

Investigation into an incident of alleged excessive force
used by authorised officers

February 2015

**Ordered to be published
Victorian government printer
Session 2014 - 15
P.P. No. 11**

Letter to the Legislative Council and the Legislative Assembly

To

The Honourable the President of the Legislative Council

and

The Honourable the Speaker of the Legislative Assembly

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973*, I present to Parliament my report into an *Investigation into an incident of alleged excessive force used by authorised officers*.



Deborah Glass OBE

Ombudsman

11 February 2015

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Foreword

This is the third Ombudsman report in four years involving alleged heavy-handed conduct of authorised officers on the public transport network.

In December 2010, my predecessor tabled a report about his *Investigation into the issuing of infringement notices to public transport users and related matters*. He included in that report four incidents captured on CCTV in which authorised officers had appeared to use excessive force, and a fifth incident in which a magistrate had expressed concerns about authorised officer conduct. In response to this report, the former Department of Transport agreed, among other things, to review the training provided to authorised officers to ensure they had the necessary skills to undertake their roles.

In February 2014, my predecessor tabled a report into an investigation of a complaint about the conduct of authorised officers on a V/Line train in March 2013. He noted that despite the Department's acceptance and implementation of his recommendations in 2010:

the recommendation regarding the review of the training provided to Authorised Officers ... does not seem to have had any impact on the conduct of the officers involved in this incident.

He recommended, among other things, further review of the training provided to authorised officers, specifically on the use of restraint and arrest, and on the provisions of the *Charter of Human Rights and Responsibilities Act 2006*. The Department (by now the Department of Transport, Planning and Local Infrastructure) accepted the recommendations 'subject to the necessary funding being made available'.

The incident that is the subject of this report took place in July 2013, before the second report was tabled. The incident was not the subject of a complaint to this office but was widely publicised in December 2013, and as a result, my predecessor commenced an investigation. The investigation was suspended until June 2014 following consultation with Victoria Police.

This investigation concludes, yet again, that the force used by an authorised officer, this time on a teenage girl suspected of evading a \$2.50 fare, was excessive and amounts to degrading treatment, a breach of the Human Rights Charter. What is equally concerning is that the department's internal investigative processes, including a review carried out following a public petition, continued to assert, without interviewing any independent witnesses, that the officers involved had complied with training methods and done nothing wrong.

It is evident from the public response to this and other incidents captured on CCTV or mobile phone cameras, that allegations of excessive force by authorised officers are damaging to public confidence. It is also evident that the use of force in restraint is a continuing feature of the relationship between authorised officers and the public. In 2014 there were 690 restraints by authorised officers, with 11 reported injuries¹.

After the investigation concluded I invited representatives from the department, Public Transport Victoria, and the Public Transport Ombudsman to consider the findings. I wanted to explore the development of meaningful recommendations that would reduce the incidence of such allegations and increase public confidence in the public transport system.

Although authorised officers are generally regarded by the public as ticket inspectors, they are employed not only to check tickets, but to 'improve customer safety, provide customer information and help during special events.'² The Chief Executive Officer of Public Transport Victoria advised me that their main role, in fact, is customer service. It is also a role that can be confrontational and at times dangerous, and officers need to be trained in self-protection. But there is a difference between the training needed to protect oneself from violent passengers and the training required, for example by police officers, to use force on others as safely as possible to effect an arrest.

¹ Department of Transport, Planning and Local Infrastructure.

² Public Transport Victoria website.

If the role of authorised officers is essentially to provide customer service, the training they receive should reflect this emphasis. Rather than more training in use of force, the focus should be on defusing and de-escalating conflict.

The system is further complicated by a split in responsibilities between the agencies. While Public Transport Victoria covers the deployment of authorised officers, the department retains responsibility for recruitment, training and authorisation. I am therefore recommending that the department (now in its third incarnation as the Department of Economic Development, Jobs, Transport and Resources) relinquish its responsibilities for authorised officers so that Public Transport Victoria is fully accountable.

In an age of the 24/7 media cycle where almost every passenger carries a camera phone, it is inevitable that this will not be the last highly publicised allegation of excessive force made against authorised officers. It is also true that video footage does not tell the full story, but it cannot be expected that the Ombudsman will step in every time excessive force is alleged on the public transport network.

Public Transport Victoria needs to investigate such incidents in a way that commands public confidence. This should include the use of an external agency to review serious incidents.

The department and Public Transport Victoria have agreed these recommendations and I commend them for their constructive response and stated commitment to real improvement. The question remains, how will we know they have made a difference? There will, inevitably, still be incidents. The test will be Public Transport Victoria's willingness to accept uncomfortable findings where appropriate, and take action to address issues openly and transparently.

Deborah Glass
Ombudsman

Background

Ombudsman investigation

1. On 31 July 2013, a Metro Trains Melbourne (Metro) authorised officer, (Authorised Officer 1) restrained a 15 year old female (Youth A) at Flinders Street Railway Station. CCTV footage shows Authorised Officer 1 lifting Youth A by her lower body and bringing her down to the tiled floor in a rapid motion. She landed on her back. Youth A was suspected of being a fare evader, resisting arrest and assaulting Authorised Officer 1 by striking him in the face while he was engaged in a telephone call to police.
 2. Shortly after, a second person (Youth B), a friend of Youth A, was arrested and restrained by another Metro authorised officer (Authorised Officer 2). Authorised Officer 2's evidence at interview was that Youth B spat at him and so he arrested her. When she spat at him a second time, he leaned over a barrier and pushed her head down over the barrier towards him.
 3. Victorian parliamentarian, Mr Greg Barber MLC obtained footage of both incidents through a Freedom of Information application to the former Department of Transport, Planning and Local Infrastructure (DTPLI) and released it into the public domain on 9 December 2013. The first restraint attracted significant media attention and was described as 'a spear tackle' and 'body slam'.
 4. Within days, nearly 20,000 people had signed an online petition calling for Metro to 'take leadership against inappropriate violence'.
 5. On 13 December 2013 a rally protesting against the restraint by Authorised Officer 1 resulted in 32,500 signatories to the petition. As of 9 January 2015 there were over 38,000 signatories.
 6. The department investigated the incidents and decided that the authorised officers had acted appropriately. A further departmental review of the incidents upheld this decision. No action was taken by the department against the authorised officers.
 7. Following review of the CCTV footage of the incidents and the media coverage, my predecessor commenced an own motion investigation into the conduct of the authorised officers.
 8. The investigation was temporarily suspended for around four and a half months in early 2014 following consultation with the Chief Commissioner of Victoria Police³ while legal proceedings were finalised.
- ## Scope and methodology
9. The investigation focussed on the:
 1. use of force by the authorised officers including consideration of whether the officers acted in accordance with the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Human Rights Charter)
 2. training of authorised officers
 3. supervision and debriefing of authorised officers
 4. department's response to incidents and recommendations.
 10. The investigation involved:
 - interviews with Authorised Officer 1 and Authorised Officer 2⁴, the Victoria Police officer who witnessed the second restraint and two people employed by Metro to train Metro authorised officers. Both authorised officers were interviewed under oath and were legally represented. The other witnesses attended voluntarily and were not legally represented
 - meeting with Youth A and her social worker to discuss the incident. Youth B was invited to meet with my officers however she declined. Youth B did not respond to my draft report
 - meetings with staff from Public Transport Victoria, the Public Transport Ombudsman, a review of material provided by these agencies,

³ Pursuant to section 13AB(2) of the *Ombudsman Act 1973*.

⁴ Authorised Officer 1 was involved in the first restraint incident involving Youth A and Authorised Officer 2 was involved in the second restraint incident involving Youth B.

consideration and review of legislation, policies, procedures and standards including:

- *Transport (Compliance and Miscellaneous) Act 1983*
- *Transport Integration Act 2010*
- *Transport (Ticketing) Regulations 2006*
- *Transport (Conduct) Regulations 2005*
- Human Rights Charter
- *Code of Conduct for Public Transport Authorised Officers*⁵
- *Law and Procedure Reference Notes for Public Transport Authorised Officers, Version 3.03, 09/10/2012*
- *Metro Information Booklet and the Metro Academy Student Workbook, 17/03/2014.*

11. This report includes adverse comments about Authorised Officers 1 and 2, Youths A and B, Metro and the department.
12. In accordance with section 25A(3) of the *Ombudsman Act 1973* I advise that any other people who are identifiable, or may be identifiable from the information in this report, are not the subject of any adverse comment or opinion and:
 - I am satisfied that it is necessary or desirable in the public interest that the information that identifies or may identify those persons be included in this report and
 - I am satisfied that identifying them will not cause unreasonable damage to their reputations, safety or wellbeing.
13. I have decided to release footage of the incidents as I believe it is necessary to understand the investigation.

⁵ *Code of Conduct for Public Transport Authorised Officers*, Department of Transport, Planning and Local Infrastructure, June 2013.

Legislation, agencies and authorised officers

Legislation

14. The legislation relevant to the operation of Victoria's public transport network and this investigation is set out below.

Transport Integration Act 2010

15. The Transport Integration Act sets out the powers and responsibilities of various parties administering Victoria's public transport system, including the department and its Secretary, the Public Transport Development Authority (which operates as Public Transport Victoria or PTV) and others. This Act, for example, empowers PTV to enter into and manage contracts⁶ with companies such as Metro, which currently operates the train network in Melbourne. Metro in turn employs staff, including authorised officers, who are charged with various tasks such as ticket inspection.

Transport (Compliance and Miscellaneous) Act 1983

16. The Transport (Compliance and Miscellaneous) Act provides for certain officers to be made 'Authorised Officers'⁷ and sets out their powers. It empowers authorised officers to require a person, under certain circumstances, to provide their name and address⁸, make arrests⁹ and remove people from trains, train stations and similar places¹⁰.

⁶ Sec 79AE(1)(i) *Transport Integration Act 2010* (Vic).

⁷ Ss 221A and 221AB of the *Transport (Compliance and Miscellaneous) Act 1983* (Vic).

⁸ Sec 218B(2) *Transport (Compliance and Miscellaneous) Act 1983* (Vic).

⁹ Sec 219 *Transport (Compliance and Miscellaneous) Act 1983* (Vic).

¹⁰ Sec 220 *Transport (Compliance and Miscellaneous) Act 1983* (Vic).

Public transport agencies

17. The key agencies involved in operating Victoria's public transport system are as follows:

- the DTPLI¹¹: under the Transport Integration Act, the department's principal function is to assist the Minister in the administration of the Transport Integration Act and other transport legislation¹², as well as a range of other functions including to support the Secretary in carrying out enforcement functions conferred on the Secretary¹³, and other specialist services to transport bodies, including the Public Transport Development Authority
- the Public Transport Development Authority operating as PTV was established under the Transport Integration Act as the 'public face of the public transport system in Victoria'¹⁴
- Metro is a private company contracted by PTV to provide passenger services and operate other related services. The agreement to provide these services sets out certain requirements for Metro's employment of authorised officers, including that Metro must:
 - provide an Authorised Officer Deployment Plan to PTV¹⁵
 - deploy authorised officers proactively to deliver safety related programs to young adults and school children in accordance with the plan¹⁶

- adopt recruitment and selection criteria which reflect PTV's requirement that the authorised officers should be friendly, courteous and customer-focused at all times¹⁷.

Authorised officers

18. Authorised officers have a statutory role to deter fare evasion, vandalism and anti-social behaviour, and to report ticketing and behavioural offences.
19. Authorised officers are given powers under legislation allowing them to require members of the public to give their name and address¹⁸ and to arrest suspected offenders¹⁹. The legislation sets out requirements for how those powers may be exercised by authorised officers.
20. As at August 2014 there were 574 authorised officers in Victoria. Currently, authorised officers are employed by private passenger transport companies and authorised by the Secretary of the department pursuant to section 221AB of the Transport (Compliance and Miscellaneous) Act.
21. Metro, which employs the authorised officers who are the subjects of this investigation, employs around 380 authorised officers.
22. The transport companies and the department have a shared responsibility for authorised officers in that:
 - transport companies must ensure officers are properly trained and supervised. The company team leaders are stationed at various suburban depots and manage crews of authorised officers. The crew leaders directly supervise authorised officers in the field. Each transport company has its own policies, procedures and operating requirements relating to authorised officer activities

11 Now the Department of Economic Development, Jobs, Transport and Resources.

12 Sec 33(1) *Transport Integration Act 2010* (Vic).

13 Sec 33(2)(kb) *Transport Integration Act 2010* (Vic).

14 Sec 79AE(1) *Transport Integration Act 2010* (Vic).

15 Cl 8.10(d) Franchise Agreement - Train dated 31 August 2009 and amended and restated 2 April 2012.

16 Cl 8.10(k) Franchise Agreement - Train dated 31 August 2009 and amended and restated 2 April 2012.

17 Cl 8.10(m) Franchise Agreement - Train dated 31 August 2009 and amended and restated 2 April 2012.

18 Sec 218B *Transport (Compliance and Miscellaneous) Act 1983* (Vic).

19 Sec 219 *Transport (Compliance and Miscellaneous) Act 1983* (Vic).

-
- the department must ensure authorised officers perform their duties and functions in accordance with the legislation²⁰
 - the department audits the transport companies' authorised officer management systems.
 - transport company, V/Line review its debriefing procedures after incidents to identify professional development opportunities.

Previous Ombudsman investigations

23. This office has previously investigated the conduct of authorised officers, and two reports were tabled in State Parliament in December 2010 and February 2014²¹.
24. These investigations identified:
 - the inability of authorised officers to deal with confronting situations, their 'heavy-handed manner' and use of excessive force
 - the failure of authorised officers to use de-escalation techniques they were trained in
 - the failure by authorised officers to comply with the Human Rights Charter.
25. The department accepted and has taken action on the following recommendations:
 - the training provided to authorised officers be reviewed to ensure officers have the necessary skills and expertise to undertake their roles and are aware of their statutory responsibilities
 - the training provided to authorised officers on restraint and arrest be reviewed
 - authorised officers have regular training regarding the Human Rights Charter

²⁰ Sec 33(2)(kb) *Transport Integration Act 2010* (Vic).

²¹ *Investigation into the issuing of infringement notices to public transport users and related matters*, December 2010; and *Investigation into a complaint about the conduct of Authorised Officers on V/Line*, February 2014.

The investigation

1. Use of force by authorised officers

26. The Transport (Compliance and Miscellaneous) Act under which authorised officers operate, permits them to arrest a person if the officer believes on reasonable grounds that the arrest is necessary:
 - a. to ensure the appearance of the person before a court; or
 - b. to preserve public order; or
 - c. to prevent the continuation or repetition of the offence or the commission of a further offence; or
 - d. for the safety or welfare of members of the public or of the person²².
27. Section 462A of the *Crimes Act 1958* permits authorised officers to use proportionate force to arrest any person committing an offence.
28. In addition to legislative powers, internal operational guidance is provided by Metro to its authorised officers, including:
 - *Arrest Procedures* (1 December 2010) This instruction notes the seriousness of depriving a person of liberty and should an arrest of a person by an authorised officer be necessary, the officer must ensure that:
 - all other avenues to deal with the situation have been exhausted
 - any arrest is to be made as discreetly and unobtrusively as possible and the person arrested must be treated with courtesy and consideration at all times
 - *Pursuit of Offenders* (11 April 2011) This instruction states that where an authorised officer is speaking to a suspected offender in relation to a ticket irregularity or other minor offence and that person attempts to leave, officers are required to make every reasonable attempt to detain the offender using reasonable levels of force as appropriate. In the event that the offender is able to decamp authorised officers are not to give chase and pursue
 - *Young people* (22 March 2011) This instruction is to be followed when authorised officers deal with people under 15 years of age or young people in general. Specific instructions include:
 - use language appropriate to the age of the young person concerned
 - officers must treat young people in a respectful, non-threatening and courteous manner. The manner in which other passengers perceive officers' treatment of a young person will have an impact on the situation and will create hostility, if handled inappropriately
 - the need to take into account that some young people due to their age, may appear smart, aggressive and argumentative and that they must be dealt with respectfully and professionally to avoid further conflict or complaints

²² Sec 219(2) *Transport (Compliance and Miscellaneous) Act 1983* (Vic).

- *Use of force Reference Notes* (09/10/12) The notes state what is reasonable will depend on the individual circumstances of each case, and it is for the authorised officer to justify that any force used was necessary and not excessive, given all the circumstances. Officers should aim to generate voluntary compliance by the person until police arrive
 - other training instructions provided to authorised officers in relation to restraint and conflict management.
29. The department's Code of Conduct for Public Transport Authorised Officers also sets out the responsibilities of authorised officers and draws on legislative and other instruments, including the Transport (Compliance and Miscellaneous) Act; Human Rights Charter; *Information Privacy Act 2000*; Transport Regulations; and Conditions of Authorised Officer Authorisation.
 30. The restraints of the two youths occurred when Youth A failed to pay for a concession public transport fare costing approximately \$2.50²³, attempted to abscond, and struck Authorised Officer 1. The fine for the offence of fare evasion was \$74.
 31. The incident took place during the week in peak hour at Flinders Street Railway Station, one of the busiest stations in Melbourne. Numerous people stopped to watch and appeared to record both restraints on their mobile phones. Three crews of four authorised officers were working in the area at the time.
 32. The following accounts of the restraint incidents are based on CCTV and mobile phone footage, incident reports and the police statements of the authorised officers.

The first arrest

33. Authorised Officer 1 was acting crew leader of a team of three other authorised officers on ticket inspection duties. He observed Youth A exit the station through a bypass gate next to the ticketing machines and approached her with another authorised officer. Three of Youth A's friends were also present. Authorised Officer 1 arrested her. Youth A was described by Authorised Officer 1 as verbally abusive throughout the incident.
34. While Authorised Officer 1 called police on his mobile phone, Youth A walked back into the station through the bypass gate. Holding his phone in his right hand, Authorised Officer 1 moved after Youth A and took hold of the back of her jacket at her right shoulder with his left hand. He was followed by other authorised officers.
35. Youth A attempted to close the gate on Authorised Officer 1 and struck him in the face with her left hand. Authorised Officer 1 then put his left arm around her upper back and his right arm around her lower body before lifting her and bringing her to the ground. Youth A landed on her back.
36. In response to my draft report, Authorised Officer 1 stated:

[I] was forced to respond quickly to a forceful punch to the face, protect [myself], and restrain Youth A from further offending.

...

... the fact no injuries were reported by Youth A is entirely consistent with Youth A not [his emphasis] making any forceful contact with the ground.

...

... the CCTV footage of the incident ... is obscured by the train station access turnstiles ... [and] ... does not entitle the Ombudsman to conclude that Youth A made forceful contact with the ground.

²³ The cost of a daily concession ticket from Zone 2 to the city for a youth at the time was \$2.48. Youth A told investigators that she had travelled one or two stops to Flinders Street Railway Station from a city location and so the fare in this case would have been even less.

37. Youth A was held face down on the ground by three authorised officers for around eight and a half minutes until police arrived. During this time, she continued to resist, bit Authorised Officer 1 on the thigh twice and screamed:

Fucking get off me ...

...

You're fucking hurting me ...

...

Fucking hell I'm fifteen for fuck's sake ...

...

You haven't been fucking raped fucking abused for your whole life.

38. Authorised Officer 1 responded:

... there is no evidence to suggest that [I] ... could or would have known with any accuracy the age of the youths at the time of the initial restraints ...

...

... the youths continued their aggressive and unlawful conduct toward the Authorised Officers ...

...

... the actions in restraining the youths, and particularly Youth A on the ground, were not only justified but were necessary until the attendance of sufficient Authorised Officers and/or police members to take control of the situation.

39. There were no reported injuries to Youth A or to Authorised Officer 1.

Evidence of Youth A

40. At interview with my officers, Youth A said that:

... [Authorised Officer 1] picked me up and he threw me on the ground and virtually nearly broke my back ...

...

I felt like I was a ball being tackled on the ground that had no feelings ...

...

... being thrown on the ground that rough and then having three huge males on top of me ... I couldn't breathe. I couldn't move. I was screaming. I was frightened and it was a traumatic experience.

41. She described the incident as 'really embarrassing' because many people recognised her when footage of the incident was shown online and in the media. She said she felt ashamed of both herself and the authorised officers and said:

They got away with it and I got in trouble.

42. Youth A told my officers she now suffers with a stiff back due to the incident. She also said she has night sweats, wakes up shaking and scared from vivid dreams of the incident and requires ongoing counselling.

Evidence of the authorised officers

43. At interview Authorised Officer 1 was shown the CCTV footage but declined to respond to any questions from my officers about the incident on the basis that he could incriminate himself.

44. In notes taken by the department's investigator, Authorised Officer 1 said that he had played rugby for many years and it was instinctual to do what he did to defend and protect himself.

45. At interview, Authorised Officer 2 who had observed the first restraint said:

It was a controlled action. Obviously one he was very familiar with. He put her in a bear hug, picked her up, turned her sideways and then took her weight and his weight, took her to the ground and then restrained her ... It was very fast. It was very controlled. There was no attempt to throw her to the ground ...

...

I thought it was very efficient ...

Evidence of Victoria Police

46. The Victoria Police officer who attended the scene minutes after the first restraint has been a police officer for 33 years and an Operational Safety Tactics Training instructor for 21 years. At interview with my officers he was shown the CCTV footage and said:

To me it's probably a bit excessive. Yeah, it's excessive. Although there was no injury there was always the potential there for injury to occur.

Evidence of the trainers

47. My officers interviewed two people engaged by Metro to train their authorised officers. Trainer A provides practical training in the use of force²⁴. When shown the footage, he said the ‘take down’ used by Authorised Officer 1 could have resulted in both parties being injured and that there ‘... is definitely a safer way to handle that and a more professional way ...’ available to authorised officers including:
- allowing Youth A to leave the scene
 - applying arm restraints
 - using a team of officers to cordon off and manage Youth A.
48. He further said:
- the take down ‘appeared excessive’
 - although the restraint on the ground was reasonable because ‘a young girl could do a lot of damage’, there were ‘enough people there to get her straight up’
 - the take down method used by Authorised Officer 1 was not a technique that he would encourage or train officers in as it was not consistent with Metro’s use of force policy.
49. Trainer B said he has used footage of this incident in his classes and tells trainees if they use the take down method, their use of force may be called into question.

The second arrest

50. Youth B tried to assist Youth A when she was restrained on the ground. Authorised Officer 2 who was working in a second crew of four authorised officers intervened to prevent this.
51. Authorised Officer 2 stood on the station side of a chest high barrier fence facing out. At interview, Authorised Officer 2 said Youth B spat in his face from the other side of the fence. Authorised Officer 2 reached over the fence, took hold of the youth’s upper arms and told her she was under arrest for assault. He then held her facing away from him until police arrived.
52. Authorised Officer 2 and a police officer restrained Youth B by each holding an arm. Authorised Officer 2 told my officers that Youth B then spat in his face a second time. He responded by leaning over the barrier and pulling her head down over the fence toward him.
53. In the CCTV footage the police officer raised his hand to Authorised Officer 2. Authorised Officer 2 responded to the police officer:
- I don’t care; the skank’s not getting another chance to spit on me²⁵.
54. At interview the police officer told my officers he had said to Authorised Officer 2:
- ‘Be careful with the way you deal with her. There’s a lot of cameras here and you’re being video taped’. So it was more concern that if he was going to hurt her that there’s a lot of people there and you’re going to be looking at being criticised. So he did I feel, back off a little bit so ... there wasn’t any risk.
55. There were no reported injuries to Youth B or to Authorised Officer 2.

Evidence of Authorised Officer 2

56. At interview Authorised Officer 2 said he used ‘minimal force’ to push Youth B’s head down so she could not spit at him again. He said it was consistent with his training to ‘control the head, control the body’. He said his own safety was paramount, that his remark to the police officer was appropriate and that he had acted in a professional and appropriate way. He said:
- I hold them so they don’t injure me.
...
It’s an instinct. I reach up. I take their head. I push it away from me or push it down and if necessary ... I instinctively go to control the head because that is what I was told.
57. In response to my draft report Authorised Officer 2 clarified that:
- As Youth B’s head was over the fence, [I] moved her head back to the same side of the fence as her body and applied an open headlock. [I] maintained this position until Youth B was detained by police.

24 Trainer A is a former police officer with 30 years’ experience.

25 Authorised Officer 2 statement to Victoria Police, 19 August 2013.

58. Authorised Officer 2 said that he was still distressed by the incident. He said he had previously been spat on which had resulted in six months of medical testing and a significant effect on his personal life. When asked by my investigators if his emotions had an impact on his judgment, he responded: 'Not overly so'.

59. Authorised Officer 2 stated that his restraint was not rough nor 'driven by emotion' but instead was 'consistent with his training' and 'well thought out'.

60. The police officer and the Metro trainers were not critical of the restraint by Authorised Officer 2.

Victorian Charter of Human Rights and Responsibilities Act 2006

61. Public authorities are required to act in a way that is compatible with the Human Rights Charter. Transport companies and authorised officers exercising functions of a public nature such as enforcement duties, are required to comply²⁶. I considered whether the authorised officers acted in accordance with the Human Rights Charter.

62. Section 10(b) of the Human Rights Charter states that a person must not be treated in a cruel, inhuman or degrading way. Section 7(2) states:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

63. Section 22(1) states that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the person.

64. According to the Code of Conduct, authorised officers are expected to be aware of the Charter rights set out below:

- protection from degrading treatment
- freedom of movement
- protection of privacy and reputation
- freedom of expression
- peaceful assembly and freedom of association
- the presumption of innocence
- liberty.

Findings

65. The take down of Youth A by Authorised Officer 1 appears to be an excessive use of force. Despite the authorised officer suspecting Youth A had evaded paying the fare, and alleging that she had assaulted him, the force used on her was neither reasonable nor proportionate in the circumstances.

66. It is disappointing that the use of force by authorised officers continues to be an issue despite two previous investigations and repeated recommendations regarding training and use of force by my office.

67. In response to my draft report, Authorised Officer 1 stated:

... in light of the aggressive and unlawful conduct of the youths, [the authorised officers] were entitled to conclude that the youths continued to present a threat and/or would continue to commit offences. Further, the Authorised Officers were not to know whether the youths might escalate their violence ...

²⁶ Code of Conduct for Public Transport Authorised Officers, Department of Transport, June 2013, page 6.

68. Based on the information provided by Metro's trainers that they discouraged the use of take downs and there were other more appropriate options available to the authorised officers, Authorised Officer 1's use of a take down was inappropriate. In addition, although there were sufficient officers available to have lifted Youth A to her feet, she was held on the ground for eight and a half minutes awaiting the arrival of police – an excessive length of time. There were three teams of authorised officers working in the vicinity at the time. However, the officers did not work together effectively to restrain Youth A nor to remove her from the ground and hold her upright after the take down.

69. The timing of the incidents – in peak hour and at a busy railway station – impacted not only on Youth A but on the many other commuters who witnessed the incidents. There was strong community concern about the first restraint as evidenced by the media and the public petition. While it must be recognised that the wider community will not have all of the facts, it appears that Authorised Officer 1 acted beyond what the community considered reasonable for an officer in his position.

70. The restraint of Youth B across a barrier by Authorised Officer 2 appeared to be rough but was not an excessive use of force.

71. In my view the manner in which Youth A was arrested and detained was degrading treatment and reached the level of severity required to make out a breach of the Human Rights Charter²⁷. In coming to this view, I have taken into account all of the circumstances of the matter, including:

- Youth A's age
- the fact that Youth A is female and was held down by three adult men, each of whom would have weighed a great deal more than her
- the fact that during the restraint Youth A disclosed that she had been sexually abused which exacerbated her distress
- that the incident occurred at around 6pm on a weekday at Flinders Street Railway Station in Melbourne. There was therefore an element of public exposure to the incident
- the fact that Youth A said she suffers ongoing effects of the incident – she gave evidence at interview of an ongoing physical injury and requires ongoing counselling.

72. I do not consider that Youth A's right not to be treated in a degrading way was justifiably limited²⁸. There were less restrictive means reasonably available to the authorised officers to achieve their objectives. Youth A could have been more quickly lifted to her feet, moved to a private area and handed over to police.

27 The European Court of Human Rights has consistently held that in order to make out a breach of Article 3 of the European Convention on Human Rights (the equivalent provision to Section 10 of the Charter) a "minimum level of severity" in the action complained of must be reached. This is to be assessed taking into account all of the circumstances of the case. For example, in *Case of Mubilanzile Mayeka and Kaniki Mitunga v Belgium*, application no. 13178/03, 12 October 2006 at [48], the Court held that this includes factors such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.

28 Sec 7(2), *Charter of Human Rights and Responsibilities Act 2006* (Vic).

2. Training of authorised officers

73. Authorised officers are engaged by transport companies to perform duties and functions essential to the successful and safe delivery of public transport services. It is critical that authorised officers have a clear and defined understanding of their role and responsibilities. Training is key to achieving this.
74. Training of authorised officers in the use of force is undertaken by Metro to department requirements. The key components of training include:
- a six-week induction program where Metro trainers deliver three days of classroom-based training
 - ad hoc refresher training provided by Metro to its authorised officers
 - team leaders' assessments of authorised officers on-the-job at three and six months and then on an ad hoc basis.
75. The training is based on several documents²⁹ issued by the department and Metro. The key messages about authorised officer use of force delivered in the training sessions include:
- authorised officers may use force that is reasonably necessary in the circumstances and proportionate to the danger
 - authorised officers should apply their professional judgment and common sense and not behave in an offensive, improper or inappropriate way or bring authorised officers into disrepute
 - authorised officers should act in accordance with the Human Rights Charter.
76. Of particular relevance is Metro's *Young People Instruction*. This requires authorised officers to treat people 15 years or younger 'in a respectful, non-threatening and courteous manner'. It states:
- Due to their age, some young people may appear to be aggressive, smart and argumentative. This needs to be taken into account, as they must be dealt with respectfully and professionally to avoid further conflict or complaints. (Note: Your professional manner and treatment of a young person should not be altered by his or her attitude towards you no matter how abusive that person may be).
77. Both Metro-employed trainers A and B told my officers at interview that trainee authorised officers are taught to consider communication and disengagement strategies and that the use of force is a last resort. Trainer A said his training emphasises de-escalation of incidents and respecting human rights. He also said however, that except for half a day where trainees act out common scenarios relating to restraint and arrest, the three days of training in the use of force and restraint is largely theoretical and book based. He said this was not sufficient and his view was that five days of training in addition to a day of scenario team based training was required.
78. One witness told my officers at interview that crew leaders and team leaders 'do not support and model' the training that they receive. Instead, they inform newly engaged authorised officers that induction training is not the 'real world'; that is, the training received may not assist when authorised officers are presented with certain situations.

²⁹ For example: *Law and Procedure Reference Notes for Public Transport Authorised Officers*, developed by the department; *Student Workbook* developed by Metro; and *Department of Transport Code of Conduct for Public Transport Authorised Officers*.

Evidence of the authorised officers about the use of force and training

79. At interview:

- Authorised Officer 1 said he was not aware of Metro's *Young People Instruction* and he could not recall any training on the Human Rights Charter. (Metro provided records that both officers had been provided the Instruction)
- Authorised Officer 2 said he was aware of the Human Rights Charter and that over the past 12-18 months, there had been more emphasis on training in de-escalation techniques
- Authorised Officer 1 said the only safe restraint he could recall being trained in was where two officers each held an arm of an offender and twisted it to bring the person to the ground. He also recalled a take down technique which was to grab an offender around the neck, put his head next to theirs and bring them to the ground by the upper torso
- Authorised Officer 2 said there was no instruction regarding take downs, but that leg take downs had been included in training and had also recently been suggested by a colleague although Authorised Officer 2 'didn't fancy them'.

80. In response to my draft report, Authorised Officer 1 stated:

... lawfully restraining a criminal offender on the ground for a period of approximately 8 minutes whilst awaiting the arrival of police does not, and cannot as a matter of law, constitute 'degrading and inhumane treatment' contrary to the provisions of the Human Rights Charter.

81. Metro provided evidence to my investigation that Authorised Officers 1 and 2 received refresher training in April 2013 and March 2013, respectively. Metro stated that this training included training in conflict management.

82. However, this is inconsistent with evidence provided by Trainer A and the authorised officers. Trainer A said that refresher training should be conducted at least annually, but that such training had ceased two years ago.

83. Authorised Officer 1 told my officers he had use of force refresher training for one day in 2010 and 2012. Authorised Officer 2 could not recall any training in the last 12 months and said he last had restraint training two years ago.

84. Authorised Officer 1 said:

It is maintained that [my] actions in connection with Youth A were justified, reasonable, and lawful. Should the Ombudsman ... maintain that [I] used "excessive force", acted inconsistently with ... training, and breached Metro's use of force policies and instruction in relation to the use of force, then it would also follow that the alleged failings on [my] part were in no small part a result of the insufficient and inadequate training ... received.

Findings

85. It is concerning that despite my office's previous reports and recommendations which have highlighted training as a significant factor leading to the use of excessive force, the training provided to authorised officers remains, in my view, inadequate.

86. The take down by Authorised Officer 1 was inconsistent with the restraint techniques training provided to authorised officers by Metro and the department. A coordinated approach to both restraints involving other authorised officers should have been used and would likely have de-escalated the situation, without resorting to the take down of Youth A.

87. The actions of Authorised Officer 1, in my view, breached Metro's policies and instruction in relation to the use of excessive force and the Human Rights Charter.

88. My investigation has identified that training of authorised officers in the use of force remains insufficient and inadequate because:

- induction training provided appears to be largely theoretical and includes a half day of practical training
- induction training has not included a focus on key instructions such as the *Young People Instruction*.

89. Refreshing authorised officers' knowledge of their responsibilities as well as updating them about new legislation, policy and procedures is a critical and ongoing function. However, Authorised Officers 1 and 2 claim that they had not had any training in the use of force in the 12 months prior to the incidents. It appears that such training is either infrequently conducted or, based on the evidence of the trainers, no longer being delivered.

3. Supervision and debriefing of authorised officers

Teamwork

90. Authorised officers generally work in teams which affords them additional assistance and safety. Metro guidance to officers reinforces the importance of planning and utilising 'efficient team tactics' when working in pairs³⁰.
91. At interview, Authorised Officer 1 was asked if teams planned how they could restrain members of the public if necessary. He responded, 'You don't plan for that sort of thing'.
92. Authorised Officer 2 said that on-the-job, 'we self-manage each other to a degree' and that he had learned 'different techniques' on an ad hoc basis from other officers.
93. Both the police officer who witnessed the second restraint and Trainer A told my officers about the importance of teamwork. Upon viewing the CCTV footage, Trainer A described the scene as 'confused'.

Debriefing

94. Metro's Student Workbook refers to one 'important, yet often overlooked factor ... the post incident debrief'. The Workbook states:
- By discussing the circumstances of an incident with colleagues and other experienced authorised officers, successful ongoing strategies can be developed to assist with dealing with future situations.
95. It is the responsibility of team leaders to give feedback in debriefing sessions following any incidents.

³⁰ *Metro Information Booklet and the Metro Academy Student Workbook*, dated 17/03/2014.

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96. A debrief of the two restraint incidents was conducted on the day they occurred by the team leaders responsible for Authorised Officers 1 and 2. The debrief was attended by all authorised officers in the two teams, including a union representative. There was no Occupational Health and Safety representative present despite this being a requirement. The debrief for both incidents took approximately 20 minutes.
97. The *Post Incident Debriefing Checklist* broadly described the first restraint as 'the restraint of a female person'. It noted that:
- staff had been offered counselling but declined
 - staff felt 'good' following the incident
 - no alternatives [to the restraint] were considered at the time because the 'situation escalated too fast'
 - no policies or procedures were breached and 'All was good'.
98. The following four recommendations were made by the team leaders in the debriefing session:
1. team leaders to reinforce with crews their responsibilities while carrying out duties
 2. team leaders to ensure crew leaders brief their crews properly prior to departing
 3. all staff to be made aware of their responsibilities concerning their position and awareness when dealing with offenders and other commuters during any incident
 4. staff with ongoing issues should be made aware of their responsibilities and their counselling documented.
99. Metro's post incident debriefing is in a questionnaire format with responses hand written by team leaders in free narrative. It sets out the basic circumstances of an incident and is directed at an evaluation of the incident in terms of resources used, the actions and welfare of the staff, preventative actions, restraint devices, police call and response time, unforeseeable problems, and policies and procedures. The debriefing notes for the 31 July 2013 incident do not consider or refer to:
- the welfare of other parties such as the youths involved in the incident
 - any injuries or potential injuries sustained by them
 - a review of incident reports or other documentation.
100. My officers asked Authorised Officer 2 what the team leaders said at the debriefing session. He said:
- Blah blah blah ...
101. In response to my draft report, Authorised Officer 2 recalled the following:
- The debrief included both union and health and safety representatives of Metro Trains. Both [Authorised Officers 1 and 2] provided an overview of the incident to those present.
- Both [Authorised Officers 1 and 2] were offered counselling but declined.
- There were also discussions about the potential for other responses if a similar incident occurred in the future, and whether or not other equipment may have been of assistance. The conclusion was the response was appropriate.

Findings

102. Key points from initial induction training require constant reinforcement and supervision of authorised officers is an effective way to achieve reinforcement of those learnings.
103. Authorised Officer 2 told my officers that authorised officers managed themselves and shared techniques. This is regarded as acceptable if the 'techniques' and information being shared are consistent with the procedures and approaches endorsed by the department and Metro.
104. Team leaders have a responsibility to ensure authorised officer crews are adequately prepared for their work, that is, they have been trained appropriately. Team leaders also need to support and model the training.
105. Metro's debriefing of the incidents the subject of this report was at best perfunctory. The debrief failed to identify any issues with policies and procedures, and did not consider in a meaningful way the scope for further education or professional development of the authorised officers. There was also no record of any consideration of the welfare of the two young people at the centre of the incident.
106. Debriefings after incidents should be rigorous, provide an opportunity for learning, identify training needs, inform future training and reinforce sound practice.

4. Department's response to the incidents and Ombudsman recommendations

The department's investigation

107. A Metro authorised officer responsible for initially reviewing the CCTV footage of the 31 July arrests on 1 August 2013 described the arrest of Youth A as a 'possible excessive use of force by [an] officer'. A Metro manager subsequently stated in an internal report dated 2 August 2014 that 'The force that was used appears to be questionable.' Metro notified the department of the incidents as potentially involving the use of force on the same day³¹.
108. The department immediately commenced an investigation to determine if the officer had 'acted unreasonably or abused his ... power.'
109. In an internal report dated 5 August 2013 a senior departmental investigator from the Authorised Officer Regulation, Training and Accreditation (AORTA) unit advised the department's Director of Compliance that:

Metro Trains management ... [has asked] ... whether excessive force was used. CCTV viewed and the answer is - possibly yes as it may involve a spear tackle.³²
110. On 3 September 2013 the department interviewed Authorised Officer 1 and recorded the following account of the incident:

[Authorised Officer 1] was executing a controlled take down of the female person, his right hand was filled with a phone so his left hand was situated just under the base of her neck, he lifted her leg and by putting her off balance he was able to place her on the ground where she struggled and bit him. He explained he had many years playing rugby and it was instinctual to do what he did to defend and protect himself.

³¹ Sec 228H(1) of the *Transport (Compliance and Miscellaneous) Act 1983* (Vic) requires a company that holds an accreditation to notify the Secretary in writing of any relevant incident or occurrence within 48 hours after the incident or occurrence took place.

³² A 'spear tackle' is described as a tackle in rugby union, rugby league and Australian Rules football in which a player lifts another player into the air and drops them such that they land on their back, head or neck. Spear tackles have caused serious injury including spinal damage, dislocations and broken bones in the shoulder or neck.

111. On 20 September 2013 the department's investigator stated in his investigation report that Authorised Officer 1 had acted reasonably. The justification for this finding was as follows:

On 20 September 2013 I finalised the inquiry after considering all the evidence at hand, which included CCTV footage, all authorised officer's [sic] statements, an interview of the officer and the findings of the Victoria Police ...

It is my finding that a circumstance referred to in section 221L(a) [of the *Transport (Compliance and Miscellaneous) Act 1983*] had not occurred and [Authorised Officer 1] exercised his functions as an authorised officer reasonably.³³

112. My investigators reviewed the department's investigation report and noted that:

- only Authorised Officer 1 was interviewed by the investigator and no other witnesses
- the statements did not fully describe the take down action
- the initial investigation was cursory because it only took into consideration the statements of the authorised officers and the CCTV footage, which did not have audio
- the accounts of the two youths were not obtained
- the investigation was summarised in three short paragraphs and did not discuss the evidence in detail. It noted that Authorised Officer 1 had exercised his functions as an authorised officer reasonably.

113. A departmental investigation of the second restraint incident also found that Authorised Officer 2 had acted reasonably.

The department's review of its investigation

114. After the restraint incidents were made public on 9 December 2013, in response to significant media interest and at the request of the Minister, the department initiated a review of its investigation. The review was performed by another investigator from AORTA, the same unit which undertook the initial investigation. The review was completed on 13 December 2013 and concluded that the matter had been properly and appropriately investigated in the first instance and upheld the decision that the authorised officer had acted reasonably.

115. Although the review was more detailed than the initial investigation, in my view it:

- did not consider any additional material, for instance, that of independent witnesses. Only the original witness statements of the authorised officers and the CCTV footage were relied upon
- appeared to be one-sided in its approach and to justify the actions of the authorised officers
- did not specifically consider the take down action.

116. However, the review's conclusion included the following comment:

[In the then upcoming hearing] the Magistrate will no doubt take into consideration all of the facts during the course of considering these charges and may also determine, as part of the case, whether the force used by [Authorised Officer 1] was reasonable or excessive ...

117. No action was taken against the authorised officer as a result of the review.

³³ Sec 221L(a) of the *Transport (Compliance and Miscellaneous) Act 1983* (Vic) - states: [t]he Secretary may at any time, by written notice served on a person authorised under section 221AB, revoke an authorisation if satisfied that the person has on any occasion in exercising his or her functions acted unreasonably or abused his or her power.

118. Following the investigations of the restraints, Metro have engaged the Youth Support and Advocacy Service to provide an information session to authorised officers on youth trauma which will include the topic of understanding the normal teenage brain.

119. In response to my draft report, Authorised Officer 1 said:

... the criticisms of the department's investigation fail to acknowledge that at the time ... Victoria Police had investigated the matter ...

...

It should not ... be concerning or surprising to the Ombudsman that after investigations were undertaken a conclusion was reached which was different to the preliminary views formed. Indeed, the very fact that the department immediately commenced an investigation would appear to indicate that the matter was treated seriously and appropriately.

Previous Ombudsman recommendations

120. Excessive use of force by authorised officers was identified by this office in public reports in December 2010 and February 2014. Despite the department having accepted and implemented the recommendations made in those reports, excessive use of force by authorised officers continues to be an issue.

December 2010 report

121. In December 2010 my predecessor tabled a report, *Investigation into the issuing of infringement notices to public transport users and related matters*.

122. The report concluded that the authorised officers did not understand that their conduct could be concerning. Further, the behaviour of the authorised officers typified an inability to handle confronting situations, illustrated by their use of excessive force for ticketing offences.

123. The report recommended the department review its training to ensure authorised officers had the necessary skills and expertise to undertake their roles and were aware of their statutory responsibilities.

124. The department accepted the recommendation and told this office that it had taken the following actions:

- established a steering committee and reviewed the *Certificate III in Public Transport Customer Service and Compliance* which includes authorised officer training
- developed a program of refresher training including the use of force
- conducted an advanced one day training program for authorised officers
- consulted the transport companies regarding the Code of Conduct, provided feedback to them and amended the Code
- expanded its regulatory program to include one-on-one feedback sessions with authorised officers at depots and stations.

125. As a result of the investigation, Metro committed to improving ongoing authorised officer training to be monitored by Metro and the department. The department stated that it was satisfied Metro was sufficiently addressing training issues and developing programs to support its authorised officers.

February 2014 report

126. In February 2014 my predecessor tabled a second report entitled *Investigation into a complaint about the conduct of authorised officers on V/Line*.

127. The report concluded that the restraint of a passenger by V/Line authorised officers was 'heavy handed' and an unnecessary use of force. The authorised officers were found to have acted consistently with training, but had used restraints prior to other available de-escalation techniques.

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128. The report recommended that the department:
- review training provided to authorised officers on the use of restraints and arrest
 - ensure that authorised officers received regular training regarding the Human Rights Charter.

The department accepted the recommendations and told this office it had taken the following actions:

- reviewed and updated the Law and Procedure Reference Notes for Public Transport Authorised Officers
- attended transport companies' induction training and provided written feedback to them
- took responsibility for the oversight of investigations into authorised officer conduct
- introduced into induction training, a module on the Human Rights Charter
- required transport companies to conduct annual refresher training on the use of force and restraint.

129. The department also said it intended to provide annual refresher training on the Human Rights Charter and include an additional day of practical training on the use of force during induction.

Findings

130. The department's response to the July 2013 first restraint incident involving Authorised Officer 1 and Youth A is concerning for a number of reasons:
- the department's investigation and review lacked rigour with key witnesses including the youths, police and independent witnesses not interviewed and very little justification in the report for the conclusion reached

- the department's review of its initial investigation lacked independence, being performed by personnel in the same unit as the investigator who undertook the initial investigation
- the investigation and review did not consider policies, procedures and the Human Rights Charter.

131. I consider that the department's conclusion about the first arrest incident was wrong and as suggested by the evidence of both the CCTV footage and the trainers, the force used in the take down was excessive in the circumstances. It is unfortunate that the department's findings have also sent a message to authorised officers in effect condoning the actions of Authorised Officer 1.

132. Consideration should be given to future reviews of investigations which are high profile and complex in nature, being outsourced to external agencies.

133. Since 2010 this office has repeatedly raised the issue of the use of excessive force by authorised officers with the department. While several of this office's recommendations have been actioned, some are yet to be fully implemented by the department. As this incident exemplifies, there is more work to be done to ensure that authorised officers are provided adequate training and guidance in the use of force.

Recommendations

I recommend that the Department of Economic Development, Jobs, Transport and Resources (formerly the Department of Transport, Planning and Local Infrastructure):

Recommendation 1

transfer the responsibility for all functions concerning authorised officers including recruitment, training, accreditation and authorisation to Public Transport Victoria.

I recommend that Public Transport Victoria (PTV):

Recommendation 2

review the training of authorised officers in light of the Ombudsman's reports and global best practice, with particular emphasis on customer service, defusing and de-escalating conflict, and provide me with a report within 12 months.

Recommendation 3

seek the assistance of the Public Transport Ombudsman in conducting a review of previous complaints to its office to assist PTV in its assessment of authorised officer training in the next 12 months.

Recommendation 4

establish robust review mechanisms to address incidents involving authorised officer conduct, including the use of an external agency to review serious incidents.

Public Transport Victoria's response:

The Chief Executive Officer stated:

PTV values and appreciates the Victorian Ombudsman's findings. I am pleased to accept the draft recommendations and believe that they will deliver improved training and support for Authorised Officers and a better outcome for public transport users.

The Department's response:

The Deputy Secretary, Transport stated:

The response forwarded to the Ombudsman from Public Transport Victoria is consistent with the views of the Department.

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