POLICING COVID-19 IN VICTORIA

EXPLORING THE IMPACT OF PERCEIVED RACE IN THE ISSUING OF COVID-19 FINES DURING 2020

Police Accountability Project

INNER MELBOURNE COMMUNITY LEGAL

Acknowledgements

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Glossary

CHO — Chief Health Officer of Victoria.

CIU — Crime Investigation Unit.

COVID — COVID-19 or the coronavirus disease.

CLC — Community Legal Centre.

BADDR Principles — 'BADDR' refers to data use that is blaming, aggregate, decontextualised, deficit, restricted.[1]

DRU — Divisional Response Unit.

IBAC — Independent Broad-based Anti-corruption Commission.

LGA — Local government areas.

Logistic linear mixed model — A statistical model that in this case took into account a number of controls, differences in the rates of individuals receiving fines and differences in the rate of fines issued by particular police operations.

Missing data — The 23.5 per cent of 2020 COVID fine data from Victoria Police where racial appearance codes were missing.

Multiple imputation — A statistical procedure by which missing values in the data are imputed multiple times so creating a large number of new data sets using range of different variables such as complexion, age, LGA, police rank and location. The pooled result of this process is then subject to the same test as the data from the complete cases as a sensitivity (comparison) test.

PSO — Protective Services Officer.

p-value — Represents the probability, if the null hypothesis is true, of obtaining the test result. The smaller the p-value, the stronger the evidence that the null hypothesis is implausible. This can be interpreted, from a pragmatic perspective, as providing evidence to support an alternative hypothesis.[2]

Racialised communities — In this report the term 'racialised' is used to draw attention to the process of social construction in which some groups of people are constructed as having a 'race' while others (white people) are 'unraced'. Racialised communities are communities of people who are constructed as non-white in Australian culture.

Racial Profiling — The disproportionate and unreasonable use of police investigative (or other such) powers against particular First Nations and racialised groups compared with white people.

Racial disproportionality — The disproportionate outcome of criminal legal processes against particular First Nations and racialised groups compared with their relative size in the population.

Situational discrimination — When police investigate particular areas more than others and so increase the rate at which particular groups are investigated compared with others.

A note on terms of race

Victoria Police ethnic appearance codes use the racial labels Caucasian and Aboriginal/Torres Strait Islander. Discussion in the report which does not refer directly to the codes use our Steering Committee's preferred labels for these groups: white people and First Nations.

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1   Maggie Walter et al, 'Indigenous Data Sovereignty in the Era of Big Data and Open Data' [2020] *The Australian journal of social issues* 1.

2   Trang Quang Hung, 'Key to statistical result interpretation: P-value in plain English' (Students 4 best evidence, 21 March 2016). Available at: https://www.students4bestevidence.net/blog/2016/03/21/p-value-in-plain-english-2; Ronald L Wasserstein and Nicole A Lazar, 'The ASA Statement on P-Values: Context, Process, and Purpose' (2016) 70(2) *The American Statistician* 129.

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Foreword

On 16 March 2020 the Premier of Victoria declared a State of Emergency under the *Health and Wellbeing Act 2008* (Vic).[3] This gave the Chief Health Officer of Victoria (CHO) powers to issue public health orders. The first order required 14-day isolation for returning overseas travellers and banned non-essential gatherings of up to 500 people. Within 14 days Victorians would be under stage 3 restrictions with only four reasons to leave home: to buy food or essential supplies, access medical care, exercise, and to attend work/education if it was not possible to do so from home. Breaches of the orders could result in up to $20,000 fines for individuals and $1,652 on-the-spot fine.[4]

These were unprecedented fines. The on-the-spot fines were eight times the rate of speeding fines and four times the rate of failing to stop at a red light.[5] Inner Melbourne Community Legal provides free legal advice and assistance to people in the inner Melbourne area in need. Our service regularly assists people on very low incomes, in crisis and experiencing homelessness. Our fines clinic sees the impact of crippling fines debt on people who can least afford to pay. Too often it is people who society has marginalised due to race, homelessness or mental illness, who bear the brunt of the fine system. Needless to say, the punitive regime to enforce public health orders set off alarm bells.

Reports came in quickly from our local communities of police unreasonably using their powers and communities feeling targeted.[6] In July 2020 residents of North Melbourne public housing estate faced an immediate hard lockdown and an estimated 500 police turn up in front of their homes.[7] It was a decision the Victorian Ombudsman found was not based on direct health advice and violated the state's human rights laws. For many Victorians it became apparent that communities were treated differently depending on whether they lived in public housing estates or beachside suburbia, the diversity of the local government area and the contact they may already have with police.

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3   Premier of Victoria, 'State of Emergency declared over Victoria' (Media release, 16 March 2020). Available at: https://www.premier.vic.gov.au/state-emergency-declared-victoria-over-covid-19

4   Premier of Victoria, 'S[t]atement From the Premier' (Media release, 30 May 2020). Available at: https://www.premier.vic.gov.au/atement-premier

5   In 2019–20 Excessive speed limit other than heavy vehicle by less than 10Km/hr resulted in $207 fine; failing to stop at red light resulted in $413 fine; See Victoria Roads "Act/Regulations" available at: https://www.vicroads.vic.gov.au/-/media/files/documents/safety-and-road-rules/feesfinespenalties/2020-21-roads-fees-and-penalties-updated-oct-2020.ashx?la=en&hash=E2814F5ACA00FB8E21F197BACE83EF0E

6   Boon-Kuo, L, Sentas, V, Weber, L (2021) COVID-19 Policing in the Pandemic: Analysis of Reports Submitted to the COVID-19 Policing in Australia Coalition (Kensington: Flemington & Kensington Legal Centre)

7   Michael Fowler, Chloe Booker, 'Anger at hard lockdown for towers without confirmed virus cases' (*The Age*, 5 July 2020). Available at: https://www.theage.com.au/national/victoria/covid-publichousing-wrap-20200705-p5596z.html

Out of the sector's Infringements Working Group, Inner Melbourne Community Legal joined the COVID-19 Community Lawyers Group chaired by Tiffany Overall from YouthLaw. Discussions with community lawyers across Victoria and the initiative of community lawyer Lloyd Murphy from Inner Melbourne Community Legal prompted this report funded by Victorian Law Foundation – Knowledge Grant.

We observed that our clients from racialised communities were receiving more fines than others. This was backed up in data obtained by the group from Victorian Crime Statistics Agency where Sudanese born people and First Nations people were disproportionately more likely to be fined.[8]

On the surface this raw data suggested that some communities were being targeted by police at higher rates than others, but it might also show a higher rate of offending. Inner Melbourne Community Legal set out to determine whether the disproportionate fines issued to Sudanese/South Sudanese and First Nations people were a consequence of racial profiling, that is, over-policing of these communities, or whether some other factor was at play.

This research is groundbreaking in taking this additional step to demonstrate why some communities faced harsher penalties than others. COVID fines provide a unique opportunity to explore this problem as the lockdown rules applied to all Victorians. Most people at some point either intentionally or unintentionally breached the public health orders during the pandemic. But not all Victorians received fines for their breaches. Only some people 'got caught'.

The report finds that racial profiling is occurring in Victorian Police force. African and Middle Eastern people were four times more likely to receive a COVID fine than their proportion in the population would predict, and First Nations people two and a half times as likely. When the data was further analysed it finds that African and Middle Eastern people were 5 per cent more likely to be fined for a public health order breach that required questioning, providing clear evidence of racial profiling. Equally concerning the report finds some police operations up to 40 per cent of the fines

they issued were to African and Middle Eastern appearing people. And particular police stations between 10 – 30 per cent of all the fines they issued were to First Nations people. The more people from non-English speaking backgrounds a Local Government Area had, the more fines they received.

Finally, the report looked at qualitative dataset to see what sort of impact random stop and searches had. The data showed people who felt singled out for COVID compliance checks by police felt more distressed than those who were part of systematic checks (such as border checks where everyone was stopped). A First Nations woman reported that police spoke to her and her passengers 'like they were dogs' and they felt scared and dehumanised.

The findings tell us about Victoria Police practices and apply more generally to the issuing of discretionary fines. The report is a call to action for the Victorian Government to eliminate racial profiling in Victoria Police. Key recommendations include mandating the collection of stop and search data and creating a Police Ombudsman so people who experience racial profiling and other human rights abuses have an independent investigative body they can make complaints to. The recommendations should be adopted as a matter of urgency to make Victoria fairer and more equal for all of us.

We look forward to working collaboratively with all stakeholders towards the implementation of these recommendations and eliminating all forms of racial profiling in police practice.

Thank you to the generous input of our steering committee – Victorian Aboriginal Legal Service, Police Accountability Project, Youthlaw and to contributions from members of the COVID-19 Community Lawyers Group and the Federation of Community Legal Centres Infringements Working Group, and University of NSW statistical support.

— NADIA MORALES
— JESSICA DEVRIES

ACTING CO-CEOS, INNER MELBOURNE COMMUNITY LEGAL

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8   Victorian Crime Statistics Agency, 'Table 1. Selected unique COVID-19 Alleged Offender Country of birth by Age group - April to September 2020' (data extracted from LEAP, 18 October 2020).

Executive Summary

This report analyses the data of all 37,405 COVID-19 fines issued in 2020 in Victoria.

This quantitative analysis of the impact of racial appearance on police in the issuing of COVID fines is the first of its kind in Australia. This analysis represents an important contribution to understanding how racialised communities are policed.

The findings of this report provide a glimpse into what is likely to be a significant problem in Victoria. Because of data limitations, this report may well underreport the severity of the policing experience by First Nations and other racialised people during the COVID-19 pandemic. The data we have access to does not capture the experience of racialised people who were stopped and questioned by the police but were not fined because they were complying with the COVID rules.

DETERMINING WHETHER THE ISSUING OF COVID FINES BY POLICE WAS RACIALLY DISCRIMINATORY

In Victoria, COVID infringements were recorded on a 508G form that includes a field for racial appearance. Police completed the racial appearance field in 76.5 per cent of the forms they completed.

This report makes an important distinction between racial profiling and the disproportionate over-representation of a group in the outcomes of the criminal legal system (see page 19).

Racial profiling involves the conscious or unconscious decisions of police to unreasonably investigate particular racialised groups at a higher rate than white people. The consequence of this excessive policing, will result in police finding more criminality, or in this case more breaches of public health orders in these groups than they would otherwise find if investigation was evenly spread across the population.

METHODOLOGY

The COVID fine data shows us how many fines were issued by the police. The challenge of this substantial data set was it only demonstrated the end result, that is how many people 'got caught' by police and issued a fine. The data itself does not tell us how many people breached health orders and were not caught, nor who were cautioned and warned. A better data source to conduct this analysis would have been data on who police stopped and questioned for COVID compliance checks. Such data is not currently available.

To attempt to overcome this challenge and determine whether police practices contributed to the disproportionate rate of fines received by racialised communities the study uses five methods. The first two considers the impact of policing behaviour on individuals, the second two the conduct of police operations and localities, the final one looks at the psychological impact on individuals of random stops.

Research questions used in the study

1. Did racialised people receive more fines for breaches of health directions that **required the police to question** them (eg. to determine if a person was outside their 5km radius) than fines for visible offences that are immediately obvious (eg. wearing a face mask)?

2. Did racialised people **get arrested at higher rates** than white people for COVID-19 offences?

3. Were more COVID fines issued in more **diverse local government areas** than the rate their overall population would predict?

4. Were particular **police operations** more racially disproportionate than others in their issuing of fines?

5. What was the **psychological impact** of a random COVID compliance check compared with a check when groups of people were being policed based on a neutral criterion, such as arrival at a border?

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KEY FINDINGS

The report found evidence consistent with racial profiling of African, Middle Eastern and First Nations people in the COVID fines data.

It found that racial profiling by Victoria Police occurred at an individual level.

African/Middle Eastern people received 5.4 per cent (95% CI: 3.5% - 7.4%) more fines for offences that required police to question them compared to visible offences (eg. not wearing a face mask).

It found evidence consistent with racial profiling occurred across Victoria's local government areas.

Controlling for the total population of each LGA, for every 10% increase in non-English speakers at home in an LGA as a proportion of the LGAs overall population, the rate of COVID fines increased 11%.

It found evidence consistent with racial profiling at a police operation level.

African and Middle Eastern people received over 30 per cent of the fines issued by some specialist crime units, public transport and highway patrols, and First Nations people received up to 1 in 3 fines issued by particular uniformed branches. The report, however, did not find racialised people were more likely to be arrested.

Victoria Police members failed to complete the ethnic appearance code field in nearly 1 in 4 fines issued.

The psychological toll of racial profiling is touched on in the qualitative data that found people felt more distressed when they were singled out for compliance checks, compared to when everyone was being checked equally, such as at a border check. This was an experience felt by white and racialised people who were stopped by police where they felt singled out.

37,405 FINES WERE ISSUED FOR BREACHES OF COVID OFFENCES IN 2020.

OF THE **28,088** FINES WHERE RACIAL APPEARANCE WAS KNOWN, **20.1%** WENT TO PEOPLE OF AFRICAN/MIDDLE EASTERN APPEARANCE, **2.5%** TO PEOPLE OF ABORIGINAL APPEARANCE

20.1% fines issued to people of **African/Middle Eastern** appearance

2.5% fines issued to people of **Aboriginal** appearance
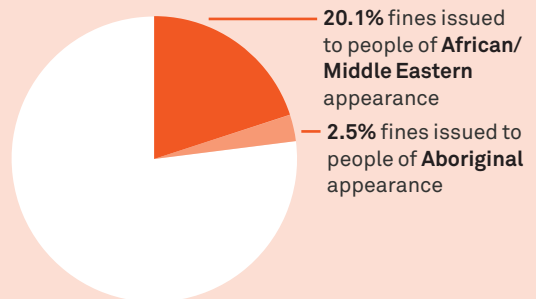
AFRICAN/MIDDLE EASTERN PEOPLE WERE **FOUR TIMES AS LIKELY** TO BE ISSUED COVID FINES BASED ON THEIR POPULATION SIZE

FIRST NATIONS PEOPLE WERE **TWO AND A HALF TIMES AS LIKELY** TO BE ISSUED COVID FINES BASED ON THEIR POPULATION SIZE

10 key findings of the study

1. During 2020, Victoria Police issued **37,405** fines for breaches of COVID-19 offences. Of the 28,088 where racial appearance was known, they issued **20.1 per cent** to people of **African/Middle Eastern appearance** and **2.5 per cent** to people of **Aboriginal appearance**.

2. Proportionate to their population size African/Middle Eastern people were over-represented **4.0 times**. First Nations people received **2.5 times** the number of fines expected by their size in the population.

3. Compared with white people, police are **5.4 per cent** (95% CI: 3.5% - 7.4%) more likely to fine people of **African/Middle Eastern appearance** for offences involving questioning compared with visible offences. This indicates that police were more active in investigating African/Middle Eastern people for potential COVID offences than white people. This is evidence of **racial profiling**.

4. The study's complete case analysis found evidence that police are **4.3 per cent** (95% CI: 1.7% - 7.0%), more likely to fine **Asian people** for offences involving questioning compared with visible offences than white people. However, when the 'missing data' (the police did not fill in racial appearance on the fine in 23.5 per cent fines) is approximated through a multiple imputation sensitivity analysis this finding was not supported.

5. The survey provides qualitative evidence that fines arising from random vehicle stops **generated more distress** than fines where people did not feel singled out.

6. This study **did not find evidence** that race impacted a person's probability of being arrested.

7. This study found evidence that **local government areas** with higher proportions of **non-English speakers** received a higher proportion of COVID fines than those where most people spoke English at home. It found that, controlling for population, for every 10 per cent increase in non-English speaking in an LGA, total fines increased by 11 per cent (95%CI: 3% - 21%).

8. Some police operations issued over a third of their fines to African and Middle Eastern people. **Police operations** that were most disproportionate in issuing fines to African/Middle-Eastern appearing people included:

- Embona Taskforce Altona North (**87.5 %** of fines (7/8) issued by the taskforce were to people of African/Middle-Eastern appearance)
- Embona Taskforce Melbourne (**50%**, 16/34),
- Passenger Notification Project (**46.2%**, 6/13)
- Crime Echo Taskforce (**39.5%**, 17/43)
- Transit South 4 PSO (**38.9%**, 183/471)
- Brimbank DRU (**38.7%**, 12/31)
- Transit North 1 (**38.5%** 30/78)
- Transit West 3 PSO (**37%** 60/162)
- Brimbank CIU (**35.9%** 14/39)
- Transit South 4 (**35.4%** 143/404)

It is notable that most of these operations are specialist crime, public transport or highway operations.

9. **First Nations communities** were more likely to be the target of disproportionate COVID fines from metropolitan and rural uniform branches. Notable branches:

- 1 in every 3 fines issued by **Mildura Uniform** was to a First Nations person (27.8%, 30/108)
- 1 in 5 fines issued by **Collingwood Uniform** was to a First Nations person (18.4%, 45/245)
- 1 in 6 fines issued by **Bairnsdale Uniform** was to a First Nations person (17.6%, 13/74)
- 1 in 7 fines issued by **Swan Hill Uniform** was to a First Nations person (13.9%,17/122)
- 1 in 8 fines issued by **Shepparton Uniform** was to a First Nations person (12.7%, 15/118).

10. Victoria Police continues to use its **old racial appearance codes** rather than the eight new codes they adopted in 2018. This leaves the data full of inaccuracies. This problem is exacerbated by racial appearance **codes missing in 23.5 per cent of fine records**.

RECOMMENDATIONS

This report is a call to action for the Victorian Government. The Victorian Police Manual has had an explicit ban on racial profiling since 2015. This report is evidence that on the ground, in everyday policing, the ban on racial profiling is not working. For Victoria Police to be accountable to Victorians there needs to be transparent and public reporting on who they stop and search. Victoria Police cannot continue to be exempt, in their treatment of suspects, from the *Equal Opportunity Act 2010*.

Importantly, Victorians who experience racial profiling and human right abuses need a safe and culturally appropriate independent body to make a complaint. Complaints need to investigated, not by police, but independently and outcomes must be enforceable. For this reason, the report adds for growing calls for an independent police complaints body and recommends the creation of a Police Ombudsman.

Full list of 20 recommendations

1. The Victorian Government mandate the collection and public reporting by Victoria Police of data on who its members stop, question, search, fine, arrest, move-on, and use force against in accordance with the recommendations of the Stop Data Working Group and recommendation 20 of the 2022 Criminal Justice Parliamentary Inquiry.[9]

2. The Victorian Government legislate to enforce the use of the eight ethnic appearance codes Victoria Police introduced in 2018[10] in particular so that sub-Saharan African appearance can be separated from Middle-Eastern/North African appearance. The correct use of these codes must be regularly and independently audited and cross-checked against body-worn camera evidence.

4. The Australian Census should collect data that can reasonably be used to assess the racial appearance of people resident within localities.[11]

4. That Victorian Government legislate to amend the definition of "services" in the *Victorian Equal Opportunity Act 2010* to include all interactions by police and prison guards with members of the public including those suspected or found guilty of committing offences.

5. That Victoria Police requests the Victorian Equal Opportunity and Human Rights Commission conduct a review of their policing practices and the outcomes for people from racialised communities under *Charter of Human Rights and Responsibilities 2006* (Vic) section 41(c).

6. The Victorian Government creates a Police Ombudsman to provide accessible, safe, independent and effective avenue for people and organisations to make complaints about Victoria Police including complaints about racial profiling and human rights abuses.

7. The police powers to stop people, i.e. targeted interactions, should be legislated so that it is limited to where police have grounds to reasonably suspect:

a) An offence has occurred; and,

b) that the stopped person has a connection (a nexus) to it.[12]

9 Fiona Patten, *Inquiry into Victoria's Criminal Justice System, Volume 1* (Parliament of Victoria, Legislative Council, Legal and Social Issue Committee, March 2022).

10 Victoria Police, 'Field Contact Policy Guide for Victoria Police Educators and Ethnic Appearance Codes - FOI 57210/17'.

11 See discussion in Liz Allen, 'Promoting Representation Through Data: The Case for More Comprehensive Ethnicity Data in Australia' (2021) 37(2) *Law in Context*.

12 R. v. Le, 2019 SCC 34 [131]

8. Biased law enforcement should be eliminated through legislation/regulations/policy that is drafted to eliminate the opportunity for bias in enforcement. This should apply broadly to all infringements and offences:

a) People should only be subjected to a targeted interaction once an offence is reasonably believed to have occurred and following a caution under the *Evidence Act 2008*.

b) Where the government explicitly authorises through legislation, questioning in the absence of reasonable grounds (and this should be in very limited circumstances only), it should be undertaken in a racially neutral location, such as at a border and not at train stations, and using a criterion that eliminates any possibility for police to be racially selective in any way such as questioning all individuals OR every 10th person or in groups of 10 vehicles.

c) An audit of authorising legislation should be undertaken to embed recommendations 1, 2, 7 and 8a and b across legislation.

9. A law reform inquiry should investigate the feasibility and efficacy of further codifying police powers in Victoria to promote and protect human rights in standardising police practices.

10. The Victorian Government should provide increased funding to community legal centres and the Victorian Aboriginal Legal Service to better understand and support communities to address systemic racism, reduce the contact of these communities with the police and criminal justice system and increase the capacity of these communities to make complaints about racial profiling through the legal and complaints systems.

11. The Victorian Government should provide increased funding to impacted communities to support alternatives to police such as community safety, health, and well-being patrols.[13] Health and wellbeing are community, rather than police issues.

12. Victoria Police should ensure that health fines are not issued in addition to other law enforcement strategies. Education should be the primary strategy when other law enforcement goals are being pursued.

13. Victoria Police operations must not be focussed on particular racialised groups. Victoria Police must develop a plan and a monitoring and public reporting strategy to ensure that its taskforces and operations are not disproportionately focussed on particular racialised groups. Aside from being in breach of the *Racial Discrimination Act 1975*, by focussing on particular racialised groups, these operations re-enforce existing stereotypes and ensure that these groups are more likely to face sanctions and enter the criminal legal system than the general community.

13　See for example Foot-Patrol by Youth Projects, and Aboriginal community safety patrols: Amanda Porter, 2016, Decolonizing Policing: Indigenous Patrols, Counter-Policing and Safety. Theoretical Criminology 20(4).

14. Victoria Police must ensure its operations are spread throughout the community and are not targeted at communities with higher ethnic diversity.

15. The Victorian Government should update the COVID-19 Compliance and Enforcement Policy to require that enforcement operations are spread fairly across communities and that enforcement agencies publicly report on where operations have occurred.

16. The *Infringement Act 2006* (Vic) should be amended to reflect that arrest be a last resort for offences where an infringement can be issued. Where an arrest has occurred the fine should not be issued.

17. To address the additional financial and emotional burden on particular communities arising from the unequal issuing of COVID fines, we recommend that the Victorian Government waive all COVID-19 fines.

- If recommendation 17 is not implemented: we recommend that all COVID fines issued by police operations where more than 5 per cent of all fines were issued to First Nations people and more than 20 per cent were issued to African/Middle Eastern people should be withdrawn in light of the grossly racially disproportionate impact of these operations on these communities. All fines issued to all individuals by these operations should be waived on the basis that they were using police tactics that lack legitimacy.

18. In future, the primary consequence for breach of health orders should be education and mask provision.

19. That the COVID-19 Compliance and Enforcement Policy be updated in line with the recommendations of this report to ensure that the enforcement of health orders is:

- non-discriminatory, with particular consideration where issuing of fines is discretionary;
- minimise the use of law enforcement tools;
- maximise overall community health through education, support and referral;
- any fines issued are publicly reported and audited to prevent racial profiling.

20. The COVID-19 Compliance and Enforcement Policy be amended to remove stereotypes from the description of First Nations people and instead reflect that First Nations communities have and continue to be disproportionately affected by discretionary decisions by Victoria Police that tend towards the more punitive option. The policy should be amended to emphasise the importance of Aboriginal community-controlled organisations in the enforcement of and adherence to public health guidelines by First Nations communities.

Introduction

In 2020, in response to the COVID-19 pandemic the Victorian Government created a series of offences for breaching orders of the Chief Health Officer of Victoria (CHO) designed to reduce the spread of the COVID-19 virus. Breaches of the CHO's orders could be punished through the Victoria Police issuing fines to alleged offenders.[14]

According to the Victorian Public Accounts and Estimates Committee, 'by 16 December 2020, police had carried out 533,896 checks, with 2,659,060 vehicles checked at roadblocks'.[15] While the police in Victoria did not collect data on who its COVID compliance checks were carried out against we know from the data collected in this report, that 37 405 fines were issued as a consequence.

14 Public Accounts and Estimates Committee, *Inquiry into the Victorian Government's Response to the COVID-19 Pandemic* (Parliament of Victoria, February 2021) 259.

15 Ibid.

Police involvement in health-related enforcement has been controversial for some time. In 2021, the Royal Commission into Victoria's Metal Health System recommended that police no longer take the lead in mental health crisis call outs and that 000 calls regarding metal health be directed to the Ambulance Service.[16] While COVID related fines are not issued in response to an immediate health crisis, their relationship to public health puts them in a separate category to ordinary fines. For example, research has revealed that the public expected the police to be sensitive to COVID transmission risks while enforcing the orders[17] and there was an expectation that police enforcement would be greatest where transmission rates were highest and not on already over-policed communities.[18] Concerns about the police enforcement of COVID orders were raised during 2020 by community legal centres and journalists[19] and a growing number of academic scholars.[20] Concerns about the racially discriminatory enforcement of COVID laws was a key theme. Louise Boon-Kuo, Vicki Sentas and Leanne Weber were, for example, able to obtain astonishing data from NSW revealing that the police searched (i.e.

engaged in a criminal investigation of) 74 percent of all Aboriginal people they stopped in relation to a COVID matter.[21] This indicates that police were using COVID compliance checks as a pretext to criminally investigate Indigenous people in NSW.

The specific focus of this current study arises from questions raised by lawyers from the COVID-19 Community Lawyers Working Group about whether the enforcement of COVID laws through the issuing of COVID fines was racially discriminatory. This study is focussed on answering this particular question.

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16 State of Victoria, *Royal Commission into Victoria's Mental Health System, Final Report, Summary and Recommendations* (No Parliamentary Paper No. 202, 2021) 13 Recommendation 10.

17 Louise Boon-Kuo, Vicki Sentas and Leanne Weber, *COVID-19 Policing in the Pandemic, Analysis of Reports Submitted to the COVID-19 Policing in Australia Coalition* (Flemington & Kensington Community Legal Centre, 2021).

18 Osman Faruqi, 'Compliance Fines under the Microscope', *The Saturday Paper* (online, 18 April 2020) <https://www.thesaturdaypaper.com.au/news/health/2020/04/18/compliance-fines-under-the-microscope/15871320009710>.

19 Luke Henriques-Gomes, 'Victoria Police Issue Almost 20,000 Fines for Covid-19 Breaches during Pandemic', *The Guardian* (online, 26 August 2020) <https://www.theguardian.com/australia-news/2020/aug/26/victoria-police-issue-almost-20000-fines-for-covid-19-breaches-during-pandemic>; Lindy Kerin, '"Causing Stress and Anxiety": Aboriginal People in Far West NSW Copping Hefty COVID Fines', NITV (online, 23 August 2021) <https://www.sbs.com.au/nitv/article/2021/08/23/causing-stress-and-anxiety-aboriginal-people-far-west-nsw-copping-hefty-covid> ('"Causing Stress and Anxiety"'); Simone Fox Koob, '"No Surprise": The Young and Poor Most Likely to Get a COVID Fine', *The Age* (23 November 2021) <https://www.theage.com.au/national/victoria/no-surprise-the-young-and-poor-most-likely-to-get-a-covid-fine-20211111-p5985s.html> ('"No Surprise"'); Michael McGowan, Andy Ball and Josh Taylor, 'Covid-19 Lockdown: Victoria Police Data Sparks Fears Disadvantaged Unfairly Targeted', *The Guardian* (online, 6 June 2020) <https://www.theguardian.com/world/2020/jun/06/covid-19-lockdown-victoria-police-data-sparks-fears-disadvantaged-unfairly-targeted> ('Covid-19 Lockdown'); Faruqi (n 18).

20 Boon-Kuo, Sentas and Weber (n 17); Louise Boon-Kuo et al, 'Policing Biosecurity: Police Enforcement of Special Measures in New South Wales and Victoria during the COVID-19 Pandemic' [2020] *Current Issues in Criminal Justice* 1 ('Policing Biosecurity'); Emma K Russell et al, '"It Is Not about Punishment, It's about Protection": Policing "Vulnerabilities" and the Securitisation of Public Health in the COVID-19 Pandemic' [2022] *Criminal Justice* 20.

21 Boon-Kuo et al (n 20) 80.

Was the issuing of COVID fines in Victoria by police racially discriminatory?

Data from the Victorian Crime Statistics Agency shows that Victoria Police issued a disproportionately large number of COVID fines during the first half of 2020 towards Sudanese born and Aboriginal and Torres Strait Islander people.[22] This data showed that Sudanese and South Sudanese born people were 35.6 times more likely to be given a COVID related fine than their proportion in population would predict.[23] Aboriginal people were proportionately 4.5 times more likely to be issued with a fine.[24]

COVID fines data provides us with evidence of who was fined. It does not demonstrate the rate of COVID offending across the State of Victoria. It would be a reasonable assumption however that offending against the CHO orders occurred throughout the community. Even the Victorian Premier was issued with two COVID related fines in 2021.[25] Consequently, rather than providing information about the actual rates of offending against the pandemic laws in Victoria, police issued COVID fines tells us a great deal about the activity of police in enforcing the pandemic laws.

The extreme levels of racial disproportionality in the issuing of police fines apparent in the Victorian Crime Statistics Agency data raises questions about the legitimacy and reasonableness of using fines to control a pandemic given their extra-ordinarily unequal impact across racialised communities. According to race scholar Kendi, 'a racist policy is any measure that produces or sustains inequity between racial groups.'[26] He argues that there is no such thing as a non-racist or racially neutral policy or law – only ones that sustain equity or inequity. Applying his analysis, we could conclude that the unequal issue of COVID fines to Sudanese and First Nations people is a consequence of a racist policy. The unequal outcome of pandemic laws on different racial groups is unacceptable and requires a reassess-ment of pandemic law creation and enforcement.

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22   This data was obtained by Tiffany Overall on behalf of the COVID Fines Community Lawyers Working Group, from Victorian Crime Statistics Agency (n 6).

23   This figure is calculated using 2016 Census data. As at April, 2023, the 2021 Census has not yet released data for people born in Sudan resident in Victoria.

24   This figure is calculated using 2021 Census data.

25   ABC News, "Victorian Premier Daniel Andrews fined for COVID rule breaches after being filmed without a mask" (ABC News online, 8 Oct 2021) https://www.abc.net.au/news/2021-10-08/police-investigate-video-of-daniel-andrews-without-mask/100523614

26   Ibram X Kendi, *How to Be an Antiracist* (The Bodley Head, 2019) 18.

The key question for this project however is to identify the extent to which Victoria Police practices themselves are leading to racial inequality. This leads us to the central question for this project: is there any evidence that racial profiling played a role in the issuing of COVID fines by police in Victoria during 2020 and not as police/media may claim, because of higher rates of COVID offending in these communities.

To explore this question, we need to understand the difference between racial profiling and racial disproportionality. Racial disproportionality is identified when there is evidence of a disproportionate outcome of the criminal legal system on some groups. Racial profiling on the other hand, concerns the identification of the disproportionate and unreasonable use of police powers against First Nations and other racialised minorities. While both disproportionality and racial profiling are problematic, the added utility of the concept of racial profiling is that it allows us to identify when disproportionality is due to the unreasonable activity of the police. In doing so, we are able identify the specific role of the police in generating racially disproportionate outcomes.

Racial profiling, a type of racial discrimination made unlawful under section 9 of the *Racial Discrimination Act 1975* (Cth) occurs when police disproportionately subject racialised people to unreasonable conduct during either suspect selection or suspect treatment.[27] A good way to explore unreasonableness is to examine police stop, question, and post-stop practices including searches. Unfortunately, Victoria Police does not collect data on who is stopped and questioned by police and PSOs.[28] Consequently, exploring the presence of unreasonableness in the issuing of fines based on police fine data is difficult.

The disproportionate issuing of fines to Aboriginal and Sudanese people visible in the Crime Statistics Agency data may be because:

a) the police (individually or through their operational strategies) are targeting Aboriginal and Sudanese appearing people for questioning and investigation at greater rates than white people (racial profiling) OR

b) the police are conducting their operations in areas where more Sudanese and Aboriginal people are present (also a form of racial profiling)[29] OR

c) the police are using their discretion to fine more Aboriginal or Sudanese people when they discover an offence (another form of racial profiling), OR

d) many more people of Aboriginal or Sudanese backgrounds are breaching COVID rules than white people (if so why?).

In order to explore the existence of racial profiling, this project was able to obtain data from Victoria Police with respect to 37 405 COVID fines issued by the police during 2020. Using this data, it is not possible to clearly identify which of the four contributors to disproportionality set out above are operating. However, there are four methods we can use that may shed light on the existence of type a) or type b) racial profiling described above, in the issuing of fines. A fifth method is also described, however this is not used to explore racial profiling, but rather differences in the experiences of being stopped for a COVID offence.

27   This definition is a fusion of Morden J's thinking in *R v Brown [2003] OJ No 1251*. With Charles R Epp, Steven Maynard-Moody and Donald Haider-Markel, *Pulled over: How Police Stops Define Race and Citizenship* (University of Chicago Press, 2014) 5.

28   Tamar Hopkins et al, *Monitoring Racial Profiling Introducing a Scheme to Prevent Unlawful Stops and Searches by Victoria Police A Report of the Police Stop Data Working Group* (Flemington & Kensington Community Legal Centre, 2017).

29   Tamar Hopkins, 'Understanding Racial Profiling in Australia' (PhD, UNSW, 2022) Chapter 2.

Methodology

The first two methods examine 'unreasonableness' in the policing of individual cases. The second two methods look at un-reasonableness in police operations themselves. Method 3 examines unreasonableness in the issuing of fines across different LGAs. Method 4 examines unreasonableness through the identification of gross disproportionality in individual police operations.

Method 5 involves a survey of people stopped for COVID matters to examine the impact of these stops them depending on the type of fine they were issued with. This method does not assess racial profiling but assists in informing policy recommendations.

METHOD 1

Hypothesis 1

If there is racial profiling, then any racially profiled group is more likely to receive fines for matters where the fine would have required questioning them than white people. Simultaneously, white people will be more likely to be fined for offences that are visually obvious to the police and do not require questioning than the racially profiled group.

One aspect of racial profiling concerns the unjust-ified investigative interest by police in racialised people, we need to understand whether police interest in a person was piqued by a potentially biased 'hunch' or the genuine sighting of illegality. We do not know from the data itself whether the COVID offence the person was fined with was obvious to the police officer at the time the person was stopped or whether detecting the offence required the police to ask questions of the person to determine whether a breach has occurred. We can however, based on the fine type, make limited inferences. We can for example infer that the offence of failure to wear a mask would have been obvious to police without questioning,[30] whereas other offences are likely to require questioning.

This then becomes our first test to explore the existence of racial profiling.

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30   A person may have had a legitimate exemption, but a prima facie case exists when police see a person in public without a mask.

METHOD 2

Hypothesis 2

Racially profiled groups will have higher arrest rates than white people for COVID offences.

There is a second potential basis to explore unreasonableness in policing from the COVID fine data. According to the definition of racial profiling described by Morden J in R v Brown[31], racial profiling can arise in the context of suspect selection OR in suspect treatment. Given that COVID offences should, if any enforcement measure is taken at all, result in a fine being issued on the spot, rather than an arrest, the fact that a person is arrested, is a sign of potential unreasonableness in suspect treatment by police. While we cannot be certain from the available data, we can infer that it is less reasonable for police to process a COVID breach via arrest than the issuing of a fine. Arrest, particularly for Aboriginal/Torres Strait Islander people, should always be the option of last resort.[32] Racialised differences in arrest verses fine rate could therefore be an indicator of racial profiling.

METHOD 3

Hypothesis 3

Localities of high racialisation will have higher rates of COVID fines than their overall population would predict.

The first method to detect racial profiling at a police operation level explores whether police are issuing fines in proportion to the total population in each Local Government Area (LGA) or whether the size of the LGA's racialised population is exerting an independent influence on police COVID fine activities. The disproportionate deployment of police to LGAs that have higher numbers of racialised people may be considered a form of 'situational discrimination'.[33] Situational discrimination occurs when police focus attention on particular areas rather than society more generally. If the areas police target are more racialised (i.e. include a higher proportion of non-white people than other areas) these practices are a form of racial discrimination.

The challenge with exploring racial profiling through this method in Australia is that current census data from 2021, does not collect information about people's racial appearance. We could rely on people's country of birth. But this does not accurately tell us about a person's racial appearance. We could also rely on whether people speak a language other than English at home. But there are many white people who speak a language other than English at home and many racialised people who speak English at home. Both these measures are inaccurate proxies for racial appearance. While acknowledging these serious difficulties, in this study, we will use speaking a language other than English at home as a crude measure of level of racialisation.

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31 *R v Brown* [2003] *O.J. No. 1251* (n 27).

32 *DPP v Carr* [2002] NSWSC 194.

33 Paul Quinton, 'Race Disproportionality and Officer Decision-Making' in Michael Shiner Rebekah Delsol (ed), *Stop and Search, The Anatomy of a Police Power* (Palgrave, Macmillan, 2015) 60, 61.

METHOD 4

Hypothesis 4

Specific police operations or branches will disproportionately issue more fines to African/Middle-Eastern and First Nations people than white people.

A second method to explore racial profiling at an operational level is to examine whether particular police operations are more racially disproportionate than others in their issuing of fines. Through exploring the types of police operations that more disproportionately impact racialised people we may be able to shed light on the way racial profiling is institutionalised into policing through certain operational practices. This study specifically examines operations that targeted First Nations people, and operations that targeted African/Middle-Eastern appearing people.

Through these four methodologies, this project aims to explore racial profiling in individual cases, through policing operations and through analysing fine rates in different LGAs.

METHOD 5

Hypothesis 5

The distress a person feels for being stopped by police for COVID compliance check increases if a person feels singled out or targeted.

While the policing of COVID offences raised considerable concerns across the population, this method uses a survey to obtain a qualitative assessment of the differences in people's experiences of being issued with a COVID fine depending on the fine type or circumstances. For drivers we explore the differences in experiencing random stops compared with being stopped at a border. For pedestrians we explore differences in being stopped for face mask offences compared with other offences.
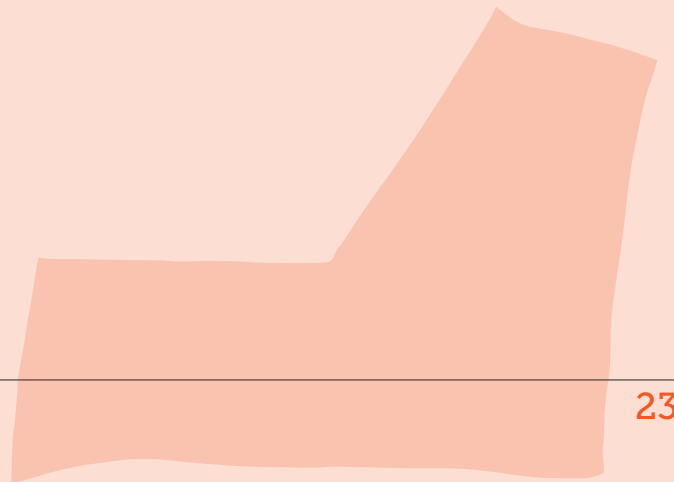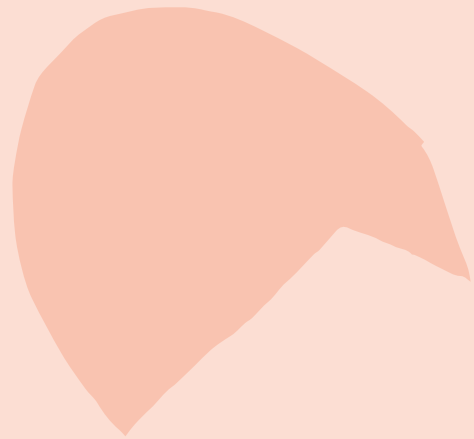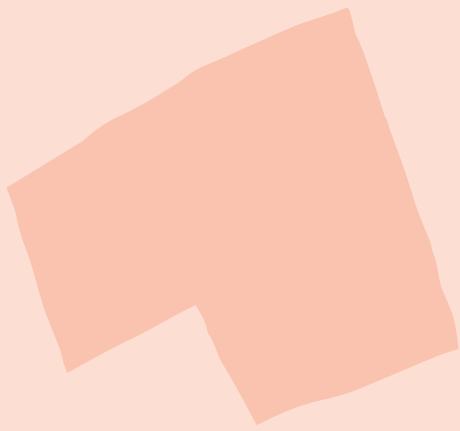
The project

In November 2021, Inner Melbourne Community Legal obtained a grant from the Victorian Law Foundation to study racial profiling in policing of COVID-19. Inner Melbourne Community Legal contracted Dr Tamar Hopkins as the project worker and appointed a steering committee from VALS (Alex Walters), Youthlaw (Tiffany Overall), and the Police Accountability Project (Ilo Diaz) to oversight the project. Michelle Reynolds from Inner Melbourne Community Legal is the chair of the steering committee. Dr Gordana Popovic from UNSW Statistics Central is the statistical consultant for this project.

The project obtained and examined two sets of data. The first set of data was obtained from Victoria Police under FOI (Dataset 1). The second set of data was obtained from a convenience survey[34] of individuals in the public who have been questioned by police in relation to potential COVID offences (Dataset 2). Dataset 1 was subject to qualitative and quantitative analysis. Due to its small size, Dataset 2 is used for qualitative purposes only.

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34   A convenience survey is a non-random survey, where people self-select to participate. The survey was advertised on social media. While the results from such a survey will to be biased in a range of ways, internal comparisons within the cohort of responses may still produce statistically valid results. See a detailed discussion in Chapter 6, Hopkins, *Understanding Racial Profiling in Australia* (n 28).

ETHICS

All data needs to be handled with care. While there is no ethics approval process that needs to be considered for the handling of Dataset 1 we took an ethical approach for the following reason:

• Any data connecting race with alleged crime is capable of re-affirming long held race/crime stereotypes in the community. [35] It is critical therefore that when we analyse the data we do it from the point of view of identifying any police targeting biases and not augmenting stereotypes and that we take into account the 'BADDR' principles.[36] This means that we do not use the data to blame, overly aggregate, decontextualise or use it to point out deficits in communities. Further, we do not restrict access to the data. We will make this data publicly available.

• We acknowledge that similar data (Country of Birth and Aboriginality) is already in the public realm.

In the process of preparing to apply to the Department of Justice and Community Safety Human Ethics Committee to conduct a survey for Dataset 2 we were informed by the Koori Justice Unit of the Department that they were satisfied that our survey will not require formal ethics approval given the existence of our steering committee and the anonymity of our data. We however proceeded with the data collection from the public under the following constraints:

• We only accepted data from people 18 years and over;

• All data is anonymous;

• Any case studies draw from the survey are vetted to ensure anonymity can be maintained;

• The overall data set will not be made available to the public;

• All recipients will need to consent to having their data used for the project and be informed about what the project is about;

• All recipients will be able to complain to Inner Melbourne Community Legal if they encounter any concerns about the project; and

• The project has clear beneficial aims for the community: it aims to explore whether there is any racial bias in the policing of COVID fines.

Obtaining Dataset 1

On 20 October 2021, Inner Melbourne Community Legal through Tamar Hopkins made an application to Victoria Police for data on the COVID related during 2020 broken down by racial appearance, LGA, type, sex, age, police operation, processing type and a number of other variables.

On 30 November 2021, Inner Melbourne Community Legal applied to VCAT to review the failure of Victoria Police to make a decision in relation to the FOI Application within 30 days as required under legislation. VCAT listed the application for directions on 23 February 2022.

On 21 January 2022, the Victoria Police FOI office made an offer of data in the absence of racial appearance. After discussions, on 4 February 2022, Victoria Police made an acceptable offer of data including racial appearance and requesting the sum of $311.32 being 50 per cent of the cost of meeting the data request.

On 14 February 2022, Victoria Police received this sum which restarted the 30-day time limit, under section 22(5) of the FOI Act for Victoria Police to respond to the data request. Consequently, we withdrew our application to VCAT.

On 23 March 2022 Victoria Police requested a further $311.32 being the balance of the costs to produce the data.

On 4 April 2022, five and half months[37] after receiving the initial request, Victoria Police provided Inner Melbourne Community Legal with data on 3 excel spreadsheets. We combined these spreadsheets and then export it into SPSS and R for analysis.

Obtaining Dataset 2

Following consultation with the steering committee, a Qualtrics survey was loaded onto Inner Melbourne Community Legal's webpage and advertised it via its Facebook and social media pages and those of Victorian Aboriginal Legal Service. The survey was open between 9 May 2022 and final data collected on 11 August 2022. A total of 82 people completed the survey. This data was exported into SPSS for analysis.

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35 Stephane M Shepherd and Benjamin L Spivak, 'Estimating the Extent and Nature of Offending by Sudanese-Born Individuals in Victoria' (2020) 53(3) *Australian & New Zealand Journal of Criminology* 352.

36 Walter et al (n 7).

37 A previous request Dr Tamar Hopkins made for similar data took 2 years and two VCAT mediations.

Dataset 1 – Demographic details

Dataset 1 contains records of 37,405 COVID fines recorded by Victoria Police between 4 April to 31 December 2020.

The variables of interest are:

- Racial appearance
- Date of the alleged offence
- Type of fine
- LGA of the alleged offence
- Which police operation was involved in the alleged offence being recorded
- Sex
- Gender
- Age
- Whether offence processed as a fine or arrest

OFFENCES

From the data, we can see that Victoria Police have divided the COVID offences they issued into six categories. There is no discussion of these categories in legislation, nor is there any discussion of policing of COVID matters in the Victoria Police Manuals of July 2021 or January 2022. Interestingly, the only reference to COVID in the Victoria Police Manual is a Chief Commission instruction (CCI 05/21) to delete all information obtained from the COVID Safe App and not use it for any prosecution or investigation purpose.

AGE

The average age of people receiving a COVID fine was 31. The youngest was 10 years old and the oldest was 100. The medium age was 28 with the age group which received the most fines being 20 years old.

GENDER

According to police characterisation, 24 per cent of fines were issued to women, 76 per cent issued to men.

RACIAL APPEARANCE

Racial appearance as perceived by the police, rather than actual racial background of the investigated person is the best variable to determine issues of racial profiling in suspect selection and many forms of suspect treatment. This is because it is the police officer's perception of race that may create a bias (conscious or otherwise) in the way the police officer responds to the person.[38] If the police ask about racial background on arrest or following the check of a database, the officer may have better information about the person's actual racial background. This may then influence the way the police respond to them.

Racial appearance categories are missing in 23.5 per cent of cases. This means, nearly one in four COVID fines issued were incomplete.

In 2018, Victoria Police created a new set of 8 racial appearance categories in line with ANZPAA guidelines.[39] Unfortunately, we discovered that Victoria Police members are continuing to use the old as well as the new codes. Following the strategy adopted by Professor Ian Gordon in examining the Haile-Michael data in 2012,[40] and by researchers in a forthcoming publication, we have resolved the contradictory racial appearance categories as detailed in Table 1.

Using these new codes, we can now determine the frequency with which Victoria Police issued a fine across the different racial appearance groups.

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38   Tamar Hopkins, *Understanding Racial Profiling in Australia* (n 29) 174,175.

39   Victoria Police, 'Field Contact Policy Guide for Victoria Police Educators and Ethnic Appearance Codes - FOI 57210/17' (n 10).

40   Ian Gordon, *First Report of Professor Gordon (Redacted) Hail-Michael v Konstantinidis VID 969 of 2010* (11 September 2012).

TABLE 1

Reclassification of Victoria Police Racial
Appearance Codes.

Classification in the existing data	New classification
Aboriginal/Torres Strait Islander	Aboriginal/Torres Strait Islander
Africa/MidEast (Don't Use)	African/Middle-Eastern
African	African/Middle-Eastern
Arab	African/Middle-Eastern
Asian	Asian
Black	African/Middle-Eastern
Caucasian	Caucasian
Indian Sub-continental	Indian Sub-continental
Indian Subcontinent	Indian Sub-continental
Latin American	Latin American
Maori	Pacific Islander/Maori
Mediterranean/Middle Eastern	African/Middle-Eastern
Middle Eastern	African/Middle-Eastern
North/Europe	Caucasian
Pacific Is	Pacific Islander/Maori
Pacific Islander/Maori	Pacific Islander/Maori
South American	Latin American
South/Europe	Southern European
Unclassified/Other Race	Unknown
Undetermined	Unknown
Unknown	Unknown
Missing	Missing

TABLE 2

The frequency of fines issued by Victoria Police to each racial appearance group.

Racial Appearance	Number of fines issued	Per cent of fines issued to this group	Per cent of fines issued to this racial appearance group excluding missing and unknown
Aboriginal/Torres Strait Islander	707	1.9	2.5
African/Middle Eastern	5640	15.1	20.1
Asian	1798	4.8	6.4
Indian Sub-Continental	1044	2.8	3.7
Pacific Islander/Maori	852	2.3	3.1
Latin American	169	0.5	0.6
Southern European	2012	5.4	7.2
Caucasian	15866	42.4	56.5
Unknown	537	1.4	—
Missing	8780	23.5	—
Total	**37 405**	**100%**	**100% of 28,088**

In Table 2, column 3 is the percentage of fines issued to each racial appearance group. However, 24.9 per cent of those fines are issued to people whose racial appearance is missing or unknown. Column 4 is the percentage of fines issued to each racial appearance group excluding the 24.9 per cent of fines that are missing or unknown.

Table 2 shows that, excluding fines issued to missing or unknown groups, Aboriginal/Torres Strait Islander people received 2.5 per cent of the fines issued by Victoria Police in relation to COVID fines during 2020. The 2021 census estimates that Aboriginal and Torres Strait Islander people made up 1.0 per cent of the Victorian population.[41] This

means that Aboriginal and Torres Strait Islander people were disproportionately issued fines at the rate of 2.5 times more than would be expected from their population number.

Calculating the number of African/Middle Eastern people in the Victorian population is much harder. This is partly because the old Victoria Police codes group African/Middle Eastern people together, but also because of difficulties in calculating this group from the Census. To calculate the population of African/Middle Eastern people in Victoria, we have used ancestry data from the 2021 census. This data shows that people with 'North African and Middle Eastern' and 'Sub-Saharan African'

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41   ABS, 'Victoria: Aboriginal and Torres Strait Islander population summary' (July 2022) Available at <https://www.abs.gov.au/articles/victoria-aboriginal-and-torres-strait-islander-population-summary>

FIGURE 1

The frequency of fines issued by Victoria Police to each racial appearance group.
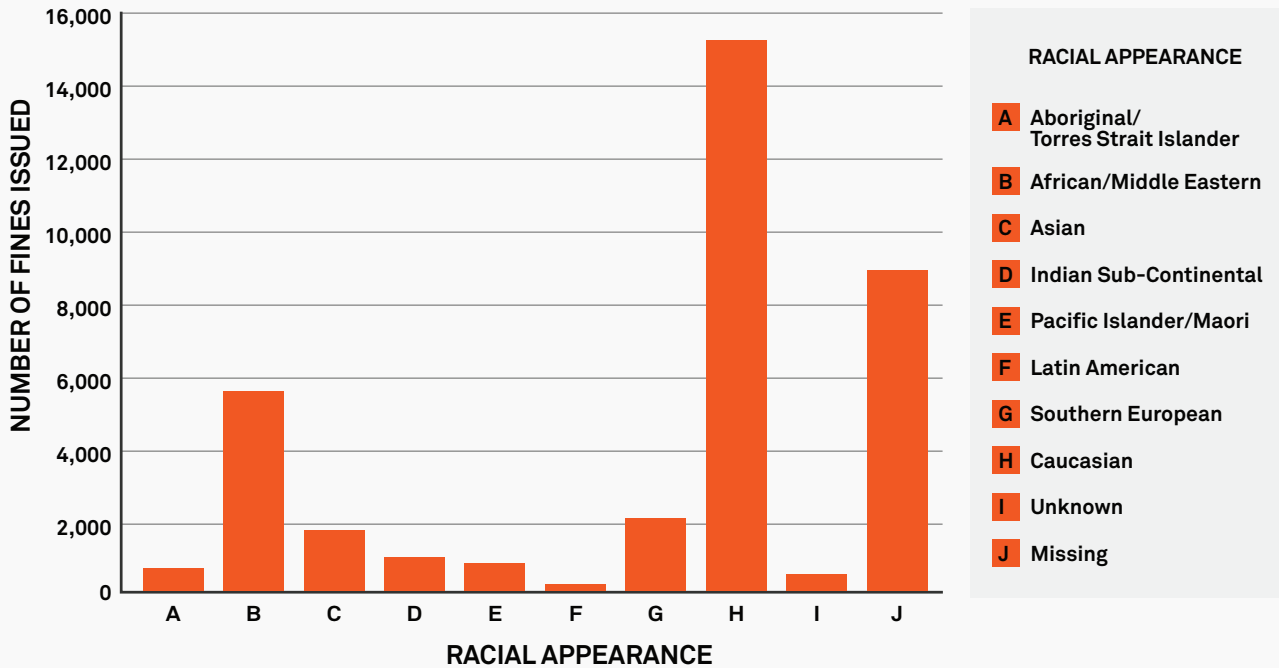
ancestry make up about 5.03 per cent of the Victorian population.[42] Because they received 20.1 per cent of the total fines issued (excluding fines issued to missing or unknown groups), we can state that they are approximately 4.00 times more likely to receive a fine than their proportion in the population would predict.

The key racial appearance groups we examine in this study are Aboriginal/Torres Strait Islander and African/Middle Eastern appearing people. We also examine Asian, Pacific Islander and Indian appearing people to provide some context and comparison.

42   Table Builder 2021 Census: counting persons, place of usual residence, 1-digit level ANCP Ancestry Multi-Response by Vic (accessed 8 May 2023).

Statistical Analysis and Results

METHOD 1: VISIBILITY OF OFFENCE

In the absence of data on who police stop and question, our first strategy to test the existence of racial profiling is to compare the rates at which different racial groups are subject to a fine for a visible offence compared with an offence that requires police/PSO questioning.

Table 3 sets out whether the offence is visible or not.

Statistical Method

For this offence type (visually apparent / questioning required) analysis we subset the data to exclude business and quarantine offences, and any fines given before mask fines were introduced (23-07-2020), so the results are for the population of persons given fines for visually apparent and questioning required COVID fines from the point when mask fines were introduced (Table 3). We used offence type (Visually apparent / Questioning required) as a binary outcome in a logistic model, to assess whether the odds of obtaining a fine for an offence where questioning was required relative to a visually apparent offence depended on the person's racial appearance. Analysis was carried out in R 4.0.3.[43]

The data contained multiple fines for some individuals, multiple fines in each local government areas (LGAs) and per police operational unit. To model this dependence we used a logistic linear mixed model with random effects for operational unit, LGA and person using the glmmTMB[44] package. Fixed effects are racial appearance (the effect of interest), as well as sex and log of age, to control for these. We carried out planned comparisons between the 5 racial appearances of interest (Aboriginal and Torres Strait Islanders, African/Middle Eastern, Asian, Indian, Pacific Islanders) relative to Caucasian appearance using the emmeans[45] package, controlling for multiple testing using Duntett's correction, and converting the outcome to relative risk using the delta method. Residuals plots were checked using the DHARMa[46] package.

There were a large proportion (23.5%) of missing racial appearances. We fit models to the complete data under the assumption of missing completely at random. This assumption is valid if there is no bias of any kind (including racial bias) in recording or not recording of racial appearance. We also carried out a multiple imputation for offence type using the jomo package[47] with random effect of person as a sensitivity analysis under the assumption of missing at random. This is valid if recording or not recording racial appearance is only biased by variables included in the imputation (Offence type, sex, age, Aboriginality, complexion, officer rank, metro/regional). We do not here explore the possibility of missing not at random, i.e. that certain racial appearances are less likely or more likely to be recorded.

43 R Core Team, 'R: A Language and Environment for Statistical Computing. R Foundation for Statistical Computing' <https://www.R-project.org/>.

44 Mollie E Brooks et al, 'GlmmTMB Balances Speed and Flexibility Among Packages for Zero-Inflated Generalized Linear Mixed Modeling.' (2017) 9(2) *The R Journal* 378.

45 Russell V Lenth, 'Emmeans: Estimated Marginal Means, Aka Least-Squares Means.' <https://CRAN.R-project.org/package=emmeans>.

46 Florian Hartig, 'DHARMa: Residual Diagnostics for Hierarchical (Multi-Level/Mixed) Regression Models' <https://CRAN.R-project.org/package=DHARMa>.

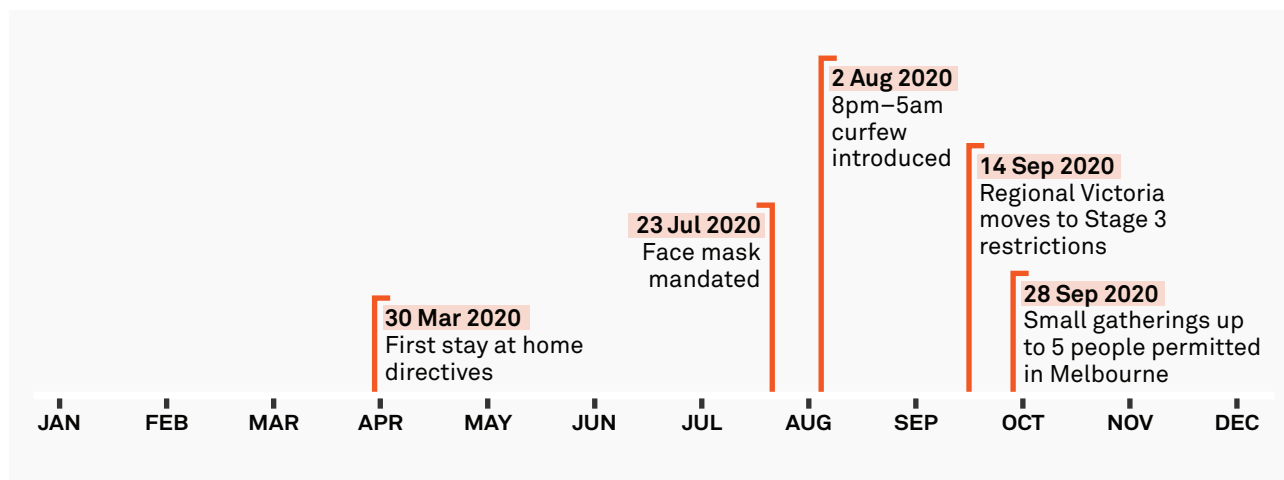47 M Quartagno and J Carpenter, 'Jomo: A Package for Multilevel Joint Modelling Multiple Imputation.' <https://CRAN.R-project.org/package=jomo>.

TABLE 3 (BELOW, TOP)

Visibility of Offences.

Offence label and type	Offence count	Offence per-centage	Date commenced	Whether offence is visible without questioning
837AQ REFUS/ FAIL COMPLY DIR/REQ AUTH OFF (B/C) (Business/Company)	85	0.2%	4 Apr 2020	This offence is not applicable because it applies to a business
837AP REFUS/FAIL COMPLY DIR/REQ AUTH OFF (IND) (Individual)	32523	86.9%	4 Apr 2020	Requires questioning
837AR REF/FAIL COMPLY DIR/ REQ WEAR FACE COVER	4148	11.1%	23 Jul 2020	Visible
837AT REF/ FAIL COMPLY REQ SELF-ISO/ QUARANTINE	39	0.1%	5 Aug 2020	This offence is not applicable because we assume it mostly concerns decisions by the Department of Health about whether to enforce
837AV LEAVE RESTRICTED AREA W/O VALID REAS/EXC	331	0.9%	19 Sep 2020	Requires questioning
837AW REF/ FAIL COMPLY REQ-PRIV/ PUB GATHERINGS	297	0.7%	30 Sep 2020	This offence is ambiguous, because it groups together offences that may be visible or not. We have classified it as it requires questioning

2 Aug 2020
8pm–5am curfew introduced

14 Sep 2020
Regional Victoria moves to Stage 3 restrictions

23 Jul 2020
Face mask mandated

28 Sep 2020
Small gatherings up to 5 people permitted in Melbourne

30 Mar 2020
First stay at home directives

JAN   FEB   MAR   APR   MAY   JUN   JUL   AUG   SEP   OCT   NOV   DEC

Results

If there is no racial profiling, then the probability of receiving a questioning required fine (relative to a visually apparent fine), would not depend on racial appearance, under the assumption that mask fines are a valid baseline. Using complete data only, we found strong evidence (p < 0.001) that the type of fine received did depend on racial appearance (Table 4).

For people receiving a fine, the fine is 5.4 per cent (95% CI: 3.5% - 7.4%) more likely to require questioning for people of African/Middle Eastern appearance than people of Caucasian appearance, and 4.3 per cent (95% CI: 1.7% - 7.0%) more likely for people of Asian appearance than people of

Caucasian appearance. No evidence of differences was found for people of Aboriginal, Pacific Islander or Indian appearance relative to people of Caucasian appearance (Table 4). Analysis of the imputed data also found evidence that fine type depended on racial appearance for people of African/Middle Eastern appearance compared with people of Caucasian appearance (p=0.021), however no evidence was found for people of Asian appearance (p=0.554).

We discuss these findings in the discussion section of this paper.

TABLE 4

The relative risk of a particular racialised group compared with a white group being subject to a fine following questioning compared with a fine for a visible offence.[48]

Racial Appearance	Relative Risk (as per cent)	Relative Risk	95% Confidence Interval	Adjusted p-value[49]
African/Middle Eastern compared with Caucasian	5.4%	1.054	1.035–1.074	< 0.001
Asian compared with Caucasian	4.3%	1.043	1.017–1.070	< 0.001
Indian compared with Caucasian	1%	1.010	0.974–1.047	0.897
Pacific Islander compared with Caucasian	2.8%	1.028	0.992–1.064	0.187
Aboriginal compared with Caucasian	- 0.08%	0.992	0.948–1.037	0.957

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48 To calculate a per cent from these figures, when the number is a 1 to the left of the decimal point, read the numbers to the right of the decimal place, i.e. 1.054 is 5.4 per cent. When the number is a 0 to the left of the decimal place, this means there is a lower relative risk than the comparison (Caucasian). These results have been subject to a sensitivity test to manage the issue of missing data Appendix A.

49 This has been subject to a Dunnett's Correction for multiple testing: Megan Goldman, 'Why Is Multiple Testing a Problem?' (Statistics for Bioinformatics, Berkeley, US, Spring 2008).

METHOD 2: METHOD OF PROCESSING THE FINE

Police processed the COVID fine by either issuing a fine or arresting the individual.

2.0 per cent (314) of Caucasians were arrested as a means of processing their fine, while 3.3 per cent (23) of Aboriginal people, 2.8 per cent (156) of African/Middle Eastern, 3.4 per cent (61) of Asians, 1.6 per cent (17) Indian and 1.8 per cent (15) of Pacific Islanders were arrested.

In order to determine whether outcome (either arrest or other) was dependent on a person's racial appearance, we performed a binary logistic mixed model regression. The model controls for age and gender and offence type as fixed effects and reporting station, LGA and person number as random effects. This accounts for multiple observation per individual, LGA and reporting station. The model excluded fines described in Table 3 that were issued to business or concerned decisions by the Department of Health. The results are reported as relative risk with a 95% confidence interval and a p-value.

Results

Of the 19,381 people with complete data, 452 (2.3%) were arrested one or more times. Most (355) were arrested once, but some as many as 14 times. As set out in Table 5 we found no evidence that the probability of arrest depends on racial appearance (p > 0.1).

While the odds ratio is greater than 1 for First Nations, African/Middle Eastern and Asian appearing people, because the p value is so high (well above 0.1), our results contain no evidence to suggest there is any difference the arrests probabilities for any of the racial groups.

TABLE 5

Relative risk of a particular racialised group compared with a white group being subject to an arrest compared with other means of processing.

Racial Appearance	Odds Ratio	95% Confidence Interval	P-value
African/Middle Eastern compared with Caucasian	1.214	0.266 - 5.535	0.985
Asian compared with Caucasian	1.157	0.113 - 11.836	0.998
Indian compared with Caucasian	0.711	0.033 - 15.322	0.990
Pacific Islander compared with Caucasian	0.711	0.027 - 18.438	0.991
Aboriginal compared with Caucasian	2.067	0.135 - 31.622	0.898

METHOD 3: EFFECT OF LGA

The data we collected shows that during 2020, Victoria Police issued 37,405 fines across the State of Victoria. Previous analysis by journalist Osman Faruqi for the Saturday paper in NSW compared areas that people were being fined with the areas where COVID transmission was highest.[50] He found that in NSW, police were issuing fines in areas of high ethnic diversity not high transmission. The present analysis does not track transmission rates.

In Victoria during 2020, COVID laws differed quite dramatically by location. The starkest differences were between metropolitan areas and rural areas.[51] However there were also periods of time where different metropolitan suburbs were under tighter restrictions than their surrounding areas, and for period of time, specific high-rise public housing complexes in the North Melbourne and Flemington area were subject to a hard lockdown, enforced by large numbers of police.[52]

Despite these fluctuations, we would generally expect that the number of fines would go up in proportion to increases in population levels. That is, we would expect that the higher the population of a Local Government Area, the higher the rate of fines.

Figure 3 shows a scatter plot of the number of COVID fines issued by LGA against the population of each LGA as described in the 2021 Census. Here we see a rough linear relationship between population size and the number of fines issued with a circled outlier which received far higher number of fines than its population. This outlier was the LGA of the City of Melbourne.

Statistical Method

To estimate the effect of speaking a language other than English on the rate of issue of COVID fines, we fit a negative binomial model using the nb.glm function in the MASS package.[53] The outcome was number of COVID fines in the LGA, offset by total 2021 population, and the predictor was proportion of people who spoke a language other than English in the LGA. Offsetting by population allows us to model the per population rates. To explore whether areas of higher First Nations population

were more likely to receive higher rates of COVID fines, we ran a generalised linear regression, using a negative binomial with log link to ascertain whether the proportion of people of Indigenous background in an LGA (as per the 2021 Census) made any difference to the number of COVID fines being issued beyond the effect of the population size in each LGA.

Results

Melbourne LGA was very different than other LGAs (Figure 3), and if included in the model had a very large effect on the estimate. With Melbourne LGA in the model we found for each 10 per cent increase in proportion of people who spoke a language other than English, the estimated rate of fines increases by 19 per cent (95% CI: 9% - 29%), while without Melbourne the estimated effect was reduced to 11 per cent (95%CI: 3% - 21%) for every 10 per cent increase in people who spoke language other than English.

In Figure 6, the Y-axis shows the log of the number of fines issued in each LGA. On the X axis is the number of people who speak a language other than English divided by the total population for each LGA. The graph shows the relationship between the number of fines issued and the number of people who speak English only at home, taking total population into account.

A post hoc analysis of metropolitan Melbourne only found no evidence (p = 0.499) of a relationship between the proportion of language other than English spoken and the rate of COVID fines.

Recall that these results are obtained using the crude estimate of speaking a language other than English at home as a proxy for racial diversity. They provide evidence that across the State, police were more active in giving out COVID fines in LGAs where there were higher numbers of people who spoke a non-English language at home. We obtained no evidence for an association, at the LGA level, for an increase in the rate of fines in areas with higher numbers of First Nations residents, whether Melbourne was included (p = 0.103) or excluded (p =0.373).

50   Faruqi (n 18).

51   See for example, *Area Directions No s 339*, Issued under s 200 of the *Public Health and Wellbeing Act 2008*, Thursday 2 July 2020, Victorian Government Gazette.

52   *Victoria Ombudsman, Investigation into the Detention and Treatment of Public Housing Residents Arising from a COVID-19 'Hard Lockdown' in July 2020* (Ombudsman, Victoria, December 2020) 252.

53   WN Venables and BD Ripley, *Modern Applied Statistics with S*. (Springer, Fourth, 2002).

FIGURE 3

Relationship between population of LGA and number of fines issued.
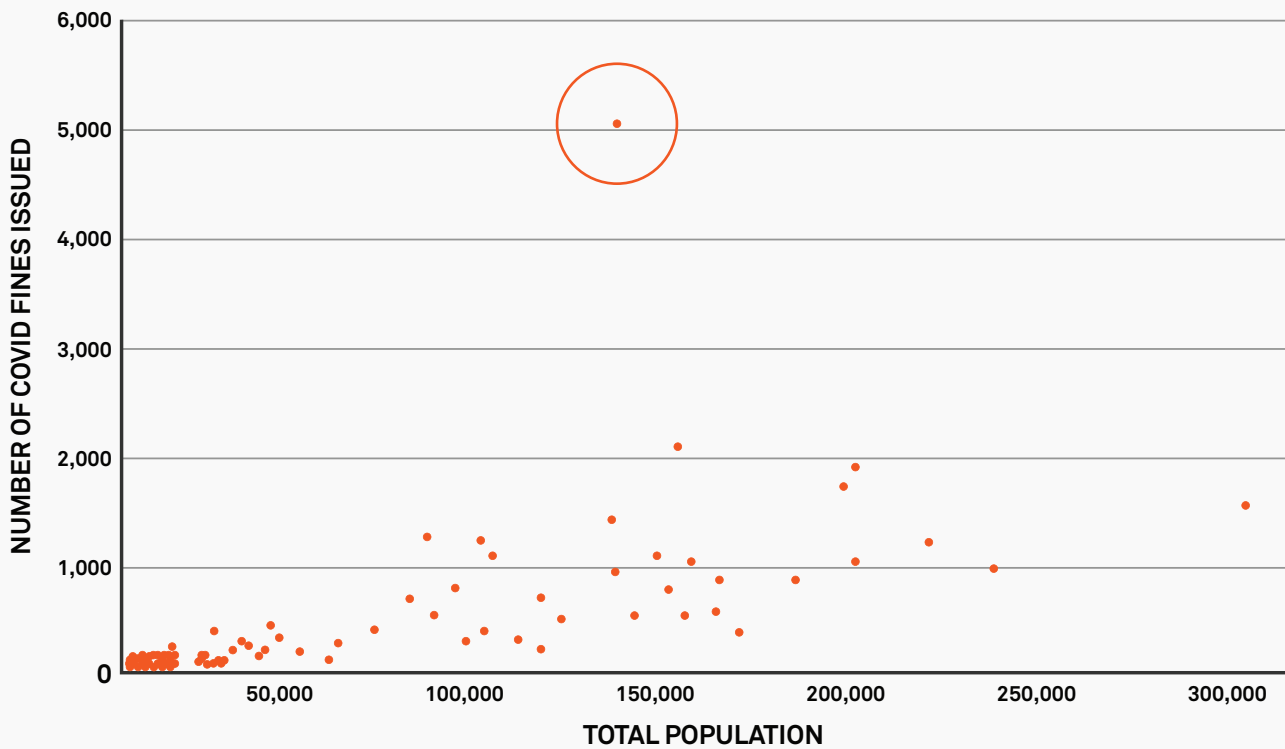
METHOD 4: EXAMINING DISPROPORTIONALITIES IN INDIVIDUAL OPERATIONS

In the next study we list the police operations that most disproportionately targeted African/ Middle Eastern appearing people and Aboriginal/ Torres Strait Islander People. We have removed from Table 6 operations, which fined less than 4 people. The tables contain results for African/ Middle-Eastern appearing people, Caucasians and Aboriginal people as a comparison.

Results

Each of these police operations or taskforces issued COVID fines to African/Middle-Eastern people in Table 6, and Aboriginal people in Table 7 at a markedly higher rate than the state-wide average (see Table 2) which was already higher than the proportion of these groups in the population (disproportionate). Recall that at a state-wide level, African/ Middle-Eastern appearing groups receive 20.1 per cent of the complete fines while Aboriginal people receive 2.5 per cent of the complete fines.

FIGURE 4

Victorian LGA heat map indicating where COVID fines were issued (the darker areas indicate a greater number of fines).
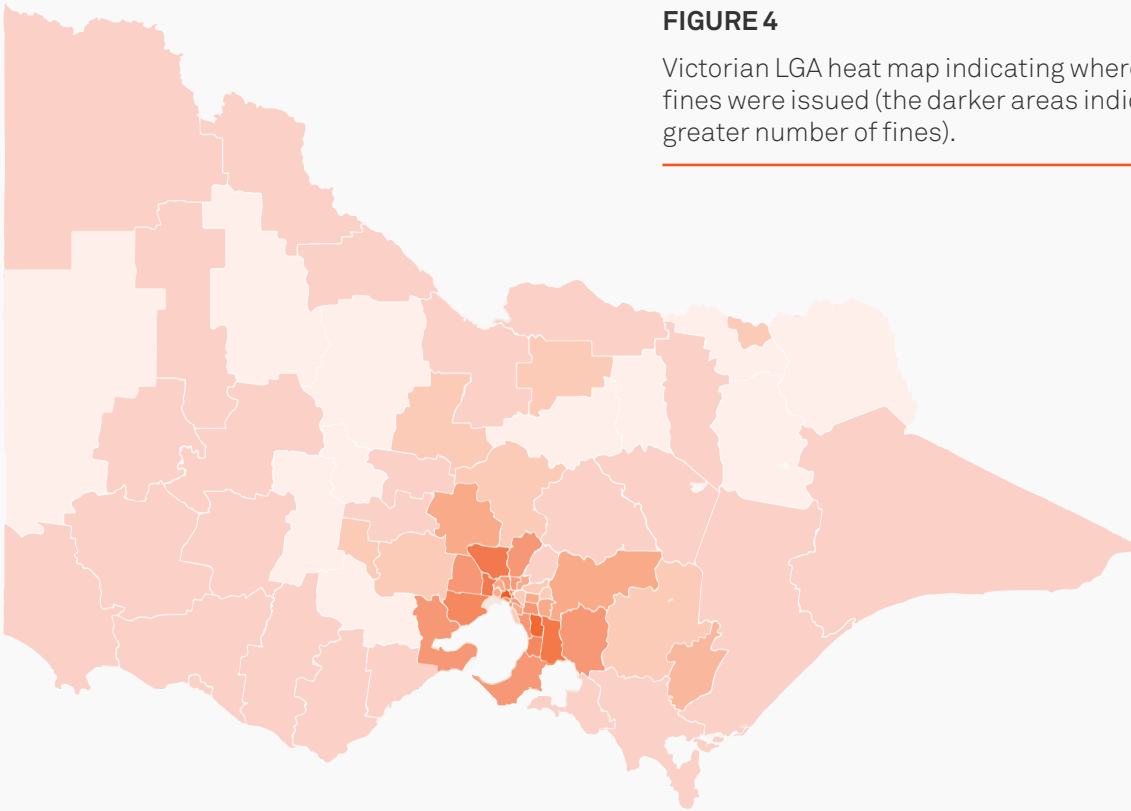
FIGURE 5

Victorian map indicating the top 10 LGAs where a language other than English is spoken at home.

3. **Hume** 5. **Whittlesea**

4. **Brimbank**

8. **Melton**

10. **Whitehorse**
7. **Monash**

1. **Casey**

6. **Greater Dandenong**

9. **Melbourne**

2. **Wyndham**

FIGURE 6

The distribution of fines across the state. The y-axis represents a log of fines issued per LGA. The x-axis represents the total number of people who speak a language other than English (LOE) in LGA divided by the total population of each LGA.

TABLE 6

The 25 police operations that issued the most disproportionate number of fines to African/Middle Eastern appearing people: (where an operation has issued at least 4 fines).
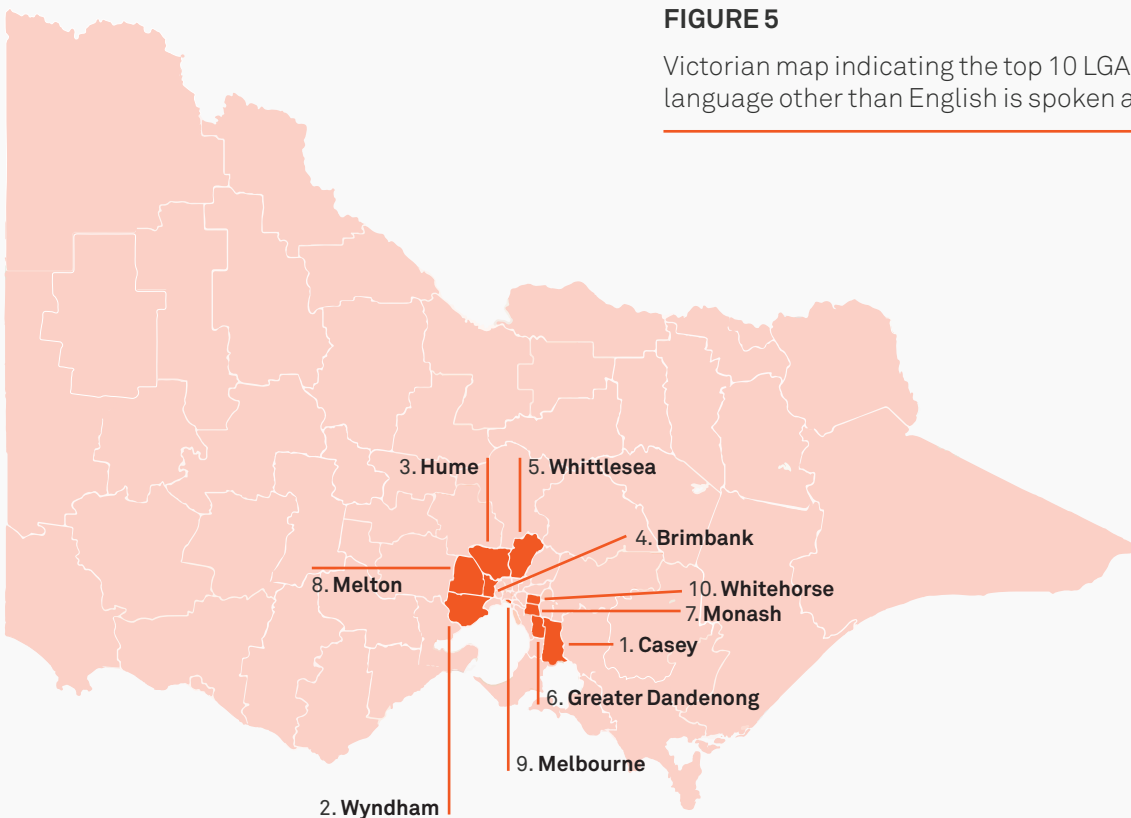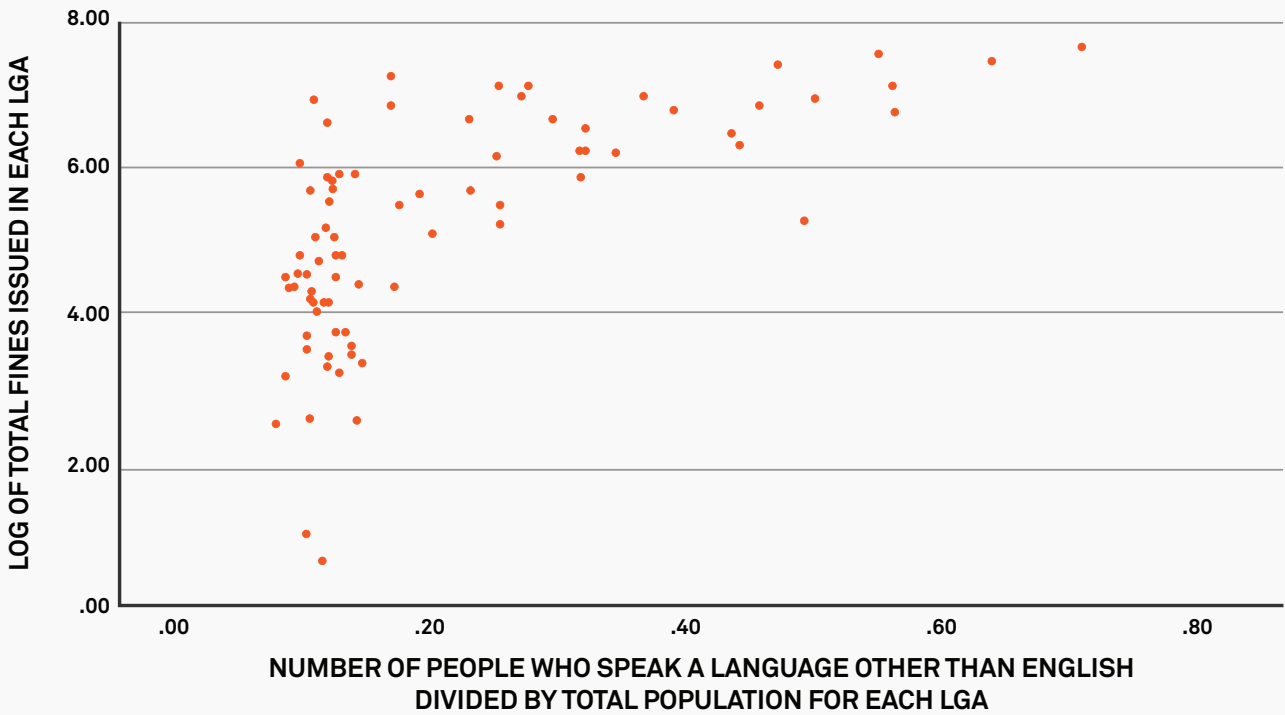
	Police Operation	Proportion of COVID fines issued to African/Middle Eastern people at reporting station		Proportion of COVID fines issued to Caucasian people at reporting station		Total COVID fines issued
		%	Total	%	Total	
1	Embona Task Force Altona North	87.5%	7	0%	0	8
2	Embona Task Force Melbourne	50.0%	16	18.8%	6	32
3	Passenger Notification Project	46.2%	6	15.4%	2	13
4	Crime – ECHO Taskforce	39.5%	17	20.9%	9	43
5	***Transit South 4 PSO**	**38.9%**	**183**	**27.8%**	**131**	471
6	Brimbank DRU	38.7%	12	3.2%	1	31
7	Transit North 1	38.5%	30	15.4%	12	78
8	Transit West 3 PSO	37.0%	60	21.0%	34	162
9	Brimbank CIU	35.9%	14	10.3%	4	39
10	Transit South 4	35.4%	143	31.9%	129	404
11	Wyndham North Uniform	34.3%	60	17.7%	31	175
12	Transit West 2 PSO	34.1%	43	27.8%	35	126
13	Casey CIU	33.3%	7	52.4%	11	21
14	DRU- Fawkner	33.3%	6	27.8%	5	18
15	Transit West 3	33.0%	25	14.7%	11	7

	Police Operation	Proportion of COVID fines issued to African/Middle Eastern people at reporting station		Proportion of COVID fines issued to Caucasian people at reporting station		Total COVID fines issued
		%	Total	%	Total	
16	Werribee Uniform	32.9%	111	21.7%	73	**337**
17	Transit North T&C	31.3%	15	18.8%	9	**48**
18	Melbourne North Uniform	30.9%	67	31.3%	68	**217**
19	Casey Highway Patrol	30.8%	8	23.1%	6	**26**
20	Wyndham CIU	30.7%	39	34.6%	44	**127**
21	Altona North DRU	30.6%	11	13.9%	5	**36**
22	Transit North 5 PSO	30.5%	25	28.0%	23	**82**
23	Transit West 2	29.4%	60	27.5%	56	**204**
24	Transit North 1 PSO	29.1%	69	31.2%	74	**237**
25	Highway Patrol Westgate	28.6%	14	24.5%	12	**49**

FIGURE 7

Distribution of the 471 fines issued by PSOs in public transport branch * Transit South 4 PSO (refer to Table 6).

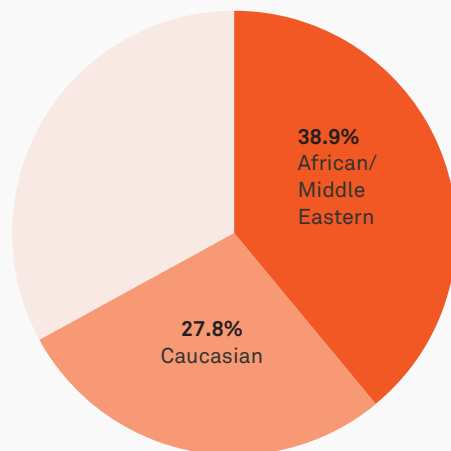38.9% African/Middle Eastern

27.8% Caucasian

TABLE 7

Top 20 police operations that issued the most disproportionate number of fines to Aboriginal people.

	Police operation	Proportion of COVID fines issued to Aboriginal people at reporting station		Proportion of COVID fines issued to Caucasian people at reporting station		Total COVID fines issued
		%	Total	%	Total	
1	Latrobe CIU	36.4%	4	36.4%	4	11
2	Mildura Uniform	27.8%	30	37.0%	40	108
3	Collingwood Uniform	18.4%	45	35.1%	86	245
4	Bairnsdale Uniform	17.6%	13	59.5%	44	74
5	Alexandra Uniform	15.8%	3	57.9%	11	19
6	Swan Hill Uniform	13.9%	17	53.3%	65	122
7	Shepparton Uniform	12.7%	15	41.5%	49	118
8	DRU-Melbourne	12.7%	7	49.1%	27	55
9	Fitzroy Uniform	10.6%	37	33.9%	118	348
10	Darebin CIU	10.6%	9	36.5%	31	85
11	Lakes Entrance Uniform	8.9%	5	60.7%	34	56
12	Traralgon Uniform	8.3%	10	63.3%	76	120
13	Whittlesea CIU	7.7%	3	38.5%	15	39
14	Morwell Uniform	7.5%	7	63.4%	59	93
15	Stonnington CIU	7.4%	4	50.0%	27	54
16	Stawell Uniform	6.9%	4	60.3%	35	58
17	Richmond Uniform	6.8%	30	37.6%	165	439
18	Robinvale Uniform	6.8%	5	13.7%	10	73
19	Portland Uniform	6.3%	3	54.2%	26	48
20	Drouin	5.9%	3	70.6%	36	51

FIGURE 8

Top 10 Victorian locations with disproportionate
number of fines issued to Aboriginal people.

Mildura
27.8%

Swan Hill
13.9%

Shepparton
12.7%

Alexandra
15.8%

Bairnsdale
17.6%

Latrobe
36.4%

Fitzroy
10.6%

Melbourne
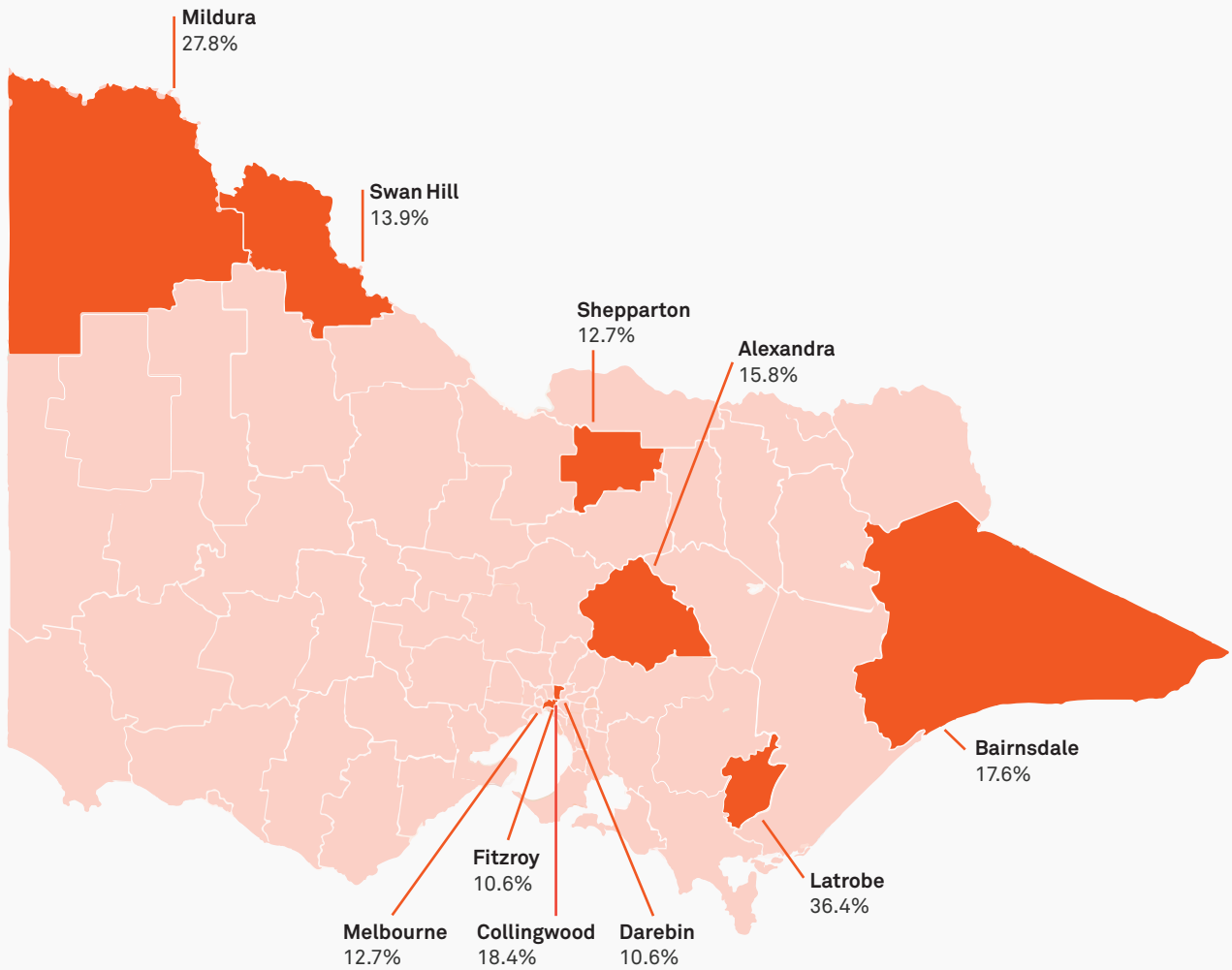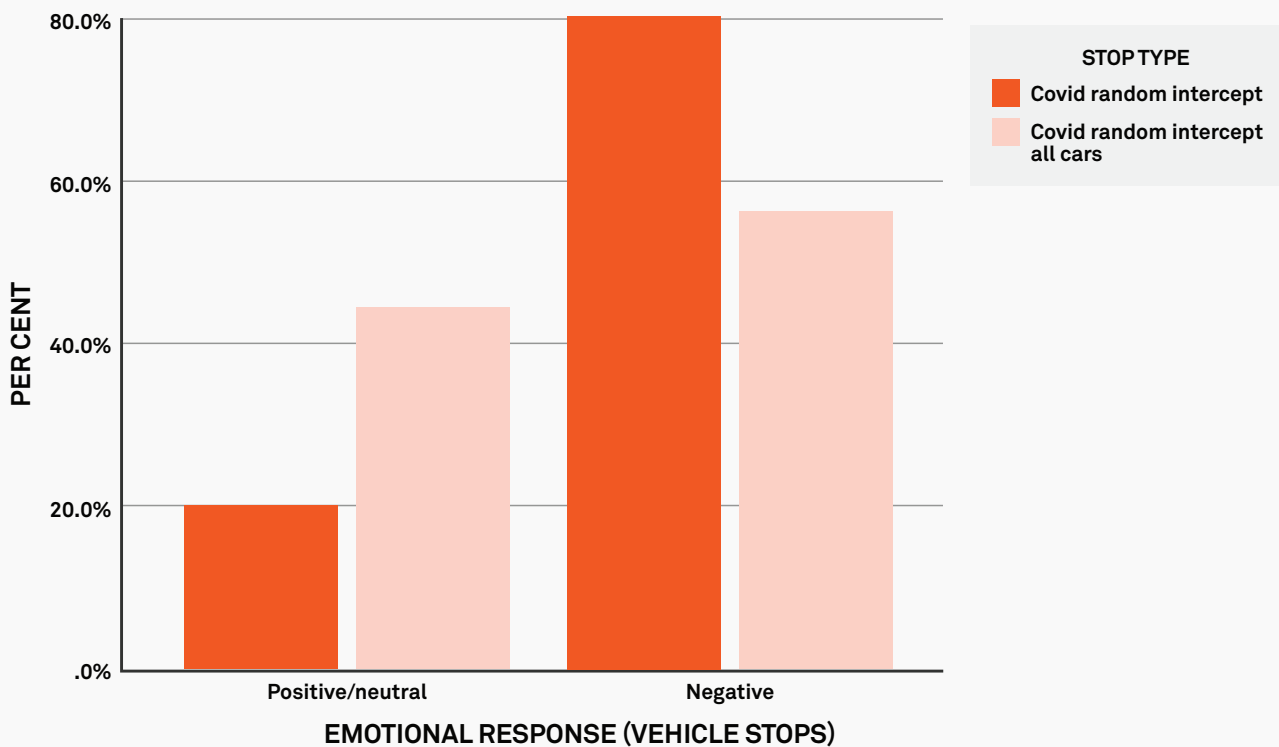12.7%

Collingwood
18.4%

Darebin
10.6%

FIGURE 9

Emotional responses to random verse border COVID intercepts.

METHOD 5: EXAMINING THE IMPACT OF BEING ISSUED WITH A COVID FINE

Of the 82 respondents to the survey we published on the Inner Melbourne Community Legal webpage, 60 per cent were living in a home owned by themselves or family members, 51 per cent were female, 14 per cent were of racialised/ non-white appearance, 73 per cent lived in a metropolitan area. 26 per cent had been stopped 2-3 times by police to be questioned about a COVID related matter. From this data there were 18 complete cases involving a pedestrian stop and 28 complete cases involving a vehicle stops.

We excluded one case whose answers were completely inconsistent. Because the data set is so small the following assessment is exploratory only and we do not present it as having statistical validity.

The key exploratory questions we ask of the data are:

1. For vehicle drivers, was there a difference in the experience of random stops verse batch COVID testing at borders on people's feelings about their experience with the police?

2. For pedestrians were people more accepting about being questioned about mask wearing offences than offences that required questioning?

The data was subject to a threshold analysis[54] to separate vehicle stop cases into two categories: random police stops or stops of sets of drivers at border crossings. Pedestrian stops were separated into mask wearing offences and non-mask wearing offences.

Results: Vehicle stops

Of the 28 vehicle stops cases, 34.5 per cent had been subject to a random COVID stop, while 65.5 per cent were subject to a batch stop at a border where all vehicles were being stopped.

For drivers, 37.1 per cent expressed positive or neutral feelings about the police stop, while 62.9 per cent expressed negative feelings. It is clear from people's comments on the survey that a lot of these negative feelings were about the rules themselves and the restrictions on people's rights during the lockdown and not about the policing.

However, a cross tabulation of stop type with emotional response shows that while all types of COVID stops were more likely to generate negative feelings in stopped drivers, it was the random COVID stops where people were singled out for questioning that generated the most negative feelings. The survey finds that 80 per cent of random COVID stops generated negative feelings while 56 per cent of the stops where all cars were stopped generated negative feelings.

In the survey of 28 drivers, we found that the police used force four times against drivers. On two occasions the police used the COVID stop as an opportunity to conduct a vehicle search without reasonable grounds. On one of these occasions the driver was searched also. Random stops seemed to be more likely when drivers had passengers. The most serious of the case studies from the survey involved a First Nations woman and her passengers.

In this case study, it appears that the police used the COVID stop as a pretext to conduct a criminal investigation of this woman and her passengers.

KYLIE'S STORY

In June 2021 Kylie*, a First Nations woman from a regional area was stopped for a random COVID compliance check by police while driving between 6am to 8am in Melbourne. She and her passengers were asked to get out of the car. The police subjected her to a pat down search and searched her vehicle without any justification. Her car was given a roadworthy check. The police conducted a bail and warrant check on her and her passengers and examined the contents of her bag including her feminine hygiene products.

During the incident, she and her passengers were forced onto the ground and handcuffed. The police made inappropriate racialised comments towards them. She felt sexually harassed by the police during the incident. At the end of the encounter she was given a COVID related infringement because the police, 'reckon that going to help my Aunty wasn't a good enough excuse'. She said the police spoke to them 'like they were dogs'. She said the police were rude, aggressive, disrespectful and abusive. She said she was scared and dehumanised. She felt angry and that she had no rights.

*Not her real name

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54   Tamar Hopkins, *Understanding Racial Profiling in Australia* (n 29) See Chapter 2, Methodologies for Identifying Racial Profiling.

The second vehicle search recorded in the survey was described as follows.

LEANNE'S STORY

In July 2021 Leanne*, a 60-year-old white woman from Melbourne was stopped between 6am to 8am the morning in Melbourne in a random vehicle stop by police to check if she was in her 5 km radius. The police asked her why she was driving in the area, checked her licence and searched her vehicle. The police also conducted a roadworthy check on the outside of her vehicle, breathalysed her and asked her for a receipt. While she was within her 5 km radius, the police gave her a fine for not having a valid reason for being outside her house. When she objected to the search of her vehicle, the police said they didn't need a reason to search the car and told her they would arrest her if she did not allow the search. She found them rude, aggressive and disrespectful. She felt devalued, scared, angry and like she has no rights and that the police can get away with whatever they do.

*Not her real name

It is clear from the descriptions provided by survey recipients that many people were angry that the police were conducting COVID compliance stops and with the COVID laws themselves. However, many people were clearly disturbed about the way that they were treated by police during these stops. Here are three further examples of experiences people described.

REBECCA'S STORY

Rebecca* is a white woman of about 30 years old. She was pulled over by police early in the morning in August 2021 for a random COVID compliance check, while driving in the city of Melbourne with her female partner. She explained that she was moving house and that her partner was helping her move. The police asked for both of their details and asked questions about where they lived. The police made a homophobic comment that made them both uncomfortable. The woman felt that the police were rude, disrespectful, unjustified, unprofessional and homophobic. She felt devalued, dehumanised and angry.

*Not her real name

DAVID'S STORY

In July 2021 David*, a 50 year-old white male driver with passengers, was stopped by the police in the early hours of the morning in Geelong for a random COVID compliance check. During the stop the police said he was not wearing a mask nor was he out for a prescribed reason. The police conducted a warrant/bail check on him and did a road worthy check of his car. The police threatened him with force and then used force on him by pushing him, holding him and poking him on the chest with an index finger. He was breathalysed and told he would be receiving a summons. He found them rude, aggressive, disrespectful, unjustified, unprofessional, threatening and abusive. He felt dehumanised, that he had no rights, and angry that the police can get away with whatever they like with no consequences. He did not think there would be any point making a complaint because the police would all back each other up.

*Not his real name

CHLOE'S STORY

In May 2021 Chloe*, a 30-year-old white woman from Melbourne, was randomly stopped by the police after 9pm. They asked to see her licence to confirm her address. She and her passengers were asked for their details and where they were driving to. They also checked her mobile phone and required her to produce a receipt and threatened her with force. They pushed and shoved her against her car and asked her to move, and then gave her a warning for being outside her 5 km radius. She said they were rude, aggressive, disrespectful, unjustified, unprofessional, threatening and abusive. She felt that they were acting out of spite. She felt devalued and dehumanised, scared and angry and that the police can get away with whatever they do.

*Not her real name

Results: Pedestrian Stops

Consistent with the analysis undertaken in Method 1, we divided the pedestrian data into stops for visual obvious offences (face mask wearing) compared with stops where the offence could only be ascertained by questioning the person. The question we ask of this data is: Which of these types of stops created the most psychological harm?

In the pedestrian stops reported in the survey, police stopped 60 per cent of individuals on a footpath or a street, 8 per cent in a supermarket and 8 per cent at a train station.

There were 18 pedestrians who answered the survey whose stops could be sorted into stop type and emotional response. Police stopped 65 per cent of the pedestrians for visually apparent face-mask offences. Sixty-seven per cent of the pedestrians reported having a negative emotional reaction to their interaction with police over the COVID matter.

The graph following shows that while most COVID police stops left pedestrians who answered the survey with negative feeling, people were slightly more positive about police stops of offences that were visibly apparent. The effect is subtle though.

FIGURE 10

Emotional responses to be stopped for visible compared with non-visible offences.
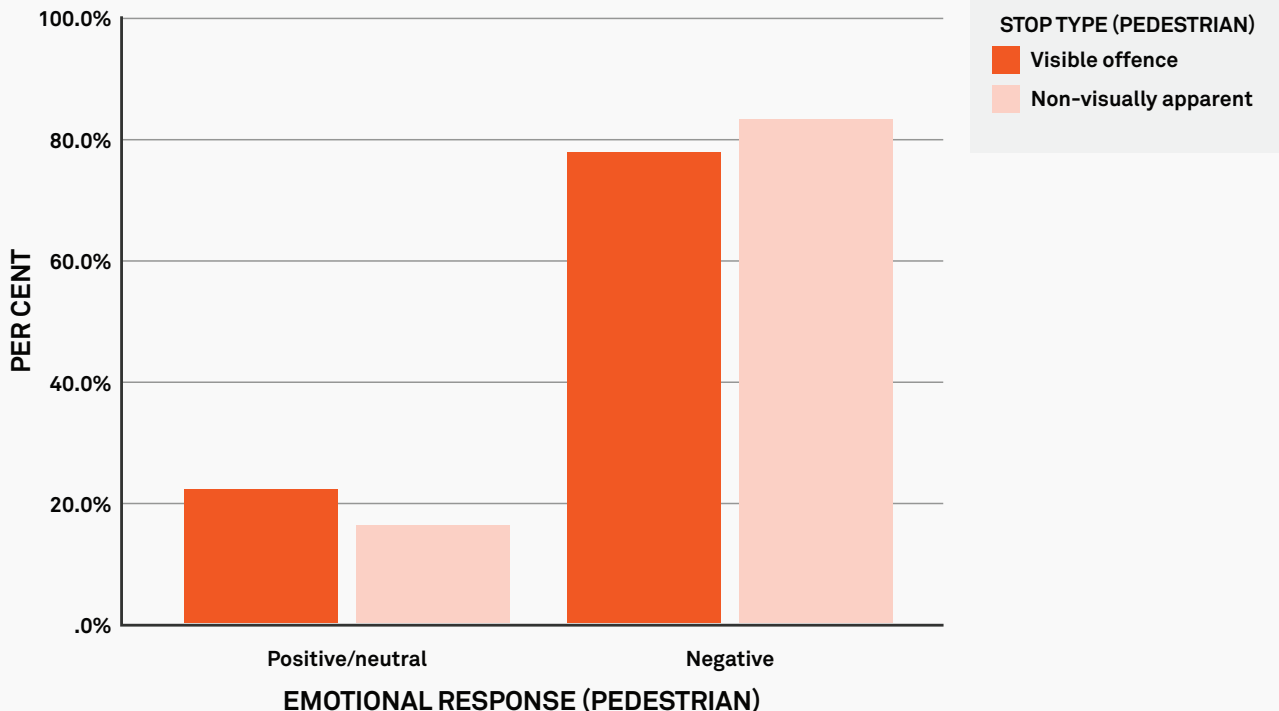
Discussion of Results

METHOD 1: VISIBLE OFFENCES V QUESTIONING OFFENCES

Our analysis shows that police are more likely to fine African/Middle Eastern 5.4 per cent (95% CI: 3.5% - 7.4%) for offences involving questioning compared with visible offences than Caucasians. This finding supports the conclusion that police were more active in investigating African/Middle Eastern for potential COVID offences than white people. This is evidence that they engaged in racial profiling against this group. Our analysis did not support a finding of racial profiling against other groups.

Our complete case analysis also found evidence that police are 4.3 per cent (95% CI: 1.7% - 7.0%) more likely to fine Asian people for offences involving questioning compared with visible offences than Caucasians. However, the multiple imputation sensitivity analysis set out in Appendix A does not support this finding. That is, once the 'missing data' is taken into account the disparity is no longer evident making this report unable to demonstrate racial profiling of Asian people in relation to COVID fines.

While racial profiling against African/Middle-Eastern appearing people has been a subject of concern in Victoria for some time[55] the racial profiling of Asian people has not been the subject of recent complaints. It was identified by White et al in 1999[56] and will appear in forthcoming research by the authors and others in relation to police searches in 2018/2019.

In 2020 COVID-19 was a times referred to as a 'Chinese virus'. There were also disturbing reports of racism directed against Asian people. One explanation for our qualified finding of racial profiling by police against Asian people is that the police, reflecting these attitudes, also unjustifiably intensified their scrutiny against Asian people. Alternatively, it is possible that our finding reflects longer standing stereotyping of Asian people. Our finding (qualified though it is) raises the question that Asian people may not be making their experiences of racial profiling known to community legal centres.

From the survey data (Dataset 2) we can see evidence that random vehicle stops and non-face mask offences generated the most distress in stopped individuals. Our findings mean that particular racial groups were experiencing higher levels of distress as a consequence of the policing of COVID fines than others.

55   Zrinjka Dolic, Race or Reason; *Police Encounters with Young People in the Flemington Region and Surrounding Areas* (Flemington & Kensington Community Legal Centre, 2011); Bec Smith and Shane Reside, *Boys You Wanna Give Me Some Action? Interventions into Policing of Racialised Communities in Melbourne* (Springvale Monash Community Legal Centre, 2010); Tamar Hopkins, 'Complaints Against Police Behaviour in Flemington, 2006' (2007) 32(1) *Alternative Law Journal* 32; Tamar Hopkins, 'Litigating Racial Profiling: Examining the Evidence for Institutional Racial Profiling by Police against African-Australians in Flemington, Victoria' (2021) 26(2) *Australian Journal for Human Rights* 209; Hopkins, *Understanding Racial Profiling in Australia* (n 29).

56   Victoria Police, 'Field Contact Policy Guide for Victoria Police Educators and Ethnic Appearance Codes - FOI 57210/17' (n 10); Rob White et al, *Ethnic Gangs in Australia, Do They Exist? Report No. 1 Vietnamese Young People* (Australian Multicultural Foundation, 1999).

METHOD 2: ARREST V FINE RATES

Method two was inconclusive about whether racial appearance had a direct effect on a person's probability of being arrested. While our methodology does not find that a person's race impacts the police decision to arrest for a COVID offence this does not mean that race does not play role in arrests. Rather than a direct effect, race may have an indirect effect on the outcome.[57]

In raw percentage numbers alone, Aboriginal, African/Middle Eastern and Asian people were more likely to be arrested than Caucasians (3.3%, 2.8% and 3.4% compared with 2.0%). The number of COVID fines a person has received is likely to be a greater driver of arrest than being African/Middle Eastern or First Nations. However, being of African/Middle-Eastern or First Nations appearance disproportionately increases the probability a person will be issued with a COVID fine (see discussion following Table 2) and is therefore likely to impact the number of COVID fines an individual in these racial groups will have.

Our data shows that police operational practices, including the location where police are based and the focus of the taskforce involved, result in particular racialised groups being more likely to be issued with COVID fines. (See results of Method 3 and 4 in this study). We also find racial profiling in questioning practices against African/Middle Eastern people (Method 1). We suggest that these effects are likely to result in more people from racialised groups receiving multiple fines. It is this that is likely to effect arrest rates.

The fact that people in breach of COVID rules were arrested at all raises questions about the purpose of COVID rules. The COVID rules were intended to reduce the spread of COVID, and yet an arrest, particularly of a person who is outside, brings a person into close contact with others through transport in a police vehicle, and inside a police station and cell of which will increase their risk of contracting or transmitting the virus. This is in addition to the already serious psychological harm involved in subjecting a person to the deprivation of their liberty in police custody. These harms need to be taken into account in considering the power of police to arrest for breach of health orders.

METHOD 3: TOTAL POPULATION V NON-ENGLISH SPEAKING POPULATIONS

Our third method to identify racial profiling examined whether the police were issuing fines in direct proportion to the population level of each Victorian LGA or whether the size of the non-English speaking population was exerting any independent effect on the rate of fines being issued, consistent with a racial profiling hypothesis.

This strategy for detecting racial profiling is hampered by the fact that non-English speaking at home is not a good proxy for racialisation: that is many white appearing people speak non-English languages at home and many racialised people speak English. Given this limitation we were still able to observe that LGAs with higher numbers of people who did not speak English at home received a disproportionate number of fines relative to their total population.

Our examination of LGAs with higher proportions of First Nations people did not find any differences in the rates of fines compared with total populations. This could be because areas where larger proportions of First Nations people were subject to lower COVID restrictions. Alternatively, LGA may be too broad an area category to detect smaller operational differences.

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57 See a discussion about this in Simon Holdaway, 'Some Recent Approaches to the Study of Race in Criminological Research: Race as Social Process' in Basia Spalek (ed), *Ethnicity and Crime: A Reader* (Open University Press, 2008) 33–6. Naomi Murakawa, 'Racial Innocence: Law, Social Science, and the Unknowing of Racism in the US Carceral State' (2019) 15 *Annual Review of Law and Social Science* 473, 481.

METHOD 4: IMPACT OF INDIVIDUAL POLICE OPERATIONS

To explore police operations and their disproportionate impact on racialised groups we examined the disproportionality levels of fine rates of different police operations against African/Middle Eastern and Aboriginal people. Recall that at the State level, African/Middle-Eastern people received 20.1 per cent of the total COVID fines issued while Aboriginal people received 2.5 per cent. In this study we examined the police operations that were substantially more disproportionate than these state averages which are disproportionate in themselves.

The police operations that were most disproportionate in issuing fines to African/Middle-Eastern appearing people included the Embona Task Force Altona North where 87.5% of their fines were issued to African/Middle-Eastern appearing people, Embona Taskforce Melbourne (where 50% of fines were issued to African/Middle-Eastern appearing people), Crime ECHO Task force (39.5%), Transit South 4 PSO (38.9%) Brimbank DRU (38.7%), Transit West 3 PSO (37%), Transit South 4 (35.4%), Brimbank CIU (35.9%), Transit West 2 PSO (34.1%) Casey Highway Patrol (30%), Highway Patrol Westgate (28.6%). It is notable that most of these operations are specialist crime, public transport or highway operations.

In contrast the police operations that most disproportionately issued fines to First Nations people, with the exception of La Trobe CIU, were police officers from the metropolitan and rural uniform branches including Mildura Uniform (27.8%), Collingwood Uniform (18.4%), Bairnsdale Uniform (17.6%), Swan Hill Uniform (13.7%) and Shepparton Uniform (12.7%).

What might explain some of these findings? The Embona Taskforces are specialist Taskforces that investigate robbery offences[58] while the Echo Taskforce focusses on organised crime.[59] We presume that the Embona Taskforces (Altona North and Melbourne) and Crime – Echo Taskforce are likely to have issued COVID fines at the time they were investigating robbery and other criminal offences. We do not know too much about the circumstances of these fines, but it is conceivable that when they knocked on the door of a robbery suspect or person of interest's home, they may have also investigated whether they were in breach of COVID rules. Their targets appear to include a significant number of African/Middle-Eastern people. In this way, the COVID fine becomes a penalty these taskforces can direct against the racialised people they already heavily survey and criminalise. While on a particular occasion, they may not have been able to charge one of their suspects with a robbery, they might have been able to fine them for a COVID breach.

If African/Middle-Eastern people are more likely to be questioned by particular police taskforces, it is more likely that these groups will be found in breach of COVID rules. This is a form of racial profiling. These taskforces rarely question white people. The already highly racialised selective process of the taskforces will mean they will be racially discriminatory in their issuing of COVID fines too. We conclude that COVID fines issued by these taskforces have been issued in breach of s9 of the *Racial Discrimination Act 1975*. It would be appropriate for any COVID fine issued by any of these taskforces to be withdrawn.

Outside these crime taskforces, it is also clear that many of the Transit police, Transit PSOs and Highway Patrols listed in Table 6 are disproportionately fining people from African/Middle Eastern background. These are frequently grossly disproportionate figures. For example, 38.9 per cent of all fines issued by Transit South PSOs went to African/Middle Eastern people. This is likely to arise as a consequence of the disproportionate questioning of people of these backgrounds in these high traffic transport areas rather than an increase in offending by these people.

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58   Victoria Police Submission to Australian Federal Parliament 73.1 available at <https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=laca/crimeinthecommunity/subs/sub73_1.pdf>

59   Erin Pearson, David Estcourt, 'New Police taskforce, Viper, to 'smash gangs, bikies and organised crime' (The Age online, 1 July 2022) <https://www.theage.com.au/national/victoria/victoria-police-launches-new-viper-taskforce-to-smash-gangs-20220701-p5aya4.html>

While in the absence of police and PSO data on who they are stopping and questioning, only who they are fining, we are unable to make definitive conclusions, the present data is certainly consistent with the hypothesis that these operations are focussing their investigations on African/Middle Eastern appearing people, consistent with racial profiling.

In contrast, in places where fines are disproportionately issued to First Nations people this occurs largely (but not only) through police in uniform branches. For example, close to 28 per cent of Mildura Uniform's COVID fines were issued toward Aboriginal people. This tends to indicate that it is when First Nations people use public spaces that they are disproportionately questioned, but less so when they use public transport or drive on highways. During COVID all individuals in public spaces are potentially in breach of the pandemic rules. However, unless the offence is obvious, (such as a mask wearing offence), police and PSO decisions about who to question lack clear criteria and are potentially

discriminatory.[60] The hugely disproportionate level of fines issued by uniformed police to First Nations people in public spaces is consistent with the observations by researchers that police are discriminatorily focussed on First Nations people in these spaces[61] (Racial Profiling). It is also however consistent with the hypothesis that First Nations people are more likely to be present in public spaces than white people (the policing of which is also a form of situational racial profiling)[62], or, and this is much less likely given that offending rates are likely to be uniform across the community[63] that First Nations people are more likely to be breaching COVID rules than white people. We need police stop and question data in addition to the data on fines issued to clarify with certainty what is going on.

METHOD 5: THE EXPERIENCE OF BEING RANDOMLY STOPPED

Our exploratory results found that 80 per cent of drivers stopped randomly by police and subject to a questioning for a COVID offence experienced distress and frustration compared with 56 per cent of drivers stopped at border checks surrounded by others experiencing the same treatment. While these are exploratory results from a small sample size, they reveal that the public is more suspicious and concerned when police engage in random stops where they have been singled out for police attention in the absence of reasonable grounds than stops where it is clear that everyone is being treated the same way.

There is good reason for the public's suspicion and concern. Research in 2018/2019 demonstrates that police initiated random vehicle intercepts are more likely to occur to non-white people.[64] Because they are more likely to be stopped arbitrarily through a random intercept, racialised people are more likely

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60   While it has not be subject to court determination, this questioning may be well be unlawful and in breach of Victoria Police Policy: Victoria Police, *Interactions with the Public* (VPM Policy Rules, Victoria Police, 31 August 2015).

61   Chris Cunneen, 'Chapter 5, Criminalisation and Policing in Indigenous Communities' in Behrendt, Cunneen, Libesman, Watson (eds), *Aboriginal and Torres Strait Islander Legal Relations*, (Oxford University Press, 2019), 89-107;

62   Quinton (n 33); Hopkins et al (n 28) 33.

63   We need a randomised survey of the Victorian population to understand true offending rates: see Ben Bowling and Coretta Phillips, *Racism, Crime and Justice* (Longman, 2002).

64   Hopkins, *Understanding Racial Profiling in Australia* (n 29).

to experience distress in their interactions with police. This finding has clear policy implications. Legislatures should not grant police the power to engage in random stops.[65]

The finding for pedestrians were marginal. People stopped for non-face mask offences were only slightly more frustrated than people stopped for face mask offences. The results show that about 65 per cent of all pedestrians stopped for a COVID related matter had a negative experience of the police interaction.

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65 Indeed the legality of random COVID stops is questionable. There was no legislative power granted for police to randomly stop vehicles, in the absence of reasonable grounds, for the purpose of checking if a person was in breach. This could not properly be described as an appropriate use of power under s9(b) of *Public Health and Wellbeing Act 2008*) nor could power be derived under the Road Safety Act as per *DPP v Kaba*.

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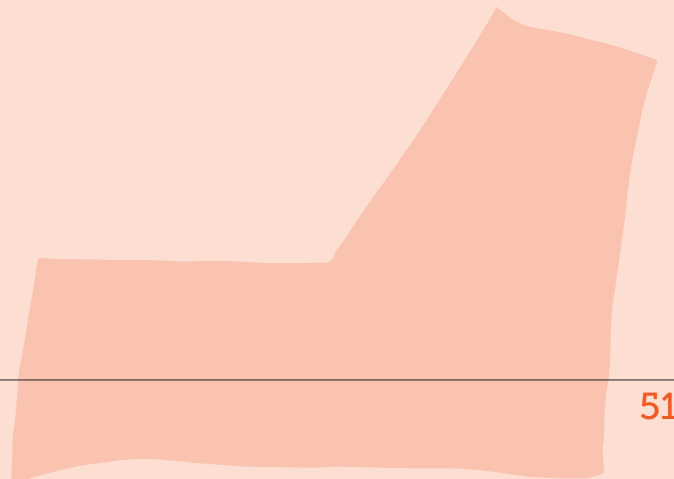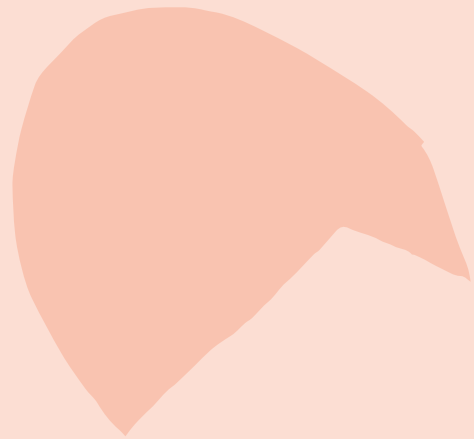
Conclusion and Key Findings

Identifying racial profiling requires researchers to be able to identify unreasonableness as well as disproportionality in police practices. Because it is likely everyone in Victoria will have inadvertently or otherwise breached COVID orders at some point (even the Premier did), the enforcement of COVID offences by police tells us a great deal about police practices rather than offence rates. As a consequence of COVID offences existing across the population, identifying racial disproportionalities in COVID fine rates is capable of providing us with information about whether policing practices are focussed through individual or operational methodologies on racialised groups.

The disproportionate issue of COVID fines towards Sudanese born people and First Nations people apparent from the Crime Statistics Agency[66] provides clear evidence that police operations are closely focussed on the detection of offences in these communities rather than generally across the State of Victoria.

Using carefully designed methodology, this research has uncovered that African/Middle-Eastern appearing people were more likely to be fined for an offence that required questioning than an offence that was visually apparent when compared with white people. This means that Victoria Police members are more likely to question African/Middle-Eastern to explore whether they have committed a COVID offence than white people. This finding supports the conclusion that Victoria Police are engaged in racial profiling against these particular racialised groups.[67]

Our results indicate there may be a higher probability of Asian appearance people being fined with offences requiring questioning than visually apparent offences, with the complete case analysis finding strong evidence (p<001) and the multiply imputed findings showing no evidence (p=0.554). A finding of racial profiling against Asian communities is somewhat unexpected and indicates that further research is needed to understand the dynamics of policing in these communities. While there is a history of targeted policing of Asian people through Victoria Police's Asian Crime Squad,[68] these communities are not making complaints to community legal centres about policing in the volume of other targeted communities.

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66   Victorian Crime Statistics Agency (n 6).
67   Previous research has discovered racial profiling in Victoria again African/Middle Eastern people: Hopkins, 'Litigating Racial Profiling: Examining the Evidence for Institutional Racial Profiling by Police against African-Australians in Flemington, Victoria' (n 55) and against African, Middle Eastern, Pacifica and Aboriginal people: Hopkins, *Understanding Racial Profiling in Australia* (n 29).
68   Patrick Thomas Boyle, 'What Is a Street Gang. A Victorian Case Study.' (Masters Thesis, Monash University, 2014).

While this study did not find evidence that race independently impacts police decisions about who to arrest for a COVID offence, this study identifies that race may have an indirect effect on COVID arrests through increasing the likelihood that particular racial groups will be issued with COVID fines. The fact that arrest is being used to enforce COVID sanctions raises issues of disproportionality: is an arrest more harmful than the public health effects of COVID rule non-compliance? Could compliance have been achieved through less restrictive means?

This study was also able to observe that as non-English speakers at home increased as a proportion of a population, so too did the rate of issuing COVID fines. This provides additional information about the way Victoria Police is organisationally structured to detect offending among racialised groups.

This study provides evidence that Victoria Police crime operations were issuing COVID fines to the African/Middle-Eastern people they were already intensely policing. This pattern could also be observed in the protective service officer and police public transport and highway patrol practices. For First Nations people, it was uniformed police in regional and metropolitan areas that were issuing them with COVID fines, so continuing what is likely to be the usual practices of these uniform branches. This is likely to be a function of long-term, historical practices that focus police attention on First Nations communities, including negative and stereotyped attitudes towards them, a lack of care, misconceptions of dangerousness and untruthfulness,[69] patterns of questioning[70] and regular patrolling of the 'usual suspects' and the areas they frequent.

Policing the 'usual suspects' and 'high crime areas' is particularly nonsensical in the context of enforcing public health laws which every Victorian (including the Premier) is likely to have breached from time to time. Because of the likely ubiquity of COVID offending across the Victoria population this data provides a rare glimpse at the way Victoria Police is operationally constructed to focus on racialised people in their investigative practices.

The findings of this study are likely to apply to fines more generally. For example, it is likely that speeding, and seatbelt type offences occur across the population and that at some point everyone will have accidentally travelled using an expired Myki. Consequently, while our recommendations are directed at COVID fines specifically, they may apply to fines more generally.

This study was hampered by a number of factors. Firstly, the failure of Victoria Police to collect data on who they stop and question means that we have been left with using fine data to attempt to identify racial profiling. A much better way of examining racial profiling would be through police stop and question practices.[71]

Secondly this study was restricted by Victoria Police continuing to use the old racial appearance codes rather than the 8 new codes they adopted in 2018. This leaves the data full of inaccuracies. This problem is exacerbated by racial appearance codes missing in 23.5 per cent of fine records.

This study was also hampered by the fact that the Australia Census does not collect information that provides information about the for racial appearance of Australians. In this study we used speaking a language other than English from the 2021 census as our basis for examining racial profiling in LGAs and ancestry from the 2022 census, in estimating the 4.00 disproportionality ratio fining African/Middle-Eastern people in Table 2. These are inadequate proxies.

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69   See for example the treatment of Tanya Day and Veronica Nelson.
70   Hopkins, *Understanding Racial Profiling in Australia* (n 29).
71   Hopkins et al (n 28).

Recommendations

CATALYST FOR ACTION FROM THE VICTORIAN GOVERNMENT

The findings of racial profiling and other forms of racial disproportionality identified in this report from Victoria Police data during 2020 raises serious concerns. This is not the first time the Victorian Government has been on notice about the existence of racial profiling by police. Following the settlement of the landmark Haile-Michael racial profiling case[72] Victoria Police introduced a racial profiling ban into Victoria Police policy in 2015.[73]

The present report adds to the growing body of evidence that this ban is not working and that racial profiling continues to occur in Victoria. Other recent evidence of racial profiling includes a report on COVID policing complaints made to a website set up in Victoria,[74] findings from a survey of 981 Victorian's stop and search experiences in 2018-2019,[75] soon to be published findings from an analysis of Victoria Police search records from 2018-2019[76] and an analysis of interviews with African and Pasifika young people in Dandenong and the operation of a number of Police's data bases that impact them.[77] Relatedly, the Inquest into Yorta Yorta elder, Tanya Day, found that a V-Line employee was racially biased when he called the police to attend a sleeping Aboriginal passenger while leaving sleeping non-Aboriginal passengers alone.[78]

This report is another call for the Victorian Government to act. The Victorian Government must now act to identify and eliminate racial profiling in Victoria Police. We set out the following recommendations for doing this.

72   Hopkins, 'Litigating Racial Profiling: Examining the Evidence for Institutional Racial Profiling by Police against African-Australians in Flemington, Victoria' (n 55).

73   Victoria Police, *VPMP Human Rights Equity and Diversity Standards* (31 August 2015) 1.

74   Boon-Kuo, Sentas and Weber (n 17).

75   Hopkins, *Understanding Racial Profiling in Australia* (n 29).

76   Hopkins, Popovic, Sanchez-Urribarri, Sentas, 'Identifying Racial Profiling in Victoria Police Search without Warrant' forthcoming.

77   Leanne Weber, *You're Going to Be in the System Forever: Policing, Risk and Belonging in Greater Dandenong* (Monash University, April 2020).

78   *Finding into the death of Tanya Day* (Coroners Court of Victoria, State Coroner of Vic, 9 April 2020).

DATA COLLECTION

Finding: While this report has created a unique methodology to permits us to research the existence of racial profiling by Victorian Police through examining fine data, this methodology has limitations. A better way to examine racial profiling would have been to obtain data on who the police stop and question as well as search, fine and arrest. Such data does not presently exist in Victoria.

Recommendation:

1. The Victorian Government mandate the collection and public reporting by Victoria Police of data on who its members stop, question, search, fine, arrest, move-on, and use force against in accordance with the recommendations of the Stop Data Working Group[79] and recommendation 20 of the 2022 Criminal Justice Parliamentary Inquiry.[80]

Finding: Victoria Police continues to use the old racial appearance codes rather than the eight new codes they adopted in 2018. This leaves the data full of inaccuracies. This problem is exacerbated by racial appearance codes missing in 23.5 per cent of fine records.

2. The Victorian Government legislate to enforce the use of the eight ethnic appearance codes Victoria Police introduced in 2018[81] in particular so that sub-Saharan African appearance can be separated from Middle-Eastern/North African appearance. The correct use of these codes must be regularly and independently audited and cross-checked against body-worn camera evidence.

3. The Australian Census should collect data that can reasonably be used to assess the racial appearance of people resident within localities.[82]

ELIMINATION OF DISCRIMINATION – ENLIVEN OBLIGATION UNDER EQUAL OPPORTUNITY ACT

Finding: This study finds that compared with white people, police are 5.4 per cent (95% CI: 3.5% - 7.4%) more likely to fine people of African/Middle Eastern appearance for offences involving questioning compared with visible offences. This indicates that police were more active in investigating African/Middle Eastern people for potential COVID offences than white people. This is evidence of racial profiling.

While racial profiling is unlawful under the *Commonwealth Racial Discrimination Act 1975* and the *Charter of Human Rights and Responsibilities Act 2006*, due to the current interpretation of the definition of 'services' it is not covered by Victoria's *Equal Opportunity Act 2010* (Vic).

Recommendation:

4. That Victorian Government legislate to amend the definition of "services" in the *Victorian Equal Opportunity Act 2010* to include all interactions by police and prison guards with members of the public including those suspected or found guilty of committing offences.

5. That Victoria Police request the Victorian Equal opportunity and Human Rights Commission review their policing practices and the outcomes for people from racialised communities under *Charter of Human Rights and Responsibilities 2006* (Vic) section 41(c).

79   Hopkins et al (n 28).

80   Patten (n 9).

81   Victoria Police, 'Field Contact Policy Guide for Victoria Police Educators and Ethnic Appearance Codes - FOI 57210/17' (n 10).

82   See discussion in Allen (n 11).

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BETTER COMPLAINTS SYSTEM AND ACCOUNTABILITY

This report has found that Victoria Police engage in racial profiling despite its 2015 racial profiling ban. This indicates there are ongoing systemic failings in the way Victoria Police interacts with racialised communities that internal police mechanisms have been unable to rectify. These findings are unlikely to be a surprise to members of racialised communities. There must be a safe and effective, independent complaints mechanism which allows people to raise human rights concerns about Victoria Police.

People are able to raise complaints against Victoria Police to Independent Broad-based Anti-corruption Commission (IBAC). However, in the last financial year IBAC investigate less than 1 per cent of complaints it received, referring the rest back to Victoria Police.[83]

The current system is failing our community and is not holding police to account. Furthermore, unless compelled to do so through appeals (see Bare[84]) IBAC are not investigating cases involving racial profiling. For example, IBAC recently audited how Victoria Police handled complaints made by First Nations people and found:

- Conflict of interests were identified in 84 per cent of files and IBAC disagreed with how these were managed in 42 per cent of files
- 41 per cent of files contain indications of bias by the investigators
- 54 per cent of files failed to collect or consider relevant evidence
- IBAC disagreed with police findings in 32 per cent of cases that were 'no complaint' 'not substantiated' or 'unable to determine'[85]

Improvements in practices will not come without public accountability. An effective complaints system not only assist an individual to receive justice, it can allow for systemic change and provide a pathway to improve culture, procedures and practices.

Recommendation:

6. The Victorian Government establish a Police Ombudsman to provide accessible, safe, independent and effective avenue for people and organisations to make complaints about Victoria Police including complaints about racial profiling and human rights abuses.

CREATING AND ENFORCING POLICE INTERVENTION THRESHOLDS

Finding: This study finds that Victoria Police were more active in investigating African/Middle Eastern people for potential COVID offences than white people The survey provides qualitative evidence that fines arising from random vehicle stops generated more distress than fines where people did not feel singled out.

The present report finds that the overwhelming majority (almost 90 per cent) of COVID offending was only discoverable after police engaged in questioning of individuals. However police/PSO decisions to question individuals is highly discretionary and open to racial and other forms of bias.[86] Indeed, this report finds that police do not exercise their investigative powers fairly throughout the community. For people who are impacted by unreasonable stops, police legal remedies are limited to what exists in common law.

Unlike some other states and territories, Victoria does not have codified police powers laws. The lack of codification makes law reform hard, and makes understanding the limits of police powers difficult for the police, community and law makers.

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83   IBAC, *IBAC Annual Report 2021-2022* (IBAC, 2022) 39.
84   Independent Broad-based Anti-corruption Commission, 'Independent investigation finalises 2009 police assault allegations' (online) Available at <www.ibac.vic.gov.au/article/independent-investigation-finalises-2009-police-assault-allegations>
85   Independent Broad-based Anti-corruption Commission, "Victorian Police handling of complaints made by Aboriginal People: Audit Report" (May 2022). Available at <https://www.ibac.vic.gov.au/node/242>
86   Michael McGowan and Christopher Knaus, 'NSW Police Pursue 80% of Indigenous People Caught with Cannabis through Courts', *The Guardian* (online, 10 June 2020) <https://www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts>; Geoffrey Barnes, 'Lifetime Traffic Penalty Comparison, Briefing Note'.

The Victoria Police Manual – Policy and Rules for 'Interactions with the Public' requires that:

> "Any targeted interactions with members of the public should be justifiable and based on intelligence, the person's behaviour or reasonable suspicion. They cannot be based upon attributes such as race, colour, language, religion, nationality or national or ethnic origin, sexuality, gender identity or impairment unless relevant."[87]

Despite this provision in the Victorian Police Manual, Victoria Police issued Public Health Order fines based on discretionary investigations disproportionately against African/Middle Eastern people. This finding is broadly consistent with other research in Victoria that finds evidence that high discretion policing is targeted against racialised (non-white) people and in particular African, Middle Eastern, Pasifika and First Nations people.[88]

Furthermore, this study provides some exploratory evidence that these discretionary stops also cause more psychological distress than non-discretionary stops.

Recommendation:

7. The police powers to stop people, i.e. targeted interactions, should be legislated so that it is limited to where police have grounds to reasonably suspect:

- An offence has occurred; and,
- that the stopped person has a connection (a nexus) to it.[89]

8. Biased law enforcement should be eliminated through legislation/regulations/policy that is drafted to eliminate the opportunity for bias in enforcement, this should apply broadly to all infringements and offences:

a) People should only be subjected to a targeted interaction once an offence is reasonably believed to have occurred and following a caution under the *Evidence Act 2008*.

b) Where the government explicitly authorises through legislation, questioning in the absence of reasonable grounds (and this should be in very limited circumstances only), it should be undertaken in a racially neutral location, such as at a border and not at train stations, and using a criterion that eliminates any possibility for police to be selective in any way such as questioning all individuals OR every 10th person or in groups of 10 vehicles.

c) An audit of authorising legislation should be undertaken to embed the previous amendments (Recommendations 1, 2, 7, 8a. 8b).

9. A law reform inquiry should investigate the feasibility and efficacy in creating further codified police powers in Victoria to promote and protect human rights in standardising police practices.

Finding: This report provides evidence that African and Middle-Eastern appearing people experienced racial profiling by police in Victoria in the enforcement of public health orders. It also provides evidence that particular police operations were grossly disproportionate in issuing fines to First Nations and African and Middle-Eastern appearing people in comparison with already disproportionate state-wide averages.

10. The Victorian Government should provide increased funding to community legal centres and the Victorian Aboriginal Legal Service to better understand and support communities to address systemic racism, reduce the contact of these communities with the police and criminal justice system and increase the capacity of these communities to make complaints about racial profiling through the legal and complaints systems.

11. The Victorian Government should provide increased funding to impacted communities to support alternatives to police such as community

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87   Victoria Police, 'Interactions with the Public' (n 60).
88   Hopkins, *Understanding Racial Profiling in Australia* (n 29).
89   *R. v. Le*, 2019 SCC 34 [131]

safety, health and well-being patrols[90]. Health and wellbeing are a community, not policing issues.

Finding: Particular police crime taskforces and some uniform operations issued grossly disproportionate public health fines against African/Middle-Eastern and Aboriginal people.

Aside from being in breach of the *Racial Discrimination Act 1975*, by focussing on particular racialised groups, these operations re-enforce existing stereotypes and ensure that these groups are more likely to face sanctions and enter the criminal legal system than people in the general community. Furthermore, police practices that target particular groups erodes trust between the police and the communities affected by these communities.

12. Victoria Police should ensure that health fines are not issued in addition to other law enforcement strategies. Education should be the primary strategy when other law enforcement goals are being pursued.

13. Victoria Police operations must not be focussed on particular racialised groups. Victoria Police must develop a plan and a monitoring and public reporting strategy to ensure that its taskforces and operations are not disproportionately focussed on particular racialised groups.

Finding: Across the state police were more likely to issue COVID fines to communities where there were higher populations of people from non-English speaking backgrounds than to communities with higher English-speaking backgrounds.

14. Victoria Police must ensure its operations are spread throughout the community and are not targeted at communities with higher ethnic diversity.

15. The Victorian Government should update the COVID-19 Compliance and Enforcement Policy to require that enforcement operations are spread fairly across communities and that enforcement agencies publicly report on where operations have occurred.

Finding: The raw data indicates that police arrested a higher percentage of Asian, African/Middle Eastern and Aboriginal people for breach of health orders than Caucasian people. While we have no evidence that these outcomes were the result of police taking racial appearance into consideration at the point of arrest, the fact that police were arresting people for COVID offending is questionable given that an arrest increases the opportunity for virus transmission in addition to other psychologically harmful effects.

16. The *Infringement Act 2006* (Vic) should be amended to reflect that arrest be a last resort for offences where an infringement can be issued. Where an arrest has occurred the fine should not be issued.

RECOMMENDATIONS IN RELATION TO INFRINGEMENTS

Victoria Police and Victorian Crime Statistics Agency data demonstrates that Victoria Police issued COVID fines disproportionately against African/Middle Eastern and First Nations people in Victoria. Because COVID offending was likely to occur throughout the community, this disproportionality is a strong indicator of systemic racism.

In particular this study finds evidence consistent with racial profiling by police against African/Middle Eastern and First Nations communities. By and large, these communities already experience marginalisation and where data

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90   See for example Foot-Patrol by Youth Projects, and Aboriginal community safety patrols: Amanda Porter, 2016, Decolonizing Policing: Indigenous Patrols, Counter-Policing and Safety. Theoretical Criminology 20(4).

exists, experience poorer health outcomes than the wider community. Racial profiling against these communities places an increased financial and emotional burden, including in some cases the loss of liberty, on these already marginalised communities which is counterproductive to the positive health outcomes the COVID regulatory regime was established to achieve. These costs are additional to the existing psychological costs on communities of police contact.[91]

We note that other jurisdictions, such as the ACT did not (at least initially) rely on issuing fines to enforce public health orders and chose to focus on education instead. [92]

17. To address the additional financial and emotional burden on particular communities arising from the unequal issuing of COVID fines, we recommend that the Victorian Government waive all COVID-19 fines.

a) If recommendation 17 is not implemented: we recommend that all COVID fines issued by police operations where more than 5 per cent of all fines were issued to Aboriginal people and more than 20 per cent were issued to African/Middle Eastern people should be withdrawn in light of the grossly racially disproportionate impact of these operations on these communities. All fines issued to all individuals by these operations should be waived on the basis that they were using police tactics that lack legitimacy.

18. In future, the primary consequence for breach of health orders should be education and mask provision.

In response to concerns raised by groups including the Federations of Community Legal Centre's Infringement's Working Group about the punitive approaches to issuing COVID fines in 2020, the new *Public Health and Wellbeing (Pandemic*

Management) Act 2021 included a requirement for the government to publish a COVID-19 Compliance and Enforcement Policy (the Policy)[93]. The Policy was effective from March 2022.

The Policy states its purpose is to 'learn the lessons' from two years of COVID-19 enforcement and shift police, PSO and other authorised officers from a punitive to a more flexible compliance and enforcement regime that focusses on education and a graduated response to escalating offending.[94]

The Policy contains four pillars:

Pillar 1: Public health driven

Pillar 2: Risk-based decision making

Pillar 3: Graduated responses

Pillar 4: Mindful of individual communities circumstances

The Policy recognises:

> "the impact of taking a punitive enforcement measure on a community already experiencing higher rates of police activity, may be more significant and therefore, less desirable."[95]

The recognition of the impact of policing in racialised communities by the Department of Health is important. It needs to be built on through meaningful changes in enforcement agencies practices. The Policy recognises the need to ensure enforcement activities are subject to 'continuous review and improvement'. Assessment criteria of police operations and actions should include:

- Is it non-discriminatory?
- Does it minimise the use of law enforcement tools where possible?
- Does it maximise overall community health through education, support and referral?

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91 Ben Bradford, Jonathan Jackson and Elizabeth A Stanko, 'Contact and Confidence: Revisiting the Impact of Public Encounters with the Police' (2009) 19(1) *Policing and Society* 20.

92 Claudia Farhart, 'Victoria Has Issued the Most Fines for Lockdown Breaches, While the ACT Hasn't Fined Anyone', SBS News (24 April 2020) <https://www.sbs.com.au/news/article/victoria-has-issued-the-most-fines-for-lockdown-breaches-while-the-act-hasnt-fined-anyone/cdbtqv0a1>.

93 Introduced under Division 5A, s231A(1) of the *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021*.

94 Department of Health, "COVID-19 Compliance and Enforcement Policy" (March 2022), 3.

95 Department of Health, "COVID-19 Compliance and Enforcement Policy" (March 2022), 15.

Recommendation:

19. That the COVID-19 Compliance and Enforcement Policy be update in line with the recommendations of this report to ensure that the enforcement of health orders is:

a) non-discriminatory, with particular consideration where issuing of fines is discretionary;

b) minimise the use of law enforcement tools;

c) maximise overall community health through education, support and referral;

d) any fines issued are publicly reported and audited to prevent racial profiling.

Pillar 4 requires fine issuers to be mindful of individual communities' circumstances before issuing a fine. This mindfulness needs to extend to a consideration of the systemic issues that created those circumstances. While the policy acknowledges the role of targeting and over-policing, the communities that experience targeting are themselves blamed for the outcomes of discriminatory practices and systemic racism. For example:

> "**Aboriginal and Torres Strait Islander**: many First Nations people have complex and varied needs, some of which include functional dependency, disability, poor physical health, mental illness, substance use, traumatic events, economic hardship and safety."

This description reinforces racial stereotypes of First Nations communities and fails to note the way police operations act to target these communities. As we have discovered in this report, some uniform police branches are grossly disproportionate in issuing fines against First Nations communities.

20. The COVID-19 Compliance and Enforcement Policy be amended to remove stereotypes from the description of First Nations people and instead reflect that First Nations communities have and continue to be disproportionately affected by discretionary decisions by Victoria Police that tend towards the more punitive option. The policy should be amended to emphasise the importance of Aboriginal community-controlled organisations in the enforcement of and adherence to public health guidelines by First Nations communities.
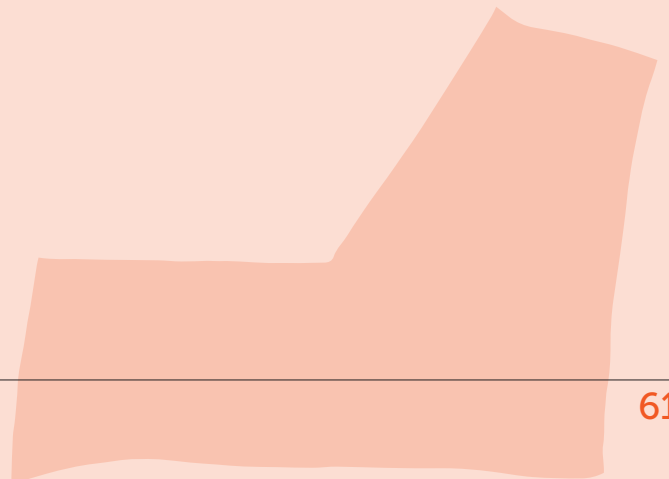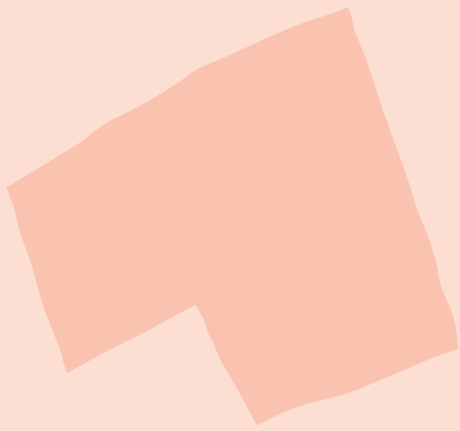
Appendix A

ACCOUNTING FOR THE DATA MISSING FROM VICTORIA POLICE

In the data we obtained from Victoria Police 23.5 per cent of racial appearance fields were missing. We have no information about why such a large amount of missing data exists. Perhaps some station commanders were less vigilant about checking racial appearance collection or failed to emphasise the need for it to be recorded. Perhaps some officers were deliberately refusing to fill in the data. Perhaps some officers were recording 'white' people more frequently than racialised people to hide any claim they may be engaged in racial profiling or the reverse to claim racialised people were more likely to be 'criminal'.

In this missing data analysis, we fit a model to the complete data under the assumption of that any missingness is 'missing completely at random'. This assumption is valid if there is no bias of any kind (including racial bias) in recording or not recording of racial appearance. To carry out the multiple imputation we used the jomo package[96] with random effect of person as a sensitivity analysis under the assumption of missing at random. This is valid if recording or not recording racial appearance is biased only by variables included in the imputation (offence type, sex, age, indigenous status, complexion, officer rank). We do not here explore the possibility of missing not at random, i.e. that certain racial appearances are less likely to be recorded.

The only way to be certain about racial appearance in future analyses, is for Victoria Police to institute a mandatory racial appearance data collection policy as they have for field contacts.[97] And a checking strategy such as comparing entries to Body Worn Camera evidence to ensure accuracy. However, as we note in our forthcoming publication, even a mandatory policy on racial appearance is failing to remedy Victoria Police's data collection problem.

The sensitivity test finds evidence for racial profiling against African/Middle Eastern people using the strategy devised in Method 1.

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96   Quartagno and Carpenter (n 47).
97   Victoria Police, 'Field Contact Policy Guide for Victoria Police Educators and Ethnic Appearance Codes - FOI 57210/17' (n 10).

TABLE 8

Sensitivity test (Method 1) – using binary logistic model described for Method 1 on page 20 and page 30, on imputed data.

Comparison with Caucasian appearing people	Odds ratio (95% CI)	P-value
African/Middle Eastern	2.2530 (1.3108 - 3.8724)	0.0212
Asian	1.2347 (0.6323 - 2.4114)	0.5541
Indian	0.7574 (0.1903 - 3.0150)	0.7105
Pacific Islander	1.2964 (0.4059 - 4.1410)	0.6776
Aboriginal people	0.6423 (0.1611 - 2.5601)	0.5536

Appendix B

OBTAINING DATA FROM VICTORIA POLICE UNDER FREEDOM OF INFORMATION

In the absence of public data on police powers the authors of the report relied on Freedom of Information (FOI) request. This note outlines how community organisation and legal centres can access data from Victoria Police to increase the public transparency and accountability.

Under section 19 of the *Freedom of Information Act 1982* (Vic) it is possible to make a request to an agency for data that needs to extracted from their systems using a computer. In practice the part of Victoria Police that will perform this extraction is the Corporate Statistics Unit.

It is possible to go directly to the Corporate Statistics Unit of Victoria Police to obtain this information but they may object to releasing it to you if you have not obtained authority through Victoria Police's Research Ethics process. This process requires Victoria Police to agree with purpose of your research, vet the use you put to the material and agree to the release of publications.

In contrast, once you have obtained the data from the FOI unit you can use it without seeking prior Victoria Police approval.

Requests for data can be very expensive, between$500- $3000. This is particularly the case if Victoria Police are performing the extraction for the first time and have not generated the codes they need to do this.

To obtain the data we used in this report, we submitted an FOI request in similar terms to the letter on the next page.

When requesting data, it is helpful, but not necessary, to know the type of form that Victoria Police uses to record the data you are seeking. We attach a copy of the 508G form and the L19C form we refer to in our letter.

If you are not sure, you may need to do an earlier FOI request to obtain the form that Victoria Police use, so that you can refer to that. It is also useful to have the underlying form to help you interpret the data when you are provided with it.

The data you will receive will be on an excel spreadsheet. To analyse that data you will need to import it into a program such as SPSS or R.

[DATE]
FOI Unit
Victoria Police Centre
637 Flinders St
DOCKLANDS VIC 3008

Dear Mr Sir/Madam

Re: Request for data COVID related fines issued in Victoria between 1 January 2020 to 31st December 2020

Please provide the following set of data in the form of an excel spreadsheet. The data I seek relates to police contacts with the public when a COVID related fine was issued by Victoria Police between 1 January 2020 to 31st December 2020. In particular I am seeking case linked data containing the following variables:

Type of fine issued (COVID RELATED):

- **837AQ – REFUS/FAIL COMPLY DIR/REQ AUTH OFF (B/C)**
- **837AT – REF/FAIL COMPLY REQ SELF–ISO/QUARANTINE**
- **837AV – LEAVE RESTRICTED AREA W/O VALID REAS/EXC**
- **837AW – REF/FAIL COMPLY REQ–PRIV/PUB GATHERINGS**
- **837AR – REF/FAIL COMPLY DIR/REQ WEAR FACE COVER**
- **837AP – REFUS/FAIL COMPLY DIR/REQ AUTH OFF (IND)**

Location of where the fine issued (by LGA/suburb):

- **Date**
- Time

Ethnic appearance of the person issued with the fine:

- **ATSI**
- Whether an arrest occurred

If available also include:

- Reporting station
- Rank
- Age
- Sex
- Hair colour
- Hair Style
- Complexion
- Was a search conducted on the person at the same time? If so, addition information from the L19C search without warrant forms that have been entered into an electronic data base (ie LEAP or LEDR Mk2) by Victoria Police members about:
    - Search without warrant type
    - Objects searched
    - Objects found
    - Substances seized
    - Quantity seized

Items marked in **bold** are the key variables I seek.

Some of the data I seek will be on the VP Form 508G. Some of it may be on the L19C forms. I am not sure if these forms can be cross-linked, but if they can, please extract data from both.

Where data is missing from the forms, if it is practical to do so, please ensure this is appropriately labelled on the spreadsheet.

I do not seek any information that could identify the searched person or the officer involved such as name, address, or ID number. I do however require the variables to be linked to each unique case.

Please let me know an estimate of the costs associated with responding to this request.

Please do not hesitate to contact me in relation to this request.

I look forward to hearing from you.

Yours sincerely,

[NAME]

Address