

# Contractualism and Policing in the Public Interest

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Once, police largely depended on their status as the embodiment of the State's monopoly on coercive force to obtain the assistance they needed to do their job. Today they are increasingly reliant on formalised arrangements of reciprocity with other public and private agents. Police are both purchasers and vendors of goods and services, including security services. This paper explores the issues surrounding the growing importance of contractualism in policing and its risks. After an examination of events policing by one large Australian police organisation, the paper concludes that, although the risks are substantial, newer economic forms of policing like 'user-pays' are not necessarily antithetical to the public interest. They may, in fact, promote it.

## Introduction

Public policing services are generally understood to be a social good, in that the provision of these services to individuals also has fundamental benefits for society in the form of better, safer societies in which to live. No Western nation conceptualises public policing services as commodities for trading for the purpose of making a profit. Public policing is, at the ideological level, the rule of law's silent partner. Yet, for pragmatic reasons to do with increasing fiscal constraints and growing public demand for police services, trading in services is exactly what has begun to happen in many jurisdictions. Police are entering the marketplace by engaging in formal relationships of reciprocity with 'outsiders' for both the purchase and sale of services. Risks are inherent in this behaviour, including risks to efficiency, equity and legitimacy. This article outlines the growing importance of contractualism in policing and its risks, using events policing as a focus. It seeks an answer to the question: 'Does engaging in these newer economic forms of policing necessarily mean that the public interest will suffer?'

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## Policing as a Public Good

In economic terms, policing services have been traditionally regarded as public goods rather than private goods. That is, they have been seen as non-rivalrous, in that their consumption by one person does not prevent them being available for consumption by others, and non-excludable, in that the benefits of these services are shared by all, whether they pay for them or not. This idea of policing as a public good has been widely discussed by policing scholars in recent years (for example, Benson 1994; Crawford 2006; Hope 2000; Loader and Walker 2001; 2006; 2007; Shearing and Wood 2003). Some have offered alternative characterisations of many policing services as 'impure public goods' or 'quasi-public goods' in the form of club goods (non-rivalrous, excludable) (e.g. Crawford 2006) or common pool goods (rivalrous, non-excludable) (e.g. Benson 1994). Loader and Walker (2007, pp.146-151) point out that both non-rivalry and non-excludability are matters 'of circumstance and degree', and so they perceive the narrow (or 'thin') economic case for policing (and security) as a public good as precarious (arguing for a 'thicker' conceptualisation of security as a constitutive public good).

It is clear that increasing public demands on police services, together with fiscal constraints common to public services across the Western world, have made the idea of non-rivalry of public police services inapt. The availability of police services is certainly not infinite -excessive consumption by one person or group can deplete availability for others. If a large number of police attend a major event like a sporting tournament or festival, or are required to deal with a catastrophic event of some kind, there clearly may be a dearth of police to attend to normal duties.

Rivalry means that police have to ration services and they have a variety of mechanisms to do so. Priority-setting is one. The Australian Federal Police, for example, operate a Case Categorisation and Prioritisation Model, whereby cases are prioritised for investigations. Many police organisations in Australia use some form of grading system for incoming calls that determines response times. Sometimes rationing involves complete withdrawal of a service; response to security alarms is a common example. Another mechanism is to charge for services that were previously provided at no cost in order to bridge the gap between resources and demand. Charging might be regarded as making the police service in question 'excludable', in that only those that can afford the service will be able to access it.

## The Rise of Contractualism

Hand-in-hand with the rationing of services to make limited resources work to their full advantage for police, we are seeing the state's side of the social contract, its obligations to provide peace and security, increasingly being fulfilled by police working through and with 'outsiders'. Other government agencies, community organisations, the business community and individuals in various capacities are entering into formalized arrangements of reciprocity with the police. This 'contractualisation' of policing is evident in relation to both the core work of policing and behind-the-scenes aspects of police work.

Police are both buyers and sellers of goods and services, including security services. As buyers, they often enter into formal arrangements for the purchase of information, both from companies who trade in open source information and from private informants. Some police organisations purchase private security to provide guarding services at police headquarters and in other locations. The sale of front-line services to private organisations and individuals provides another example of contractualism. Formal arrangements for public policing services paid for either wholly or partly by private money, such as patrols, are not unusual in the United Kingdom and other Western societies. Crawford and Lister (2006, pp.176-181) recount the story of a community on the periphery of York, England that, in 2000, contracted, through its housing trust, with local police commanders for an additional 24-hour per week community patrol service to the village, in order to address residents' concerns about a perceived lack of beat police. Police in California developed a solution to the problem of high levels of juvenile crime in Montclair Plaza by concluding an agreement with the Plaza's management for 50 per cent funding for a full-time police officer to patrol the Plaza and train the Plaza's private security contingent. The Plaza provided an office and equipment for the officer (Geason and Wilson 1992). NSW Police operate a Supplementary Policing scheme in which approved private businesses such as shopping centres are able to 'rent' from the organisation fully equipped and empowered police officers who would otherwise not be rostered for duty. The minimum period of a supplementary policing arrangement is two months, although shorter periods may be negotiated 'for requirements such as special sales and promotions at shopping centres' (NSW Police 2004, s 6.1.7b)

Some more permanent institutional arrangements for longer term hire of police also exist in some jurisdictions. The British Transport Police are 95 per cent funded by the rail industry (Department of Transport 2006, pp. 57-58). The Gold Stealing

Detection Unit (GSDU) of the Western Australia Police Service is funded entirely by members of the WA Chamber of Mines and Energy (Chamber of Mines and Energy 2005; Western Australia Police 2007). Contract policing is part and parcel of policing in Canada, where the RCMP provides policing services under contract in all provinces and territories except Ontario and Quebec (Royal Canadian Mounted Police 2006) and Ontario Provincial Police provide a contract policing service in different municipalities within Ontario (Law Commission of Canada 2006, p. 4). Similarly, the Australian Capital Territory (ACT) government purchases policing services from the Australian Federal Police (AFP) under contract. The sale of public policing services is not confined to Western industrialised nations. Abrahamsen and Williams (2005) note that in Nigeria, oil companies pay and control a public police entity, the Supernumerary or Spy police, which provides unarmed security, mainly guarding services, at oil company facilities.

A process of contractualisation can also be seen in the work police do backstage, supporting their core tasks through infrastructure maintenance and improvement. For instance, there are increasingly complex procedures being adopted for the acquisition of necessary equipment and services (Ayling and Grabosky 2006). The assistance of citizens with policing tasks in both paid and voluntary capacities, the contribution of funds (donations or sponsorship) from businesses and community organisations in return for acknowledgement or other consideration, the purchase of police merchandise and intellectual property for an agreed fee and subject to agreed conditions - all these may be subject to standardised formal agreements.

Contractualism appears in both formal and informal, or unwritten, forms. The obligations and entitlements of informants are often but not always agreed in writing. Police may accept donations subject to expectations of reciprocity or to conditions about their use without ever putting pen to paper.

## **The Risks of Contractualism**

There are clearly many risks associated with the increasing contractualisation of policing. The specifics, of course, do vary depending on the kinds of arrangements in question. Buying goods and procuring services, for example, involve particular risks for police organisations including capture by business interests, corruption of involved police officers, problems of staff morale, legal issues over the quality of a contractor's service and so on (Ayling and Grabosky 2006). Many of these specific

risks will have little application to other forms of contractualism in policing. However, the risks of contractualism generally may be thought of as falling into three broad categories: risks to efficiency, equity and legitimacy.

Gains in *efficiency*, or value for money, are the rationale for many of the managerialist changes that have taken place in policing over the last few decades, including the movement to contract. However, entering into contractual relations with others will not always result in efficiency gains. It will sometimes be more costly to outsource a service than provide it in-house; any direct savings may be eaten up in the red tape of finding and negotiating with contractors, in training police staff in tendering processes and in ongoing contract management (Ayling and Grabosky 2006, p. 674). Nor do the fees charged for police services provided to a private interest necessarily cover the full cost of replacing those consumed resources with others of an equivalent quality (Ayling and Shearing, 2008). In this case one might argue that consumption of police resources in the policing of private events or otherwise for the benefit of private individuals or institutions amounts to a taxpayer subsidy for those particular people, and is therefore inefficient.

As representatives of the state, the 'symbolic repository of societal values' (Marx 1992), police garner a certain amount of respect and moral, along with their legal, authority. This *legitimacy* is essential to their effectiveness. But legitimacy is contingent. It is all about perceptions and so can be readily influenced. Risks to it need to be taken seriously. If police are perceived as deceptive, corrupt or corruptible, biased or prejudiced (inequitable), stupid or uncaring, or as wasters of taxpayer resources or poor managers (inefficient), trust in them and willingness to cooperate with them may be diminished. There are a myriad of ways such perceptions can come about in the course of, or as a result of, police engagement with third parties in relationships of reciprocity. For instance, where public policing services are provided to the benefit of private parties, one can easily imagine how perceptions of unfairness and inefficient use of taxpayer resources might arise from this scenario and the consequent risks to police legitimacy. In some countries, such as Australia, the tradition of taxpayer-funded public policing is a time-honoured one; anything different provides fertile ground for speculation that corruption may be afoot. Transparency of user-pays processes is therefore essential to protect the legitimacy of police.

It is part of the folklore of policing that police services are available to all and sundry with no discrimination between individuals or groups. *Equity* in the distribution of services is what one can expect of a public good because of its non-

excludable nature. However, once contractualism takes hold, equity may be placed at risk. Like legitimacy, non-excludability is contingent, as Drahoš (2004, p. 324) points out. To say that a good is non-excludable is not to say that the good can never be made excludable; rather that, because of the nature of the good, it is difficult and perhaps costly to do so. Clearly, any police-public relationship that involves payment for a policing service (be that a public policing service provided on a user-pays basis or a service outsourced to private contractors who then charge for it) carries with it the risk that price will become an exclusionary factor. And if one party can pay for policing services and another cannot, there is the further risk that the interests of those private citizens or institutions who can afford the service will influence policing agendas to the detriment of those who are less well off, further aggravating inequity. Trade in police services, or commodification, thus poses a risk to the public interest. Many policing scholars have identified this risk (Loader 1999; Newburn 2001; Murphy 2002; Crawford and Lister 2006). Some foresee a future in which paid policing, both public and private, predominates, where taxpayer-funded public policing becomes 'a second tier form of provision' (Crawford and Lister 2006, p. 184; see also Loader 1999, pp. 383-4) and police budgets suffer as a result (Loader 1999, p. 383; Crawford and Lister 2006, p. 184).

Equity may also be put in jeopardy simply by entering contractual relations. Good contracts precisely specify the tasks to be undertaken, the obligations to be met and the results to be achieved. In negotiating such contracts, whether they are for acquisition of goods and services, sale of police goods or services, sponsorship of police activities or purchase of information, police will necessarily focus on the relationship with the other party. There is always a risk that broader considerations of how the contract 'fits' with the mandate of the public police and serves the public's interest will take second or even no place, especially in cases where the negotiations are complex and the product is one that does not directly contribute to front line policing (as is the case with the purchase of many goods and services police need). As Davids and Hancock (1998, p. 57) point out, 'there are other less obvious aspects of public and political accountability and public interest that are simply not mentioned in contracts'.

So the risks of newer forms of economic activity by police are substantial. However, whether these risks manifest themselves will depend not only on the extent to which police indulge in such activity but also on how they go about doing so, and for what purpose. An ARC-funded study undertaken by my colleagues and me, of ways in which police organisations are choosing nowadays to enhance their resources, has turned up an instance where police manage a user-pays policing

service in a way that, rather than being antithetical to the public interest, may, in fact, promote it. We consider that the scheme for events policing operated by Victoria Police probably enhances efficiency and equity, and poses little threat to police legitimacy. The information in the following section is largely based on discussions with those involved in running the scheme.

## **Case Study: Events Policing by Victoria Police**

### *Charging fees*

Victoria Police, like a number of other Australian police organisations, charges fees for events policing. The law and policy in relation to charging for police services is set out in the *Police Regulation (Fees and Charges) Regulations 2004* and VPM Instruction 107-2. The Instruction states the police case for charging: 'The application of charges for certain police services recognises the community's right to have first call on the resources of the Victoria Police, compared with organisations or individuals who may seek to divert these public goods for private and/or commercial purposes' (Regulatory Impact Statement for *Police Regulation (Fees and Charges) Regulations 2004*, section 5.4). This provides a clear public interest underpinning for the scheme.

Some form of user-pays scheme for events has been around for 60 or 70 years in Victoria. Previously, all income went to the State's consolidated revenue fund but, alongside the introduction of the new regulations, an intra-governmental agreement was concluded that allows police to keep revenues over a certain threshold. Collected revenue is pooled centrally and distributed to regional police when a convincing case is made. So events policing clearly enhances the resources of Victoria Police. However, the revenue raised, while significant in absolute terms, is relatively minor in the scheme of overall police revenue. For example, in 2004-2005 Victoria Police made approximately \$3.4m from events policing. The total revenue from ordinary activities for Victoria Police in 2004-2005 was over \$1,352m (*Victoria Police Annual Report for 2004-2005*, Appendix J).

Fees are levied where a sporting and entertainment event comes within one or more of three categories: first, admission charges are made for the event (whether to view or participate in the event); second, the event is commercial in nature; and third, the event is commercially promoted or sponsored (reg. 4(1)). Fees cover police time spent at the event itself and in planning it, and supervising and supporting the

personnel involved. They also cover equipment (vehicles, dogs, horses etc.). The aim is to recover costs, not make a profit.

Police levy fees whenever officers attend an event of the specified type (unless the event is policed using officers ordinarily on duty at or near that location), whether or not a request for assistance by the organiser of the event for police attendance has been forthcoming. Event organisers are required to approach the police before the event to discuss the number of police officers to be deployed. But these talks between organisers and police also canvass other details, such as the organiser's plans for the engagement of private security, event hours, limits on alcohol availability and its manner of service, water provision, traffic management and space design issues. Organisers are expected to take into account police recommendations on these and other issues that affect safety, security and public order at the event. Upon concluding the negotiations, police provide the organiser with a quote for the needed police resources. The quote enables organisers to budget for the police contribution as they would any other event expense.

If an organiser neglects or refuses to come to the police before the event, or where the arrangements proposed by the organiser do not, to the police's satisfaction, properly address the issues of public safety and order, police may provide and charge for numbers of police that the organiser neither wants nor has budgeted for. The police consider that this imposition of themselves is necessary to fulfil their mandate. An element of compulsion can therefore be identified in these essentially commercial arrangements.

### *Waiving fees*

Some organisers can apply to the Chief Commissioner for a waiver of fees. A waiver is regarded by Victoria Police as a government subsidy (Victoria Police 2005), so is not usually given if an event is profitable. Waivers are almost always partial (an exception was the event staged to raise money for the tsunami victims in 2005).

At the first level of screening, an eligibility requirement for a waiver is applied. The organiser must demonstrate that the imposition of police charges would threaten the viability of the event or its staging in Victoria. In determining eligibility, the Commissioner both considers the financial details relating to the event and asks questions about whether the organiser could have done more to increase viability, better manage the event and comply more satisfactorily with police suggestions.



Then, when eligibility is determined to exist, a second level complex matrix of criteria is applied to determine the amount of waiver to be given. As well as purely financial considerations, police give weightings to factors like whether the event is a recurring one, the benefits it brings to the community and the effects of the identified funding deficit on the event or organiser. A percentage waiver is then determined. The percentage may be further reduced in some circumstances - if, for instance, the organiser unnecessarily consumed police resources, the event had attracted waivers in previous years, or the organiser did not use private security to best advantage.

### *Engineering the market*

So although cost recovery is the proclaimed primary purpose of the scheme, other factors play a part. An important underlying objective, evidenced by the lengths to which police go to negotiate with organisers over the details of the event, is to educate event organisers about how to manage events from a security perspective and how to improve their management over time. Police are seeking to 'responsibilise' (O'Malley and Palmer 1996; Garland 1996) organisers so that they will manage events in ways that limit the demand on police resources.

This is also why waivers are reduced progressively for recurring events. Fewer police resources should be required over time if the organiser learns how better to ensure public safety and security. Thus the event should become increasingly self-regulating. An organiser who resists cooperating with police recommendations and takes the view that it is cheaper and easier just to keep on paying the fees will find that those fees grow each year because of the reducing percentage of waiver.

As can be seen, this scheme enables police to engineer solutions to the deficit in policing resources they continually face. It provides an example of Cheng's 'structural' methods of regulation, establishing 'mechanisms or procedures that push citizens [in this case, event organisers] toward compliance by making the undesirable behaviour less profitable or more troublesome... Unlike fiat, structure does not regulate undesired behaviour directly through ex-post penalties. Rather, it regulates indirectly and ex-ante by subtly shaping the physical, social, or other arrangements that enable the behaviour to occur in the first place. Its philosophy is more preventive, rather than reactive.' (Cheng 2006, pp. 655, 662).

It should be noted that these responsabilisation attempts have not been welcomed in all quarters. Resistance to the payment of user fees is found not only among those being charged but also among police themselves who see user-pays as

potentially interfering with police-community relations, especially in rural areas. They would agree with the 1988 Report by the National Police Research Unit in Australia that identified charging for police presence as an initiative that could 'dissipate the unique closeness between the public and the police fostered by such events' and negatively affect public opinion of police (Berwick 1988, p. 9).

### *Efficiency, equity and legitimacy*

How might this scheme be evaluated in terms of the risks it presents to efficiency, equity and legitimacy? Only an empirical study could do this with any degree of exactitude. However, some general observations may be ventured.

The events-policing fees scheme of Victoria Police, and its user-pays system more generally, sits within the context of an increasingly business-savvy policing organisation. Efficiency is a driving force for many changes in the organisation. It is, for example, looking at ways to improve decision-making processes for the distribution around the organisation of resources and for the development of innovative activities (including commercial activities). It would be surprising indeed if Victoria Police considered that this scheme did not provide the public with value-for-money. The scheme is not hugely labour intensive but manages to both bring in some revenue that can be used to subsidise normal policing services and reduce demands on police resources over time. In terms of efficiency, it is probably quite strong.

If normal policing services suffer because police are diverted to policing private events, a legitimacy problem may arise. However, if fees are used to ensure normal service continues, legitimacy may be a non-issue for the community. There is clearly the potential for any user-pays scheme, particularly at its inception, to be greeted with rhetoric that indicates there has been some damage to police legitimacy amongst those who are being charged. Over time, however, the ability for organisers of community and non-profit events to access waivers would seem to reduce the potential for outbreaks of hostility towards police. This, of course, depends on the scheme being administered fairly and perhaps with a degree of transparency. As one officer to whom we spoke said, decisions about charges and waivers 'are not light decisions - if you make the wrong decision it affects real people ... you need to understand the event and the impact of it'. Transparency is, to some extent, currently lacking with this scheme. For example, organisers are not given a copy of the criteria against which waiver percentages are assessed. However, genuine attempts by any organiser to understand how they might improve event safety in cooperation with

police would, we understand, be welcomed by Victoria Police. Legitimacy, nevertheless, will always be contingent on the circumstances.

Does the scheme result in or perpetuate an inequitable distribution of services? As Victoria Police point out, the purpose of charging fees at all is to recover costs. An equitable distribution of resources within the community can be ensured by using fees charged to replace diverted resources. Furthermore, who really benefits by police attendance at events? The answer must surely be both the private organiser and the attending public. Just as policing at a street march might ensure that a right to freedom of speech is upheld, and policing at a religious venue might ensure that people can go about their business of worship with no interruption, so too, policing at a sporting or entertainment event ensures a safer and more relaxed experience for those attending. This is the case whether the event is profitable or not for the organiser. Indeed, even if police operated purely on a public goods (non-commercial) basis, they would have to assign events policing a high priority. For those attending such events, a lack of safety at an event that could be tracked to an absence of police might be an argument that *they* were suffering from an inequitable distribution of policing services.

## **The Public Interest**

Of course, just because risks to efficiency, equity and legitimacy are largely mitigated does not necessarily mean that the public interest overall is unharmed by a user-pays policing scheme like that in Victoria (although it obviously goes some way in that direction).

'Public interest' is a slippery concept, one widely debated in political philosophy, and this is not an appropriate place for a detailed examination of its intricacies. For my purposes here, an instrumental rather than utilitarian view is adopted: that the public interest is the collective good of society. This 'collective good' notion indicates that the public interest is more than merely the aggregate of individual interests, an idea that 'commands the support of a varied and powerful cloud of witnesses, ancient and modern' (Elcock 2006), including Aristotle and Rousseau. It allows for the possibility that not only may measures that are favoured by all or the majority be in the public interest, but also that measures that may not be favoured by all or most individuals (for example, because they impose a financial cost) may yet be good for society and therefore good for those individuals who constitute society. It also allows for the possibility that what is good for an

individual, or even many individuals, may not be good for society (i.e. not in the public interest). There is a difference, as Cassinelli (1958, p. 48) explains, between what is in the public's interest (the public interest) and what the public is interested in.

Although the interests of individuals and of the wider public are often at odds, on occasion they do coincide. This may occur, for example, where public order and safety is ensured at a privately-run event, as we have suggested above. Organisers may not like paying but there are clear advantages for their reputations and future business in staging a secure event. There are benefits, too, for attendees. However, the user-pays policing scheme of Victoria Police goes further than serving a variety of individual interests. Police, the acknowledged experts in the area, pay particular attention to ensuring that organisers 'pick up their act' when it comes to public safety. Through negotiations over the police and the organiser's respective roles, police play the role of educators. The waiver scheme then operates to cement these gains in responsabilisation over the longer term. In this way, police may in the long run engineer a situation whereby they can gradually retreat from their current involvement in private policing without endangering public safety. Because organisers get better at organising events, and because over time the scheme is likely to prove efficient with public monies, it might be argued that this user-pays policing scheme serves not only individual interests but also promotes the collective good, or public interest, in the longer term. It actively produces a convergence of public and private interests.

## Conclusion

What we are seeing in police organisations today is perhaps an expression of what the Victorian legal historian Sir Henry Maine called 'a movement from Status to Contract', which he believed typifies progressive societies (Maine 1861 [1920], p. 174). Where once police largely depended on their status as the embodiment of the State's monopoly on coercive force to obtain the assistance they needed to do their job, today they are increasingly reliant on formalised arrangements of reciprocity. But the movement to contract that we can see occurring in police organisations does not necessarily mean that status has receded into oblivion. For police, legitimacy is the sine qua non of effectiveness and so, a good public image and healthy community relationships remain supremely significant. A lack of equity and

efficiency on the part of police can negatively affect legitimacy. So it is important that risks to any of these be minimised when police engage in contractual relations.

These risks are clearly substantial with any arrangement involving the police buying or selling services. Trading in policing services fundamentally changes the traditional conception of public policing as something separate from the marketplace, a public good that is freely available to all at no cost. But police may be driven to engage in the marketplace through increasing demands on police services against a background of growing resource limitations. To cope with this, rationing of services, including by making some services excludable through the imposition of fees, has taken place. Such measures may promote efficiency at the expense of equity and legitimacy, or pose risks to all three of these.

User-pays policing of privately run events provides an example of police contractualism at work. By charging fees, police can cover the costs of private policing and sometimes enhance their resource base. And there is every reason for the police to be interested in the policing of such events. It will almost certainly provide positive externalities for the community. Even the provision by the police of services with the attributes of private goods (excludability and rivalry) may be in the public interest when private and public interests converge.

The way in which police contractualism is structured and conducted is also significant to the issue of whether a particular form of it poses too great a risk to the public interest. The brief examination here of the events policing scheme of Victoria Police indicates that contractualism and public risk do not necessarily go hand-in-hand. The scheme is illustrative of the way in which police can use carefully managed contractualism, involving fees, incentives, education and coercion, to improve their productive efficiency. Reducing the costs of particular policing services is itself consistent with the public interest provided that it does not detract from effective public goods provision. In this case, police seem to manage to be both efficient and effective, ensuring public safety both at particular events and, through responsabilising organisers so that police resources are freed up for productive use elsewhere, over the longer term. This kind of regulatory methodology, involving managing contractual relations with systems that actively produce a convergence of public and private interests, may well be adaptable to other types of marketplace activity in which police are increasingly engaging.

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