



Human rights in police stop and search practices
Victoria Police Field Contact Policy and Cross Cultural Training
Community Consultation

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About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

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Contents

1.	Introduction	2
2.	Human rights framework	6
3.	A case study of the <i>Control of Weapons Act</i>	10
4.	Comparative lessons: The United Kingdom	14
5.	Community engagement	20

1. Introduction

1.1 Introduction

1. Victoria Police officers play an important role in safeguarding the human rights of the community. They are entrusted with considerable power, authority and responsibility in carrying out this role. In turn, the community expects Victoria Police officers to use their authority professionally, fairly and with the highest level of integrity.¹
2. An increasing body of research has highlighted the importance of public confidence in policing. Trust and confidence can encourage active citizen participation, enhance accountability and responsiveness, and secure public cooperation with the police and compliance with the law.² Chief Commissioner Ken Lay explains the importance of the relationship between Victoria Police and the community in his Foreword to the *Field Contact Policy and Cross-Cultural Training Community Consultation* document.
3. Unfortunately, racially discriminatory incidents and behaviour by Victoria Police members over a number of years has led to a break down of trust between Victoria Police and specific ethnic communities. These incidents not only impact upon the relationship between Victoria Police and members of these particular groups, they also diminish the integrity of Victoria Police in the eyes of the community as a whole.
4. These incidents include overtly racist behaviour identified internally within the Victoria Police, such as the racist stubby holders and racist emails shared between co-workers; and allegations of racially motivated abuse and violence directed at members from particular racial groups such as young men of African descent and Aboriginal peoples.
5. There have also been a history of reports of widespread 'over-policing' of members of the African-Australian community that indicate that "race" is used in Victorian policing practices, either consciously or unconsciously, in a manner that is illegitimate and discriminatory.
6. These incidents have been documented comprehensively in submissions to this Inquiry such as the submission prepared by the Flemington Kensington Community Legal Service.
7. These incidents highlight that Victoria Police has a significant problem with racially discriminatory behaviour that goes beyond the actions of a few individuals and reflects broader problems with police culture and accountability.

¹ Victoria Police, *Code of Conduct: Professional and Ethnical Standards*, p 1. (available at http://www.aic.gov.au/documents/0/4/F/%7B04F19D1A-19B1-4C6F-9EC0-A38F1B3DDF38%7Drpp111_002.pdf)

² Jackson and Bradford, 'What is Trust and Confidence in the Police?', *Policing: A Journal of Policy and Practice*, Volume 4, Issue 3, 2010), pp. 241-248 (available at <http://policing.oxfordjournals.org/content/4/3/241.abstract>)

8. It is likely that for every racist incident that has been made public, there are many more which have occurred but have not been reported.
9. There is an urgent need for Victoria Police to carefully review and reform processes, policies and practice to ensure that that racism is eliminated from Victorian policing practices and public confidence is restored in the ability of Victoria Police to carry out its duties and serve the community in a non-discriminatory manner, in compliance with human rights standards.

1.2 Racism and discrimination cause significant harm

10. In addition to undermining public confidence in police, racism and racial discrimination by police causes significant harm to individuals.
11. Freedom from racial discrimination is a fundamental human right protected under international law and reflected in Commonwealth and Victorian laws.³ Racial discrimination, and racially motivated harassment, abuse and violence perpetrated by Victoria Police officers against African-Australians and people from other racial backgrounds represents a violation of the human rights of those individuals, protected under law.
12. There is increasing recognition and growing evidence that racial discrimination can cause serious health, social and economic consequences for affected individuals and their families.⁴ Racial discrimination can have negative outcomes in many spheres of life such as access to justice, housing and health. VicHealth has conducted extensive research into the links between racial discrimination and poorer mental and physical health outcomes.⁵ When racial discrimination is suffered at the hands of government agencies, such as Victoria Police, these adverse physical and mental health impacts are compounded by the gross breach of trust that such violations represent.

1.3 Scope of this submission

13. The HRLC welcomes the opportunity to provide input to this Community Consultation into Field Contacts and Cross-Cultural Training (the **Inquiry**) conducted by Victoria Police.
14. The HRLC does not seek to duplicate the comprehensive submissions of other organisations such as Flemington Kensington Community Legal Centre, the Victorian Equal Opportunity and

³ *Racial Discrimination Act 1975* (Cth); *Equal Opportunity Act 2010* (Vic); International Covenant on Civil and Political Rights (Article 2 and Article 26); International Convention on the Elimination of All Forms of Racial Discrimination.

⁴ World Conference Secretariat, 2001; World Health Organisation, 2001, cited in Vichealth et al, *More than Tolerance: embracing diversity for health*, 2007, p 11.

⁵ Vichealth et al, *More than Tolerance: embracing diversity for health*, 2007; Vichealth et al, *Building on our strengths: a framework for reducing race based discrimination and supporting diversity*, 2010.

Human Rights Commission and Smart Justice for Young People. The HRLC supports the submissions of these organisations.

15. We have sought to utilise human rights law and principles, international research and case studies to develop a series of recommendations on discrete issues raised by the Inquiry.
16. This submission aims to:
 - (a) provide guidance on a human rights based approach to the use of race in policing work;
 - (b) using the case study of *Control of Weapons* legislation, illustrate that police search powers have expanded without adequate justification at the same time as accountability has declined. This contributes to the likelihood of the inappropriate use of race as a factor in police searches; and
 - (c) examine best practice examples from the United Kingdom to inform recommendations concerning the approach of Victoria Police to field contacts; and
 - (d) briefly consider how Victoria Police could improve its community engagement practices.

1.4 Summary of recommendations

Recommendation 1:

Victoria Police policies should expressly provide that race should only be used in operational policing decisions where there is relevant intelligence, information or specific behaviour about a particular person.

Recommendation 2:

Victoria Police should analyse the impact of the expanded powers under the Control of Weapons Act on particular racial groups and make the analysis public.

Recommendation 3:

Victoria Police should engage with the Victorian Government to review the expanded powers under the Control of Weapons Act to restore compliance with the Victorian Charter and to establish adequate accountability mechanisms.

Recommendation 4:

Victoria Police should enhance data collection processes to enable better identification and analysis of the impact of stop and search powers on particular racial groups. Victoria Police should publicly report in its annual report on the use of stop and search powers on particular racial groups.

Recommendation 5:

Victoria Police should trial the provision of receipts when conducting searches as recommended by the Flemington Kensington Community Legal Centre and the Victorian Equal Opportunity and Human Rights Commission.

Recommendation 6:

Targeted and firm measures should be taken to address the conscious and unconscious use of race or other personal characteristics in policing. These measures should include effective and ongoing community engagement, and key officers within Victoria Police should be tasked with monitoring their implementation and effectiveness. Police training should specifically address racial profiling and the impact of unconscious racial bias in policing decisions.

Information concerning the use of race in policing, and measures taken to address this, should be made publicly available.

Recommendation 7:

Victoria Police should establish a ‘human rights community advisory committee’ or similar body. Such a group would:

- meet regularly and identify and address current issues in human rights and policing;
- provide ongoing advice to Victoria Police in the development of human rights compliant policy, procedures and training; and
- include representatives from community legal centres, human rights organisations and others dealing with policing issues affecting vulnerable groups such as Victoria Legal Aid and academic organisations.

Victoria Police should use a newly established human rights advisory group and existing community reference groups to follow-up and report on implementation of actions arising from the Inquiry.

1.5 A note on terminology: race, racism and racial discrimination

17. In a general sense, most people consider ‘race’ to be connected to inborn biological traits despite the lack of valid biological criteria for dividing races into distinct categories.⁶ Race, ethnicity and cultural are inter-related concepts, with ethnicity referring to a self-perceived idea of group affiliation and identity.⁷ Culture is a more general term that refers to the distinctive

⁶ VicHealth et al, *Building on Our Strengths*, Op Cit, p 14.

⁷ VicHealth et al, *Building on Our Strengths*, Op Cit, p 14. Consequently, VicHealth et al define an **ethnic group** is a social group whose members share a sense of common origins, claim common and distinctive history and destiny, possess one or more dimensions of collective cultural individuality and feel a sense of unique collective solidarity.

patterns of values, beliefs and ways of life of a social group.⁸ The range of racial, ethnic and cultural identities and communities that vary from the so-called dominant culture are generally referred to as Culturally and Linguistically Diverse (CALD) communities.

18. The term 'race' under Australian discrimination law refer to a number of concepts, such as colour, descent, ethnic origin and national origin.⁹ In NSW and Tasmania the term 'ethno-religious origin' has been added to the statutory definition. Courts have been reluctant to define the term, instead opting for a 'common understanding' approach to the term.¹⁰
19. For ease and consistency, throughout this submission the HRLC will adopt the term 'race' and 'racial' to refer to the range of concepts embodied by the legal definition.
20. While the concept of 'racism' has been the subject of much debate from a range of disciplinary perspectives it can be defined broadly refers to 'that which maintains or exacerbates inequality of opportunity among ethnoracial groups'.¹¹ Racism can be expressed through stereotypes (racist beliefs), prejudice (racist emotions/affect) or discrimination (behaviours and practices).¹²
21. The concept of discrimination focuses on 'unfavourable treatment'. Racial discrimination can take both direct and indirect forms, the latter recognising the unfair effect of equal treatment in particular situations.

2. Human rights framework

2.1 Support for human rights within Victoria Police

22. As a public authority, Victoria Police must comply with the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (the **Victorian Charter**). Since its introduction, Victoria Police has consistently and commendably expressed support for the Victorian Charter and a human rights-based approach to policing. At the launch of the Victorian Charter, Victoria Police Assistant Commissioner, Luke Cornelius, noted that the safeguarding of human rights has been among the fundamental objectives of policing in the Westminster tradition since policing

⁸ VicHealth et al, *Building on Our Strengths*, Op Cit, p 14.

⁹ See, for example, the definitions utilised in the *Racial Discrimination Act 1975 (Cth)* and *Equal Opportunity Act 2010 (Vic)*.

¹⁰ Rees, Lindsay & Rice, *Australian Anti-Discrimination Law: Text Cases and Materials*, 2008, p 176.

¹¹ Berman & Paradies, 'Racism, disadvantage and multiculturalism: towards effective anti-racist praxis', *Ethnic and Racial Studies* Vol 33, No. 2 February 2010, pp. 214-232, p 217.

¹² Berman & Paradies, 'Racism, disadvantage and multiculturalism: towards effective anti-racist praxis', *Ethnic and Racial Studies* Vol 33, No. 2 February 2010, pp. 214-232, p 217.

began.¹³ In its submission to the National Human Rights Consultation, Victoria Police noted that ‘human rights is synonymous with good policing in liberal democratic societies’.¹⁴

2.2 Policing and human rights

23. Policing requires careful balancing of human rights. On the one hand, police protect key human rights by upholding criminal laws and protecting community safety. On the other, police regularly limit human rights using their powers to stop, question, search and use force against members of the public.
24. The Victoria Charter recognises that human rights can lawfully be limited to protect important public or social needs, such as public safety, public order and the enjoyment of other rights. However, any limitation must be reasonable and demonstrably justifiable in a free and democratic society.
25. In determining whether or not a limitation is reasonable, the Victorian Charter requires an examination of factors including the purpose of the limitation and whether there are any less restrictive means reasonably available to achieve that purpose.¹⁵ Where the Government wishes to pass a law that limits human rights, at the very minimum it must provide a specific, evidence-based justification for its actions.¹⁶

2.3 Race, policing and human rights

26. Racial profiling occurs when police use generalisations based on race, rather than objective evidence or individual behaviour, as the basis for making policing decisions about who has been or may be involved in criminal behaviour.¹⁷ Racial profiling most commonly occurs in police decisions about who to stop, question, search, ask for identification or arrest. Racial profiling may arise from racist behaviour by individual police officers, or from ingrained unconscious bias within police culture.¹⁸
27. Policing based on generalisations about the criminality of people of particular races undermines fundamental principles of racial discrimination law. It is generally unlawful to act on the basis of assumed wrongdoing by individuals from a particular racial group because of

¹³ Luke Cornelius, ‘Remarks at the launch of the Victorian Charter’, as cited in Victoria Police, *National Human Rights Consultation Victoria Police Submission* (2009), p 6.

¹⁴ Victoria Police, *National Human Rights Consultation Victoria Police Submission* (2009), p 10.

¹⁵ Victorian Charter, s 7.

¹⁶ See also *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381, [144] – [156] (per Warren CJ).

¹⁷ This is the definition used in Open Society Institute, *Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory*, 2009.

¹⁸ Open Society Institute, *Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory*, 2009.

wrongdoing of some members of that group.¹⁹ In a case concerning the practice of UK immigration officers targeting Roma people to check their immigration status, the House of Lords accepted that Roma were more likely to try to enter the UK as asylum seekers but still found that the targeting was unlawful:

The [immigration officer] may be acting on belief or assumptions about members of the ... racial group involved which are often true and which if true would provide a good reason for the less favourable treatment in question. But “what may be true of a group may not be true of a significant number of individuals within that group.” *The object of the [U.K. Race Relations Act] is to ensure that each person is treated as an individual and not assumed to be like other members of the group.*²⁰

28. Similarly, the US District Court of the Southern District of New York recently dismissed the argument that police stops of blacks and Hispanics should be undertaken in proportion to the representation of those demographics amongst criminal suspects. Judge Scheindlin stated that this:

... reasoning is flawed because the stopped population is overwhelmingly innocent – not criminal. There is no basis for assuming that an innocent population shares the same characteristics as the criminal suspect population in the same area.²¹

29. Judge Scheindlin added that:

... whilst it is true that any one stop is a limited intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience. No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life.²²

30. In that decision, Judge Scheindlin found that the New York Police Department had adopted a policy of indirect racial profiling in violation of the Fourth Amendment protection against unreasonable searches and seizures and Fourteenth Amendment protection against intentional discrimination on the basis of race. Her Honour attributed responsibility for these violations not only to the officers involved, but also to top police officials, who she found had acted with complete indifference to the way in which stop and search powers were being exercised, and also to city officials, who she found had turned a blind eye to evidence that

¹⁹ *Williams v Spain* UN Human Rights Committee, Communication No 1493 of 2006, UN Doc CCPR/C/96/D/1493/2006, 17 August 2009. The state must prove that such practices are effective, proportionate and necessary, which will rarely if ever be possible. See Open Society Institute, *Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory*, 2009, p 22 and European Union network of independent experts on fundamental rights, “Ethnic Profiling”, December 2006, Ref. CFR–CDF, Opinion 4, 2006, at 6.

²⁰ *Regina v Immigration Officer at Prague Airport*, December 9, 2004, [2004] UKHL 55.

²¹ *Floyd v City of New York* 08 Civ. 1034 (SAS) (12 August 2013) at 8-9.

²² *Floyd v City of New York* 08 Civ. 1034 (SAS) (12 August 2013) at 3.

stops were being conducted in a racially discriminatory manner, and called for a federal monitor to oversee broad reforms.

31. Racial profiling is also ineffective and inefficient. Studies have shown that racial profiling does not enhance police efficiency and that police are more likely to properly identify criminals where they do not use arbitrary racial profiles and rely instead on behaviour-based profiles.²³
32. UK and US policies prohibit racial profiling where race or ethnicity are used as either the sole, explicit or significant basis on which to target a suspect.²⁴ US Federal Guidance acknowledges the 'terrible cost' of racial profiling, both to individuals who suffer discrimination and to the nation that is diminished by it.²⁵ It states that race may only be used in routine or spontaneous law enforcement decisions, such as stop and search, as a descriptor of a specific subject.²⁶
33. The UK code of conduct for police stop and search powers requires an objective basis for a suspicion on which to stop and search that is based on facts, information and intelligence. It states that:²⁷

Reasonable suspicion can never be supported on the basis of personal factors. It must rely on intelligence or information about, or some specific behaviour by, the person concerned. For example, unless the police have a description of a suspect, a person's physical appearance (including any of the 'protected characteristics' set out in the Equality Act 2010 (see paragraph 1.1), or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other, or in combination with any other factor, as the reason for searching that person. **Reasonable suspicion cannot be based on generalisations or**

²³ See discussion of the studies in Open Society Institute, *Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory*, 2009, Section G, p 51. The ineffectiveness of police racial profiling is generally acknowledged by the US government in the US Department of Justice, Civil Rights Division, Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (Washington DC: Department of Justice, June 2003), p 1, available at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf. See also, Equality and Human Rights Commission, Stop and Think Again, July 2013,

http://www.equalityhumanrights.com/uploaded_files/raceinbritain/stop_and_think_again.pdf.

²⁴ This is supported by the Committee on the Elimination of Racial Discrimination's General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, para 20.

²⁵ US Department of Justice, Civil Rights Division, Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (Washington DC: Department of Justice, June 2003), available at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

²⁶ US Department of Justice, Civil Rights Division, Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (Washington DC: Department of Justice, June 2003), available at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

²⁷ Home Office, Police and Criminal Evidence Act 1984, Code of Practice A, revised December 31st 2005, para. 2.2, available at http://police.homeoffice.gov.uk/news-and-publications/publication/operational-policing/PACE_Chapter_A.pdf?view=Binary

stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity.

Recommendation 1:

Victoria Police policies should expressly provide that race should only be used in operational policing decisions where there is relevant intelligence, information or specific behaviour about a particular person.

3. A case study of the *Control of Weapons Act*

3.1 Overview

34. Victoria Police officers are granted powers to stop and search individuals and vehicles by a number of statutes, including the *Control of Weapons Act 1990 (Vic)* (**Control of Weapons Act**).
35. The expansion of stop and search powers in the *Control of Weapons Act* provides an example of the way in which field contact-related powers granted to Victoria Police may:
 - (a) erode human rights protections;
 - (b) create operational challenges for officers of Victoria Police; and
 - (c) impact relationships between Victoria Police and Victorian communities.
36. The history of the development of these powers over the past decade highlights that police powers have expanded while accountability has diminished. At the same time, police crime statistics and hospital admission data cast considerable doubt about the need for the expanded powers. The resulting legal framework contributes to the likelihood of police inappropriately exercising these powers.

3.2 Stop and search powers and human rights

37. The use of police search powers can limit a number of rights, including the right to equality and non-discrimination, the right to privacy, children's rights and the right to liberty and security of the person. For example:
 - (a) the power to search persons and vehicles without suspicion can be incompatible with the right to privacy and (where the search is of a child) children's rights;
 - (b) the power to conduct strip searches also presents a significant intrusion on the right to privacy and children's rights and will only be justified in particular circumstances;

- (c) the power to conduct random searches within a designated area implies a power to arbitrarily detain a person for as long as reasonably necessary to conduct a search, interfering with the right to liberty and security of the person; and
- (d) as discussed above, where stop and search powers are exercised consciously or subconsciously on the basis of race, ethnicity or national origin, the right to equality and non-discrimination may be infringed.

3.3 Expansion of police stop and search powers in Victoria

38. The Control of Weapons Act was passed as part of the Victorian Government's introduction of 'tough on crime' policies in 1990. It was premised on the view that increasing weapons control would result in a reduction in violent and weapon-related crime.²⁸ Police officers were originally empowered to search a person without a warrant only when they *reasonably believed* that the person was carrying a banned weapon.²⁹
39. In 2002, renewed media and public focus on weapon control following a number of high-profile assaults³⁰ prompted the Victorian Government to introduce amendments to enable police officers to search a person without a warrant with only *reasonable grounds to suspect* that the person was carrying a weapon. The amended Act³¹ contained certain safeguards, including a requirement that police made a record of the search immediately or as soon as practicable after the search, and also a requirement that the Chief Commissioner report annually to the Minister on the number of searches without warrant undertaken.³²
40. Control of Weapons Act stop and search powers were further amended in December 2009.³³ The new provisions empowered police to search a person without a warrant and *without any reasonable suspicion or belief* within a designated area. The Statement of Compatibility tabled with the amendments acknowledged that provisions of the amending bill were incompatible with the human rights protected under the Victorian Charter.
41. In 2010, in response to further media reports concerning children's access to weapons and violence against Indian students, certain safeguards relating to the stop and search powers

²⁸ Office of Police Integrity, *Review of Victoria Police use of 'stop and search' powers* (2012, Victorian Government Printer), p12.

²⁹ *Ibid*, p13.

³⁰ *Ibid*, p14.

³¹ *Control of Weapons and Firearms Acts (Search Powers) Act 2003* (Vic).

³² *Ibid*. See also Office of Police Integrity, *Review of Victoria Police use of 'stop and search' powers* (2012, Victorian Government Printer), p14.

³³ *Summary Offences and Control of Weapons Acts Amendment Act 2009* (Vic).

introduced in 2009, such as the requirement to record searches without any reasonable suspicion, were relaxed.³⁴

42. In March 2012, the Act was further amended to remove the requirement that a seven day notice be advertised of planned area searches.³⁵
43. As a result of these amendments over the past decade, the circumstances in which police can conduct searches have increased whilst transparency in the exercise of these powers has decreased.
44. Further, the HRLC notes that Victoria Police has been unable to comply with either the original or relaxed reporting requirements because of deficiencies in its information management systems.³⁶ This inability to report as required is indicative of the Victorian Government's failure to investigate fully the feasibility of the safeguards attached to stop and search powers in the Control of Weapons Act.³⁷ It also draws attention to weaknesses in Victoria Police's information management systems that inhibit the collection of data needed to properly identify and address the risks of racial bias in policing.

3.4 No evidence base for expanding the powers

45. The Statement of Compatibility tabled with the *Summary Offences and Control of Weapons Acts Amendment Bill* in 2009 stated that the bill was partially incompatible with the Victorian Charter. This was the first occasion on which the Victorian Government proceeded with legislation that had been expressed to be incompatible with the Charter in its Statement of Compatibility. The Victorian Charter does not prevent the Victorian government from passing legislation that is incompatible with human rights.
46. The Victorian Government's reasons for expanding stop and search powers in the Control of Weapons Act related to community concerns regarding weapons-related crime.³⁸ That community concern appears to have arisen in response to media reporting of escalating knife crime.³⁹

³⁴ *Control of Weapons Amendment Act 2010 (Vic)*

³⁵ *Control of Weapons and Firearms Act Amendment Act 2012 (Vic)*.

³⁶ Office of Police Integrity, *Review of Victoria Police use of 'stop and search' powers* (2012, Victorian Government Printer), pp24-25.

³⁷ *Ibid*, pp24-25.

³⁸ Hansard (12 November 2009) – Assembly Second Reading Speech, *Summary Offences and Control of Weapons Acts Amendment Bill*, p4027, cited in Office of Police Integrity, *Review of Victoria Police use of 'stop and search' powers* (2012, Victorian Government Printer), p19, n42.

³⁹ See for example Gary Tippet, 'Survival can be a stab in the dark' *The Age* 11 July 2010; Lauren Wilson, 'Police to use knife search powers in Footscray' *The Australian* 4 January 2010

47. Analysis of Victoria Police crime statistics shows however that knife crime had dropped significantly over the decade to 2009/10. Per head of population, Victoria Police statistics shows that between 2000/01 and 2009/10, robberies with knives dropped 61% and assaults with knives dropped 12%.⁴⁰
48. Hospital admission data similarly showed no evidence of escalating knife assaults. Research based on data from the Victorian State Trauma Registry was referred to in the 2010 report, *Inquiry into Strategies to Reduce Assaults in Public Places in Victoria*, by the Victorian Parliament's Drugs and Crime Prevention Committee. At page 2, the report notes that "between 2001 and 2007...the rate of penetrating injuries – caused by knives, guns etc – remained fairly stable".
49. Although addressing community concerns may be a legitimate legislative goal, it is one that must be carefully balanced against the erosion of human rights protections, particularly where the community's concerns do not have a strong factual basis and could be better addressed through alternative more effective human rights compliant methods of reducing knife crime. Indeed, detailed research for the Victorian Government on preventing knife carrying by young people argued that expanded stop and search powers were not warranted and may be counterproductive.⁴¹

3.5 Impacts of expanded powers

50. The expanded stop and search powers under the Control of Weapons Act impact both police operations and the community.
51. The breadth of the power to conduct searches without suspicion increases the risk that conscious or subconscious racial prejudices will affect the way police officers make decisions concerning the exercise of this power, in turn impacting individuals who are searched and also broader community relations with Victoria Police.
52. The fact that police are operating under legislation that is incompatible with the Victorian Charter also creates operational challenges for police officers, who are lawfully required to carry out their duties in compliance with the human rights in the Victorian Charter.

⁴⁰ Victoria Police Crime Statistics 2009/10 and 2000/01. Victorian population figures are taken from Australian Bureau of Statistics estimated resident population figures as at 31 December in the relevant year (ABS 3101.0)

⁴¹ Bondy, Julian; Ogilvie, Alan and Astbury, Brad, *Living On Edge: Understanding the Social Context of Knife Carriage Among Young People* 2005, 134.

Recommendation 2:

Victoria Police should analyse the impact of the expanded powers under the Control of Weapons Act on particular racial groups and make the analysis public.

Recommendation 3:

Victoria Police should engage with the Victorian Government to review the expanded powers under the Control of Weapons Act to restore compliance with the Victorian Charter and to establish adequate accountability mechanisms.

4. Comparative lessons: The United Kingdom

4.1 Stop and search powers in the UK

53. Stop and search powers in the UK provide useful guidance in the Victorian context because the expansion of many stop and search powers in Victoria was modelled on similar developments in the UK. However, it should be noted that there is also a current focus on the use of stop and search powers, particularly in the context of racial profiling, in other jurisdictions such as the US and Canada.
54. As is the case in Victoria, police stop and search powers in the UK are provided in a number of different statutes. However, the majority of searches are conducted in reliance on:
- (a) the *Police and Criminal Evidence Act 1984 (PACE)*, s 1, which empowers an officer to stop and search a person or vehicle for stolen or prohibited items with reasonable grounds to suspect;
 - (b) the *Misuse of Drugs Act 1971*, which empowers an officer to stop and search a person, vehicle or vessel for controlled drugs with reasonable grounds to suspect; or
 - (c) the *Criminal Justice and Public Order Act 1994*, s 60, which empowers an officer to stop and search any person or vehicle for weapons in a designated area without reasonable grounds to suspect.
55. Significantly, the UK police code of practice referred to at paragraph 33 above prohibits the use of personal factors, including race, to support a 'reasonable suspicion'.⁴²

⁴² *Police and Criminal Evidence Act 1984*, Code A, [2.2], cited in Her Majesty's Inspectorate of Constabulary, *Stop and Search Powers: Are the police using them effectively and fairly?* (2013), p19.

4.2 Review of stop and search powers

56. The exercise of stop and search powers in the UK has been controversial and subject to significant public debate, particularly in regard to the impact of racial prejudices on the decision to stop and search 'black' and 'Asian' members of the community.⁴³ Several recent and significant reviews of these powers have been undertaken, the results of which can inform the exercise of these powers in Victoria.
57. The Equality and Human Rights Commission (**ECHR**) has undertaken an in-depth review the use of stop and search powers in England and Wales. This review focused on stop and searched conducted under PACE, which requires reasonable grounds to suspect.
58. The ECHR published the 'Stop and think' report in 2010, which reviewed critically the use of stop and search powers in England and Wales, and presented an analysis of stop and search statistics, the justifiability of race disproportionality in search statistics and emerging good practice.⁴⁴ A 2013 follow up report, 'Stop and think again', presented the outcome of actions taken following 'Stop and think' in five police forces identified as a priority for further action.⁴⁵
59. The 'Stop and think' report stressed the vital role in defending fundamental rights performed by police, and noted that police support the community's ability to live free from violence and help create an environment in which rights and freedoms can be enjoyed.⁴⁶ However, it also observed that the exercise of powers on stereotypical assumptions does not help make society safer, but rather 'erodes trust and makes cooperation harder'.⁴⁷
60. Importantly, in certain police forces, a reduction in disproportionality was found to have been accompanied by a reduction in crime and increased levels of public confidence, suggesting that measures to address the use of race in policing can enhance crime reduction strategies.
61. Further significant findings presented in 'Stop and think' include that:

⁴³ See Equality and Human Rights Commission, *Stop and think: A critical review of the use of stop and search powers in England and Wales* (2010), p23 for an example of the definition and use of the terms 'Black' and 'Asian'.

⁴⁴ Equality and Human Rights Commission, *Stop and think: A critical review of the use of stop and search powers in England and Wales* (2010), available at: <http://www.equalityhumanrights.com/key-projects/race-in-britain/stop-and-think/>.

⁴⁵ Equality and Human Rights Commission, *Stop and think again: Towards race equality in police PACE stop and search* (2013), available at: <http://www.equalityhumanrights.com/key-projects/race-in-britain/stop-and-think-again/>.

⁴⁶ Equality and Human Rights Commission, *Stop and think: A critical review of the use of stop and search powers in England and Wales* (2010), p3, available at: <http://www.equalityhumanrights.com/key-projects/race-in-britain/stop-and-think/>.

⁴⁷ *Ibid*, pp 3-4.

- (a) evidence confirmed by ethnic monitoring indicated significant racial disproportionality in the exercise of stop and search powers, with blacks being found to be at least six times as likely to be searched, and Asians approximately twice as likely to be searched, as whites;
 - (b) evidence further suggested that black and Asian persons were being searched disproportionately because of discriminatory and unlawful use of stop and search powers;
 - (c) there was no robust evidence to suggest that black people are more involved in crime; and
 - (d) there was significant variation in racial disproportionality between police forces, and the evidence suggested that the way in which a particular force exercised its powers was a more significant factor in the level of race disproportionality of its searches than the nature of the community it served.
62. The ECHR concluded that, as searches contributed to only a small reduction in crime, the negative impact on community confidence of unfair use of stop and search powers needs to be balanced accordingly.
63. Her Majesty's Inspectorate of Constabulary (**HRIM**), the police inspectorate of England and Wales, has also recently published a report on the use of stop and search powers.⁴⁸ This review of stop and search powers was undertaken following the 2011 riots, and encompassed a review of each of the 43 police forces in England and Wales and also a public survey.
64. The review focused on identifying:
- (a) how effectively and fairly police use stop and search powers;
 - (b) whether or not officers know how to use stop and search in a way that works to cut crime; and
 - (c) how the powers can be used to build public trust, rather than erode it.
65. The HRIM review found that the most important factor in motivating people to cooperate and not break the law is the legitimacy of the police force, and that legitimacy 'involves the public trusting the police because they think officers would treat them with respect, make fair decisions and take time to explain these decisions to them'.⁴⁹ Further relevant findings included that:

⁴⁸ Her Majesty's Inspectorate of Constabulary, *Stop and Search Powers: Are the police using them effectively and fairly?* (2013), available at: <http://www.hmic.gov.uk/media/stop-and-search-powers-20130709.pdf>.

⁴⁹ Her Majesty's Inspectorate of Constabulary, *Stop and Search Powers: Are the police using them effectively and fairly?* (2013), p49, available at: <http://www.hmic.gov.uk/media/stop-and-search-powers-20130709.pdf>.

- (a) the majority of forces do not understand how to use stop and search powers effectively and fairly to prevent and detect crime, and too few forces collected sufficient information to assess whether or not the use of these powers had been effective;
- (b) twenty-seven per cent of stop and search records examined did not include sufficient grounds to justify the lawful use of power – the reasons for this included poor understanding amongst officers about what constitutes ‘reasonable grounds’;
- (c) there is high public support for the use of stop and search powers, but this support diminishes where there is a perception that they are being overused; and
- (d) half of the 43 forces had not taken steps to understand the impact that stop and search had on communities, and fewer than half had complied with the requirement that stop and search records be made scrutinised by the public.

66. In response to the HRIM report, Home Secretary Theresa May recently announced that a six-week public consultation would be conducted into the exercise of these powers.⁵⁰ This consultation has not yet concluded. However, the results, when available, may provide further guidance to Victoria Police in respect of issues relevant to its field contact policies and cross-cultural training.

4.3 New and good practice initiatives

67. The recent reviews of stop and search powers in the UK, and in particular those undertaken by the ECHR, have identified a number of new and good practice initiatives. Consideration of these initiatives may assist to inform the development of appropriate responses in Victoria. In particular, the UK experience demonstrates the way in which the use of race in stop and search can be addressed in a resource-efficient manner that targets priority forces or stations.

68. Emerging good practice identified by the ECHR includes:

- (a) the implementation of rigorous reporting, which has enabled more effective identification of the forces in which, and extent to which, race is being used in stop and search decision-making;
- (b) the production of a stop and search manual setting out expectations of police forces, accompanied by a Practice Oriented Package intended to assist forces to identify the

⁵⁰ Jessica Elgot, ‘Stop and search unlawful in one in four cases, Police Watchdog finds’, *Huffington Post* (9 July 2013), available at: http://www.huffingtonpost.co.uk/2013/07/08/stop-and-search-unlawful_n_3561409.html.

reasons for racial disproportionality and remedial actions to address this, which was implemented in Staffordshire with positive results;⁵¹ and

- (c) the 'Next Steps' initiative, which provides principles and policies directed to reducing disproportionality in stop and search and includes the following measures:
 - (i) allocation of specific roles for key officers;
 - (ii) measures to combat non-recording;
 - (iii) analysis of trends, including individual officer patterns; and
 - (iv) reinforcement of training messages; and information from analysis at daily briefings.⁵²

69. Following the 'Stop and think' report in 2010, the ECHR agreed a more intensive program of action in two forces identified as priorities. The initiatives implemented through these programs included:

- (a) developing a revised policy;
- (b) delivering training to all officers, including on 'reasonable grounds' and lawful and proportionate use;
- (c) implementing targets for reduction;
- (d) taking steps to ensure full and complete reporting;
- (e) undertaking detailed statistical ethnic monitoring;
- (f) promotion of 'intelligence led' use of stop and search powers, and prohibition of practice based on 'hunches' or generalisations about groups;
- (g) scrutiny by senior management group meetings and also a community reference group;
- (h) nomination of an Association of Chief Police Officers rank officer with overall responsibility for the ongoing program; and
- (i) elimination of performance targets that encouraged prolific rather than carefully judged use of stop and search powers.⁵³

⁵¹ Equality and Human Rights Commission, *Stop and think: A critical review of the use of stop and search powers in England and Wales* (2010), p62, available at: <http://www.equalityhumanrights.com/key-projects/race-in-britain/stop-and-think/>.

⁵² *Ibid*, pp62-63.

4.4 Lessons for Victoria

70. The UK experience points to significant flaws in the accountability for Victoria Police use of stop and search powers. Victoria Police officers, when conducting searches without warrants, record “Ethnic appearance” on the relevant police form. However, there appears to be no systemic police analysis of this data. There is certainly no public reporting of the number of searches undertaken of people from different racial backgrounds. Accordingly, unlike the UK, there is no public method of assessing race disproportionality in searches, nor of assessing progress in addressing any disproportionality.
71. The Flemington Kensington Community Legal Service, in the context of the *Haile-Michael* case, arranged for an expert analysis of police LEAP data to statistically assess whether or not young African Australians in the area were more likely to be stopped by police. The analysis showed that African males in the Flemington and North Melbourne areas were 2.4 times more likely to be stopped by police than other members of those communities and yet were under-represented in crime statistics.⁵⁴
72. It is clear that Victoria Police needs to do more to analyse the extent of the problem of the disproportionate use of search powers against particular racial groups, and also to measure progress in addressing disproportionality.
73. The receipting policy recommended by the Flemington Kensington Community Legal Service and the Victorian Equal Opportunity and Human Rights Commission would address this lack of accountability around the exercise of police search powers.

⁵³ Equality and Human Rights Commission, *Stop and think again: Towards race equality in police PACE stop and search* (2013), pp5-7, available at: <http://www.equalityhumanrights.com/key-projects/race-in-britain/stop-and-think-again/>.

⁵⁴ Flemington Kensington Community Legal Centre, *Submission to Victoria Police*, 30 July 2013, Chapters 1 & 2.

Recommendation 4:

Victoria Police should enhance data collection processes to enable better identification and analysis of the impact of stop and search powers on particular racial groups. Victoria Police should publicly report in its annual report on the use of stop and search powers on particular racial groups.

Recommendation 5:

Victoria Police should trial the provision of receipts when conducting searches as recommended by the Flemington Kensington Community Legal Centre and the Victorian Equal Opportunity and Human Rights Commission.

Recommendation 6:

Targeted and firm measures should be taken to address the conscious and unconscious use of race or other personal characteristics in policing. These measures should include effective and ongoing community engagement, and key officers within Victoria Police should be tasked with monitoring their implementation and effectiveness. Police training should specifically address racial profiling and the impact of unconscious racial bias in policing decisions.

Information concerning the use of race in policing, and measures taken to address this, should be made publicly available.

5. Community engagement

5.1 The importance of community engagement

74. The benefits of a 'community policing' approach and greater engagement between police agencies and the wider community, and, in particular, vulnerable groups, have been widely documented.⁵⁵
75. In addition, civilian oversight and input into addressing systemic issues in police policy, culture and practice also enhances accountability and transparency of policing processes and contributes to higher ethical and professional standards and more effective policing.

⁵⁵ See generally, for example, Putt, J. (Ed.), *Community Policing in Australia*, Australian Institute of Criminology Report: Research and Public Policy Series, (2010) (available at http://www.aic.gov.au/documents/0/4/F/%7B04F19D1A-19B1-4C6F-9EC0-A38F1B3DDF38%7Drpp111_002.pdf).

5.2 Improvements to community engagement practices

76. Victoria Police serves a range of constituency groups and the community more broadly and must work to maintain its relationships with certain communities, particularly those who have suffered historically from poor treatment at the hands of police (for example, LGBTI communities and the criminalisation of homosexual activity) and those communities or affected population groups that experience or are perceived to experience high levels of contact with police and the criminal justice system.
77. Victoria Police should be commended for its efforts to maintain and build relationships with certain specific community groups. The Aboriginal Justice Agreement including the regular Aboriginal Justice Forums and related activities that involve Victoria Police, are examples of good practice in community engagement.
78. While there are a range of improvements that could be made to community engagement processes, this submission is focussed on the opportunity for direct input by the HRLC and similar organisations.

5.3 Harnessing the expertise of non government organisations

79. Community legal centres (CLCs), Victoria Legal Aid and other community organisations assist clients from a range of disadvantaged backgrounds.⁵⁶ These client groups are overrepresented in their levels of contact with Victoria Police and the criminal justice system and are also disproportionately represented as victims of crime. Often these clients lack the capacity or resources to directly engage formal consultation processes. Because of their direct experience working with disadvantaged people, CLCs and similar organisations are well placed to comment on legal and policy issues affecting these groups.
80. The HRLC and other community legal centres have benefitted from ad hoc opportunities to provide input into Victoria Police procedures and training.⁵⁷ We have also convened meetings of senior members of Victoria Police, government policy makers and international experts to discuss, for example, best practice and models for Taser use, to inform the training and policies surrounding the use of Tasers in Victoria.⁵⁸ There has also been mutual benefit from including a civilian participant on the Victoria Police panel that reviews police Taser use incidents and which recommends improvements to training and policies.

⁵⁶ For example, Aboriginal and Torres Strait Islander peoples, young people, people from culturally and linguistic diverse communities, mental health consumers, people with disabilities, people experiencing homelessness, women including victims of family violence, LGBTI people, people living with HIV/AIDS, sex workers, and more.

⁵⁷ For example, opportunity to comment on the Tactical Options Model in 2012 and attending PSO training at Glen Waverly Police Academy in March 2013.

⁵⁸ Expert Roundtable on Tasers convened by the HRLC and the Federation of Community Legal Centres (Victoria) on 16 October 2012.

81. This engagement could be enhanced through an ongoing and strategic approach to enable CLCs and similar organisations to provide feedback and input to Victoria Police on a continuous basis. An ongoing forum and contact point within Victoria Police would have significant practical benefits and improve the transparency and accountability, including:
- (a) new and emerging issues ‘on the ground’ could be reported and addressed quickly and efficiently before they escalate;
 - (b) systemic issues would receive ongoing and concerted attention and progress would be able to be monitored over time;
 - (c) a feedback mechanism would readily available and accessible to consider and test the human rights impacts of revised or new Victoria Police policies and processes and training modules;
 - (d) data sets and emerging trends and analysis of data could be shared and discussed to identify and address systemic issues; and
 - (e) relationships and levels of trust would be strengthened to mutual benefit, ensuring that issues could be progressed efficiently and effectively.

Recommendation 7:

Victoria Police should establish a ‘human rights community advisory committee’ or similar body. Such a group would:

- meet regularly and identify and address current issues in human rights and policing;
- provide ongoing advice to Victoria Police in the development of human rights compliant policy, procedures and training; and
- include representatives from community legal centres, human rights organisations and others dealing with policing issues affecting vulnerable groups such as Victoria Legal Aid and academic organisations.

Victoria Police should use a newly established human rights advisory group and existing community reference groups to follow-up and report on implementation of actions arising from the Inquiry.