person checks identified in File 3 for individual African/ Middle Eastern (LEAP) males and individual males of 'other' ethnic backgrounds identified as offenders in File 5. The 50 African/ Middle Eastern (LEAP) males identified in File 5 as offenders had an average of 11.5 person checks while offenders from 'other' ethnic backgrounds had an average of 6.7 person checks. Although this difference was not statistically significant, "it is close to being statistically significant" (Gordon Report, para 129).
67. I conclude from this that not only are individual African/ Middle Eastern (LEAP) offenders more likely to be stopped for field contacts and specifically for person checks more than offenders of 'other' ethnic backgrounds (para 65 above), they are also more likely to be stopped with greater frequency. Again the earlier finding that African/ Middle Eastern (LEAP) males classified as offenders have on average fewer offences than offender males from 'other' ethnic backgrounds is relevant. The frequency of police stops cannot be attributed to greater offence profiles. This evidence further supports the view that police are engaging in racial profiling in the number of stops involving African/ Middle Eastern (LEAP) males compared to males from 'other' ethnic backgrounds.
68. File 4 of the data provided by the Victoria Police contains text information ('remarks') relating to field contacts. Professor Gordon was requested to analyse the remarks for field contacts of those records with common identification numbers between Files 3 and 4 and to report on any disparity between African/ Middle Eastern (LEAP) males and males from 'other' ethnic backgrounds specifically in the use of the following phrases:
- Gangs
  - No reason
  - Nil reason
  - Move on
  - Negative attitude
69. Professor Gordon found that the percentage of field contact remarks containing one or more of the above phrases was greater for field contacts associated with males from African/ Middle Eastern (LEAP) 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).

70. The evidence provided in the use of these phrases suggests that the reasons police are recording for the field contacts identified Files 3 and 4 in relation to African/ Middle Eastern (LEAP) males are not indicative of a formed view that the activities of the individuals in which the field contact occurred constituted criminal offending behaviour. 'Nil reason' and 'no reason', as the remarks suggest, indicate no valid reason for the contact was recorded. 'Negative attitude' and 'gang' are highly subjective reasons for police intervention and likely reflect attitudes in relation to the racial minority group in question. While Victorian Police have broad discretionary powers to require people to 'move on', the disparate identification of this 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. The more frequent recording of the term 'gang' may reflect racialised perceptions of African/ Middle Eastern (LEAP) males as gang members. However, it is difficult to draw any firm conclusion on the use of this term.
71. In the 'remarks' identified above, the African/ Middle Eastern (LEAP) ethnicity of the person was statistically significant. In other words the remarks were not randomly attributed to African/ Middle Eastern (LEAP) males but represent a distinct *pattern*. This pattern reflects racial profiling: race is a primary determinant underlying the remarks recorded by police for the intervention. For this reason I further conclude that the evidence suggests racial profiling.

### *Conclusion*

72. I conclude from the interpretation of the results presented in Paragraphs 60 to 71 above that there is evidence of racial profiling of African/ Middle Eastern (LEAP) specified males for the following reasons.
- Individual African/ Middle Eastern (LEAP) male offenders are involved in fewer offences than male offenders of other ethnic backgrounds.
  - However, male offenders from 'other' ethnic backgrounds were 8.5 times more likely *not to be recorded* in File 3 compared to African/ Middle Eastern (LEAP) males. The vast majority of field contact types recorded in File 3 are 'person checks' (87.9%).
  - Offenders from 'other' ethnic backgrounds were 5.3 times more likely than African/ Middle Eastern (LEAP) offenders to *not be stopped* for a person check.
  - African/ Middle Eastern (LEAP) males who are classified as 'offenders' are more likely to be stopped for person checks than male persons from 'other' ethnic backgrounds, although they have fewer offences than male offenders of other ethnic backgrounds.
  - Therefore 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.
  - Individual African/ Middle Eastern (LEAP) offenders are more likely to be stopped for field contacts, and specifically stopped for person checks, than offenders of 'other' ethnic backgrounds. In addition, they are also more likely to be stopped with greater frequency.
  - The remarks recorded for the field contacts identified in Files 3 and 4 in relation to African/ Middle Eastern (LEAP) males are not indicative of a formed view that

the activities of the individuals in which the field contact occurred constituted criminal offending behaviour. For example, African/ Middle Eastern (LEAP) males are more likely to have 'nil reason' or 'no reason' recorded than males from 'other' ethnic backgrounds.

73. I regard these results as much stronger evidence of racial profiling than the over-representation data presented in Paragraph 59 above.
74. I conclude that one of the indicia of racial profiling has been met: police initiating contact by stopping, searching, questioning or requiring individuals to 'move-on' on the basis of the individual's race or ethnicity. The data analysis presented to me does not allow conclusions to be drawn in relation to other indicia of racial profiling.
75. I have made all the inquiries that I believe are desirable and appropriate and that no matters of significance that I regard as relevant have, to my knowledge, been withheld from the Court.

Professor Chris Cunneen  
11 October 2012