RETHINKING POLICE USE OF FORCE: LINKING LAW REFORM WITH POLICY AND PRACTICE

Use of force is an inescapable part of the police mission. Indeed, for some scholars, this power to use force is the defining characteristic of policing – the individual officer has been delegated the power to use force on behalf of the state and community.¹ In practical terms, use of force by and against police commonly arises during arrests and police stops on the street.² Allegations of excessive force arising from such encounters are high on the list of public complaints made against officers,³ making use of force incidents one of the top risks within policing organisations requiring management.⁴

In Australia, public concern over police use of force has converged on mistreatment of members of vulnerable communities, such as Aboriginal people, the homeless, young persons and those suffering from mental illness. A tragic example was recently revealed by State Coroner of Victoria, who handed down her verdict into the 2008 death of Tyler Cassidy, a mentally disturbed teenager who was shot and killed by police. Tyler had stolen two large kitchen knives from a shopping centre. Police were called and in the subsequent confrontation in the adjacent car park, Tyler was called upon by police to drop the knives and to surrender. When he refused, he was sprayed with Oleoresin Capsicum (OC) spray, and chased across a park before he stopped and pointed the knives at the officers. The police sprayed Tyler again and issued further commands to drop the knives or “he would be shot”. The police officers stated that Tyler responded by saying “I’m going to kill you” and “you’re going to have to shoot me” and then advanced towards one of the officers. That officer then fired a warning shot followed by two shots at Tyler’s legs, which did not halt the boy advancing with a knife in each hand. Two of the other officers also fired at this stage and, finally “fearing for his life and having exhausted all other non-lethal options, [the first officer] fired three shots directly at Tyler’s chest area as Tyler walked towards him”.⁵ The whole encounter between police and Tyler lasted less than two minutes.

Three years after the shooting, the coronial inquest returned its verdict finding that the officers had fired in self-defence. Although vindicating the actions of the individual officers on that day, this tragic case spotlighted serious organisational and structural failures in relation to use of force policy and practices. These failures came to light shortly after Tyler’s death, through an independent review by Victoria’s Office of Police Integrity (OPI). The OPI’s 2009 report detailed a litany of deficiencies in the management of use of force within Victoria Police, including failures to maintain regular training for frontline officers, keep proper records of use of force, adequately debrief officers, and generate “lessons learned” from critical incidents to inform the development of policy and practice. In the final analysis, the report recommended that “Victoria Police must re-focus attention on establishing a culture embedded in principles of safety first, risk assessment, risk management and avoiding or

² Office of Police Integrity in Victoria (OPI) has noted that force is most likely to arise when police “arrest or check someone in the street. Force is used in these circumstances nearly twice as often compared to any other”: OPI, *Review of the Use of Force By and Against Victorian Police* (2009) p 43.
³ Allegations of excessive force against members of the Australian Federal Police (AFP) is a distinct category of complaints dealt with under Pt V of the *Australian Federal Police Act 1979* (Cth), classified as a form of “serious misconduct” under the Act. These complaints are subject to inspection and independent review by the Office of the Commonwealth Ombudsman. The Ombudsman has repeatedly criticised the delays and defensive approach adopted by the AFP to such allegations. In its most recent report, the Ombudsman noted that, between 2007 and 2010, not one of the 80 complaints by members of the public about excessive force had been substantiated by the AFP: *Office of the Commonwealth Ombudsman, Annual Report on the Commonwealth Ombudsman’s activities under Part V of the Australian Federal Police Act 1979 – for the period 1 July 2010 to 30 June 2011* (November 2011), http://www.ombudsman.gov.au/files/activities_under_part_v_05.pdf pdf viewed 16 March 2012.
⁴ For example, the inappropriate use of force is listed as one of the top 10 risks facing Victoria Police: OPI, n 2, p 55.
⁵ Coroners Court of Victoria, *Finding – Inquest into the Death of Tyler Cassidy, State Coroner Judge Coate* (23 November 2011).
minimising the use of force." These deficiencies, which were accepted by the then Chief Commissioner Simon Overland in his response to the OPI report, were addressed through improvements to training, reporting and monitoring. Although these improvements were noted approvingly by the State Coroner in the 2011 verdict, retrospective reform offers cold comfort for the family of Tyler Cassidy.

In my view, the present approach to the reform of police use of force – which may be termed as a “culture change” approach – continues to miss the mark. A significant blind spot in Australia relates the role and significance of law in shaping police decision-making. Ultimately, the legitimacy of use of force rests upon the legality of the officer’s decision, not merely its tactical soundness and compliance with policy. This demands a careful evaluation of the officer’s conduct and the extent to which, consistent with the relevant law, policy and practice, the use of force is necessary, reasonable and proportionate.

The core legal concepts of necessity, reasonableness and proportionality are found in both common law and specific statutory police powers – it should be noted that police powers, though placed on a statutory footing in most jurisdictions, are not codified and thus do not repeal or limit the common law powers available to police. The overlay of general and specific powers is further complicated by the availability of general criminal law defences, such as self-defence and legal authority, which potentially operate to absolve officers of responsibility for using force that otherwise would amount to criminal acts of assault or even murder.

With wide coercive powers and broad defences, the legislature, courts and community demand that police officers, like ordinary citizens, are answerable to the law for their actions – this is a key element of the rule of law. Yet, “the law” in this regard offers few bright lines for the officer earnestly seeking to uphold the rule of law and act within the scope of his or her legal authority. A cursory survey of the law in this field reveals a complex web of statutory powers authorising officers to use force, which change according to the particular type of powers being exercised. The boundaries of the common law in Australia are similarly murky, hampered by its limited doctrinal development. The lack of judicial guidance arises from the fact that the legality of police action is only rarely tested in Australian courts, with out of court settlements being the norm rather than the exception. Faced by this level of complexity, it is not surprising then that legal literacy of the frontline police (in effect, an officer’s command of the law) is tested to its limits.

Police in liberal democracies, like ordinary citizens, need access to the law in a form that is understandable so as to guide future conduct and to avoid the prospect of retrospective criminalisation and punishment. In the face of legal blind spots, internal directives and guidelines have become the de facto (if not de jure) operational “rules of engagement” for police. In the absence of comprehensive codification of the relevant legal standards, operational and tactical norms necessarily fill the gap, shaping if not determining an officer’s understanding of the legal standards of necessity, reasonableness and proportionality. However, these “soft law” sources of guidance to officers are pitched at a very high level of generality, focused on improving the processes of decision-making regardless of context (for example, the directions apply whether or not the subject is drug affected or mentally ill). A typical example is the Operational Procedures Manual of the Queensland Police Service (QPS) that directs that use of force by an officer must be “authorised, justified, reasonable, proportionate, appropriate, legally defensible and tactically sound and effective”.

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6 OPI, n 2, p 57.
7 For example, in the field of public order, the common law duty of the police “to keep the peace” empowers constables to use necessary and reasonable force to suppress or prevent a breach of the peace: See Bronitt S and McSherry B, Principles of Criminal Law (3rd ed, Lawbook Co., 2010) Ch 13.
In Australia, police are trained in the situational tactical options model, first taught to Victorian Police in 1994, which has since been incorporated into the National Guidelines for Incident Management, Conflict Resolution, and Use of Force. Central to this model are the following Operational Safety Principles (OSP):

1. **Safety first** – the safety of police, the public and offenders or suspects is paramount;
2. **Risk assessment** – is to be applied to all incidents and operations;
3. **Take charge** – exercise effective command and control;
4. **Planned response** – take every opportunity to convert an unplanned response into a planned operation;
5. **Cordon and containment** – unless impractical, adopt a “cordon and containment” approach;
6. **Avoid confrontation** – a violent confrontation is to be avoided;
7. **Avoid force** – the use of force is to be avoided;
8. **Minimum force** – where use of force cannot be avoided, only use the minimum amount reasonably necessary;
9. **Forced entry searches** – are to be used only as a last resort;
10. **Resources** – it is accepted that the “safety first” principle may require the deployment of more resources, more complex planning and more time to complete.

According to Principles 6, 7 and 8, officers should avoid violent confrontation and force where possible, and where it is necessary as last resort, they should apply “minimum force” in the performance of their duties.

There are problems with the OSP, as currently conceived. The OPI noted:

The current [OSP] refer to conducting a risk assessment, but do not identify the importance of assessing the whole situation, the behaviour of other individuals, the environment, the likelihood of timely backup, or support etc. The current principles do not include the consideration of options to defuse the situation, nor do they state the importance of communicating clearly and calmly both to people at the scene of the incident and other police providing backup or support. These issues should be addressed.

Moreover, the OPI noted that the effectiveness of the OSP depends on the level of awareness among officers, which at the time of the review was found wanting. In calling for culture change, OPI concluded that “[t]he Operational Safety Principles should represent the attitude and values of Victoria Police to the use of force and provide a practical guide that is easy to remember for operational police”.

How then should the legality of police use of force be determined? As revealed by the Tyler Cassidy inquest, legal justifications for use of force tend to be determined from the standpoint of the officer at the precise moment of the act causing death or injury. As noted in a United States study of excessive force, this approach is unduly restrictive. The preferable view developed by the authors of that study is that the reasonableness (and hence legality) of any decision by police to use force should examine the whole context leading up to the incident, rather than focusing on the necessity question, namely the severity of threat and the officer-perception in that split-second before force deployment – what may be termed the “trigger point”. An holistic contextual approach widens the forensic frame of accountability. Consistent with the normative significance of the OSP, this approach should include any obvious failure to take other options, reasonably and easily available to police, to de-escalate the situation. This does not mean that police are held to a stricter standard governing use of force. Rather,

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11 OPI, n 2, p 53.

12 OPI, n 2, p 53.

13 See Alpert G and Smith W, “How Reasonable is the Reasonable Man?: Police and Excessive Force” (1994) 85(2) The Journal of Criminal Law and Criminology 481 at 491. The authors contrast the two approaches: the preliminary frame and the final frame analysis.
it acknowledges that determination of “reasonable force” and, thus, the legal responsibility of individually (for the police officers) and institutionally (for the police organisations that employ them) must consider the context, which includes levels of training and experience, as well as the professional expectations and competences of “reasonable police officers” faced by that situation. Advocacy of an holistic contextual model would be consistent with trends in other parts of the criminal law, such as self defence, duress and provocation, where law melds subjective and objective standards to determine responsibility.

It is most important that any assessment of the responsibility of the police officer using force avoids falling into the trap of “hindsight bias”, where assessment suffers from an “an over-estimation of how easy it should have been to be successful and oversimplification of what should have been done”. Is there a way of neutralising this type of bias? As psychologists point out, awareness of the magnitude and direction of biases is an important curative. In the legal arena, where the officer’s decision is being assessed by a coroner, jury or trial judge sitting without a jury, there is clearly need for input from forensic psychologists as expert witnesses, as well as jury directions sensitising lay decision-makers to potential biases and mechanisms for neutralising them. This model must accept expert psychological insights that officer decision-making may be adversely affected by stress and uncertainty.

Clearly then, more guidance from the courts and legislature is needed on the interaction between the law and administrative guidelines (like the OSP). Though the latter should not fetter the inherent discretion of police officers, guidelines are clearly relevant to the legal standards of necessity, reasonableness and proportionality. Departure from these guidelines does not per se render the decision to use force unreasonable (and hence unlawful), and the law will undoubtedly continue to grant police officers a broad discretion in how they apply and operationalise these norms in any given situation.

Use of force policy and guidelines in Australia have been developed in the shadow of adverse events, such as a spate of shootings of persons suffering from mental illness in the 1990s. In my view, the process of law reform can be improved when insulated from the moral panic and sensationalised media attention that follow police shootings and allegations of brutality. Politicians and civil liberties groups demand more accountability in policing, more institutional control and more independent oversight. To my mind, this is not the heart of the problem, not least of all because the levels of police accountability, oversight and visibility have never been higher. In my opinion, the key problem is not the incidence or prevalence of police use of force, but the lack of clarity surrounding police decision-making and uncertainty over the legal powers of police to use force.

The time is now ripe to examine the law governing police use of force, and the multiple contexts where force is or may be used, and to consider the development of a model code of police powers suitable for adoption in all nine jurisdictions. In developing common national standards of policing in the legal arena, it is vital that the latest research insights on police decision-making inform law reform. It must not be left to the police agencies to drive this alone. This is clearly another area where reform must be evidence-based, and incorporate best practice from Australia and overseas. The impact of

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14 Indeed, this approach has been adopted in relation to determining recklessness and criminal negligence for military service offences tried under the Defence Force Discipline Act 1982 (Cth), s 11.


17 There is a problem in determining prevalence rates due to the lack of uniformity in data collection by police agencies. As the OPI in Victoria found, though the Use of Force Register was created six years ago, it did not serve its intended function: not only were there problems with the accuracy and under-reporting of incidents, but the data placed on the register did not inform training or policy development, or provide an early warning system for identifying officers involved in multiple use of force incidents: OPI, n 2, p 23. Similar problems have been identified in the United States: Alpert G and Durham R, Understanding Police Use of Force: Officers, Suspects and Reciprocity (Cambridge University Press, 2004).
tragedies like Tyler Cassidy’s death demand immediate attention. However, this clamour for attention must not cloud police leadership and senior policy-makers as to the importance of developing holistic, rather than ad hoc and piecemeal, responses.

Ultimately, improved law and policy is only part of the equation. As the OPI in Victoria concluded, regulation of the use of force – whether at the organisational or individual level – is as much about police culture as it is about law and policy. Police culture, rather than subverting law and policy, must be harnessed positively as part of a wider reconceptualisation of the police mandate in terms of human rights protection. As the OPI concluded in its review of this topic:

Senior police managers must provide consistent messages about how to be both peace keeper and law enforcer. They must lead by example and demonstrate that having regard to human rights means not just treating everyone with dignity and respect, but also having regard to the safety of others: other police and members of the public.\(^\text{18}\)

Culture change and legal change are not distinct or separate reform processes. Recognition of the importance of their relationship and interaction should be placed at the forefront of the policing research and reform agendas.

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\(^{18}\) OPI, n 2, p 53.

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