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The *Australian Journal of Human Rights* is a publication of the Australian Human Rights Centre. Located in the Faculty of Law at the University of New South Wales, the Australian Human Rights Centre is an independent non-government organisation dedicated to encouraging multidisciplinary teaching and research in the area of human rights at the national, regional and international levels.

The *Australian Journal of Human Rights* is the first journal of its kind in Australia to be devoted exclusively to the publication of articles, commentary and book reviews about human rights developments in Australia and the Asia Pacific region. The aims of the Journal are:

- to raise awareness of human rights issues in Australia and the Asia Pacific region by providing a forum for scholarship and discussion; and
- to monitor human rights developments in this region.

To achieve these aims the Journal adopts a broad-based multidisciplinary approach to human rights issues. It deals not only with the legal aspects of human rights but also with philosophical, historical, sociological, economic and political issues as they relate to human rights in Australia and the Asia Pacific region.

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Fr Frank Brennan SJ AO is a Jesuit priest; Professor of Law in the Institute of Legal Studies at the Australian Catholic University; Professor of Human Rights and Social Justice at the University of Notre Dame Australia; and Professorial Visiting Fellow in the University of New South Wales Faculty of Law. He was the founding Director of the Uniya Jesuit Social Justice Centre in Sydney and served there as Director and Associate Director from 1989 to 2004. In 1995 he was made an Officer of the Order of Australia (AO) for services to Aboriginal Australians, particularly as an advocate in the areas of law, social justice and reconciliation. In 1997 he was Rapporteur at the Australian Reconciliation Convention. He was awarded the Humanitarian Overseas Service Medal in 2002 for his work in East Timor and the Australian Centenary Medal in 2003 for his service with refugees and human rights work in the Asia Pacific region.

Australian Journal of Human Rights

Special issue: Policing and human rights
Volume 20 Issue 2 2014

Table of contents

Linking policing and human rights: a recent invention or an enduring legacy?

Simon Bronitt, Melanie O'Brien and Melissa Bull*

The genesis of this special issue of the *Australian Journal of Human Rights* was an international conference on policing and human rights held in Canberra in 2013.[1] The theme of the three-day conference, hosted by the Australian Research Council Centre of Excellence in Policing and Security (CEPS), was hardly original. Fifty years earlier, at the same hotel venue (the Rex Hotel, Canberra), the Commonwealth of Australia hosted the United Nations Seminar on the Role of Police in the Protection of Human Rights (1963). That seminar, like the 2013 conference and this special issue, provided a forum to reflect upon the vital role that policing plays in upholding human rights. This issue provides a showcase of the contemporary challenges, locally and globally, in policing and human rights. It also demonstrates how the discourses have changed in 50 years: the voices of the oppressed are heard more clearly, and the range of disciplines engaged in this debate has expanded from law to include psychology, ethics, criminology and sociology.

Professor David Hambly, one of the guests of honour at the 2013 event, was the only person whom we could ascertain had in fact attended the 1963 seminar. At the time, he was a fledgling legal academic. In the speech delivered at the conference dinner, Professor Hambly recalled the atmosphere of the UN seminar, reflecting on the prevailing political climate of the 1960s that stretched out from the United States and Europe to a sleepy, conservative and rather sparsely populated Canberra. It was apparent to some of the attendees that, in the words of Bob Dylan, 'The Times They Are A-Changin' '. At the 1963 seminar, the 'elephant in the room' as Professor Hambly

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1 Human Rights and Policing Conference, an international conference commemorating the 50th anniversary of the UN Seminar on the Role of Police in the Protection of Human Rights, Canberra 1963, hosted by the Australian Research Council Centre of Excellence in Policing and Security, Canberra, 16–18 April 2013. The Australian Research Council Centre of Excellence in Policing and Security (SR0700002) (2007–14) was established to boost policing and security research capacity in Australia amid the growing complexity and internationalisation of transnational crime in the post-9/11 environment.

termed it — the abuse of Aboriginal people at the hands of the criminal justice system — was exposed in dramatic fashion, not by the official delegates, academics, lawyers or judges, but through the powerful words of a civil society and social justice activist, Shirley Andrews. Miss Andrews's attendance was as an observer, representing the UK-based Anti-Slavery Society for the Protection of Human Rights. Her brief but effective intervention in the seminar highlighted police discrimination against Aborigines and provoked a visceral reaction from the senior police officials present. Fittingly, the first contribution to this special issue is an edited version of Professor Hambly's speech, which we include not only for its eloquence and the important historical preservation of his eyewitness memories, but also to provide a fitting tribute to the power of a single female voice to 'speak truth to power'. At that time, it was a 'truth' that was flatly and angrily denied by the Australian senior law enforcement officials and public servants attending the seminar. The controversy that Miss Andrews's intervention provoked, which even reached the pages of *The Times* of London, was a foretaste of the royal commissions and inquiries that in subsequent decades would expose the widespread discrimination and violence directed to Aboriginal people at the hands of the police, as well as the entrenched nature of corruption and abuses of power by police.

As the eminent policing historians John Myrtle and Mark Finnane observed in their commissioned background paper on the 1963 UN seminar (Myrtle and Finnane 2013), the seminar's themes traversed two roles for police: (i) the duty of the police to maintain a system of law and order; and (ii) the duty of the police to protect the community without them infringing on the rights of anyone, including the criminal and the suspect. In reviewing the 1963 program, the challenges for policing and human rights were somewhat predictably represented as a perennial tension between crime control and due process; implicitly, the quest for police and policy-makers alike was striking the 'right' balance between these two interests.[2] The topics addressed in the seminar ranged across police powers, the right to silence, the exclusion of illegally obtained evidence, and electronic surveillance, as well as the importance of political independence and other police issues.

Much has changed for policing since 1963. The extent of those changes is reflected in the range and diversity of the 2013 conference topics, which examined, inter alia, advancements in police technology and forensic science (the use of social media and DNA profiling); the internationalisation of policing (peacekeeping missions, mutual assistance and cooperation in fighting transnational crime, and international criminal

2 Indeed, the UN seminar just predated the publication of Herbert Packer's influential essay (1964), in which he famously represented criminal justice in terms of a tension drawn between two models, Crime Control and Due Process.

courts and tribunals); the increased role of women in policing; human rights concerns around security and anti-terrorism (such as control orders and preventive detention); and police interactions with young people, minorities and disadvantaged groups, and those experiencing mental illness.

This special issue profiles only a snapshot of the work underway in Australia and overseas on policing and human rights. The first three articles provide an assessment of interactions between various vulnerable minorities and the police, and the criminal justice system more generally. Offering an international perspective, Easton critically examines the normative ideal of community policing, a new model of policing that has been enthusiastically embraced around the globe in policing agencies committed to upholding liberal democratic principles and human rights — including in her own country, Belgium. Easton's empirical study, based on extensive interview and observational data gathered over three years, reveals how policing responses are (mis)informed by frontline officers' perceptions, images, stereotyping and clichés prevalent in society about 'problem' groups. These working 'profiles' lead to more repressive police responses, though interestingly her study suggests that over-policing within multicultural neighbourhoods does *not* run along ethnic or racial lines, suggesting that 'problem' groups for police have a more diversified character than research previously suggested. The flipside to over-policing is under-policing, where police neglect of 'non-problematic' neighbourhoods misses significant opportunities to promote community cohesion and social order. The interaction between over-policing and under-policing generates what Easton terms 'blind spot' policing, in which frontline police remain 'blind' to the real policing needs of multicultural neighbourhoods.

Farmer, in the second article, assesses 'move-on' and related powers granted to police in the state of Victoria. These powers effectively bypass formal mechanisms of the criminal justice system (arrest, charge and prosecution), creating a form of police-administered justice. Farmer outlines the rationale behind move-on powers, the terms of the legislation itself, the crime prevention impacts, and the application of the powers in the context of procedural justice and rule of law ideals.

In the third article, Richards and Dwyer examine the policing (in the broadest sense of the term) of lesbian, gay, bisexual, trans, intersex and queer (LGBTIQ) young people in the youth justice system in Australia, including their interactions with police officers, courts and detention systems. The authors consider this in the context of the international human rights framework relating particularly to non-discrimination and criminal justice, while at the same time acknowledging the limitations within that framework with regards to specific protections for LGBTIQ youth and a need

for greater tolerance and non-discrimination from actors within the criminal justice system towards LGBTIQ youth.

The fourth and fifth articles of this issue deal with specific policing actions and conduct. Goodman-Delahunty, Beckley and Martin look at the nature of conduct reported in complaints against New South Wales Police, and categorise the conduct into human rights violations under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The authors consider the actions taken in regards to the complaints, and how they impact Australia's obligations under human rights treaties. The fifth article focuses on how specific human rights principles, related to fairness and procedural justice, must be applied to every step of the criminal justice process. Sivasubramaniam, Goodman-Delahunty, Fraser and Martin evaluate the protection of human rights in police interviews, with a specific focus on the recording of interviews and interview duration limits. Preliminary findings show that human rights principles are substantially followed, including liberty and security of the person, protection from self-incrimination, and protection from cruel, inhuman or degrading treatment. The authors determine that further study is required to ascertain future directions for the policy and practice of investigative interviewing.

As the disciplinary diversity of these contributions reveals, it is striking how far debates in policing and human rights have progressed in the past 50 years. Police leadership is no longer uniformly sceptical, or indeed openly hostile, to the role of human rights in policing. In police leadership circles (if not always frontline practice!) there is widespread recognition that upholding human rights (whether embedded in domestic human rights legislation or international treaties) is a vital part of the policing mission. In the United Kingdom, spurred on by the adoption of the *Human Rights Act 1998* (UK), human rights are now viewed as core *operational* policing principles: 'human rights must sit at the heart of the conception, planning, implementation and control of every aspect of the operations of the police service'.[3] Of course, the implementation of these human rights — either as policy or as ethical or operational principles — remains a challenge in specific policing contexts, as Harfield reveals in his thoughtful examination of the human rights dilemmas implicated when police engage in covert operations. Of course, as recent events in the United Kingdom have revealed, a strong policy commitment to human rights policing, backed by a

3 Cited in College of Policing 2013. By contrast, Australian police agencies do not regard human rights as an operational principle. The Australian Federal Police does, however, commit to human rights protection as part of its *international* peacekeeping mandate.

legislatively mandated authorisation scheme, may not ultimately be an adequate safeguard against the wayward actions of individual officers and their supervisors.[4]

In the final article, Miller exposes the moral and ethical problems raised by police corruption, articulating the key elements of effective integrity systems for policing. Drawing on empirical research with Victoria Police, Miller identifies that most officers are not corrupt and are keenly aware of the harms caused by corruption. Nevertheless, officers remain unwilling (for a range of reasons) to report corrupt conduct. These concerns include perceptions that such actions will generate harsh, unfair and disproportionate punishments for reported officers. Miller contends that the resultant 'blue wall of silence' combines with ineffective internal affairs procedures to sustain cultures of corruption within modern policing. Miller's contribution to police ethics more broadly is his insight that policing inherently involves conduct that otherwise (outside the policing context) would be morally harmful (for example, using force or intrusive covert or even unlawful methods to prevent or apprehend serious crime). It is only through linking the fundamental institutional purpose of policing to the protection of human rights (and other moral rights) of citizens that this type of moral harm can be justifiable.

Miller's closing article underscores the point that the vocabulary of human rights provides much of the ethical framework for police training and development. In these first decades of the 21st century, there is evidence that at least senior police leadership across the globe takes human rights much more seriously. Although human rights violations in policing around the world persist and continue to challenge us, there have been significant improvements since 1963. The last word on the 1963 seminar may be left to Dr John Humphrey, founding Director of the Division of Human Rights in the United Nations, and one of the architects of the UN Declaration of Human Rights. Reflecting upon the seminar series and the significant controversy generated in Canberra in 1963, Dr Humphrey concluded:

> The police are sometimes guilty of violating the most fundamental rights, but they also protect human rights. The excellent discussions were well covered by the press and we made a real impact on the public … The participants came from all over Asia; but it was

4 This is most powerfully revealed by the controversy surrounding Mark Kennedy, an undercover police officer who for seven years infiltrated a range of environmental protest groups. Over that time, posing as a senior leader of these groups, Kennedy instigated occupations of power plants and other unlawful direct actions. At the same time, he was also forming long-term intimate relations with women in the group. At all times, the operations had been approved by senior police leaders. The Kennedy controversy, and resultant miscarriages of justice and inquiries, are reviewed in Hyland and Walker 2014.

> the Australian delegation, which was made up largely of judges and police commissioners (who could be expected to have radically different points of view) that kept the debate going. [Myrtle and Finnane 2013, 23.]

The 2013 conference and the articles included in this special issue are a commemoration of the important idea, emerging from the 1963 seminar, to keep the debate going about policing and human rights. Although the police, legal and academic communities may not always be 'on the same page' on many of the topics discussed here, it remains vital that this discussion continues.

Finally, in our capacity as organisers of the 2013 conference and editors of this special issue, we offer our sincere thanks to the numerous local and international participants who attended the conference, and especially those who presented papers and then responded to our invitation to submit their papers for publication. Bringing the papers to publication took much longer than planned, and we offer our collective thanks to the *AJHR* executive editors, Associate Professor Chris Michaelsen, Dr Claudia Tazreiter and Associate Professor Justine Nolan, as well as the student editors Ash Wickremasinghe and Timothy Chan, for their patience and understanding concerning the 'special' issue editors.

The 2013 conference in Canberra, unbeknown to the organisers at the time, would be the last annual CEPS conference. CEPS had been established in 2007 as an Australian Research Council Centre of Excellence. It was a research-industry partnership between Griffith University (the administering host organisation), the Australian National University, the University of Queensland and Charles Sturt University and various policing agencies, including the Queensland Police Service, Victoria Police and the Australian Federal Police. CEPS ceased formal operations as an ARC Centre of Excellence on 31 December 2014, while this publication was under way. This special issue on policing and human rights therefore serves as a fitting tribute to the hard work and dedication of the community of researchers, PhD students and administrative staff, as well as policing partners, who provided support to our activities between 2007 and 2014 (profiled at www.ceps.edu.au). It would be remiss not to acknowledge the Australian Research Council, which provided substantial funding to CEPS between 2007 and 2014, including funding for the 2013 conference and, by association, this special issue on policing and human rights. ●

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Police and human rights: 1963 and 2013

David Hambly*

This is an edited version of a conference dinner speech delivered by Professor David Hambly during the Human Rights and Policing Conference held in Canberra in 2013. The 2013 conference commemorated the United Nations Seminar on the Role of Police in the Protection of Human Rights held in Canberra 50 years earlier. In his speech, Professor Hambly, who had attended the 1963 seminar, reflects upon the significance of the seminar, as well as the continuing challenges faced by modern police forces in the intervening years to uphold law and order, as well as respect fundamental human rights.

Fifty years ago, in this room at the Canberra Rex Hotel where we dine tonight, I was a spectator at the first United Nations conference to be held in Australia. I was probably the youngest person in the room. Now, I might be the only available survivor. In some circumstances, this could be liberating. History belongs to the survivors. I could tell you anything. But I am constrained by the admirable essay on the 1963 seminar that has been prepared by John Myrtle and Mark Finnane (2013). It is the product of their extensive research into official archives, contemporary newspaper reports, and correspondence and other papers of prominent participants. I shall only attempt to supplement their work by offering some recollections of the events 50 years ago, and some reflections on their significance for us today.

But first, let us reflect for a moment on the events in Boston as we are meeting.[1] We must always remember that there are many parts of the world where such calamities are a constant hazard, but it is still shocking when an attack happens in a place like Boston. Preparing for this conference led me to think about the 1960s, and in 1964–65, I lived in Boston as a graduate student at Harvard University. It was a formative experience for a young visitor from remote Australia. To give you a glimpse of that time: an unforgettable Boston highlight for me was to attend a civil rights rally in a huge high school auditorium, addressed by Dr Martin Luther King, Jr. There is a sombre contrast between my uplifting memories of Boston then, and the disaster on Sunday. I think it is proper to acknowledge the disaster and its ramifications here,

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1. On Sunday, 15 April 2013, bombs exploded during the Boston Marathon, killing three people and injuring hundreds. Participants in the seminar learnt of the bombing as they assembled for the opening session.

in a gathering of people with a professional, as well as a humanitarian, concern for public security.

Now, let me try to place the 1963 seminar in its historical setting for a 2013 audience.

As Myrtle and Finnane say, 'the event was unprecedented and its agenda potentially explosive' (2013, 4). It was a signal achievement by the UN Division of Human Rights to convene a seminar on the role of police in the protection of human rights, in Canberra, and with representatives from nations in the region of the Economic Commission for Asia and the Far East (as the region was then called). The Director of the UN Division of Human Rights, Dr John Humphrey, was at the seminar. He was a Canadian who had been the lead staff draftsman of the 1948 Universal Declaration of Human Rights (UDHR). He set an apparently modest but realistic goal: simply to stimulate awareness of human rights issues among those responsible for policing policy and practice.

The event itself was of historic significance. I remember that Justice McClemens, one of Australia's participants, said in informal discussion that he felt his fortnight was well spent simply as an expression of international goodwill. In his speech of welcome, Sir Garfield Barwick, then Commonwealth Minister for External Affairs and Attorney-General, acknowledged the ceremonial value of the gathering, partly as a celebration of the 15th anniversary of the UDHR.

While recognising the significance of the event, it must be said that there were constraints on the depth and candour of the discussions. This was clear to some critics then — some vocal, some subdued. It seems obvious today. The contrast with the relaxed candour of the international and interdisciplinary discussions here, 50 years later, is notable, but hardly surprising.

Like most professional conferences in those days, it was a forum for insiders. The organisers were predominantly government lawyers. Only two police officers — Commissioners Selwyn Porter from Victoria Police and Ray Whitrod from the Commonwealth Police Force — were involved in the planning. The participants, nominated by their respective governments, were safe choices for a culturally diverse international forum, and, overwhelmingly, lawyers or senior police officers. Distinguished lawyers of a robust, critical disposition (such as Justice John Barry and Professor Julius Stone) attended only as observers for non-government organisations.

It had the ambience of a gentlemen's club. There were no women participants or alternates on any national delegation. Several Australian women attended as

observers, representing NGOs, but observers were given very limited speaking opportunities and their contributions are not reflected in the official report.

There was another, contextual, factor. The year 1963 was extraordinary in a decade of upheaval in the Western world in social attitudes and behaviour. Young adults assertively entered political debate, questioning traditional attitudes. There were challenges to power structures based on social class and wealth. Deference to the professions was offset by new demands for accountability.

In the United States, for example, 1963 saw a massive surge in the civil rights movement, culminating in the March on Washington and Dr King's 'I have a dream' speech. Then, in the aftermath of President Kennedy's assassination in November 1963, the landmark *Civil Rights Act of 1964* was enacted. In the turmoil of the civil rights movement and the anti-war movement, there were new issues for the law and law enforcement on the balance between free speech and maintaining public order. The US courts were also intensely active in expounding the Bill of Rights in the Constitution to ensure that the protections promised to accused persons at their trial were applied in practice and not circumvented. A series of Supreme Court cases sought to extend the protections to the investigation and interrogation stages of the process, so that the protections at trial were not pre-empted at the police station. These included the unanimous landmark US Supreme Court decision of *Gideon v Wainwright,* 1963, in which the court held that an indigent defendant had a right to counsel under the Fourteenth Amendment — the 'due process clause' of the Constitution. (Australia did not establish an equivalent level of protection until *Dietrich v R,* 1992, where the High Court held that the failure to provide legal representation to indigent accused facing serious charges would violate the common law right to a fair trial.)

And, in 1963, Betty Friedan published *The Feminine Mystique*, which helped to launch a new wave of feminism, and Bob Dylan, aged 22, sang 'The Times They Are A-Changin''.

In England there were comparable social convulsions; for example, some of you will know of the Profumo affair in 1963. Philip Larkin, a gloomy, middle-aged poet, saluted 1963 in England in a poem called 'Annus Mirabilis':

> Sexual intercourse began
> In nineteen sixty-three
> (Which was rather late for me) —
> Between the end of the *Chatterley* ban
> And the Beatles' first LP.

Australia observed these tumultuous changes, and in its own small way tried to join in.

The only unplanned incident at the 1963 seminar exemplifies all the constraints that I mentioned, and the underlying sense that the times were beginning to change.

Shirley Andrews was a Melbourne biochemist with a commitment to social activism. She was honorary secretary of the Council for Aboriginal Rights in Victoria. She gained accreditation as an observer representing an international organisation, the Anti-Slavery Society for the Protection of Human Rights. Through persistence and courage, she gained the floor to deliver a brief speech that drew more media attention, nationally and internationally, than any other aspect of the conference. She spoke of discriminatory laws in all states which made Aborigines especially vulnerable to breaches of human rights, and discriminatory police practices in both city and country areas. She attracted support in the press and in private correspondence, and achieved her aim of drawing the attention of UN agencies to human rights issues affecting Indigenous Australians.

But within the seminar, officials chided her for bad manners in exposing Australian embarrassments to an international audience, and senior police requested a suspension of business so that they could reply. New South Wales Police Commissioner Norman Allan, in particular, denied that any discrimination or impropriety of this kind ever occurred in New South Wales, whether in Redfern or remote rural areas. This implausible defensiveness might now be seen as an example of the kind of incident that provoked the shift in the 1960s and 70s from deference to assertions by the professions that their standards and practices were beyond challenge by laypeople, to an acceptance of reasoned debate and principles of accountability.

So, in tune with the changing times of the 1960s, Miss Andrews, though a layperson among professionals, and with only the status of an observer whose speech was ignored in the official report, made the most courageous and consequential contribution to the seminar.

I should like now to mention two other Australians who were associated with the seminar. They were pioneers in Australian criminology and in the study of the administration of criminal justice. The benefits of their work still endure.

Sir John Barry was a long-serving judge of the Supreme Court of Victoria, the first chair of the Parole Board of Victoria and a major figure in the Department of Criminology at the University of Melbourne. He attended the first week of the seminar as an observer. He slipped away from the seminar to join a few members of the Law

Faculty at the Australian National University for lunch at University House. Fifty years later, I remember that lunch vividly. I was struck by the passion and vehemence of his opinions on law and politics. It seemed to me, mustering all the insight of a 23-year-old fledgling academic, that having narrowly missed appointment to the High Court of Australia, where he would have made an inimitable contribution, he had determined to carve out his own territory in fields of law that he deemed to be socially important, even if they were spurned by the mainstream of the practising legal profession. He said he was glad to preside in the undisturbed isolation of the divorce jurisdiction and the Parole Board. He detested personal injury litigation; he used the word 'prostitution' in referring to legal practice in that field. Fifty years later, the proposal for a National Disability Insurance Scheme might give a ray of hope that the cruelties of the personal injuries compensation lottery in Australia might at last be alleviated to some degree. Justice Barry gave his energies outside court to many aspects of public affairs. He contributed to the early stages of the family law reform movement and to pioneering the parole system in Australia. As it turned out, I spent part of my career on family law reform and I chaired a Parole Board for many years, so for me and for others in each of those fields, Justice Barry was a trailblazer.

At the lunch, his intensity, and his perception that he was a lonely dissenter who was ahead of his time, gave him the air of a visionary condemned to constant disappointment. As we left the lunch and walked through the University House library, he went to the bookshelves and returned to tell us, with sorrow, that he had donated his book on the great 19th-century penal reformer Alexander Maconochie (Barry 1958) to the library some years ago, but it was not there. The gift must have been rejected or lost. Another rebuff, another disappointment. A quick-thinking colleague said 'It will be out on loan to a reader'. This had not occurred to Justice Barry, and he almost smiled at the thought that this theory might be true.

The library at the Australian Institute of Criminology is named in his honour. I recommend Mark Finnane's biography of Justice Barry (Finnane 2007) as rewarding post-conference reading.

I encountered Norval Morris in 1958 when I was a student and he, at 35, was an exceptionally gifted teacher in undergraduate classes in criminal law and torts at the University of Melbourne. Although his students could not help but believe that we were getting the full blast of his enthusiasm and energy, his teaching in law must have been almost incidental to his prodigious work in criminology and in advising governments here and overseas. He was a protégé and a lifelong friend and colleague of Justice Barry. He was closely involved in planning for the 1963 seminar, but he withdrew from participating when he was appointed to an important new UN post in Tokyo.

From 1964, he held a chair in law and criminology at the University of Chicago for 40 busy years. As well as academic and advisory work, he stimulated public debate in the United States with books such as the provocatively titled *The Honest Politician's Guide to Crime Control* in 1970. I shall just add a note on the less publicised aspect of his career. Exceptional teachers bestow enduring inspiration on their students. Norval Morris was such a teacher.

Barry and Morris were mainstays of the long campaign that achieved the establishment of the Australian Institute of Criminology. It is a memorial to both of them.

Norval Morris had urged that the theme of the 1963 seminar should be 'the dual obligation of police in relation to the human rights of the citizen — the duty to protect the citizen from antisocial behaviour by others and also from the use of excessive police powers by the state'. This seems to me to be a theme of significance, whether in 1963 or 2013. As eminent policing scholar Professor David Bayley reminded us yesterday in an address titled 'Progress and prospects for human rights policing', these obligations need not be antithetical. To advance human rights is to advance public safety. Nevertheless, the relative emphasis given to these obligations at any time will influence our perception of the role of police in the protection of human rights.

As Tim Vines, representing Civil Liberties Australia, showed in his presentation '50 years of police/civil liberties interaction', at the level of legislation and government policy in Australia, social and technological change is producing a shift in the balance of policing obligations. Proliferating legislation affecting the prevention and investigation of crime and the interrogation of suspects, as well as legislation reacting to terrorism, has moved the balance towards public security, with incursions on civil liberties. Conferences like this give an opportunity to ask whether the balancing of policing obligations is appropriate.

However, in order to place that question of high policy in perspective, may I invoke the spirit of Shirley Andrews, and respectfully draw your attention to some 'elephants in the room'. The first elephant: no matter how impressive formal rules and procedures affecting police and human rights may be, they count for little if the criminal justice system is polluted by delay. 'Justice delayed is justice denied' is a timeless adage. The Magna Carta promised 'To no one will we sell, to no one deny or delay right or justice'. Even Shakespeare's Hamlet moaned about 'the law's delay'. The adage might seem trite today, but it is profoundly true. For complex reasons, even in affluent and sophisticated countries, delays in many courts are becoming overwhelming. Lives of victims, witnesses and accused are stalled. Prosecution failure rates go up alarmingly. Trust in the integrity of the system evaporates. The

New York Times is this week running a series of articles on the utter breakdown of the criminal courts in the Bronx, and the demoralisation of everyone in contact with them. The noble protections of the Bill of Rights, promised to all Americans, mean little in the Bronx in the face of chronic, hopeless delay.

We cannot be complacent. We have a mounting syndrome of delay in Australia. We all know this, but delay in the criminal justice system is insidious and intractable, and our sensitivities become blunted. To give a small example: the Australian Capital Territory has the highest percentage in Australia of prisoners on remand, awaiting trial: 34.7% of all prisoners. This is unacceptable.

The second elephant: efforts to enhance policing and to protect human rights can be frustrated by indiscriminate legislative sentencing policies, such as mandatory sentencing regimes.

A third elephant enters the room when a government acts in breach of international human rights standards. For example, although Australia is a party to the UN Refugees Convention, governments on both sides of politics have imposed mandatory detention on so-called 'boat people' seeking asylum. I do not want to gloss over the complexity of the issues, or to take a partisan position. But there is now a proposal, which one party will apparently take to the next election, that would go even further, and create new functions for police. Asylum seekers released into the community will be subject to a regime called 'behaviour protocols, with clear negative sanctions for breaches of such protocols'; they are not to be housed near 'vulnerable communities'; 'neighbouring residents must be alerted in advance of boat arrivals being located in their community', according to Scott Morrison MP. All this will involve notification and consultation with police. Presumably, police will have duties of enforcement (Morrison 2013; see also Zagor 2013). Professor Bayley spoke yesterday of migrants, human rights and xenophobia. Such a scheme would indeed pose new questions about the role of police in the protection of human rights.

It remains for me to thank Professor Simon Bronitt and his colleagues for their enterprise in organising this 50th anniversary event. An Australian poet, Alan Wearne, wrote sadly about a recent academic conference. He said (Wearne 2012) that he emerged with:

> Frequent flyer points and tears, tears, tears,
> Backstabbed, bitten and burnt.

I think we have done rather better than that. Whether in spite of or because of the gravity of the subject matter, our discussions have been congenial and purposeful. We look forward to the next conference on a milestone anniversary of the 1963 seminar. Because of everything that has been said here about the pace of technological change, I expect that we shall all be able to participate next time, wherever we happen to be. ●

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'Blind spot' policing in Belgian multicultural neighbourhoods and the implications for human rights

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This article reconsiders the findings of three years of qualitative empirical research in six Belgian multicultural neighbourhoods on the dynamics of policing in terms of its implications for human rights. Based on interviews with both police and ethnic minorities, as well as observations of police interventions on the beat, our findings show that police knowledge of certain groups in multicultural neighbourhoods influences their images of those groups. More specifically, these images strongly influence police actions in relation to those groups by generating over-policing and under-policing. This leads to some form of 'blind spot policing' with implications for the right to security of citizens living in these neighbourhoods. Furthermore, these findings generate questions in relation to whether police can be true guardians of human rights and to the intrinsic ambiguities emerging from the Belgian model of community oriented policing.

Keywords: democratic policing, right to security, community policing, multicultural neighbourhoods, 'blind spot' policing, police tradition

Introduction

This article reconsiders the findings of three years of qualitative empirical research in six Belgian multicultural neighbourhoods on the dynamics of policing in terms of its implications for human rights. This Belgian research can be considered a contribution to police sociology through which the project sought to understand police work by studying the social processes taking place between the police and citizens (Van der Torre 1999). The project aim was to shed light on the complex dynamics inherent in police work in multicultural neighbourhoods in Belgium through undertaking research on the interactions between police personnel and citizens. Paying attention to both sides of 'the story' allows us to reflect upon the relationship between police work and human rights, and the implications for the right to security of every citizen.

To develop our argument, this article is divided into seven parts. In the first part, we elaborate on the idea of the police as guardians of human rights in a democratic

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society. The second part explains the explicit policy choice adopting community oriented policing in Belgium and examines its link with human rights. The unique character of the Belgian research is described and contextualised in the third part of the article. The research design is described in the fourth part and the main findings in the fifth part. Interactions between images, feelings and actual behaviour of the police are addressed in the sixth part and the voice of residents of multicultural neighbourhoods is central to the seventh part. This leads to the conclusion that enables us to reconsider these findings in relation to human rights and community policing.

Police as guardians of human rights in a democratic society

The strength of a democracy, it is often said, can be measured through its respect for human rights. Human rights treaty ratification, although valuable, is not enough (Neumayer 2005) and there remains an urgent need to examine the operation of both policies and practices in the field. This is particularly true in relation to police work, since the mission and functions of the police in a democratic society have implications for the balance between freedom and security. In democratic societies, the mission and functions of the police are defined by reference to the two key concepts of 'law' and 'order'. 'Law' in this context includes municipal laws, but also the fundamental human rights and freedoms enjoyed by all citizens. 'Order' refers to the central values in society that promote peace and security, and derive their legitimacy from agreement of the majority. The balance maintained between safeguarding the rights and freedoms of every citizen and upholding the public order is a matter of abiding concern for any democracy (Lustgarten 1986; Monet 1993; Keith 1993). Police are directly confronted with this balancing act in exercising their functions.

The traditional paradigm through which policing is operationalised is known as the 'law and order' approach (Monet 1993). On this view, 'order' is invariably placed above 'law'. Order is the state authority embodied within and constituted by the police, while law is what legitimises this authority (Van Ryckeghem, Huens and Hendrickx 1998). Most modern European police organisations were founded in the 19th century for the express purpose of creating and maintaining order within the state (Keith 1993; della Porta and Reiter 1997). Apart from this conceptualisation of the police as an embodiment of state authority, the traditional paradigm rests upon an instrumental vision of policing. In a democratic society, the public police is a professional force that contributes to safeguarding the legal and constitutional rights of everyone. To this end, the police are given a monopoly on the legitimate use of violence. On this conception of policing, police officers are merely simple enforcers of the law and its directives; this ideal of strict enforcement of law denies police officers any power to exercise critical independent judgment on whether or not the

law should be enforced. Consequently, law is perceived by police officers as being a compulsory and restrictive framework for policing work (Monet 1993; Monjardet 1996; Van Ryckeghem, Huens and Hendrickx 1998). The law is coercive because the law *should* be applied. As reflected in the Latin maxim *dura lex sed lex*, the law is an end in itself.

In totalitarian regimes, this instrumental view is that the police are a tool for upholding the power and authority of the state. In democratic regimes, the police are enlisted in the service of order, authority and the law (Monjardet 1996). From an instrumental viewpoint, the police are a mere sword in the hands of the domestic government (Cachet 1978), reinforcing the ideal that policing is apolitical — a position that has been highly controversial and contested in the academic literature (Reiner 1992; della Porta and Reiter 1997).

The traditional model embodies two elements for policing: undertaking state action and upholding state authority. This model, with its two core assumptions, has shaped the development of most European police organisations in the 19th century (Monet 1993). This traditional paradigm is present in many contemporary models of policing and is observable in police models in Western liberal democracies, as well as in those policing models exported to their former colonies or post-conflict areas (Easton et al 2010). It has always been striking to contrast the British model of *domestic* policing by consent (characterised by an unarmed force of 'bobbies') with the export model of *colonial* policing (characterised by armed paramilitary forces) applied across the British Empire, including in India (Jauregui 2010). Nevertheless, the traditional view of policing has been increasingly questioned since the second half of the 20th century, with growing awareness that a different style of policing is required to meet the changed needs and expectations of modern Western liberal democracies.

One possible answer that has emerged is community policing, a philosophy that addresses the question of how to make the police more democratic and responsive to the community they serve: 'an inclusive philosophy that promotes community based problem-solving strategies and encourages partnerships between police and communities in a collaborative effort to solve crime and disorder' (Fleming 2009, 37). One of the basic ideas of community policing is that the police should first understand the nature of societal problems before they decide what kind of answer the police can or should provide. It implies a critical reflection on the role of the police in solving complex societal problems. Community policing requires that the underlying cultural assumptions of the traditional model of policing should be questioned (Van Ryckeghem, Huens and Hendrickx 1998). On the level of the role and position of the police in society, this questioning leads to a considered choice in democracies to stress 'law' before 'order'. In practice, this means that the rights and

liberties of the minorities are being protected without neglecting attention for the values of the majority (namely, the maintenance of public order). To be able to do so, the police need to work on their relationships with the civil world and be a part of society, like schools and churches. From the point of view of community policing, the police are assumed to be guardians of human rights in democratic societies.

Human rights and the explicit choice for community oriented policing in Belgium

The sources of the concept of human rights in Belgium are diverse and an important context for the research presented in this article. Global, regional and European treaties and the national constitution are the main points of reference. Undoubtedly, the United Nations Universal Declaration of Human Rights, signed on 10 December 1948, has been a global key initiative and a crucial starting point for the development of other human rights conventions (De Raedt 2013). In the context of discussing police work in Belgium, the European Convention on Human Rights (ECHR), signed on 4 November 1950, is very important. The ECHR has direct links to Belgian national law; its jurisdiction is often associated with the exercise of the police functions, as exemplified by the fact that parliamentary work in relation to our police legislation explicitly refers to the ECHR (Goossens 2006). The Belgian *Law on the Police Function* (05/08/1992) stipulates that the police should fulfil their administrative and judicial functions while protecting individual rights and freedoms and the democratic development of our society (Art 1). Article 1 is considered to be 'an anchor' in the field for linking human rights and police work in Belgium (De Raedt 2013).

Another important context is the profound (structural and cultural) reorganisation of the Belgian police system in 1998. The Belgian *Law on the Integrated Police* (07/12/1998) implied a structural reorganisation in which the municipal police forces, gendarmerie and judicial police forces, which formerly constituted separate independent agencies, were integrated. Since then, the newly created Integrated Police Force consists of a federal police component and a local police component, which are functionally (though not hierarchically) linked to each other. This structural fusion, which was on the political agenda for many decades, can be considered as one of the most significant administrative reorganisations of the Belgian landscape of public policing. The forces driving change were dysfunctions in each of the police forces, including lack of information exchange and the incompetence of police officers. Scandals, including the Dutroux affair where the 2004 trial of a child molester and serial killer exposed serious failures in Belgian policing, further garnered political momentum for police reform.

An important element within this profound change is the cultural component. Belgian policymakers had the intention to change the culture of the public police by introducing a new philosophy of community oriented policing. Together with police practitioners and academics, key policy documents were developed to steer the implementation of community oriented policing in Belgium (Vande Sompel et al 2003a; 2003b). In addition to drawing on Anglo-American expertise, insights from community policing in South Africa and Sweden were used to develop the five central steering principles (Van Ryckeghem and Hendrickx 2001; Van Ryckeghem, Hendrickx and Easton 2001). These principles were 'external orientation', 'problem-solving', 'partnership', 'empowerment' and 'accountability' — principles which are now considered to be the keystone of the Belgian interpretation of community oriented policing. All five principles, which are mutually reinforcing, are central to the nature of police work and the role of policemen and policewomen as guardians of human rights in a democratic society.

'External orientation', for example, explicitly refers to the fact that the public police should be a part of our society, delivering their services to all citizens on an equal basis, regardless of race, gender or other status. Rights and freedoms of members of minorities should be safeguarded and cannot be brushed aside in the interests of the majority. With this principle, community oriented policing directs police attention towards vulnerable or disadvantaged communities in our society. 'Empowerment' refers to the need to support the emancipation of communities, and the stimulation of resilience and social self-reliance. The aim is that people can take greater care of their own security and safety and, in the (ultimate) end, the police are not needed anymore. The remaining principles of 'problem solving', 'partnerships' and 'accountability' reinforce the functioning of 'empowerment' and 'external orientation'. Problem-solving demands an open mind towards understanding the complex societal problems that lie behind disorder and crime, which are the symptoms that frontline police are confronted with on a daily basis. Since the public police is no longer the main security actor, 'partnerships' are needed to address these underlying problems and symptoms. 'Accountability' in relation to goals and means used by the police is considered to be the tail-end of this democratic model of policing. Finally, it is the interaction between these five principles that is considered to be essential in the philosophy of community oriented policing in Belgium, cultivating, at the individual level, new attitudes and mentalities that police officers are guardians of human rights. Nevertheless, it is obvious that the five central principles of community oriented policing are an ideal type, and that the implementation in the field often tells a very different story (Easton et al 2003).

Belgian lawmakers made the explicit choice for police that they must act according to the principles of community oriented policing (departing from the traditional

instrumental model described above). The fact that this philosophy has been embedded both in the substantive law on policing and in ministerial circulars makes Belgium quite a unique and interesting case study. The adoption of community oriented policing at the legal policy level implies clear expectations towards operational frontline police officers in terms of being guardians of human rights in the field. This contribution is aimed at discovering how this philosophy applies in practice in Belgian multicultural neighbourhoods.

Community policing in Belgian multicultural neighbourhoods

Taking into account that community policing grew out of Anglo-American policing conflicts with minority communities in the 1980s (Fleming 2009), the question is raised what this philosophy could mean in the context of Belgian multicultural neighbourhoods. Although Belgium is a small country on a global scale, it has an interesting migration history and Belgian cities are confronted with challenges that resemble those of any other West European capital (Liedenbaum et al 2013). Since the Second World War, Belgium has known three waves of migration. The first wave included work-related immigrants from Italy, Spain, Portugal, Morocco and Turkey. Families were being reunited during the second migration wave (in the mid-1970s) and nowadays the third wave involves a more diffuse group of migrants entering Belgium. This group contains refugees, asylum seekers, highly skilled and educated people, fugitives and people coming over to marry Belgians, but also people without any papers at all (Martens and Caestecker 2001; Meuleman and Billiet 2003; Wets 2001; Timmerman, Clycq and Lodewycks 2004).

International research and Belgian research (to a more limited extent) examining the relationship between the police and ethnic minorities reveal both tensions and complicated interactions (Bowling, Phillips and Shah 2003; Casman et al 1992; Haen Marshall 1997). These studies often point out that the cause of this difficult relationship originates in conflicting cultural backgrounds and a mutual construction of negative images, which often lead to self-fulfilling prophecies of conflict between the police and these groups. From the perspective of ethnic minorities, this is frequently connected to (perceived) racism in the police (Casman et al 1992; Brunson and Miller 2006; Goodey 2006) and to social vulnerability and exclusion (Sun, Payne and Wu 2008). Studies suggested that this may lead to the development of a 'vindictive subculture', which is also directed towards the police (as 'delegates' of the Belgian government) (Hebberecht 1995; Bekkour 2001). On the other hand, negative images of ethnic minorities held by the police are often linked to a belief in the validity of official crime data and to the frequency of negative confrontations, which bolster stereotyping processes and sustain an inadequate knowledge of ethnic communities (Casman et al 1992;

Feys 2002; Hebberecht 1995; Van San and Leerkes 2001; Walgrave 2002). The bulk of the research is, however, usually fragmented in the sense that it focuses on particular elements of this relationship (for example, institutional racism: see Lee 1981) or treats it merely as a secondary subject — for example, not making it the focus of research in any way (see Van San and Leerkes 2001; Vercaigne et al 2000). These limitations provide compelling reasons to examine both sides of this 'story' in Belgium, in order to reveal what is actually happening in the field. On the one hand, researchers are interested in revealing how police officers deal with the reality of working in multicultural neighbourhoods on a daily basis. How is community oriented policing being implemented, and how have officers and community members responded to the assumption that police are guardians of human rights in these neighbourhoods, specifically in relation to upholding the right to security? On the other hand, researchers are interested in revealing the perspectives of people living in those multicultural neighbourhoods, their expectations towards the police, and their interpretation of community oriented policing and the safeguarding of their human rights. The main research question is what dynamics are at play in the streets of these multicultural neighbourhoods, and what the implications are for the assumption that the police should be the guardians of human rights. In the next part of this article, we sketch the methodology employed to obtain data about these everyday policing realities and practices, and the main research findings.

Empirical qualitative research in five Belgian cities

This article is based on revisiting the findings of a three-year empirical, qualitative study completed in 2009 on policing multicultural neighbourhoods in Belgium (Easton et al 2009). For the purpose of this article, we focus more specifically on two aspects of this research. First, we examine the images that 'street cops' develop in relation to groups of residents within multicultural neighbourhoods being studied. We pay attention to the link between their images and thoughts (stereotypes), feelings and appreciation (prejudices), and actual behaviour (discrimination). Second, we examine the images being developed by some members of those groups (residents of the neighbourhoods) in relation to the police. This generates insights on the 'fit' between both images and the dynamics that play in the field. It inspires us to reflect upon the nature of police work in multicultural neighbourhoods and the role that street cops play as guardians of essential human rights.

This research took place across six multicultural neighbourhoods, over a six-month period in each neighbourhood, in Brussels (two neighbourhoods), Charleroi, Seraing, Antwerp and Genk. The study focused on neighbourhoods with a heterogeneous demographic composition. The degree of urbanisation (small to large cities ranging

from 50,000 to 500,000 inhabitants in Belgium) and the diversity of the residential histories of the ethnic minorities (in terms of the migration waves mentioned above) were the main criteria for selecting the neighbourhoods in these cities. Although the available statistics never fully reflect the real flow of migrants, a large diversity of ethnic minorities was covered in the selected neighbourhoods. The main groups were people from (North) Africa, Turkey, Roma, Armenia, the Philippines, Pakistan, Italy, Iraq (Iraqi Kurdistan), Nepal and Poland. A characteristic of each of the multicultural neighbourhoods being studied is the accumulation of economic and social problems. Poor housing, lack of public space, unemployment, health problems, nuisance and social disorder are part of everyday life for many people living in these kinds of neighbourhoods (Liedenbaum et al 2013).

Two researchers worked full-time on this project for about three years. After studying the context of each of the selected neighbourhoods, an intensive period of observation took place in which the researchers contacted people living and working in the neighbourhood (the social sector and the public police). A total of 37 members (or representatives) of the immigrant community were interviewed (in Dutch, French or English) and 24 police officers were interviewed before going into the field for observation (182 days in total). It is important to note that the researchers entered the field of research by starting to build up contacts with (representatives of) ethnic minorities to prevent being considered as 'the enemy'. This allowed them to obtain a picture of the images developed by the community before interviewing and observing police in the field.

The focus of the observations (or the 'unit of analysis') was the interactions between the police and ethnic minorities. Police on the beat and during interventions were observed because they have the most frequent contacts and interactions with citizens in the field. Observations were made during the day and overnight, and the available time was used to ask questions about attitudes, behaviour, intentions, perceptions and consequences of certain interactions. Citizens and police officers of a variety of ages, genders, experiences and ethnic backgrounds were selected for these purposes. We now turn to the main research findings.

Over-policing and under-policing in dealing with multiple communities

The fieldwork revealed that the police regularly come into contact with only parts of the community that they should serve. So-called 'regular customers' are 'over-policed' (also referred to as 'police property': Reiner 1994), compared with 'under-policed' groups with which the police hardly, if ever, come into contact. Both groups are part of the same heterogeneously composed neighbourhood. The police, however,

experience these groups as multiple neighbourhood communities related to an extremely fragmented social patchwork of origins, behavioural patterns, preferences, statuses, 'cultures' and ages. The striking conclusion is that the line of separation between both groups does not run clearly between immigrant groups on the one hand, and non-immigrant groups on the other hand. The boundaries of groups that are being over-policed and under-policed sometimes coincide with ethnicity, but are likely just as much to correlate with other variables such as age, lack of parental control, gender and marginality.

The 'regular customers' are a minority of groups and individuals in the neighbourhood who repeatedly call on the police services and interventions. Police officers encounter these citizens on a regular basis as 'victims', but also as 'offenders' of different types of crime. These groups, which contain native Belgian people and ethnic minorities, live in marginal conditions of housing, work and health. They have weak social networks and often lack the ability to take care of themselves. For these people, the police are often the only helpline available 24/7. Due to the nature and the frequency of the contacts, the police experience a feeling of 'proximity' towards these residents. Police develop strong perceptions about this small but problematic group with which they are constantly being confronted. They build up images of group members, ascribing them with specific attributes and nicknames such as 'drunks', 'petty crooks', 'jerks', 'tramps' and 'amoebas'. The nicknames are mainly used internally to communicate between colleagues about the complex social phenomena related to this group. Police consider this language to be a functional shorthand in the field that assists them to predict possible behaviour and to be ready to act accordingly. After all, these police are the ones who have gathered much knowledge and experience about (the context of) this group of people. Accordingly, this street 'knowhow' makes them able to adjust their intervention strategies — which can be preventive but also repressive, depending on the nature of the problems.

This kind of knowledge is not available in relation to the group of people being 'under-policed' in multicultural neighbourhoods. The research pointed out that police officers have far more vague perceptions and images of these groups, which can be subdivided into the problematic and the unproblematic. The problematic category contains people who represent to police in the role of a victim, though this group rarely seeks police assistance. Roughly three groups can be distinguished. The first group of people are travellers, mobile groups of people such as asylum seekers, people without papers, gypsies and students. As mentioned earlier, these people stay for a shorter period of time in the neighbourhood where there is a high turnover of population. Quite often, these transient people are simply afraid to talk to the police, or they think that the police are unable to help them, as their problem is not a priority — for example, in cases of rape or stolen bikes. The second group are

people who have a long history of living in the neighbourhood, but who prefer to manage their own problems in the community without the help of the police. In the neighbourhoods examined, the Turkish and Pakistani communities are considered to be an example of this group. The third group of people are new residents in the neighbourhood — for example, new immigrants from Eastern Europe. Police on the street do not feel comfortable dealing with these groups and indicate that they feel a 'distance' towards most of them.

On the basis of our interviews and observations, we have found out that the lack of information about these people generates vague perceptions and images and triggers stereotyping and the acquisition of clichés (such as 'Eastern Europeans use heavy violence' or 'gypsies are kidnappers') that are prevalent in society with regard to these groups. Far more important are the effects of these images on their empathy and feelings, and eventually on their actions and behaviour in the field. The lack of any contextual information about these groups in their neighbourhood prevents police officers from developing different strategies to deal with the nature of the problems encountered. As a result, observations show that more repressive strategies are being used to deal with these problematic groups.

The take-home message from this research is that the experiences of street cops in multicultural neighbourhoods are fragmentary, since police only have contact with some of the groups and individuals living in the neighbourhood, regardless of ethnicity. Moreover, the images that these police develop on the basis of these fragmentary experiences are selective, as the research revealed that not all experiences have an equal effect on the image that the police develop of these groups. Moreover, a pitfall lies in the observation that the intertwined perceptions of known groups and unknown groups (which leads to over-policing) convinces police officers that their images are equally grounded in reality and experiences. However the observations show that this is a misconception of reality and that 'fragmented experiences' and 'selective images' are generated in the field (as developed above). This truly holds a risk in terms of democratic policing.

Our main argument is that this dynamic of over-policing and under-policing generates what we term 'blind spot' policing. This occurs when policing in these neighbourhoods develops without awareness about the blind spot in perceptions and images that are generated in the dynamics of working in the field. As a result, policing is 'blind' to the needs of some of the groups living in those neighbourhoods, which threatens the right to security of those groups. The research reveals that a complex range of factors is at work in a dynamic that is further explored below.

Factors influencing the relationship between images, feelings and actual behaviour

The qualitative nature of this empirical research revealed some of the factors that influence the connection between images, feelings and actual behaviour of street cops in multicultural neighbourhoods. In relation to human rights, this connection is crucial as it sheds light on the link between stereotyping (on the level of images), prejudices (on the level of feelings and appreciation) and discrimination (on the level of behaviour). A pressing question arises whether the labels and categories described above produce more prejudiced street cops who engage in discriminatory policing in Belgian multicultural neighbourhoods.

Our research identified some inductive factors that contribute to the complex relationship between images, feelings and the behaviour of street cops. Roughly four main factors can be discerned. The first factor relates to the tendency of police on the beat to set priorities themselves, more or less independent of implemented official policy. These officers prioritise much more on the basis of perceived and experienced realities in the workplace (in terms of criminality, troublemaking and neighbourhood problems). Police on the beat construct their own mental crime profiles, which they relate to specific communities and to which they tailor their own approach. These profiles rest largely on anecdotal 'hands-on' experience and are not informed by systematic analysis. Some well-defined minorities, such as gypsies (members of Romani or other groups with itinerant traveler lifestyles), suffer directly through this. Street cops experience mental and physical distancing in relation to this group and even systematically attach to the group a particular crime profile (such as 'gypsies are thieves'). It is a group whose negative image always comes through during interactions, regardless of the police officer(s) involved or the specific situation. Second, situational aspects often influence the tone of an interaction and the approach taken by the police. It is in the concrete situational context that underlying perceptions or preferences are expressed. This tends to be the case if the situation and, more particularly, the behaviour of the citizens coincides with the presumed attributes that police have given to the person or group through their categorising system. In this way, street cops have their preconceptions confirmed, for example, when they catch a gypsy in the act of stealing. This finding is extremely consistent and is strongly related to the way in which street cops define their own role and how they interpret the behaviour of the citizen encountered. The third factor, which has already been explained above, is the amount of contextual knowledge that street cops have about particular (members of) groups they are policing. During interactions with the so-called 'property groups', the police may select from several strategies depending on the situation. They may depart from the dominant social narrative about the group and, due to their varied experience, opt for other specific strategies or even a custom-made approach. This may be tough and controlling,

but also conciliatory or mediating. However, these choices appear to be missing in interactions with groups for which only partial (hands-on) knowledge is available. At such moments, street cops seem to lose their grip on the situation and fall back on a kind of 'consensus approach', which leans closely towards underlying but clichéd perceptions and exaggerated criminality profiles.

Finally, the 'cultural and social capital' of street cops is a fourth crucial factor influencing the link between images, feelings and behaviour. This covers all the underlying attitudes, political preferences, knowledge and social skills, as well as experience, knowledge of various social representations and trends, social networks and environments frequented in their private life. For example, this factor clarifies the often precarious relations between street cops and young North Africans in the neighbourhoods being studied. In general, negative images about these young persons and problematic relationships with police are being observed. Perceptions of North African youths rest on explicit mental crime and troublemaking profiles. We were, however, unable to observe any so-called 'consensus approach', as opposed to the observations with regard to gypsy families. On the contrary, during interactions with Moroccan youths, for example, we observed caution. Despite the negative image, we observed a variety of 'soft' and 'hard' strategies in practice, which varied greatly from officer to officer. However, some police followed a 'black-and-white' reasoning, opting for a tougher response regardless of the situation. This type of approach could be observed mainly among police officers who placed themselves on the right of the political spectrum, and who were quicker than other colleagues to criticise multicultural society. They appear less ready to take a mediating line. Other police demonstrated a more subtle and moderate approach. They were also the ones who took the trouble to put their colleagues' negative statements about policing multicultural neighbourhoods into context when talking to the researchers in the field. They even corrected their colleagues' statements or actions, but never engaged in this criticism in the presence of any citizen.

These factors indicate that existing images do not always or automatically translate in certain appreciations and accompanying behaviour. Street cops using the labels and categories mentioned above are not automatically prejudiced in their work and do not always manifest discriminatory behaviour on the streets. It is possible that they share jokes (containing racist stereotypes) about certain groups when they are with their colleagues but, confronted with members of those groups on the street, demonstrate appropriately respectful behaviour. We observed a wide variety of relations (between images, appreciation and behaviour) and most of the time interaction effects are at play with the factors above. Nevertheless, abuses do occur, and these need to be taken seriously and they demand accountability. Over-policing and under-policing that exist in multicultural neighbourhoods create blind

spots in the service delivery towards citizens. This threatens the right to security and negatively influences the relationship between police and residents in these neighbourhoods. In the next part of the article, we shift focus from the perspective of police officers to that of residents.

Listening to residents in multicultural neighbourhoods

Reviewing the data gather on the perceptions and experiences, as well as the needs, of the interviewed residents (n = 37) with regard to police conduct, the following can be concluded. First, residents of these neighbourhoods expressed the desire to be treated equally and do not wish their particular ethnic origin to be viewed as important during interactions with the police. Second, residents have specific requirements regarding the tone and attitude during interactions with street cops. They expect police to adopt a respectful, professional and objective approach in which (cultural) subtleties are taken into account. Third, residents want to be recognised as 'victims' of the neighbourhood context, and want the police to pay attention to their vulnerabilities. Fourth, they expressed a preference for vigorous, efficient 'hard' police who deal with the problems in the neighbourhood (such as nuisance), but who also listen to them and who know the community and take into account their expectations and concerns. Regarding these findings, there are no significant differences between over-policed and under-policed groups, between problematic and non-problematic groups, or between ethnic minorities and native Belgian people in the neighbourhood. It appears that all residents interviewed wanted the police to be present, reachable, available and familiar with their problems. Combined with the findings related to over-policing and under-policing, this data reveals a blind spot in policing where the needs of citizens are not being met.

Variation in the images, needs and expectations of residents of multicultural neighbourhoods can be linked to a range of factors, including the age and attitude of the street cops; personal experiences and recent incidents with street cops; impressions or 'stories' told by other residents; the image of the police in the residents' homeland; their immigration status; feelings of being treated unfairly; perception of the societal climate in relation to immigration age, role and function of the residents in the neighbourhood; and concerns about (the status of) the neighbourhood. For example, resident migrants from war-torn countries or without any papers are more afraid of the police and have lowered expectations accordingly, as the following reflection of a citizen from Russia reveals:

> The reason that I do not like to see or be close to the police is related to my experiences in my home country. I am still afraid of the police. Although I do not commit any crime … I just do not like to have contact with them.

Another example comprises residents from the Turkish community, who often have a preference to solve their own problems and who often hesitate to call upon the police for help.

It is interesting to examine the congruence of these images and expectations of residents to the key principles of community oriented policing. Their expectations and complaints are mainly linked to 'external orientation' and 'problem solving'. Analysis of their responses reveals a discourse that creates the image of a repressive, reactive but also 'distant' and passive police. Too often, residents meet the police in a negative context and they complain about slow or even unresponsive police. Furthermore, residents perceive police vehicles as 'shields' that block and interfere with police–citizen interactions. Residents believe that police officers lack the necessary information on what is happening in the neighbourhood, which impedes performance and authority in the field. Even the police officer on the beat is considered to be quite repressive and 'hasty'. More regular contact and communication in a neutral context, with structured dialogue through community organisations, would be welcomed. It seems that these groups want a multiple community oriented police — which, due to the dynamics of over-policing and under-policing outlined above, is a serious challenge for police services to institute in their neighbourhood.

Conclusion

Revisiting the empirical research on community oriented policing in Belgium, this article has revealed that the dynamics of policing in multicultural neighbourhoods generate blind spots in which certain problems are not being addressed by the police, with the result that the right to security of some residents might be threatened. Researchers observed a Janus-faced story of police practices, in which some problems were over-emphasised while others were under-estimated. A process of under-policing and over-policing is taking place in these neighbourhoods. This prevents full service delivery by police to all residents, who (in theory) equally share the same right to security. Some of these problems remain under the radar of police, although they form part of the multifaceted problems confronting multicultural neighbourhoods. Over-policing and under-policing are two sides of the same coin, since, as this research demonstrates, they can co-exist within the same multicultural neighbourhood. The research demonstrates that the most vulnerable communities in those neighbourhoods include individuals drawn not only from ethnic groups, but also from native Belgian groups that experience disadvantage and social deprivation. The contradiction between the images and expectations of the residents, and the images and perceptions of the street cops, reinforces the existence of what we have called 'blind spot' policing. The ultimate challenge for policing and policymakers is

to balance over-policing and under-policing in multicultural neighbourhoods that are particularly vulnerable to these dynamics.

The identification of blind spot policing puts pressure on the concept of community policing, and is fundamentally at odds with the idea of the police as guardians of human rights. Blind spot policing generates shortcomings in police interactions with all citizens within a defined geographical space, such as a neighbourhood, and for the police role in protecting the citizens' right to security. The finding that the division between over-policing and under-policing does not run along ethnic lines might moderate the problem slightly. The findings of this research do not add any strength to the argument linking ethnic profiling and over-policing, as suggested by earlier research (Open Society Justice Initiative 2012). An exception to the rule, however, was identified in relation to gypsies in Belgium. As in other European countries, this group suffers from the risk of stereotyping directly translating into repressive behaviour by the police, with officers paying little (if any) attention to the specific context of particular group members and their behaviours.

In respect of under-policing, one might assume that police paying no attention to unproblematic groups is not an issue at all. Unfortunately, this is not the case. Many members from these unproblematic groups contribute to the positive dynamics (collective efficacy) in the neighbourhood — for example, taking initiatives to bring people together, establishing start-up businesses, developing informal power, building social cohesion through networking, and so on. These actions may be unknown to street cops, though knowing about these dynamics could offset the cynicism, frustration and professional isolation that most street cops develop due to their almost total preoccupation with the groups being over-policed. The research findings generate further questions in relation to the definition of '*the* community', upon which the concept of community oriented policing rests. The research shows that the singular idea of *the* community is difficult to grasp — especially in multicultural neighbourhoods where there is a huge degree of anonymity, and a constant movement of people coming 'in' and 'out' of the neighbourhood. The fact that most of the local police officers in this study did not know exactly who was living in their neighbourhood indicates the scale of challenge faced in implementing community oriented policing and the barriers police will continue to face in performing their assigned role as guardians of human rights. ●

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'Is a 24-hour ban such a bad thing?' Police-imposed banning notices: compatible with human rights or a diminution of due process?

Clare Farmer*

A key element in Australian policing in recent years is the growth of police-imposed discretionary summary justice. The rise and impact of on-the-spot fines, infringement notices, exclusion orders and move-on powers enable police-initiated resolutions and punishments to be imposed, often without legal or judicial intervention. These operational policing mechanisms reflect underlying pressures to reduce costs, ease the burden on the court system, and speed up the decision-making process, but when viewed from a human rights perspective the potential consequences are significant.

Focusing on the legislative development of banning notices in Victoria, this article highlights the impact of such a police-imposed punishment upon individual due process procedural protections. Banning notices deny the recipient the right to conduct a defence, undermine the presumption of innocence, and conflate notions of pre-emption and punishment.

The rhetoric upon which the banning notice legislation is predicated obviates meaningful scrutiny of the diminution of individual rights that are implicit in its enactment. A perceived 'need' to control disorder and 're-balance' justice to prioritise community protection is used to legitimise any consequential impact upon the principles of criminal law, due process and human rights.

Key words: police-imposed punishment, discretionary summary justice, due process, criminal justice procedures, banning notice provisions, individual rights

Introduction

The notion of the state regulation of behaviours, activities and space, in the pursuit of risk management, mitigation and security, has found increasing expression within criminal justice processes in recent years, both internationally and across Australia. A key element is the role and growth of discretionary summary justice (Morgan 2008; 2011; Young 2008). Increasingly, punishments are being imposed that bypass the

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formal mechanisms of the criminal justice system through the application of police-administered justice. The rise and impact of measures such as on-the-spot fines, infringement notices, exclusion orders and move-on powers enable police-initiated resolutions and punishments to be imposed, potentially without legal or judicial intervention. Such developments may reflect a number of underlying pressures — for example, to reduce costs, ease the burden on the court system, speed up the decision-making process, and respond to media depictions and public perceptions regarding problem areas and behaviours, as well as enabling minor and first-time offenders to avoid the effects of criminalisation. However, when viewed from the perspective of human rights, judicial procedural protections and due process, there are significant consequences inherent in a move towards police-imposed punishments. Most discretionary powers are applied to lower level behaviours, where scrutiny and explicit application of human rights and civil liberties are less evident (Valverde 2009).

Through an examination of Victoria's banning notice provisions (*Liquor Control Reform Amendment Act 2007* (Vic); *Justice Legislation Amendment (Victims of Crime Assistance and Other Matters) Act 2010* (Vic)), this article identifies specific due process implications arising from the legislation, with particular respect to notions of pre-emption, burden of proof and the immediate imposition of penalties. Issues relating to legislative, public and judicial accountability, as well as broader human rights considerations, are then discussed in the light of the implementation and application of the banning notice provisions.

Criminal justice and human rights

Individual rights should be maintained through the independence and separation of the judiciary and judicial functions, at both federal and state/territory levels. Separation of powers is fundamental to the effective operation of the criminal justice system, ensuring the protections and safeguards embedded within it (Wheeler 1997; 2004; Bateman 2009). This is bolstered by the formalisation of criminal process procedures and due process rights in state, national and international declarations and conventions. Due process comprises both procedural and substantive principles. Procedural principles find expression in the criminal justice framework in a number of specific protections encompassing the presumption of innocence, the opportunity to effect a defence, the right to legal representation, and the right of the accused not to be compelled to confess their guilt (Bateman 2009; Keyzer 2008). Clear procedures underpin the functioning of criminal justice processes, ideally ensuring consistency, transparency and accountability.

Expectations and experiences of human rights and civil liberties animate legal stakeholders, judicial theorists, politicians and the media. The assumption that the criminal process be subject to safeguards should elicit little controversy. Whether the safeguards are constitutional in basis or exercised through statutory limits placed upon the police, legislative and judicial bodies, they are 'norms to which any decent state should aspire' (von Hirsch and Simester 2006, 173). Such a due process depiction reflects a need to successfully surmount a set of obstacles in the pursuit of justice (Packer 1968, 163). Evolving human rights-focused models of the criminal justice system (Roach 1999; Zedner 2005; Ashworth and Redmayne 2010; Dripps 2011) perceive these obstacles as protective barriers designed to safeguard the rights and liberties of individuals against the potential power of the state, exercised through agencies such as the police.

Public compliance with the law is predicated, in part, upon perceptions of procedural fairness, validity and effectiveness that comprise and underpin police legitimacy (for example, Tyler 2006; Murphy 2009; Tankebe 2013). The growing use of risk-focused, administrative and pre-emptive responses to crime and disorder is increasingly competing with expectations of human rights in police interactions with the public (von Hirsch and Simester 2006; Zedner 2007a; 2010; O'Malley 2010; Ashworth and Redmayne 2010). Conceived as a manifestation of governmental regulatory control, 'police power' reflects a drive to manage crime and public behaviour (Dubber 2005; 2011). This is particularly prevalent at the lower level of offending through mechanisms, such as infringement notices, that control and regulate an increasing range of activities and behaviours (Ashworth and Zedner 2008; Crawford 2009). With a focus upon public interest and protection, control and risk management are prioritised in the best interests of the community (Dubber 2005; 2011). While definitions of criminality are vague, the scope of the criminalisation of behaviours, activities and space continues to expand (Dubber and Valverde 2008; Pantazis 2008; Crawford 2009; 2011), along with the range of discretionary police powers. This article focuses on one manifestation of this broader trend: namely, the introduction of banning provisions in Victoria.

Victoria's banning provisions

Liquor licence reforms, taxation changes and deregulation in the 1980s and 1990s, rooted in the 1986 Nieuwenhuysen report (Nieuwenhuysen 1986) on liquor licensing, led to significant growth in the alcohol industry across Victoria, and a proliferation of licensed premises and entertainment precincts. Alcohol-related problems evolved and escalated in parallel (Zajdow 2011). In common with jurisdictions across Australia, Victoria's burgeoning night-time economy, and the impact of changing patterns and trends in alcohol consumption and behaviour, led to a series of licensing

and operational measures (Doherty and Roche 2003; McIlwain and Homel 2009; Department of Justice 2009). Victoria's Alcohol Action Plan: 2008–13 (Department of Justice 2008) presented a suite of initiatives targeting a reduction in the impact of alcohol-fuelled violence and anti-social behaviour, a key tenet of which was the banning notice provisions enacted in the *Liquor Control Reform Amendment Act 2007* (Vic) (LCRA Act).

The LCRA Act was the first Victorian legislation to introduce the notion of the prohibition of individuals from a defined designated area for a fixed period of time — initially 24 hours, it was increased to 72 hours under the *Justice Legislation Amendment (Victims of Crime Assistance and Other Matters) Act 2010* (Vic) (JLA Act). Reflecting the re-emergence of banishment[1] as a method to control people and behaviours (Beckett and Herbert 2010a), and a movement towards the criminalisation of public space (Crawford and Lister 2007; Pantazis 2008; Hancock 2008; Beckett and Herbert 2010b), banning notices apply to declared designated areas. An area may be declared if 'alcohol-related violence or disorder has occurred in a public place that is in the immediate vicinity of the licensed premises within the area' (LCRA Act, s 147(1a)), and if it is believed that the imposition of banning notices may be effective in controlling or preventing alcohol-related violence or disorder in the area. Victoria's first two designated areas were declared by the Victorian Commission for Gambling and Liquor Regulation (VCGLR) in December 2007, within days of the legislation passing through parliament. These areas were the Melbourne Central Business District (CBD) and Prahran/South Yarra, incorporating the Chapel Street entertainment precinct of inner Melbourne (VCGLR 2013). The application and reach of designated areas increased steadily. By February 2013, 18 designated zones had been declared across Victoria, in both metropolitan and regional areas, typically encompassing key entertainment districts within major towns, cities and suburbs (VCGLR 2013).

The LCRA Act afforded police on-the-spot powers to ban troublemakers and those perceived to be behaving in an anti-social manner from the designated area. While

1 Exile and banishment were used widely across ancient empires, in the emergent United States, in the Soviet Union, during British colonial rule and generally under more authoritarian forms of governance (Borrelli 2002; Beckett and Herbert 2010a). In jurisdictions across the United States, Western Europe and Australia, banishment and exclusion have been reintroduced under the guise of social control, law enforcement and the management of public space (Young 2007; Beckett and Herbert 2010a; 2010b; Crawford 2011).

not a criminal sanction, the imposition of a banning notice is recorded indefinitely on the Law Enforcement Assistance Program (LEAP) database.[2] Specified offences for which banning notices may apply are documented in the LCRA Act (s 7 Sch 2). A banning notice may also be imposed in anticipation of more general disorderly behaviours, as perceived by police officers, for which a specified offence may not exist (LCRA Act, s 148B). Breach provisions are outlined in the legislation and may be initiated if a banned person is caught returning to the prohibited area within the period of the ban. Initially financial, breach penalties carry the usual potential to lead to criminal consequences in the event of persistent noncompliance (LCRA Act, s 148F).

In the first five years of operation, 5364 bans were imposed across Victoria, with the majority (4305, or 80%) applying to Melbourne's CBD (Victoria Police 2008; 2009; 2010; 2011; 2012a). The proportion of recipients receiving multiple bans rose from 0.78% in the first year to 5.04% in the period ending June 2012 (Victoria Police 2008; 2012a).[3] From these figures, it is clear that banning notices, whether as a method of control, punishment or community protection, are being used extensively. Consideration of their potential impact upon due process procedural expectations and human rights, therefore, is more than merely theoretical or conceptual.

'Is a 24-hour ban such a bad thing?'

Banning notices may appear to be a straightforward and logical response to a clearly articulated issue. They remove those causing problems from the area in which they are causing them. Leaving aside the difficulty of enforcement — and more fundamental issues associated with exclusionary practices, particularly in relation to vulnerable groups — 'Is a 24 hour ban such a bad thing?' (Legislative Assembly 2007b, 4072 (Ms Thomson)). Bans may seem innocuous and a sensible addition to the options available to police officers on the street. However, a number of specific due process issues are embedded within Victoria's banning provisions, reflecting their permissible pre-emptive application, their changes to the usual burden-of-proof requirements, and their immediate imposition.

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2 Introduced in 1993, LEAP is a dynamic database recording Victoria's crime-related data and information. It is used for operational policing and statistical analysis of individual offences, penalties, missing persons and so on. An individual's record may remain on LEAP indefinitely (Victoria Police 2012b).

3 Victoria Police data does not detail the demographics or any specific information for multiple recipients. This prevents analysis of any trends or patterns underpinning this increase.

Pre-emptive application

Banning notices may be imposed pre-emptively. A notice may be given if a police officer reasonably believes that it may prevent the recipient continuing to commit a specified offence or committing a further offence. Crucially, though, no actual offence need have been committed. In effect, officers may issue a banning notice in anticipation of problematic behaviour. While there are specified offences for which a ban may be imposed (LCRA Act, s 7 Sch 2), more general behaviours that may lead to banning notices are much more loosely defined, are determined on-the-spot by police officers, are discretionary in their application, and do not necessarily pass the threshold of criminality for which a specified offence may exist. While not discussed here, the merits of not criminalising individuals for engaging in problematic or undesirable behaviours are acknowledged. However, measures that are put in place in lieu of a criminal sanction but restrict the rights of recipients, and from which criminal consequences may follow, should still aspire to the expectations inherent in due process procedural protections in particular and human rights in general.

Such pre-emptive imposition personifies the temporal and conceptual depiction of pre-crime articulated by Feeley and Simon (1992) and cemented by Zedner (2007a), Pantazis (2008), Crawford (2009; 2011) and others. It also embodies Crawford's (2009) critique of the principle of governing the future, whereby early interventions, risk assessments and security-focused approaches fundamentally challenge traditional principles of criminal justice — in particular, the presumption of innocence and the need for a specific offence to have occurred that warrants police action. Pre-emptive imposition of a punishment leads to some fundamental questions, specifically in relation to whether intent should be assumed, whether punishment should result from that assumed intent, and how pre-emption is balanced with individual rights and community protection.

Diluted burden of proof

The dilution of the burden of proof builds upon issues embedded in the pre-emptive imposition of banning notices. There is no requirement for a police officer to offer proof that an offence has been committed or to objectively demonstrate that the accused intended to commit an offence. Imposition of a banning notice requires only that police suspect 'on reasonable grounds' (LCRA Act, s 148D) that an offence has been committed or is likely to be committed. Behaviours for which banning notices may be imposed are loosely drawn, largely subjectively determined, and described in normative terms such as 'disorderly', 'anti-social' and 'quarrelsome'. That no proof, evidence or witnesses are required for a banning notice to be imposed adds to the potential fluidity of the behaviours that may lead to such a penalty. Compounding the effect of changes to the burden of proof when a ban is imposed is the application

of the reverse onus principle to breach proceedings (LCRA Act, s 148F(3)). Not only are recipients denied the presumption of innocence in receiving their ban, if they are accused of a breach they must prove their defence beyond reasonable doubt.

Immediate imposition; no judicial oversight

The banning notice sanction is imposed and takes effect on-the-spot. The immediate nature of the penalty — along with the absence of any need to prove intended or actual behaviours — is heightened further by there being no recourse to legal representation or capacity to independently challenge the imposition of a ban. The decision is made and the penalty is imposed on the street, in real time. Anyone to whom a banning notice is to be given must provide their name and address to the requesting police officer (LCRA Act, s 148D). Penalties exist for refusal to do so 'without a reasonable excuse' (s 148D(3a)), but what is meant by this is not defined in the legislation. Recipients are effectively compelled to accept the notice and, therefore, their guilt. The legislation is bolstered by the permissible use of 'reasonable force' to ensure that the banned person leaves the designated area (s 148H). No provision exists for legal representation and, reflecting the burden-of-proof requirements, no evidence or witness details need be recorded.

Unlike other legislation that permits the imposition of on-the-spot penalties, such as speeding fines, there is no realistic opportunity to appeal or seek a review of a banning notice decision. Section 16 of the *Infringements Act 2006* (Vic) outlines the options available for recipients of penalty notices who wish to challenge their imposition, and the penalty — typically a fine — is not required to be paid until the review process is complete. Due process is enabled prior to the punishment taking effect.

In the case of banning notices, the immediate nature of the sanction means that such a challenge is rendered impossible. The only avenue for the recipient of a banning notice to appeal its impact or perceived validity is in writing to a police officer above the rank of sergeant (LCRA Act, s 148E(1)). The likelihood of being able to submit such a written application and receive a response within the period for which the ban is enacted is debatable. No records are available detailing how many of these applications, if any, have been made. And no appeal is possible beyond the realm of the police. During parliamentary debate on the Liquor Control Reform Amendment Bill 2007 (Vic) (LCRA Bill), an amendment to permit judicial appeal was approved by the Legislative Council (Legislative Council 2007, 3891). This would allow a banning notice decision to be reviewed in court and the record to be expunged from an individual's LEAP database entry if its imposition was found to be inappropriate. Clear concern is evident in the parliamentary debate, manifested as principled support for the right to a court-based appeal against a banning notice:

> We believe that if you can challenge a parking fine in court, you should be able to challenge a banning order in court. [Legislative Assembly 2007a, 4405 (Mr O'Brien).]
>
> I must say as a matter of general principle we think the amendments themselves are common sense and sensible, because the notion of a banning notice being issued in the manner which is contemplated by the bill is something which ought as a general principle carry a right of appeal. [Legislative Assembly 2007a, 4405 (Mr Ryan).]
>
> … how absolutely appalling it is for the Attorney-General to be seeking to deny to citizens a right of appeal to the courts to clear their name and to have the law upheld. [Legislative Assembly 2007a, 4406 (Mr Clark).]

However, as part of openly articulated concessions to ensure timely passage of the LCRA Bill through parliament on the last sitting day of 2007, the amendment to permit a right of judicial appeal against a banning notice was overturned in the Legislative Assembly (Legislative Assembly 2007a).

Judicial oversight is only possible when a banning notice recipient is accused of breaching their ban. As the breach of a banning provision is regarded as a criminal offence, due process is therefore enabled (LCRA Act, s 148F(3)). There is perhaps some irony that the reasons for the imposition of a ban (which may involve an accusation of problematic or serious behaviours) may not be judicially challenged, but the fact of a breach (which requires entry into a designated space — an action not typically regarded as criminal) carries full judicial and procedural protections. However, there are no records of any court-based breach proceedings in relation to a banning notice.

The LCRA Act has created and embedded a number of fundamental challenges to core due process protections and, as a consequence, to the individual human rights of recipients. The effect of these specific issues is compounded by the ways in which the implementation and operation of the banning provisions are rendered accountable.

Accountability vacuum

Victoria's *Charter of Human Rights and Responsibilities Act 2006 (*Charter Act) took effect in January 2007. Three core principles underpin the application of the Charter Act:

- when developing new laws, parliament must consider human rights and how proposed legislative changes may affect them;
- all public organisations must consider and comply with the Charter's stated human rights in all matters that affect the public; and

- judicial processes must ensure that the interpretation of laws is compatible with the Charter requirements (Charter Act, s 1).

The primary objective of the LCRA Act may be laudable: a targeted response to a perceived risk or challenge. However, broader consequences and what should be an overriding need for accountability in the administration of justice, and the assurance of human rights, should not be subsumed by a drive to be seen to do something.[4] To this end, banning notices appear to operate within something of an accountability vacuum, which lacks effective mechanisms across the three key domains reflected in the Charter Act principles (legislative, public and judicial) — each of which should work to ensure Charter Act compliance, transparency, scrutiny and the necessary accountability.

Legislative

The Charter Act requires parliament to present a Statement of Compatibility for all proposed legislation to ensure human rights compliance, and to document and justify any potential areas of noncompliance (Charter Act, s 28). That a banning notice is not a criminal sanction is referenced across the parliamentary debate to minimise the need to comply with the detailed provisions of the Charter Act (for example, Legislative Assembly 2007b, 4067; Legislative Assembly 2007b, 4072). This is despite the potential consequences for repeated noncompliance, and the fact that personal details are recorded as a permanent record on the LEAP database. Specifically, ss 24 and 25 of the Charter Act, regarding rights to a fair hearing and rights in criminal proceedings, are not addressed in the Statement of Compatibility for the LCRA Bill, with specific respect to the imposition of a banning notice (Legislative Assembly 2007c). They are discussed in relation to breach proceedings, but no mention is made of their relevance or application to the initial imposition of a ban.

Concern is evident in the parliamentary debate of the LCRA Bill regarding civil liberties and the potential incompatibility of banning provisions with a number of core human rights — in particular, freedom of movement, the right to a fair trial, and the right to judicial consideration of the impact and appropriateness of a penalty (Legislative Assembly 2007a; Legislative Assembly 2007b; Legislative Council 2007). However, justifications of the interests of the greater good and the need for public protection are used repeatedly to counter concerns regarding the impact of provisions

4 The LCRA Act was one of a number of targeted responses to address issues relating to alcohol-related violence and disorder — what John Brumby, then state Premier, regarded as 'the biggest social issue facing Victoria' (Whinnett 2007).

upon individual recipients. Victoria's then Attorney-General, Rob Hulls, insisted that banning notices are not a punishment and that their purpose is to protect (Legislative Assembly 2007a, 4405). When justifying the extension of the banning period to 72 hours, Mr Hulls highlighted the precedent already set with respect to 24-hour bans not impacting the human right to freedom of movement:

> In effect, these provisions ensure that banning notices are only given where there are strong community protection grounds for doing so … As such, while it is possible that a 72-hour banning notice issued on a weekend may now prevent a person from availing themselves of the most efficient or timely route to, for example, their place of work on the following Monday, in my opinion, the purpose that is fulfilled by such a notice outweighs any temporary inconvenience that may or may not be caused to that person.
>
> The potential for any such inconvenience was also possible … under the previous 24-hour maximum period. For example, a notice issued on a Friday night may have prevented a person from conveniently travelling to his or her place of work on the Saturday. [Scrutiny of Acts and Regulations Committee 2010, 14.]

Any impact upon individual rights was deemed irrelevant by Mr Hulls, as the notion of banishment had already been approved on the overriding principle of protection of the public. This merits consideration regarding how much further such a rationale could be taken.

Public

In an attempt to ensure the appropriate and proportionate use of the banning provisions, the need for Victoria Police to publish detailed statistics was articulated during parliamentary debate of the LCRA Bill (Legislative Assembly 2007b; Legislative Council 2007). The legislated requirements include the publication of the reason for the imposition of each notice, where they were imposed, and key demographics of each recipient (LCRA Act, s 148R). The provision of this data is cited in parliamentary debate as the vehicle for public scrutiny of the appropriateness of banning provisions, of the behaviours for which bans are imposed, and, in particular, of any disproportionate impact upon defined demographic groups (Legislative Assembly 2007b; Legislative Council 2007). While not stated explicitly, implied is the need to ensure a perception of police legitimacy in the discretionary power to ban. Yet an amendment to trigger a review of the legislation if certain groups were found to be adversely affected was rejected (Legislative Council 2007, 3894). The formal recording and publishing of specified data was regarded as a sufficient check to ensure the appropriate implementation of the legislation: 'Any of the figures in the report indicating that particular groups are the subject of banning or exclusion

orders should be the subject of public debate rather than subject to ministerial review' (Legislative Council 2007, 3894 (Ms Lovell)). The published data, along with its public scrutiny, was to be the safety net for individual rights.

However, the data required to do this has not been published, contrary to the legislated requirements. General data has been made available in terms of overall numbers of notices, where they were imposed and the age ranges of recipients. However, the data lacks granularity and key specifics are missing or vague. Other than in the first year of publication, both the Indigenous status of recipients and the specific reasons for which bans are imposed are not reported appropriately (Victoria Police 2008; 2009; 2010; 2011; 2012a).

Failure to publish fully the mandated banning notice data renders assessment of their precise impact problematic. In particular, lack of scrutiny limits identification of specific consequences for defined or vulnerable groups. Other than by general age category, it is simply not possible to elucidate any common characteristics or features of banning notice recipients in terms of their behaviours, their gender, their ethnicity or any discernible vulnerability. For example, the proportion of recipients whose Indigenous status is recorded as 'unknown' increased from 0% in the first (part) year, ending June 2008, peaking at 46% in the year ending June 2011 and 35% in the year ending June 2012 (Victoria Police 2008; 2011; 2012a). The Indigenous status of a significant minority of ban recipients is unrecorded, and understanding of the impact of banning on Indigenous citizens is limited — contrary to legislative requirements and parliamentary expectations. Public examination and scrutiny of the actual operation of police-imposed banning provisions are therefore compromised.

The way in which banning notices are imposed places significant emphasis upon police discretion. Without robust public scrutiny, the potential for discriminatory application is considerable. Given the fluid and subjective nature of the behaviours that may lead to the imposition of a banning notice, their permissible pre-emptive nature, the lack of evidence required, and the absence of judicial oversight, the execution of police discretion is fundamental to the impact upon the human and procedural rights of recipients, and consequential perceptions of police legitimacy. Police decisions are influenced by multiple and complex factors. In the context of the discretionary power to ban, the potential for personal bias, stereotyping, prejudice and subjectivity is enhanced and enabled by the opacity of the scrutiny of notices imposed. Discriminatory policing that disproportionately targets ethnic and other vulnerable groups is the subject of extensive research (for example, Tyler and Waksak 2004; Bowling and Phillips 2007; Gray 2011). Acknowledging the significance of police legitimacy in ensuring public confidence, and following allegations of endemic racial profiling, in 2013 Victoria Police published a strategy to address discriminatory

policing, improve community engagement and ensure individual rights. That report emphasises the need to remove prejudice, personal assumptions and unconscious bias from the decision-making process (Victoria Police 2013, 9). However, the discretionary nature of banning notices and the failure to publish the required data limits any meaningful analysis or assessment of the application of banning notice powers, in particular the use of racial or any type of discriminatory profiling.

Judicial

Whether or not formally categorised as criminal sanctions, manifestations of state control (in the case of banning notices via the police) that carry the risk of significant impact on individual rights should be subject to careful and ongoing scrutiny. To this end, legislation is typically tested and verified through judicial channels and processes, such as court-based appeals. Judicial accountability is thereby rendered clear and visible. That no appeal beyond the police is permitted in relation to the imposition of a banning notice, unless breach proceedings are initiated, means that there is no legal scrutiny of the legislation. The issues associated with enabling an immediate appeal that would delay the imposition of the ban are acknowledged. However, the reasons why no subsequent judicial appeal is permitted are much less clear.

Despite the principled concerns expressed about the absence of a right of appeal, analysis of parliamentary debate suggests a prevailing view that only those who deserve to be affected by a banning notice will actually be affected. A picture is painted of alcohol-fuelled troublemakers who are making life a misery for the majority of law-abiding citizens and who therefore fully deserve whatever penalty is enacted upon them. One member commented:

> This is a good provision, and it seems foolhardy to suggest that a person should be able to appeal it, which is why we oppose that amendment … Is a 24-hour ban such a bad thing? One would suggest that if someone is so concerned about it, maybe they should have been banned for 24 hours. [Legislative Assembly 2007b, 4072 (Ms Thomson).]

The debate appears to embody the paradoxical dichotomy that we all have rights, but some deserve more rights than others. Implied is an assumption that the rights of those from whom the community needs to be protected must be conceded to the overriding rights of the broader community. Embedded within the parliamentary discourse is the notion of 'them' and 'us'. Those causing problems, 'them', are perceived and presented as being less deserving of their rights than the majority, 'us'. This presumption remains unchallenged, and the undesirable minority is marginalised through the political debate and resulting legislation (van Dijk 1993;

Burnside 2007). As a result, Victoria's banning notice legislation has been legitimised effectively through ministerial statement, rhetoric and use, rather than procedural and judicial scrutiny. Its worth is implied and assumed, and its application is subject to limited scrutiny and accountability. Victoria's Charter Act makes it clear that human rights apply to everyone; they are not relative, discriminatory or more applicable to any one group. The way in which the banning provisions can be imposed undermines this fundamental expectation.

Legitimised through use rather than scrutiny

Whatever the desired *end*, the consequences of the chosen *means* must be fully understood (Waldron 2003; Zedner 2007b). Responses that are put in place to address a specific issue, but lack or compromise established due process and structural accountability, may not only impact human rights and procedural protections in themselves, but may also risk being extended and applied more broadly. Despite the due process and human rights issues that are evident, the way in which the need for banning provisions has been justified raises a number of concerns. These relate in particular to an ongoing lack of scrutiny of the individual impact and general effectiveness of the legislation, yet within the context of a continued assumed need, the conflation of intent and punishment, and the potential for the normalisation of a police-imposed discretionary sanction — in spite of the issues that it embodies.

Need, effectiveness and public protection

The rhetoric upon which banning legislation has been predicated has reduced debate and diminished any challenge to the diminution of due process protections and individual rights that are explicit and implicit in its enactment. Parliamentary debate of the proposed legislation assumes the existence of a serious problem, from which the broader community must be protected. Anecdotes and hypothetical scenarios are presented, employing persuasive techniques of hyperbole and the language of fear. For example, requests for an amendment permitting judicial appeal are countered with responses such as:

> [Opponents of the legislation are] trying to wreak havoc by allowing drunks and people who are drug affected to rampage through communities, venues, shopping centres, neighbourhoods and streets … [Legislative Assembly 2007a, 4405 (Mr Batchelor).]

> … you could have Alphonso doing all sorts of antisocial things in Chapel Street. Under that earlier provision a police officer would come up and try to give him a banning notice. Alphonso would say, 'Hold on, I've got my lawyer here. I want you to withdraw the banning notice. We will see you in the Magistrates Court tomorrow, and we will sort out

> the propriety of the banning order which is meant to apply now. We will sort that out in two or three weeks time' … It would have been a lawyer's picnic. [Legislative Assembly 2007a, 4406 (Mr Robinson).]

Despite the rhetoric, specific analysis of the issues that banning notices are designed to address is not evident within the debate. Similarly, each application to designate a new declared area, such as the Melbourne Docklands (Future Melbourne Committee 2011), is embedded with assumptions about both the problem that needs to be addressed and the effectiveness of banning as the proposed solution. Official crime figures are used to imply that banning notices are effective in reducing rates of certain offences. For example, offences relating to behaviour in public reduced from 8322 in 2009–10 to 6414 in 2011–12, or by approximately 30% (Victoria Police 2012b, 48). However, variations in offence rates reflect more than the imposition of banning notices. A number of initiatives and legislative changes occurred alongside the introduction of banning provisions. New penalty infringement notices for riotous, offensive and indecent behaviours and language were enacted in July 2008 (*Infringements and Other Acts Amendment Act 2008* (Vic), Pt 2). In December 2009, amendments to the *Summary Offences Act 1966* (Vic) introduced move-on powers and expanded the use and application of infringement notices for public drunkenness and anti-social behaviour (*Summary Offences and Control of Weapons Acts Amendment Act 2009* (Vic), Pts 2 and 3). Like banning notices, infringement penalties are not criminal offences. Official crime figures may suggest that rates of key offence types are reducing, but data relating to infringement and banning notices are typically not included. Those who may have previously been charged (and afforded full procedural rights) may now be dealt with differently (Victoria Police 2012b). Behaviours, therefore, have not necessarily changed, but operational police responses have. There remains no empirical evidence to support the actual effectiveness of banning notices, yet their permissible use and scope continue to be expanded.

The legislative development of banning notices in Victoria can be explained as a response to perceived challenges relating to alcohol-related violence and disorder in the night-time economy, but specific due process consequences have received only limited consideration. Similarly, broader issues relating to human rights and civil liberties, while acknowledged in parliamentary debate, have been largely subsumed to the clearly articulated interests of the greater good and public protection (Legislative Assembly 2007a; 2007b; Legislative Council 2007). The application of banning provisions — being low level, immediate and 'on-the-street' — has served to limit their legal and critical scrutiny. Lack of information and data regarding their use similarly restricts meaningful analysis. The perceived pressing need upon which the banning provisions continue to be based finds only limited resonance with respect to broader notions of human rights and civil liberties.

Pre-emption, intent and punishment

The way in which the banning provisions have been drawn up conflates notions of pre-emption, intent and punishment. Lacking judicial examination or any independent review mechanism, banning notices may be imposed following an assessment by a police officer of a potential behaviour. The sanction, while initially administrative in application, carries a tangible impact upon the human right of freedom of movement. A banning notice breach may lead to criminal prosecution. Implied throughout the legislation is the bundling up of more traditional responsive policing with anticipatory and pre-emptive controls. As an end-to-end process, banning notices arguably hybridise two criminal justice paradigms, creating what could be termed the 'pre-crime: crime-control' model (Packer 1968; Feeley and Simon 1992; Zedner 2007a).

The lack of data reporting the offences and behaviours for which banning notices have been imposed means that there is no clear knowledge of how banning powers are actually being applied, or who is being impacted. Their legitimacy cannot be verified. Extensions, to both the length of bans and the increasing number of areas in which they apply, have been justified essentially with the rationale that it has been okay so far, so extending them will be okay too (Scrutiny of Acts and Regulations Committee 2010). Such scope creep within such an accountability vacuum is a high risk endeavour. In this case, the process is reliant almost entirely upon the appropriate and proportionate application of the legislation by police, but without any effective capacity to empirically examine this.

Normalisation of the exceptional?

Lack of legislative and ongoing scrutiny risks normalising exceptional responses. Crawford (2009) argues that powers may be introduced, initially as exceptional measures, that are time limited or spatially restricted (such as banning notices), but which later become *routinised* — need and success are assumed, momentum builds, scope and impact expand, and the exceptional transitions into the normal. The experience of police-imposed powers in other jurisdictions offers a useful comparison and a framework from which to consider Victoria's banning legislation.

One example is the UK dispersal order. Introduced in the *Anti-social Behaviour Act 2003* (UK) (ss 30–36) as a specific measure to be used only in pre-designated areas for a specific purpose, a 48-hour dispersal order may now be imposed anywhere with blanket restrictions, preclusions and prohibitions (Crawford and Lister 2007; Crawford 2011). Under new provisions in the *Anti-social Behaviour, Crime and Policing Act 2014* (UK), a police officer need only be satisfied that dispersal will prevent members of the public being 'harassed, alarmed or distressed' (s 35). Children as

young as 10 may be subject to dispersal and those over 16 may receive a community protection notice if their 'conduct is unreasonable' (s 43). Failure to comply could result in imprisonment (ss 39, 48). This legislative progression is underpinned, again, by assumption regarding the nature of the problem, but with limited monitoring and scrutiny of the solution.

The normalisation thesis excites critics and proponents alike. Perspectives contrary to the notions of net-widening and progressive normalisation of policy may acknowledge the more pessimistic viewpoint with respect to civil liberties and procedural protections. However, their focus reflects advances and improvements as a result of mechanisms such as human rights charters and conventions (Waddington, Stenson and Don 2004; Waddington 2005). Pessimists are accused of focusing upon potential rather than actual affects. Rather than being a one-way 'slippery slope' (Waddington 2005, 369), criminal justice policy and practice are 'a hotly contested terrain' (Waddington 2005, 371) where civil liberties may be improved and extended, as well as diminished. However, examples such as human rights charters are not necessarily sufficient proof of the advancement of civil liberties. They are an aspirational framework and their true value lies in the way in which they are implemented and enforced. Victoria's banning provisions exemplify how requirements and protections articulated in the Charter Act are flexed and waived by ministerial statement in the interests of loosely framed public protection, demonstrating the subjective and limited nature of the human rights that the Charter Act purports to ensure.

Conclusion

Central to the thesis presented here is that police-imposed discretionary justice risks subordinating individual human rights to loosely defined but overriding needs of public protection. Whatever the nature of the alleged activity, when penal consequences follow there must be clear processes, protections and scrutiny. Victoria's Equal Opportunity and Human Rights Commission, in its 2012 review of the Charter Act, emphasised the fundamental role of judicial oversight:

> Courts and tribunals play a crucial role in the Charter's human rights protection framework. They are a mechanism where Victorians can hold government and public authorities to account for conduct that infringes their rights. [VEOHRC 2012, 30.]

As they stand, the banning provisions lack any judicial scrutiny of the operation of the legislation, and also lack effective public scrutiny due to the failure to publish required data. The efficacy and effectiveness of banning provisions are assumed and largely unchallenged, bolstered by parliamentary debate and the convenient

application of crime statistics. But the way in which the banning notice legislation has been framed, implemented and extended has three core implications, all of which merit ongoing examination: a police-imposed discretionary punishment operating largely without meaningful measurement or effective accountability; the embedded notion of 're-balancing' the provision of justice for the 'greater good' of public protection, but which undermines the separation of powers and individual rights; and the ability of the Victorian parliament to circumvent the Charter Act but without rigorous scrutiny of the human rights impact of legislation. ●

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Unspeakably present: the (un)acknowledgment of diverse sexuality and gender human rights in Australian youth justice systems

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A number of international human rights frameworks protect the rights of young people in contact with the criminal justice system in states parties, including Australia. These frameworks inform youth justice policy in Australia's jurisdictions. While the frameworks protect young people's right to non-discrimination on the grounds of 'race', religion and political opinion, the rights of young people to non-discrimination on the grounds of sexuality and gender diversity are not explicitly protected. This is problematic given that lesbian, gay, bisexual, trans, intersex and queer (LGBTIQ) young people appear over-represented in youth justice systems.

This article argues that the exclusion of this group from human rights frameworks has an important flow-on effect: the marginalisation of the right of LGBTIQ young people to non-discrimination in policy and discourse that is informed by international human rights frameworks.

After outlining the relevant frameworks, this article examines the evidence about LGBTIQ young people's interactions with youth justice agencies, particularly police. The evidence indicates that the human rights of LGBTIQ young people are frequently breached in these interactions. We conclude by arguing that it is timely to consider how best to protect the human rights of LBGTIQ young people and keep their rights on the agenda.

Keywords: human rights; youth justice; lesbian, gay, bisexual, trans, intersex and queer young people

Introduction

While there has been much progress in youth justice systems to acknowledge the diversity of young people (AHRC 2008), some forms of diversity are yet to be

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explicitly acknowledged in international human rights frameworks that relate to youth justice. While international frameworks note that young people should be protected from discrimination on the grounds of 'race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status', for instance, they are still silent on sexuality and gender diversity. While the United Nations has claimed that its international human rights frameworks cover sexuality and gender diversity (UN 2012), these specific terms are still noticeably absent from the frameworks and are instead covered by reference to 'other' statuses. We argue in this article that the lack of explicit acknowledgment of sexuality and gender diversity in international human rights frameworks creates the potential for the human rights of lesbian, gay, bisexual, trans,[1] intersex and queer (LGBTIQ) young people to go unacknowledged in policy and practice frameworks in youth justice systems in Australia.

As LGBTIQ status is still to be recorded in the national census, we have no statistics on the proportion of Australian young people who identify as LGBTIQ, or how many of these young people come into contact with Australian youth justice systems. However, international research demonstrates that LGBTIQ young people comprise around 14 per cent of youth justice populations (Irvine 2010). If a similar proportion of Australian youth justice populations identify as LGBTIQ, human rights frameworks fail to explicitly protect the right to non-discrimination of a substantial population of young people in contact with youth justice systems.

This article is divided into two parts. The first part introduces the international human rights frameworks that relate to youth justice, and the principles that these frameworks promote. It then outlines in more detail the principle of non-discrimination contained in each of the frameworks, and demonstrates the absence of an explicit commitment to non-discrimination against LGBTIQ young people in the frameworks. The second part considers the potential consequences of this absence. It argues that the absence of an explicit commitment to protecting the human rights of LGBTIQ young people filters down to the numerous national, state and local government and nongovernment organisations whose policy and practice is informed by international human rights frameworks. Following this, it summarises the international research on breaches of human rights experienced by

1 'Trans' is an umbrella term used to refer to people whose physical sex does not match with how they experience or feel their gender identity. People who identify with this category may transition with or without medical intervention and may use many different types of identifiers (for example, transgender, transsexual, transvestite).

LGBTIQ young people who come into contact with the police, courts and youth detention. We conclude by arguing that in light of this evidence, it is timely to consider how best to protect the human rights of LBGTIQ young people and keep the rights of this marginalised group on the policing, youth justice and human rights agenda.

Human rights and young people in contact with the criminal justice system

A number of international human rights frameworks provide guidance to states parties, including Australia, on the principles that should underpin youth justice. The four primary frameworks (Goldson and Muncie 2006) are the:

- Convention on the Rights of the Child;
- Standard Minimum Rules for the Administration of Juvenile Justice;
- Rules for the Protection of Juveniles Deprived of Their Liberty; and
- Guidelines for the Prevention of Juvenile Delinquency.

Further guidance on the 'interpretation, promotion and protection of child rights' (UNICEF 2007) is provided by the UN Committee on the Rights of the Child (UNCRC 2007).

Collectively, these human rights frameworks promote a number of principles of youth justice, including that:

- a minimum age of criminal responsibility should be set;
- pre-trial safeguards should be utilised;
- punishments for young people should be proportionate;
- detention should only be used as a last resort;
- capital and corporal punishment should be prohibited; and
- young people have a right to be treated without discrimination of any kind.

Signatories to the frameworks are required to embed these principles into their practice with young people in contact with the criminal justice system.

The principle of non-discrimination

As noted above, the four major human rights frameworks that relate to youth justice each contain the principle of non-discrimination. Article 2 of the Convention on the Rights of the Child states that:

> States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Similarly, Art 2.1 of the Standard Minimum Rules for the Administration of Juvenile Justice is to be:

> … applied to juvenile offenders impartially, without distinction of any kind, for example as to race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status.

Article 4 of the Rules for the Protection of Juveniles Deprived of Their Liberty similarly asserts that:

> The Rules should be applied impartially, without discrimination of any kind as to race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

Likewise, the Guidelines for the Prevention of Juvenile Delinquency state that they relate 'to the rights, interests and well-being of all children and young persons' (Art 7).

The Committee on the Rights of the Child (UNCRC 2007, 4) also highlights the importance of ensuring that all young people in trouble with the law are treated equally:

> Particular attention must be paid to de facto discrimination and disparities, which may be the result of a lack of a consistent policy and involve vulnerable groups of children, such as street children, children belonging to racial, ethnic, religious or linguistic minorities, indigenous children, girl children, children with disabilities and children who are repeatedly in conflict with the law (recidivists).

Young people's human rights broadly, and their right to non-discrimination specifically, are also protected under international human rights frameworks not directly related to youth justice, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Further, the rights of young people in detention — including a right to non-discrimination — are protected by the UN's Standard Minimum Rules for the Treatment of Prisoners, which, like the frameworks relating to youth justice, state that in the implementation of the Rules, 'there shall be no discrimination on grounds of race, colour, sex, language, religion,

political or other opinion, national or social origin, property, birth or other status' (Art 6(1)). In practice, however, these frameworks are rarely evoked in relation to youth justice policy and practice in Australia. Rather, the Standard Minimum Rules for the Administration of Juvenile Justice and the Convention on the Rights of the Child are the frameworks that most commonly provide the basis of the protection of young people in youth justice systems (see, for example, AJJA 1999; ACT Government 2012).

Absence of sexuality and gender diversity

While the principle of non-discrimination is clearly a key feature of international human rights frameworks relating to youth justice, it is striking that sexual and gender diversity is absent from each of these frameworks. Indeed, while 'race', ethnicity, nationality, language, religion, political views, sex, culture and disability — and even recidivist status and the status and views of a young person's parents and family — are all explicitly listed as grounds on which a young person must not be discriminated against, sexuality and gender diversity are conspicuously absent.

This is not to say that the right to non-discrimination does not exist for LGBTIQ people. On the contrary, 'United Nations treaty bodies have consistently held that sexual orientation and gender identity are prohibited grounds of discrimination under international law' (UN 2012, 41). In particular, in the case of *Toonen v Australia* (UNHRC 1994), the UN Human Rights Committee found that 'the reference to "sex" in articles 2, paragraph 1, and 26 [of the International Covenant on Civil and Political Rights] is to be taken as including sexual orientation' (see further Shearer 1995). In its summary of international human rights protections for LGBTIQ people, the United Nations (UN 2012, 40) states that 'All people, irrespective of sex, sexual orientation or gender identity, are entitled to enjoy the protections provided for by international human rights law'. It follows that the international frameworks relating to youth justice outlined above protect the right of LGBTIQ young people to non-discrimination by their reference to being applied 'without discrimination of any kind' and/or to young people of any 'race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or *other status*' (UN 2012, Art 2.1, emphasis added).

The use of the terminology 'other status' in some other international human rights frameworks was strategically intended to allow the frameworks to be inclusive. For example, according to the United Nations (UN 2012, 4), the drafters of the International Covenant on Civil and Political Rights 'intentionally left the grounds of discrimination open by using the phrase "other status"'. According to the United Nations (UN 2012, 40):

> These lists do not explicitly include 'sexual orientation' or 'gender identity', but they all conclude with the words 'other status'. The use of the phrase 'other status' shows that the lists were intended to be open-ended and illustrative: in other words, the grounds of discrimination are not closed.

Decisions of various United Nations agencies have also held that sexuality and gender diversity are covered by these references to 'other status' (UN 2012). In relation to young people in particular, the Committee on the Rights of the Child (UNCRC 2003, 2) has stated in a General Comment that:

> States parties have the obligation to ensure that all human beings below 18 enjoy all the rights set forth in the Convention [on the Rights of the Child] without discrimination (art. 2), including with regard to 'race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'. These grounds also cover adolescents' sexual orientation …

A key point of this article, however, is that although *sex* is listed as grounds on which young people in contact with the criminal justice system must not be discriminated against, *sexuality* is uniformly omitted, and although sexuality and gender diversity may be *implicitly* encompassed by principles of non-discrimination, they are not explicitly addressed. Further, while this comparatively recent General Comment of the Committee on the Rights of the Child (UN 2003, 2) has ruled that 'other status' must include 'sexual orientation', this remains absent from the wording of the major human rights frameworks that relate to youth justice. Moreover, it is important to note that this General Comment relates only to the Convention on the Rights of the Child and not to any of the three other international frameworks that relate more specifically to youth justice. In addition, while this General Comment recognises 'sexual orientation', it does not mention gender diversity, thereby excluding intersex and trans young people. Even if we are to assume that intersex and trans young people are to be included under 'other status', it is worth noting that neither the Rules for the Protection of Juveniles Deprived of Their Liberty nor the Guidelines for the Prevention of Juvenile Delinquency utilise this terminology, referring instead to 'the rights, interests and well-being of all children and young persons' (Guidelines, Art 7) or being applied 'without discrimination of any kind' (Rules, Art 4). While it seems fair to assume that the right to non-discrimination exists for all LGBTIQ young people in international law, our rather modest contention in this article is that the absence of any explicit reference to these groups of young people is potentially problematic and should be closely examined.

We recognise that the omission of LGBTIQ young people from international human rights frameworks may have resulted from a strategic decision on the part of the

United Nations to ensure that conservative states did not refuse to ratify them. It follows that explicitly recognising the right of LGBTIQ young people to non-discrimination might not be in the best interests either of this group specifically or of young people in trouble with the law more generally, as conservative states may resist ratifying human rights instruments that explicitly recognise and protect this group, which would in turn limit the protections afforded to all young people in contact with the justice system. Nonetheless, this article argues that the exclusion of this group from human rights frameworks has an important flow-on effect: the marginalisation of the right of LGBTIQ young people to non-discrimination in policy and discourse that is informed by international human rights frameworks. We turn our attention to this in the following section of the article.

Considering the potential impacts of the lack of protection for LGBTIQ young people

The omission of sexuality and gender diversity from international human rights frameworks that offer protection to young people in trouble with the law has potentially important consequences. One consequence is that while these frameworks inform the objectives and operating procedures of countless organisations around the globe, since sexuality and gender diversity are not explicitly noted in the frameworks they do not filter down to these organisations and are therefore subject to a process of repeated omission.

For example, the Juvenile Justice Standards of the Australasian Juvenile Justice Administrators (AJJA) — the 'agreed set of standards juvenile justice services agencies [in Australia and New Zealand] aspire to meet' (AJJA 2009, 11–12) — draw on the Standard Minimum Rules for the Administration of Juvenile Justice and the Rules for the Protection of Juveniles Deprived of Their Liberty. They include a commitment to recognising the 'age, sex, gender, culture and personal circumstances' and the 'cultural, linguistic and religious diversity' of young people (AJJA 2009, 5–6), but do not explicitly address the needs of LGBTIQ young people. Similarly, the AJJA's Standards for Juvenile Custodial Facilities, which again draw heavily on the international frameworks relevant to youth justice, include the following standards for youth detention centres:

- 'the centre recognises and responds appropriately to the linguistic and cultural diversity of young people';
- 'the centre recognises and responds appropriately to the expressed religious and spiritual needs of young people'; and
- 'the centre provides age-appropriate and gender-appropriate services' (AJJA 1999, 11–12).

Again, therefore, while cultural, gender and religious diversity are explicitly recognised, diversity in sexuality is not. Interestingly, however, gender diversity is recognised in this instance. A 'sample indicator' of the latter standard is that 'there is an appropriate policy or established method of responding to the needs of transgender and other young people who do not fit traditional gender categories' (AJJA 2009, 12). This may indicate that trans young people present more of a visible 'problem' to youth detention centres than do young people with non-heterosexual preferences.[2]

Importantly, while these AJJA national standards are informed by international human rights frameworks, they in turn inform policy and practice in Australian youth justice systems. For example, Queensland's *Youth Detention Centre Operations Manual* is 'underpinned by a suite of policies and collectively reflects the obligations outlined in the *Youth Justice Act 1992* and the Australasian Juvenile Justice Administrators (AJJA) service standards for juvenile custodial facilities' (Queensland Government 2013). Tasmania's Ashley Youth Detention Centre is similarly 'influenced by the Australasian Juvenile Justice Administrators Standards for Juvenile Custodial Facilities (AJJA Standards), which incorporates relevant United Nations standards and provides a benchmark for service provision and the treatment of young offenders' (Tasmanian Department of Health and Human Services 2005, 10). Our concern here is that the omission of LGBTIQ young people from international human rights frameworks has a flow-on effect, resulting in their omission from national policies and standards and, in turn, state and territory policies and standards that shape youth justice practice in Australia.

These examples demonstrate that while the international human rights frameworks relating to young people — including the incorporation of the principle of non-discrimination — help shape youth justice policy in Australia and elsewhere, the absence of an explicit commitment to non-discrimination against sexuality and gender diverse young people has filtered down and resulted in its repeated omission from policy and discourse about youth justice. This is not to suggest, however, that discrimination against this group of young people occurs as a direct result of this omission. As many scholars lament, human rights frameworks are 'aspirational documents' (Garbarino and Briggs 2014) and do not always have their intended influence on policy and practice (Bessant 2009; Muncie 2008; Zigon 2014). As Goldson and Kilkelly argue, while international human rights standards are useful

2 Trans young people may be detected more easily than gay or lesbian young people, as diverse sexuality is not always visible. Visual cues about gender non-conformity, however, can be visible, as the physical appearance of a trans young person may not align with more traditional expectations of masculine/feminine dress and personal presentation.

in curtailing some of the excesses of youth detention, their practical impact has been limited to date (Goldson and Kilkelly 2013). We recognise that the acknowledgment of a group of young people in these frameworks will not necessarily result in a practical reduction in discrimination faced by them. As stated above, we also recognise that explicitly recognising the right of LGBTIQ young people to non-discrimination might not be in the best interests either of this group specifically, or young people in contact with the criminal justice system generally, as some nations may refuse to ratify human rights instruments that explicitly recognise and protect this group. Nonetheless, given both their over-representation and their vulnerability in the youth justice system (discussed below), the ways in which the rights of this group might best be protected is a matter that must be urgently addressed.

As noted above, there is emerging evidence that LGBTIQ young people have more adverse contact with criminal justice systems than do their heterosexual counterparts. The remainder of this article examines this research and documents the discrimination and mistreatment of LGBTIQ young people in youth justice systems. As much of the existing research examines the contact of LGBTIQ young people with the police, we focus predominantly on policing. However, as discriminatory policing of LGBTIQ young people can entrench this group of young people into the more severe stages of the criminal justice system, we then consider the documented experiences of LGBTIQ young people in court and youth detention.

Policing LGBTIQ young people

The police are charged with maintaining order in public spaces, and it is well documented that LGBTIQ young people are subject to more victimisation than are heterosexual young people (Hillier et al 2010). This leads them to spend more time in public spaces. For example, homophobia from families can lead to LGBTIQ young people being homeless, using drugs and being reliant on activities such as 'survival sex' for food and shelter (Jordan 2000; Bontempo and D'Augelli 2001; Cochran et al 2002; Whitbeck et al 2004; Cull, Platzer and Balloch 2006). Such activities are subject to policing in public spaces. This makes LGBTIQ young people more likely than heterosexual young people to have interactions with criminal justice agencies (Himmelstein and Bruckner 2011). Even when involvement in risk-taking behaviours is controlled for, LGBTIQ young people are more likely to be stopped and detained by police than are heterosexual young people (Himmelstein and Bruckner 2011). This raises important questions about the extent to which the human rights of LGBTIQ young people — including their right to non-discrimination — are observed by police.

An emerging body of research suggests that police engagements with LGBTIQ young people are less than satisfactory. Dwyer's research found that looking queer

can shape how policing happens for LGBTIQ young people (Dwyer 2011; 2012) and that police are still policing same-sex affection between young people as a form of public indecency (Dwyer 2012). Police officers used homophobic pejoratives, policed same-sex affection in public, and failed to respond when LGBTIQ young people were victimised. Some police even worked around legal frameworks to fine young people for transgressing boundaries of heteronormativity. As one young person interviewed for Dwyer's study claimed (Dwyer 2012, 22):

> I got a $125.00 fine for telling a copper they looked hot in their uniform, this male cop … 'cause I was in a car when I said it, and we were driving past him, the way he charged me was he said I had my body parts out the window … so he wrote the fine out under that and … told me that he was giving me the fine because that offended him … 'cause he knew he couldn't give me a fine just for telling him he was hot. [Mac, gay male, 19.]

Issues like these are echoed in the work of Amnesty International (2006), with police non-response reported in addition to the harassment of LGBTIQ young people in public spaces as a result of the enforcement of 'quality of life' legislation (which covers 'offences' such as 'public nuisance' and 'indecency'). These practices evidently breach a range of human rights of LGBTIQ young people.

These issues are particularly important given that, in most jurisdictions, police can remand young people in custody (Richards and Renshaw 2013). While there are no Australian data on the number of LGBTIQ young people on custodial remand, one study in the United States found that LGBTIQ young people are 'twice as likely [as non-LGBTIQ young people] to be held in secure detention for truancy, warrants, probation violations, running away and prostitution' (Irvine 2010, 693). Further, it has been documented that particular groups of young people, including homeless young people, those in out-of-home care and/or those lacking familial support, are vulnerable to being placed on custodial remand by police in Australia (Richards and Renshaw 2013). Given that LGBTIQ young people are at high risk of being excluded from families and becoming homeless, it stands to reason that this group of young people is exceptionally vulnerable to being remanded in custody by police.

Although little has been documented about contact of LGBTIQ young people with police, the emerging evidence suggests that the human rights of these young people are being breached. Moreover, policing decisions have serious consequences for young people, and can draw them further into the justice system — a system that has serious documented impacts on young people and communities, and one that is notoriously difficult to exit. The remainder of this article examines these impacts on LBGTIQ young people in the more severe stages of the criminal justice system: courts and detention.

LGBTIQ young people and the courts

Little has been documented specifically about how LBGTIQ young people fare in Australian criminal courts. International research, however, demonstrates that court interactions with LGBTIQ young people often fail to assist them (Majd, Marksamer and Reyes 2009). Feinstein et al (2001) note that LGBTIQ young people can be misrecognised by court staff based on their appearance and behaviours, as they may act 'straight' to avoid detection in youth justice systems. The needs of these young people are subsequently overlooked (Feinstein et al 2001). The international research also documents a lack of knowledge about LGBTIQ issues among court staff. Majd, Marksamer and Reyes (2009) and Marksamer (2008), for example, found that courts in the United States have sentenced LGBTIQ young people to programs that attempt to change their sexual orientation, and have included details in sentenced orders that require trans young people to dress according to their biological sex in the misguided belief that this will 'cure' their gender issues (Marksamer 2008). These actions breach the human rights of these young people and are discriminatory and harmful. While we are yet to document if these are issues in an Australian context, this research underscores the key argument of this article: that the human rights of LGBTIQ young people in contact with the justice system require closer examination.

Detention and LGBTIQ young people

International research demonstrates that the rights of LGBTIQ young people are transgressed in a range of circumstances in detention facilities (Estrada and Marksamer 2006). Curtin (2002) found that detention centre staff in the United States refused to allow girls to shave their heads and to demonstrate affection to other young people in detention. LGBTIQ young people were also isolated from young people of the same sex for the purposes of 'protective' custody (to keep them safe from other inmates) or 'preventative' custody (to prevent them from making sexual advances towards young people of the same sex) in detention facilities (Curtin 2002).

In the Australian context, little has been documented about how LGBTIQ young people are treated in detention. One interviewee in Dwyer's study (2011, 17), however, recounts her experiences with security staff in an Australian youth detention centre as follows:

> I'm a pretty butch girl … I didn't really get treated that well cause they were like, 'Ah you should stand up for yourself you're butch ha ha', and it was just like 'Yeah I'm a 14 year old kid with a shaved head'. [Tayden, pansexual female, 19.]

This example demonstrates that, in some cases, LGBTIQ young people are assumed to have particular characteristics and are therefore treated by criminal justice

personnel in particular (discriminatory) ways due to misguided beliefs about this group of young people. Issues were also raised in the recent review of Bimberi Youth Detention Centre in Canberra, with young people in the review noting 'concerns with staff not adequately responding to taunts from other young people about race or sexuality' (ACTHRC 2011, 307).

Conclusion

There is currently only a limited body of research on the experiences of LGBTIQ young people with police, courts and corrections systems, particularly in the Australian context. As outlined above, however, the emerging literature suggests that this group of young people is discriminated against by criminal justice personnel on the grounds of sexuality and gender diversity. This supports the argument of Majd, Marksamer and Reyes (2009) that youth justice systems are 'characterized by a profound lack of acceptance of LGBT identity' and this can consequently mean that youth justice professionals and processes fail to recognise the needs of sexuality and gender diverse young people. The primary aim of this article is therefore to stimulate consideration of the human rights of this group of young people.

While we acknowledge that the United Nations has made substantial progress to address issues related to discrimination on the grounds of sexuality and gender diversity, we have argued in this article that an explicit recognition of the right of LGBTIQ young people to non-discrimination is absent from international human rights frameworks that influence domestic policy and practice. We also acknowledge that many international human rights frameworks have limited practical impact. As Muncie (2008) notes, while the Convention on the Rights of the Child may be the most ratified human rights convention in the world, it is 'lamentably also the most violated'. Nonetheless, as we have aimed to demonstrate in this article, these frameworks are cited constantly in the youth justice literature (Hammarberg 2008; Muncie 2008; Gray 2011; Goldson and Muncie 2012) and are referred to constantly in debates about youth justice policy formation (see also NSW Department of Attorney General and Justice 2011). Further, they are standards against which the performance of Australia and other states parties in youth justice is measured. Each state party to the Convention on the Rights of the Child, for example, is periodically assessed on its progress towards meeting the objectives of this framework (Goldson and Muncie 2012; UNCRC 2012). It has been suggested that compliance with international frameworks could be adopted more routinely in Australian youth justice systems: 'the compliance of a juvenile justice department, program or intervention with the *Convention on the Rights of the Child* … could be used to measure performance' (Richards 2011). Indeed, this already occurs in some organisations. For example, the first key performance indicator listed in the Queensland Commission for Children

and Young People and Child Guardian's *Strategic Plan 2011–15* (2012, 13) is the extent to which 'Queensland's performance with respect to the implementation of United Nations Convention on the Rights of the Child (UNCROC) is positive'. To date, however, evaluations of the compliance of various nation states with these frameworks have focused largely on the extent to which young people in contact with the justice system face discrimination on 'racial' or ethnic grounds (Goldson and Muncie 2012; Muncie 2008). The absence of any explicit right to non-discrimination on the grounds of sexuality and gender diversity precludes states' performance in this regard from being measured.

Our concern is that as LGBTIQ young people — who are over-represented in the criminal justice system and who are a vulnerable group within this system — are not explicitly included in these frameworks, the potential exists for their human rights to be breached and for their needs to be overlooked. The primary message of this article is, therefore, that it is timely to consider how best to protect the human rights of LBGTIQ young people and keep the rights of this marginalised group on the policing, youth justice and human rights agenda. ●

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Complaints against the New South Wales Police Force: analysis of risks and rights in reported police conduct

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Citizens subjected to wrongful arrest, incivility or other police misbehaviour need access to a sound and objective system for making complaints about police conduct that infringes their fundamental human rights. This qualitative empirical study examined potential human rights violations in written descriptions by 91 legal practitioners and client advocates of events culminating in a formal complaint against the New South Wales Police Force (NSWPF). The descriptions were systematically coded to identify the types of police behaviours that led to complaints, the nature and extent of any human rights violations, and the degree of legal risk exposure to the NSWPF in the reported conduct. The majority of the complaints resulted from police inaction (30%) or unlawful behaviour (25%), and involved moderately high or high risk behaviours exposing the police to potential legal liability and diminishing police legitimacy. The reported police conduct was not trivial and impinged upon multiple rights of citizens, particularly the right to security of person and equality before the law. Increased awareness of human rights issues implicated in citizen complaints and the potential for costly litigation will assist police in responding more effectively to complaints and will enhance community confidence in police.

Keywords: police, accountability, citizen complaints, human rights violations

Introduction

All people living in Australia have the right to protection from infringement of their fundamental human rights, whether explicitly provided by legislation or by international instruments. However, Australia, as a liberal democracy, is unique in that it does not have a national integrated human rights legal framework (Marmo, de Lint and Palmer 2012, 641). Residents in some states and territories, such as Victoria and the Australian Capital Territory, are protected by local human rights legislation

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(*Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT)). In states and territories where no explicit rights-based legal system exists, such as New South Wales, all residents are accorded protections enumerated in the Universal Declaration of Human Rights (UDHR). In 1948, all members of the United Nations (UN) General Assembly, including Australia, adopted the UDHR (Australian Human Rights Commission 2006). Australia has also ratified most major international human rights instruments,[1] and issued a standing invitation to UN human rights experts to visit and report on the protection of human rights in Australia (AHRC nd).

The protection and infringement of individual human rights are inextricably linked with everyday operational policing activities. Many police powers — such as stop, search, seizure, arrest, detention and interview — impact the rights to personal freedom and the privacy of persons with whom police interact in the course of operations to prevent and detect crime. Other rights, such as freedom of speech and lawful assembly, are affected by policing efforts to ensure public order and to prevent obstruction of free passage. Furthermore, decisions relating to the granting or refusal of licences, which form part of police administrative activities, and access to criminal justice, such as the right to a fair trial and employment, affect the rights of individuals (Beckley 2000, 1). During normal police operations, such as crime investigations and peacekeeping, the human rights and fundamental freedoms of citizens can be infringed if police use excessive force, make a wrongful identification or arrest, fail to act, or simply misinterpret a situation.

Additional sources of protection for citizens' human rights are inherent in professional standards and codes of conduct for police (Prenzler, Bronitt and Beckley 2012), such as the UN *Code of Conduct for Law Enforcement Officials* (1979) which states at Art 1:

> Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

In New South Wales, a police officer who successfully enters the NSW Police Academy and becomes a police constable is bound by the following Oath of Office:

> I ... swear that I will well and truly serve our Sovereign Lady the Queen as a police officer without favour or affection, malice or ill-will until I am legally discharged, that I will see and cause Her Majesty's Peace to be kept and preserved and that I will prevent to the best

1 Such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

> of my power all offences against that Peace and that while I continue to be a police officer I will to the best of my skill and knowledge discharge all the duties thereof faithfully according to Law. So help me God. [*Police Act 1990* (NSW), s 207D.]

Moreover, the New South Wales Police Force (NSWPF) Customer Service Charter includes items relevant to the protection of the human rights of witnesses, victims and community members, undertaking to 'be accessible to all persons regardless of their culture, language, age, sexuality, physical and mental ability, locality and socio-economic background', and to treat customers 'fairly and with respect' (NSWPF 2013b).

Notably, the major instruments that protect human rights are not part of Australian law. The UDHR, although not a treaty, comprises part of customary international law and can be perceived as a source of law in Australia (Gans et al 2011, 10), but is non-binding. The *Code of Conduct for Law Enforcement Officials* (UN 1979) is recognised worldwide in policing (Neyroud and Beckley 2001, 62; Smith 2010) as a guide to best practice in managing policing operations (Cawthray 2013; Prenzler, Bronitt and Beckley 2012). Section 47 of the *Australian Human Rights Commission Act 1986* (Cth) declared that seven international instruments were part of it, including the International Covenant on Civil and Political Rights (ICCPR). However, the courts have held that when executive agents of the government sign a treaty this does not create rights or obligations for private citizens unless these instruments are incorporated into domestic Australian law. Therefore, the instruments are not the bases of any actionable rights (Gans et al 2011, 19).[2]

The ICCPR encompasses all the human rights and fundamental freedoms that exist in other instruments, such as the UDHR. The incorporated rights most relevant to the investigation and prosecution of crime are the right to life (Art 6); the right to liberty and security of the person (Art 9); the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment (Art 7); the right to privacy (Art 17); the right to silence (Art 14); and the right to a fair trial (Art 4) (Gans et al 2011, 37). These rights are interpreted in a similar way to those enumerated in the UDHR and have been mentioned in many criminal and civil cases in Australia, especially cases on deaths in police custody (Office of Police Integrity 2009) and excessive use of police force (UN Human Rights Committee 2009). Some of these rights have been incorporated into Australian statutes and human rights law, where it exists.

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2 See *Walker v Baird,* 1892. An example of a law enacted to give rights to Australian citizens is the *Sex Discrimination Act 1984* (Cth), which emanates from the Convention on the Elimination of All Forms of Discrimination against Women.

According to Gans et al (2011, 47), the right to privacy remains 'relatively insecure' in Australia. The value of human rights in Australia has been the basis of some scepticism in legal circles: 'because rights do not have an absolute value they have no special value at all' (Ashworth and Redmayne 2010, 36). This somewhat jaundiced view seems to emanate from uncertainty of the interpretation and weight that an Australian court will accord to a particular right recognised under the ICCPR.[3]

Many academics and international non-governmental organisations have recognised the importance of considering human rights in policing. For instance, police owe citizens a duty of care, requiring them to be 'critically aware of shared human rights, and the ways these ethical stances and legal structures can lead to better practical outcomes for vulnerable people and populations, and all "users" more generally' (Bartkowiak-Theron and Asquith 2012, 14). International sources are more prescriptive about human rights principles — for example, the UN training manual for police officers states: 'Law enforcement officials are obliged to know, and to apply, international standards for human rights' (UNOHCHR 2004, 1).

Whereas in ex-Warsaw Pact or other countries with totalitarian regimes the purpose of policing is to protect the state or its ideology, the purpose of policing in democratic countries is ostensibly to protect the human rights of individual citizens — a diametrically opposite approach.[4] Countries such as Australia, deemed liberal democracies, aspire to achieve policing models described as democratic (Bayley 2006) that are accountable to the public, and have attained 'legitimacy' (Jackson 2013). Political systems achieve legitimacy when they (a) meet certain objective criteria related to the acceptance of domestic norms; and (b) observe human rights (Hough

3 Where it is alleged to a court that evidence presented has been unlawfully or improperly obtained, the court may consider whether to exercise discretion to exclude evidence obtained 'contrary to or inconsistent with a right of a person recognised by the ICCPR' (s 138(3)(f) of the Australian uniform evidence legislation: see, for example, the *Evidence Act 1995* (Cth)). This factor has been considered in several cases (for example, *R v Sotheren*, 2001) to apply to the rights of the person in accord with Australian law, not a wider interpretation of other jurisdictions. In addition, because Australia acceded to the First Optional Protocol to the ICCPR, complainants may petition the UN Human Rights Committee for a determination on whether Australian law complies with the ICCPR. If a petitioner is successful, through a long and painstaking process, changes to the law are not enforceable, but may be considered by the Australian government. The potential for success should not be dismissed, however, as proven by the well-known decision in *Mabo v Queensland*, 1992, a remarkable case in which the High Court of Australia first recognised the merits of native land rights of a Torres Strait Island citizen.

4 One of the authors, who was a serving police officer, witnessed this factor while working with pre-accession countries to the European Union (Beckley 2012, 275).

2012; Goodman-Delahunty et al 2013b). In the criminal justice system, legitimacy exists when people accept that authorities have earned the right to command, willingly obey systems of authority, and perceive police as legitimate (Hough 2012, 146; Goodman-Delahunty et al 2013b). Police legitimacy is intrinsically linked to accountability to the public (Bennett et al 2009; Mazerolle et al 2011; 2013a; 2013b; 2013c). Police accountability is maintained through a system of complaints against the police scrutinised by police oversight bodies such as the Ombudsman or specific bodies such as the Police Integrity Commission.[5]

Legitimacy, policing and the 'social contract'

As part of the 'social contract' (Neyroud and Beckley 2001, 20), citizens are content to comply with legislation and participate in maintaining good order in return for protection by the state, as well as safety and security. Operational policing, by the nature of its activity, often engenders conflict between citizens and stakeholders[6] that culminates in complaints against the police. Members of the public require a fair and objective means through which to communicate their displeasure when they are a witness to or a victim of police conduct that entails incivility, dishonesty, misconduct or more serious issues such as excessive use of force or corruption. A complaints system is a mechanism to deter police misbehaviours, hold police accountable for their actions, and empower citizens to assert that their rights are upheld. When citizens are subject to wrongful arrest, incivility or other police misbehaviour, they need access to a valid and trusted system of complaints that, when activated, results in an open, transparent, objective, timely and fair investigation with an acceptable outcome in most cases (Goldsmith 1999, 34; Prenzler 2009, 61). The significance of a well-managed complaints system in protecting citizens against human rights abuses should not be minimised: 'In all jurisdictions, whether or not a culture of police impunity prevails, complaints and the way they are handled serve as important indicators of police professionalism, responsiveness and accountability' (Smith 2010, 71).

Complaints against the NSWPF

In New South Wales, legislation covering the detailed procedures for complaints against the police is provided by the *Police Act 1990* (NSW) (Goodman-Delahunty et al 2012; NSWPF 2012). Media sources reported that the total number of complaints

5 All states and territories in Australia have some form of independent oversight to ensure accountability of the police. See den Heyer and Beckley 2013; Goldsmith 2001; Lewis 1994.

6 The 'stakeholders' in this context are all members of society, whether citizens or visitors, and, in particular, elected members and police oversight or scrutiny bodies.

Table 1: Number of complaints against the NSWPF 2009–2013

NSWPF	Year of complaint				Source of data
	2009/10	2010/11	2011/12	2012/13	
Complaints per thousand sworn police officers	301	289	311	332	NSWPF annual reports (1 July to 30 June annually)
Total number of complaints	5196	5516	5135	4928	

filed against the NSWPF in 2011 was around 7000, including both formal and informal complaints from internal and external sources (Domjen 2012). The numbers of citizen complaints against police recorded in NSWPF annual reports in recent years are shown in table 1.

Despite what appears to be a substantial number of written complaints, the volume of recorded complaints against police in Australia has been described as 'only the tip of the iceberg' (Prenzler 2009, 61). Prior research in the United Kingdom indicated that up to 90% of persons who have legitimate grounds to lodge a complaint based on negative experiences in their interactions with police did not formally lodge a complaint, despite their dissatisfaction with police conduct and service (Maguire and Corbett 1991).

An investigation of complaints lodged against the NSWPF in the 12-month period May 2009–May 2010 revealed 3131 discrete external complaints from citizens, extracted directly from the NSWPF computerised complaints recording system, 'c@ts.i', which is the tracking system database used by the NSWPF to manage all written complaints, accessible to the NSW Ombudsman and the NSW Police Integrity Commission (Goodman-Delahunty et al 2011). A common perception among some police officers is that the majority of complaints are non-meritorious, initiated either by disgruntled suspects who are motivated to retaliate against the police or by housewives with too much time on their hands (Goodman-Delahunty et al 2011, ix). However, an analysis of the content of the complaints revealed that the majority were initiated by law-abiding community members who reported serious and actionable misconduct that exposed the NSWPF to substantial legal risk (Goodman-Delahunty et al 2011; 2013a). When classified using the NSWPF taxonomy, which distinguishes 23 separate issues related to specific police behaviours, these complaints reported on 6460 separate issues, indicating that many events reported by complainants raised more than one issue of alleged police misconduct (Goodman-Delahunty et al 2011). To date, however, few researchers have examined the nature and scope of human rights violations in complaints about police conduct. The current study addresses this issue.

Research aims

The purpose of the current study is to examine the extent to which human rights abuses were alleged in police conduct that formed the basis of formal written complaints lodged by legal professionals and community advocates who represented members of the NSW community following their clients' negative interactions with the police.

Method

Research design and materials

A mixed-method online survey questionnaire containing 42 questions was designed in collaboration with Community Legal Centres NSW[7] (Goodman-Delahunty et al 2014). Ethics approval to conduct the study was secured through the Charles Sturt University Human Research Ethics Committee (2011/062).

Participants

Survey participants were 493 legal professionals and community advocates in New South Wales contacted via email through the Law Society of New South Wales and professional networks of the Community Legal Centres NSW.[8] They were dispersed across a diverse range of metropolitan and rural locations in New South Wales. Survey participation took approximately 10–20 minutes, depending on the scope of participants' experience with the NSWPF complaints procedures.[9] In all, 378 participants completed all questions in the survey. More than half of the participants (n = 195) had experience directly assisting their clients to make a complaint against

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7 Assistance and support in developing and fielding the survey questionnaire was provided by Roxana Zulfacar of Community Legal Centres NSW and Mira Taitz at Charles Sturt University.

8 Participating organisations included Aboriginal Legal Service; Australian Association of Social Workers; Australian Association of Social Workers NSW Branch; Australian Community Workers Association Inc; Australasian Disability Professionals; Australian Services Union; Community Legal Centres NSW (CLCNSW); Council of Social Service of New South Wales; Immigrant Women's Speakout Association; Law and Justice Foundation; Law Society of New South Wales Monday Briefs; NSW Young Lawyers Legal Aid; NSW Young Lawyers Human Rights Committee; NSW Young Lawyers Criminal Law Committee; NSW Young Lawyers Public Law & Government Committee; Settlement Council of Australia; Women's Domestic Violence Court Assistance Scheme DV Workers; Youth Action Policy Association; and Youth Justice Coalition.

9 Further details of the survey methodology are specified in Goodman-Delahunty et al 2014.

a police officer or to seek redress from the NSWPF. Approximately one in every four survey participants (23%; $n = 91$) had a client's complaint against the NSWPF finalised within the 24-month period prior to completing the survey. A finalised complaint is one where an investigation into a matter has been assessed and allocated an outcome. These participants were asked the following open-ended question: 'For the most recently finalised written complaint, what was the incident of concern?'

Responses from those participants who reported firsthand experience within the past 24 months of lodging a formal complaint on behalf of a client against the police comprised the sample for the current study. This report analyses their written responses to this question. The majority of the participants in this group (51%; $n = 47$) were legal practitioners; 30% ($n = 27$) were client advocates who worked in social or community services in New South Wales; and 19% ($n = 17$) were other advocates. Most participants were women (62%); 26% were men; and 12% did not disclose their gender.

Data analysis and coding procedures

To assess the extent to which issues complained of infringed upon the clients' human rights, participant responses describing the police conduct leading to the most recent finalised complaint were reviewed and manually coded on three dimensions indicative of the gravity of that conduct: (1) the nature of the police conduct in issue; (2) the level of legal risk exposure to the NSWPF in the reported conduct; and (3) the human rights, if any, breached by the conduct.

The nature of the reported police conduct in issue: The police conduct described in participant narratives was classified as one of the following 10 behaviours: (1) illegal or unlawful conduct (behaviour contrary to criminal law); (2) undue aggression or force; (3) incivility, rude or abusive behaviour; (4) unprofessional conduct; (5) discriminatory or biased treatment; (6) inaction; (7) poor communication; (8) infliction of mental distress; (9) property damage; and (10) other. Where behaviours fitted within more than one classification, they were counted in the most appropriate category as determined by the researchers by assessing the most serious of the actions.

Legal risk exposure: The level of legal risk exposure to the NSWPF in the reported police conduct was classified in one of five categories of legal risk, ranging from low to high (Goodman-Delahunty et al 2011; 2013a), as follows: (1) low risk consisted of rudeness, intolerance or minor inaction; (2) low–moderate risk consisted of police inaction involving vulnerable persons, repeated behaviour, costs to complainants with little public impact; (3) moderate risk conduct was action or inaction involving

public visibility, but no significant consequences or use of force; (4) moderate–high risk conduct resulted in physical or psychological injury, including assaults; and (5) high risk conduct resulted in severe injury or detriment to police public image — for example, serious assaults, severe intimidation, negligence, failure of duty, deceit, corruption or wrongful death. Based on civil torts law, conduct that was rated low or low–moderate in risk was that posing a negligible risk of civil litigation against the police.

Human rights abuses: Using the definitions of human rights enumerated in the Articles contained in the UDHR, descriptions of the reported police conduct were reviewed and coded. The comparative framework of the UDHR was used because it is an internationally accepted and well-understood framework regarding the scope and reach of its Articles.[10] All responses were coded by two independent raters,[11] who were blind to other survey responses provided by participants. To ensure the accuracy and reliability of the coding, the degree of consensus was tested statistically using a measure devised for coding the reliability of open-ended verbal responses.[12]

Results

Finalised complaints against NSWPF

On average, each participant had experience with between one and two finalised written complaints against the NSWPF in the past two years. In total, they had experience with 211 separate formal written complaints in this period.

10 Other instruments could have been used, such as the ICCPR, which does have a place in the legal system of Australia, albeit a marginal one, or the Convention on the Elimination of All Forms of Discrimination against Women, but the gender of complainants was not always clear. Taking the foregoing factors into consideration, the researchers based the coding on the longer-established and clear credentials of the UDHR.

11 Raters were the second and third authors, legal professionals with expertise in policing and human rights law.

12 For the nature of the police conduct in issue, this yielded a Krippendorff's alpha of 0.7; for the legal risk exposure, 0.8; and for the human rights codes, 1.00. Inter-rater reliability was in the 'good' to 'very good' range.

Table 2: Reported conduct culminating in complaints against NSWPF

Type of police conduct reported	%	Example of reported conduct
Inadequate police service — inaction	30	They had done no investigation and intended to do no investigation, and despite me giving them information as to witnesses before — as the matter developed, during, and immediately after, they took no details, didn't care (Other Advocate 5)
Illegal/unlawful conduct	26	Client claimed the police searched her in the main street, asking her to lift up her top, showing her bust in the main street. Witness can back up the claim, and observed this happening (Client Advocate 11)
Unprofessional conduct	11	Police officers passed on information to the RTA [Roads and Traffic Authority] that was distinctly contrary to evidence given in court, causing my client to have their licence suspended (Legal Practitioner 27)
Undue aggression	10	Excessive force against a young person and arresting instead of using alternatives (Other Advocate 10)
Discriminatory treatment: biased action or inaction	9	The NSWPF dismissed the concerns of a person with disability (Client Advocate 17)
Incivility; rude and abusive behaviour	7	My client complained that the officer was insulting and disrespectful as well as rude and inappropriate … told she was a liar and that no one would ever believe a junkie hooker (Client Advocate 18)
Inadequate communication	3	Lack of provision of Auslan [sign language] interpreters (Client Advocate 13)
Property loss or damage	1	Non-return of property following an arrest (Legal Practitioner 47)
Undue mental distress	1	A victim in DV [domestic violence] being re-traumatised by the Officer in Charge (Client Advocate 7)
Other	2	I can't really go into details, because even though the NSWPF considers the complaint finalised, neither myself nor my client does (Legal Practitioner 29)

Note: $N = 91$. A behaviour that fitted more than one category was counted only once in the most appropriate category, determined by the researchers by assessing the most serious of the reported actions.

The nature of police conduct leading to complaints

Participants' descriptions of details of the events that had generated the most recently finalised complaint revealed that the incidents of concern encompassed a variety of types of police conduct — for example, their clients reported that the police had not listened to what they said, did not follow routine protocol, were unnecessarily oppressive or harassed them. Systematic analyses of the nature of the police conduct in issue in the formal complaints that were lodged, as described by the client

Table 3: Legal risk incurred by police conduct reported

Level of risk	%	Example of conduct reported
Low	3	My client complained that the officer was insulting and disrespectful as well as rude and inappropriate (Client Advocate 18)
Low–moderate	5	Attitude of the police when arresting based on circumstantial evidence (Client Advocate 16)
Moderate	38	Lack of action from attending police, on behalf of victim of domestic violence (Client Advocate 2)
Moderate–high	25	The police performed a strip search of my client at the back of a pub with the door partially ajar (instructs my client). My client was detained for 30 minutes while a female police officer was called from a nearby town. Nothing was found. My client was unhappy with the bullying behaviour of the police, the fact that she was made to wait and the fact that she was completely strip searched for the alleged theft of a purse (Legal Practitioner 9)
High	23	Client was seriously beaten by police, while not doing anything unlawful. Client was subsequently charged with assault police and use offensive language (Legal Practitioner 30)
Unable to be coded	2	Traffic matter (Legal Practitioner 39)

Note: $N = 91$.

advocates and legal professionals, revealed that three in every 10 complaints (30%) arose because of police inaction, or failure to fulfil their duties and obligations. One in every four complaints (26%) described conduct that violated the law, such as assaults. Other forms of police conduct that led to complaints were less frequent: one in every 10 complaints (11%) was characterised as a form of unprofessional behaviour, or undue aggression or force, or discriminatory/biased treatment. The nature of the police conduct reported, the proportion of complaints in each category, and examples provided by the legal representatives and client advocates of each type of conduct are displayed in table 2.

A supplementary assessment of the gravity of the police conduct reported was provided by analysing the level of legal risk exposure to the NSWPF inherent in that conduct. The results revealed that the actions taken by police officers exposed NSWPF to substantial levels of legal risk. Only 9% of the incidents were rated low or low-to-moderate risk. By far the substantial majority, 89%, were rated as moderate-to-high risk incidents. One-half of the behaviours described (49%) were classified as either moderate-to-high (23/89) or high risk (21/89). The proportion of complaints within each risk category and examples of the reported conduct in each category are shown in table 3.

Human rights abuses in the reported police conduct

Examination of the reported conduct in light of the Articles in the UHDR revealed that rights in all but three Articles (the right to political asylum, Art 14; the right to a nationality, Art 15; and the right to marry and found a family, Art 16) were potentially impacted by the exercise of police operations. The conduct reported by the participants was further analysed to determine the nature of the rights impacted by that conduct and the percentage of human rights violations in each category. In addition, the relevant police powers and authorisation for police actions impacting upon these rights were tabulated for each type of complaint.

These analyses demonstrated that the right most susceptible to violation was equality before the law (UDHR, Art 7), accounting for one-third of the complaints. A number of examples of complaints in this category were about domestic violence incidents, where participants reported a 'lack of action in relation to domestic violence and applications for apprehended domestic violence orders' (Legal Practitioner 25) by police, or that police treated victims of domestic violence inappropriately and insensitively and 'put inappropriate comments in the AVO [apprehended violence order]' (Legal Practitioner 14).

One in every five complaints was classified as a violation of the right to life, liberty and security of person (UDHR, Art 3). Typical complaints in this category were those where the clients reported that 'excessive force' was used by police, along with alleged 'assaults' by police when the clients were being detained or held in custody.

The proportion of complaints comprising violations of all other human rights was smaller. No breaches of Art 4 (no one shall be held in slavery or servitude), Art 18 (the right to freedom of thought, conscience and religion) or Art 20 (the right to freedom of peaceful assembly and association) were observed. Table 4 displays the percentage of violations of each article in the UDHR with examples of the reported police conduct that infringed each enumerated right.

Discussion

The current study aimed to evaluate human rights concerns within formal complaints lodged against the NSWPF. Specifically, the focus was on types of conduct or failures to perform assigned duties that generated citizen complaints.

The study participants were not the complainants themselves, but persons who, in their professional roles as legal representatives of clients who had experienced problems with police, regarded the police conduct in issue as sufficiently serious to warrant a formal written complaint. The fact that the complaints were lodged by

professionals who are subject to criminal sanctions for frivolous use of the complaint process (s 141(b) of the *Police Act 1990* (NSW)) provided an additional degree of reliability regarding the nature of the reported police conduct that was the subject of this analysis. This feature of the survey distinguished it from studies that rely exclusively on self-reports by complainants, who may be more susceptible to self-serving biases.

The most frequent type of complaint against the NSWPF entailed reported police conduct that was inadequate or circumstances in which police inaction was unsatisfactory, along with behaviour that was considered unprofessional or unlawful. These behaviours translated into various violations of human rights. The violation that was most frequently reported was the right of all persons to be equal before the law. Another substantial complaint category concerned violations of the human right to life, liberty and security of person. The nature of the police conduct reported in these complaints comprised substantial violations of not only human rights laws, but also codes of conduct within the NSWPF. Members of the NSWPF are trained to respect human rights and they acknowledge international instruments such as the UDHR and the UN Code of Conduct for Law Enforcement Officials in their recruit training. Yet the results of this survey indicated that some police officers in New South Wales did not appear to comply with their Oath of Office or with good policing practice.

The NSWPF complaints system plays an important role in holding police officers accountable for their conduct, promoting fair treatment and protecting the human rights of citizens. A key function of the NSWPF complaints system is that it also provides an opportunity for the police to resolve disputes over conduct with complainants and maintain positive relationships with the community. When the NSWPF does not resolve adverse relationships with complainants, complainants rarely pursue the matter further. Although complainants can resort to alternative methods of resolving conflict with police, such as civil litigation for monetary damages, financial costs usually prevent this (Hopkins 2011; Ransley, Anderson and Prenzler 2007). One participant stated: 'Need some [civil litigation] to make an impact on the current system [to document cases] where non-compliance with LEPRA is [regarded by police as] an acceptable form of behaviour'.

Civil litigation as a mechanism to redress complaints has a high success rate financially, with high costs to the police (Hopkins 2011). Unresolved complaints against the NSWPF leading to civil litigation have resulted in substantial compensation awarded in decisions against the police (Nine News 2012; Hekmat 2012). Overall, the NSWPF incurred $75 million in 2010 and $69.7 million in 2011 in costs related to contingent liabilities for all civil matter claims against the police (Dodd 2012, app 2). During the

Table 4: Reported violations of human rights and associated NSWPF powers

UDHR Article and human right	%	Examples of reported human rights infringement	Relevant police powers, code/ legislation
7. All are equal before the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. (Note: also a right under UDHR, Art 12; ICCPR, Arts 2 and 17)	34	• Failure to act on assaults (Legal Practitioner 1) • Police officer refused to breach perpetrator on an AVO saying that it was a technical breach … then perpetrator went back to premises an hour later and assaulted her (Client Advocate 6) • Client made a report of sexual assault as a teenager against her father. My client's case was not followed up, and she later discovered paperwork had been mislaid (Other Advocate 6)	Discriminatory use of powers in investigating specific crimes/ incidents and investigating/ assembling evidence or omitting/declining to take prescribed action; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA), ss 114–138, 197–204
3. Right to life, liberty and security of person.	20	• Alleged assault by police officer (Legal Practitioner 3) • Use of excessive force by police during arrest (Other Advocate 8) • Client arrest for offence where the circumstances did not support the charge and police were or should have been aware that that was the case (Legal Practitioner 35) • Assault in custody on a female (Legal Practitioner 15)	Coercive force (minor to lethal); powers of entry, arrest, detention, search, seizure; LEPRA, ss 230, 231, 9–10, 99–108, 114–138, 20–45, 46–52
12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.	7	• The client was not happy with her treatment and believed that she was treated with contempt each time police attended her home (Client Advocate 5) • Police heavy-handed in their bail checks (Legal Practitioner 7)	Powers of search and seizure; discretion/decision-making in granting/not granting licences administered by the police such as firearms, betting, gaming, liquor licences and other businesses; LEPRA, ss 211–229.
5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.	5	• Strip search conducted at police station without complying with LEPRA (Legal Practitioner 2) • Victim in DV [domestic violence] re-traumatised by the OIC [officer in charge] (Client Advocate 7) • Client claimed the police searched her in the main street (Client Advocate 11)	Treatment of arrested persons and persons in custody; treatment of witnesses and vulnerable persons; LEPRA, ss 114–138; NSWPF 2010a
6. Right to recognition everywhere as a person before the law.	5	• Lack of using interpreters for CALD [culturally and linguistically diverse] community members (Client Advocate 1)	Discriminatory use of police powers, arrest, charging, prosecution; international treaties

UDHR Article and human right	%	Examples of reported human rights infringement	Relevant police powers, code/ legislation
2. Everyone is entitled to rights and freedoms in this Declaration.	3	• Intellectually delayed client unfairly treated by police officers (Client Advocate 3) • Targeting of client with intellectual disability (Legal Practitioner 11)	Oath of Office, cl 8; *Police Regulations 2000* (NSW); NSWPF 2008
9. No one shall be subjected to arbitrary arrest, detention or exile.	3	• False imprisonment when arrested by mistake (Legal Practitioner 33) • Attitude of the police when arresting based on circumstantial evidence (Other Advocate 13)	Powers of arrest, detention, deportation; move-on powers; LEPRA, ss 9–10, 99–108, 114–138, 20–45, 46–52, 197–204
10. Everyone is entitled in full equality to a fair and public hearing.	3	• Police officer lying and admitting lying under cross-examination (Legal Practitioner 19) • Fabrication of evidence assault committed, unlawful arrest (Other Advocate 16)	Investigations in specific crimes/ incidents and assembly of evidence or lack of it; common law (Bar Rules); international treaties; *Evidence Amendment (Evidence of Silence) Act 2013* (NSW)
11. Everyone charged with a penal offence has the right to be presumed innocent. (Also right to representation, ICCPR, Art 14.)	3	• Two young people kept in police cell for nearly 48 hours without ALS [Aboriginal Legal Service] contact or put before a bail court (Other Advocate 9) • Corrupt conduct in the form of police encouraging clients not to seek legal assistance and demanding to know what the defence was by direct contact with represented clients (Legal Practitioner 16)	Investigations and interviews; common law (Bar Rules); international treaties; *Evidence Amendment (Evidence of Silence) Act 2013* (NSW)
13. Right to freedom of movement and residence within the borders of each state.	3	• Harassment of client by local police officers (Legal Practitioner 23) • Unlawful removal from transport and excessive force (Client Advocate 14)	Stop and search powers on foot or in vehicles; LEPRA, ss 35–45, 185–192
17. Right to own property alone as well as in association with others.	3	• Trespass by police, refusal to leave, foot in the door (Legal Practitioner 38) • Intimidation of elderly man and direction to leave his home (Legal Practitioner 42) • Non-return of property following an arrest (Legal Practitioner 47)	Search and seizure of property; LEPRA, ss 211–229

UDHR Article and human right	%	Examples of reported human rights infringement	Relevant police powers, code/ legislation
1. All human beings free and equal in dignity and rights. (Also ICCPR, Art 2.)	2	• Racial vilification, detained due to racial identification, racial slurs made to person (Other Advocate 4) • A client who had a number of encounters with NSWPF and the Charter of Victims' Rights was not complied with (Legal Practitioner 13)	Oath of Office, cl 8; *Police Regulations 2000* (NSW); NSWPF 2008
8. Right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.	2	• Lack of thorough preparation of a prosecution in a breach of an AVO domestic (Legal Practitioner 8)	Discriminatory use of police powers; approach to specific crimes/incidents and investigating/assembling evidence or omitting/declining to take prescribed action; international treaties
19. Right to freedom of opinion and expression. (Also ICCPR, Arts 2 and 6; Convention on the Elimination of All Forms of Discrimination against Women, Arts 1 and 2.)	2	• The issue was that the police did not listen to a deaf woman who suffered domestic violence from her daughter at home (Client Advocate 9) • Lack of provision of Auslan [sign language] interpreters (Client Advocate 13)	Powers in managing/curtailing public protests/meetings; move-on powers; LEPRA, ss 87, 197–200

financial year 2010/11, $5.3 million was paid in compensation and legal costs only for matters involving unlawful arrests or detention (McNally 2012). These human rights violations impose an enormous financial burden on the NSWPF (Dodd 2012). A prudent public sector organisation should minimise public expenditures on litigation by effective interventions before matters escalate. Unresolved complaints diminish police legitimacy (Goodman-Delahunty et al 2013b), trust in the police, and the cooperation of the community (Maguire and Corbett 1991, 10; Mazerolle et al 2011).

Prior research revealed that obstacles to effective police complaint handling include the presumption by many police officers that complaints are mostly non-meritorious and are filed by police suspects who are motivated to retaliate against police (Goodman-Delahunty et al 2013a). This view was controverted by the findings in this study that most of the complaints entailed serious actionable police misconduct that exposed the NSWPF to significant legal risk.

The fact that the majority of the study participants who had filed complaints on behalf of their clients were legal professionals reflected the fact that the current complaints

system was largely inaccessible to lay citizens and other members of the community (Goodman-Delahunty et al 2014, 83). If the system were more user friendly, community members who have negative experiences with the NSWPF would not have to seek legal representation to make a complaint about perceived violations of their rights (Goodman-Delahunty et al 2013a). Law texts feature details of the ICCPR prominently, although criticism has been levelled at Australia because of the lack of openness, access and transparency of the law to the general public (Gans et al 2011, 47), particularly in respect of the right to privacy (Beckley 2013a). Recommendations to increase options for complainants to avoid litigation should incorporate a number of intermediate steps (Goodman-Delahunty et al 2012), including:

- seeking to speak with the police officer concerned;
- seeking to speak with a more senior officer in the relevant police station;
- seeking to speak with the local area commander;
- seeking resolution via the NSWPF Customer Assistance Unit;
- making a formal written complaint (lodged with NSWPF, NSW Ombudsman or various other organisations);
- reporting a police officer to the Police Integrity Commission;
- filing a complaint with the Australian Human Rights Commission under anti-discrimination law;
- if relevant, raising concerns in the criminal defence of a client accused of an offence;
- sending a letter of demand for redress to NSWPF (such as for compensation); and
- commencing civil legal action against the NSWPF.

Conclusion

The human rights treaties that comprised measures of police operational actions in this article are not recognised in the domestic law of Australia, except where explicitly included (Gans et al 2011, 18). The situations in Victoria and the Australian Capital Territory, which have incorporated a Bill of Rights into the criminal justice system, are exceptions; the remaining states and territories of Australia comply in principle with human rights law, but do not offer effective legal protection to their citizens. An initiative commenced in 2009 to introduce a national human rights framework failed to gain acceptance (Australian Government 2011a) by the then federal government, apparently because 'the majority of people did not foresee their rights being curtailed and were content with current arrangements' (Marmo, de Lint and Palmer 2012, 641). The baseline study (Australian Government 2011b) for the framework set out Australia's commitment to human rights:

> Australia has a long tradition of supporting the protection and promotion of human rights at the international level and has been closely involved in the development of the international human rights system.[13] [Australian Government 2011, 5.]

There have been some positive developments (AHRC 2011),[14] but the lamentable conclusion of the national initiative and the government's ostensible strong commitment to human rights have been questioned in several areas in recent years. Examples include the record on immigration (Human Rights Law Centre 2013; Hekmat 2013); discrimination against Indigenous peoples (Johnston 1991); people trafficking (Lindley and Beacroft 2011); and, specifically, the use of excessive force and lethal force by police officers in Australia (UN Human Rights Council 2010; Lillebuen 2013; Sommers 2013). The issue of the right to privacy and its lack of enforcement has also been discussed (Beckley 2013a). The findings of Royal Commissions and empirical studies[15] can substantiate a basis to indicate that governmental action is required to protect citizens' human rights and fundamental freedoms. The foregoing analyses of qualitative data about police conduct described by legal practitioners and community advocates comprising the basis of a formal complaint against the NSWPF revealed that almost all complaints lodged involved police conduct that infringed human rights. A more user-friendly complaints system that enables the resolution of complaints will assist in ensuring the legitimacy of the NSWPF.

One of the benefits to police organisations of the foregoing analysis of complaints is the opportunity to learn from mistakes and to identify best practice (Neyroud and Beckley 2001, 154–55). Ideally, the police organisation should have a process in place to capture the learning from adverse incidents or experiences involving members of the public and then disseminate information and training on practices, policies and procedures to eliminate the risk of human rights abuses (Beckley 2013b). Governments need to adopt a wider vision to ensure that human rights and fundamental freedoms for individual citizens are effectively protected, or they risk diminution of national standing, and dilution of the ideology and benefits of a liberal democracy. ●

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13 For example, Dr H V Evatt, then Australia's Minister for External Affairs, played a leading role in the adoption of the UDHR and, as President of the UN General Assembly, chaired the session at which the UDHR was adopted on 10 December 1948.

14 For example, scrutiny of all new legislation for compliance with human rights principles through the *Parliamentary Scrutiny Act 2011* (Cth).

15 For example, Bartkowiak-Theron and Asquith 2012; UN HRC 2009; Johnston 1991; Office of Police Integrity 2009.

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Protecting human rights in Australian investigative interviews: the role of recording and interview duration limits

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The way in which interviewers balance human rights concerns in Australian investigative and intelligence interviews was examined by documenting common practices and beliefs reported by 139 seasoned practitioners (M = 16 years) employed in Australian police, military and intelligence organisations. An online survey gathered information about interviewers' perceptions of recording practices, the duration of interviews and the number of times persons were interviewed for each matter. The majority of the participants (73%) were New South Wales Police Force interviewers. While results revealed some variability, interviewers reported that most interviews were conducted in two or three separate questioning sessions lasting approximately one hour each. Frequency analyses showed that interviewers favoured strategies protective of detainees' human rights, such as videorecording of interviews. Interviewers' open-ended responses revealed that they supported recording because it yielded more accurate information, promoted procedural fairness and transparency in compliance with legal evidentiary requirements for admissibility in court, and protected interviewer integrity. Participants reported that videorecording had the added advantage of preserving interviewees' body language, tone of voice and other perceived indicators of credibility. The majority of interviews were reported to be

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within length requirements and recorded as required, indicating compliance with human rights concerns of suspects and non-suspects.

Keywords: criminal investigation, intelligence gathering, recording, interviewing, HUMINT, police

Introduction

In the past decade, police interviewing has been influenced by a movement away from a 'criminal justice' paradigm that values individualism, rights and process principles, towards a 'control source' paradigm that values minimising risk and ensuring the security of the group, and emphasises efficiency and flexibility of process (Dixon 2008; 2009). This shift has raised questions about potential infringements of individual human rights of police detainees and interviewees. For the past decade, academic debate on police management methodologies has centred on the value of intelligence in improving law enforcement performance (Radcliffe 2008). The role of some police in Australia has shifted from response and enforcement activities to managing intelligence and human security risks (Coyne and Bell 2011). As a result, the goals of law enforcement interviews have broadened, and investigative interviews are conducted for multiple purposes.

In Australian practice, investigative interviewing is the method of eliciting evidentiary information through the questioning of suspects, victims and witnesses to record their accounts of events related to criminal activity (Green 2012; Kassin, Appleby and Perillo 2010). The ultimate or desired outcome from interviewing is not exclusively criminal prosecution. Rather than documenting a suspect's past offences and gaining viable evidence for prosecution, the focus in interviews has moved to information gathering, or gaining knowledge of future actions. The aim of the investigative interview is to contribute to an investigation by gaining details of events, rather than solely eliciting a confession or incriminating evidence (Kassin, Appleby and Perillo 2010). In interviews with detainees suspected of a criminal offence, accusatory confession-oriented or prosecution-oriented tactics can lead to violations of the legal right against self-incrimination, which has attained status internationally as a fundamental human right, as outlined in the International Covenant on Civil and Political Rights (ICCPR). In recent years, recognition of the unproductive outcomes of confession-oriented, accusatorial tactics (in particular, false confessions; for a review, see Kassin and Gudjonsson 2004) led to a revision of police interviewing procedures in Australian criminal investigations towards a less accusatorial and more information-gathering framework (Moston and Fisher 2007). In addition, in intelligence and counter-intelligence operations (which may include intelligence-gathering interviews not only with suspects, but also with witnesses and other

informants), the desired outcome may be information 'supporting the production of strategic, operational and tactical intelligence' (www.afp.gov.au).

This article describes an empirical study in which contemporary law enforcement officers were surveyed about their interviewing practices. It examines the extent to which their reported practice aligned with a human rights framework. The article also analyses whether methods commonly reported in pursuit of intelligence operations where suspects are detained and interviewed are consistent with the principle that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person' (ICCPR, Art 10, para 1). Because fundamental differences may exist in the desired outcomes of interviews conducted for investigation versus intelligence purposes, possibly leading to differences in interviewers' approaches, the article also compares the approaches of interviewers who work in investigative versus intelligence contexts. Furthermore, in Australian criminal investigations and intelligence operations where interviewees are not under arrest or detained, but are questioned informally by police officers, their liberty may not be deprived. Thus, no enforceable legal rights are accorded to non-suspects such as informants or witnesses. Finding a balance between allowing public authorities to function properly and protecting the public from failure by public authorities to exercise their power appropriately is difficult (United Nations Human Rights Council 2012), and it is important to ensure that the human rights of interviewees are not compromised in efforts by law enforcement to ensure community safety. Scholars have expressed concern that the shift towards a control source paradigm has abrogated individual rights in favour of community rights, making it more difficult to scrutinise police processes and eliminating the clarity that existed under the criminal justice paradigm, in which individual rights were better protected (Bronitt 2004; Dixon 2008; 2009). In this article, we consider the ways in which police balance the individual rights of interviewees (whether suspects, witnesses or informants) with the rights of the community to safety and security from crime, including terrorism.

In many policing and security agencies, distinctions are made between information-gathering interview techniques that aim to gain intelligence about past and future threats, and traditional criminal investigative interview techniques that aim to produce admissible evidence about a crime. The primary purpose of interviews with witnesses and informants may be information gathering or the production of admissible evidence, and interviews with witnesses and other informants are not accusatory. Interviews with suspects may also be conducted for the purposes of gathering information and producing admissible evidence, but different techniques may be used for different purposes in suspect interviews, with accusatory confession-oriented or prosecution-oriented tactics employed for the purpose of producing admissible evidence, and more rapport-based and less accusatorial techniques

employed for information gathering. Such techniques would represent a deviation from the approach intended by jurisdictional regulations; in Australia, as in the United Kingdom, interviewing of suspects in the PEACE model is intended to be non-accusatory (Dixon 2010). Although some confusion about usage of the terms 'interrogation' and 'interview' persists due to changes in questioning techniques over recent decades, and fictional portrayals of police procedures on television shows (Dixon 2010; Moston and Fisher 2007), the term 'interrogation' is not used officially in law enforcement in Australia or the United Kingdom (Dixon 2010).

Regulation of investigative and intelligence interviews

Within constraints imposed by the adversarial legal system in Australia, interviewers must secure the cooperation of interviewees (whether they are suspects, witnesses or other human intelligence sources) and must communicate with them in ways that are productive and that do not violate their human rights. Police powers to arrest, detain and interview suspects exercised in the course of operations to prevent and detect crime can infringe upon suspects' human rights to personal freedom (such as those outlined in the ICCPR) guaranteeing 'the right to liberty and security of person'. In the past, a successful criminal interview was defined as one in which a full confession was obtained, but failing a full confession, any incriminating evidence produced in the interview represented success (Evans et al 2010). Historically, confessional evidence was relied upon, and courts controlled police malpractice in interviews through the exclusion of evidence at trial. A variety of compliance-gaining tactics has been used by interviewers in many jurisdictions. Australian courts usually dismiss any evidence gained via coercive, misleading or suggestive techniques (such as threatening the detainee, or lying to the detainee about evidence), in line with Australia's obligations as a signatory to United Nations Human Rights covenants (including the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). For a comprehensive discussion about miscarriages of justice that have resulted from coercive interviewing strategies, and the psychological processes that produce these miscarriages of justice, see Kassin and Gudjonsson (2004).

Australian states and territories are largely responsible for regulating their own criminal justice systems; each state has its own criminal laws, justice system and police force. In the empirical study we describe in this article, the majority of participants were agents of the New South Wales Police Force (NSWPF), the largest Australian state police force, with approximately 20,000 employees (NSWPF 2012). The state of New South Wales does not have a rights-based legal system.[1] However,

1 That is not the case in the state of Victoria and in the Australian Capital Territory, each of which has its own human rights legislation.

its residents are, by implication, beneficiaries of the rights enumerated in the Articles of the United Nations Universal Declaration of Human Rights, ratified by Australia at the UN General Assembly in 1948 (AHRC 2006). Although the Declaration is not a binding treaty, it is perceived as a source of law in Australia (Gans et al 2011), interpreted and applied mainly by the High Court of Australia rather than by courts in the states or territories.

Four major Articles in the Universal Declaration of Human Rights are pertinent to suspect interviews: Article 5 states that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'; Article 9 that 'No one shall be subjected to arbitrary arrest, detention or exile'; Article 11 that 'Everyone charged with a penal offence has the right to be presumed innocent'; and Article 29 that 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'. These rights have implications for police practices with respect to the records of interviews, the duration of interviews and the number of times that a detainee is interviewed, and it is on these practices that this article focuses in order to examine alignment of interview practice with human rights concerns.

Furthermore, United Nations treaties such as the ICCPR have been used to interpret national domestic law through judicial intervention.[2] As noted in the General Comments and Recommendations on the ICCPR statement for the Right to a Fair Hearing, the ICCPR provides that the accused may not be compelled to testify against himself or herself or to confess guilt (para 24). The General Comments and Recommendations explicitly state that in considering this safeguard, the provisions of Art 7 (preventing torture or cruel or degrading treatment) and Art 10, para 1 (ensuring that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person') should be prioritised, and recognise that methods that violate these provisions are sometimes used in order to compel the accused to confess or to testify against himself or herself. The General Comments and Recommendations state that the law should require that 'evidence provided by means of such methods or any other form of compulsion is wholly unacceptable'. The refusal by Australian courts to admit evidence gained via coercive, misleading or suggestive techniques is consistent with these ICCPR principles.

It should be noted that, while procedures and regulations designed to protect against coercive, misleading or suggestive techniques are well-aligned with human rights

2 See www.bayefsky.com/getfile.php/id/1128.

principles, they may not entirely eliminate the use of such techniques. For example, in a high profile terrorism case, Justice Adams condemned Australian intelligence officers for conducting an unlawful, intimidating and deceptive investigation, which included false imprisonment and kidnapping and amounted to a 'gross breach of powers' (*R v Ul-Haque*, 2007). Although interview recording requirements and other regulations were followed in this case (including the suspect being asked on tape if he was a willing and voluntary interviewee), the content of the interview made it clear that he was coerced into compliance with interviewers, rather than voluntarily cooperating in the interview.

Records of interviews

Since the 1990s, police in Australian jurisdictions have been required to routinely record electronically suspect interviews about all indictable offences (Dixon 2010). The introduction of mandatory recording of police interviews is a pre-trial mechanism intended to control police malpractice in interviews and to protect the rights of suspects. In 1991, the NSWPF introduced its audiovisual program, Electronic Recording of Interviews with Suspected Persons (ERISP), which was a police initiative, rather than legislation mandating the recording of interviews. The policy in the NSWPF Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence) is to require recording of admissions relating to indictable offences on a tape, with consent of the accused (NSWPF 2010, 74). Further, when an interview is not recorded, the police must present reasonable explanations for failure to record (NSWPF 2010), which can include a refusal by the detainee to be recorded (Dixon 2006). Other Australian jurisdictions have similar requirements (for example, s 464H of the *Crimes Act 1958* (Vic) requires police who are questioning a suspect in relation to an indictable offence to record by audio or audiovisual recording any confession or admission made by the person). In Queensland, police officers are required to electronically record cautions and the provision of information to persons under investigation or questioning for indictable offences 'if practicable' (s 435 of the *Police Powers and Responsibilities Act 2000* (Qld)). An evaluation of this policy demonstrated both benefits and harms to the administration of criminal justice. There was agreement among judges, prosecutors and defence lawyers that ERISP reduced the length of trials and challenges to the admissibility of evidence related to admissions, and increased public faith in the justice process (Dixon 2006). Conversely, the use of visual images in evidence could be problematic when defendants are judged on their appearance and body language (which research shows bear no discernible links to deceit: DePaulo et al 2003), as a 'majority of judges and prosecutors reported that they believed that demeanour was an indicator of veracity' (Dixon 2006).

In addition, the NSWPF Code of Practice for CRIME details the powers of police when investigating indictable offences. CRIME stipulates that police have no power to compel or intimate to the suspect that he or she must participate in an electronic recording of interview. The police caution given to detainees who are questioned by an investigating official is as follows: 'You are not obliged to say or do anything unless you wish to do so, but whatever you say or do may be used in evidence. Do you understand?' (*Evidence Amendment (Evidence of Silence) Act 2013* (NSW), Sch 1, ss 89(A), 9(A)(9)). In this context, 'official questioning' of a defendant in relation to a serious indictable offence means questions put to the defendant by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of the serious indictable offence. In this way, the CRIME guidelines align with the principles outlined in the ICCPR, which specify the minimum guarantees in the determination and investigation of criminal charges, and aim to ensure that police interviewers engage in a non-coercive and transparent interaction with suspects in custody (Art 14, para 13).

Notably, Australian police are not required to record interviews with witnesses or other informants, or with people who are not suspects of indictable offences. Furthermore, past research on the ERISP in New South Wales revealed that informal police questioning of suspects (pre-ERISP) was common (Dixon 2006). Researchers have noted that Australian courts give police some latitude on interviews conducted away from formal ERISP facilities or other types of recording equipment (Moston 2009).

Interview duration and number of interviews

As noted earlier, four Articles in the Universal Declaration of Human Rights are relevant to suspect interviews. These Articles have implications for police practices with respect to not only the records of interviews, but also the duration of interviews and the number of times that a detainee is interviewed. Police in New South Wales are directed to operate within the protocols of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA) during interview proceedings. Sections 114–121 of LEPRA constrain the duration of investigative interviews by imposing time limits on the investigation period. These provisions specify that the maximum investigation period is four hours, but may be extended up to eight hours by a detention warrant. In general, police in New South Wales must conduct and conclude an interview in less than four hours; in special circumstances, the detention and interview period may exceed four but not eight hours. During the detention period, a detainee may be questioned multiple times. Police in other jurisdictions around Australia are subject to similar restrictions — for example, in Queensland, under the *Police Powers and Responsibilities Act 2000* (Qld), a person must not be detained

for more than eight hours (unless an extension is obtained from a magistrate) and, within that eight-hour detention period, the person must not be questioned for more than four hours.

Research aims

Few studies have examined the views and practices of Australian law enforcement officials (Alison and Howard 2005; Hill and Moston 2011). Dixon (2010, 437) called for additional research on this topic, noting the difficulties of access to police samples and records of interviews. The present research evaluated Australian investigative interviewing and intelligence collection practices with respect to records of interviews, their duration, and the number of times detainees are interviewed, in the context of human rights principles. In line with the principles articulated in various international human rights declarations and treaties, legislation mandating the videorecording of suspect interviews in criminal investigations was introduced around Australia in the 1990s. This study examined the extent to which practitioners reported compliance with that legislation, explored their attitudes towards the recording of interviews, and also compared responses of members of the NSWPF with those of police from other states and territories. Because fundamental differences may exist in interviews conducted for investigation versus intelligence purposes, as noted above, this study also compared the approaches and strategies of interviewers who work in investigative versus intelligence contexts.[3]

Method

Participants

Participants comprised individuals from a wide range of organisations engaging in intelligence and investigative interviewing, such as police forces, military forces and intelligence organisations. Participants were recruited via convenience and purposive sampling through contacts with various law enforcement agencies in Australia, including police and intelligence agencies. To be eligible to complete the survey, participants had to be at least 18 years of age and have some experience in investigative interviewing. Participants of any role or rank in the organisation were eligible, and any members of the agency with intelligence, counter-intelligence or

3 The data collected in this study did not focus on high-stakes interviews but rather on procedural approaches in investigations. Others have addressed issues in high-stakes interviews. See, for example, Dixon 2008; Lynch, Macdonald and Williams 2007.

information-gathering interviewing experience were invited by email to take part in the survey. No incentives were offered in return for survey participation.

Overall, 139 individuals (76.3% males, 23% females, 1 gender undisclosed) participated in the survey. Participants ranged in age from 21 to 62 years (M = 39.55, SD = 9.16). Almost the entire sample (96%) reported current engagement in active duty. Of the 139 participants, 88% (n = 122) were employed in a police force. Approximately three-quarters of the sample (73%, n = 101) were members of the NSWPF. The remainder of the sample were from an Australian police force (unspecified: 15.2%, n = 21), an Australian agency (unspecified: 4.3%, n = 6), the Australian Federal Police (3.6%, n = 5), the Australian military (2.2%, n = 3), Australian foreign intelligence (0.7%, n = 1) and Fair Trade NSW (0.7%, n = 1). One person did not report their agency. For the purposes of analyses presented in this article, participants who did not report that they were members of the NSWPF were classified as non-NSW police.

The majority of participants reported that their current or most recent assignment was a criminal investigation (68%, n = 95; intelligence collection 9%, n = 12; undisclosed 23%, n = 32). The sample was highly experienced (M = 15.79 years, SD = 8.92 years), ranging between 0.33 and 45 years of practical experience in the field. On average, they had a high level of formal education (M = 14.87 years, SD = 2.52 years), ranging between 10 and 18 years (including primary, secondary and tertiary education). The majority of the sample (65.9%) reported having at least some tertiary education, with 30.4% of the sample reporting at least four years of tertiary education.[4] In addition to this formal education, participants in this sample may have received additional qualifications specific to investigation. The 2011 Australian Government Investigations Standards (AGIS) recommend minimum levels of training or qualifications for staff in any Australian government agency involved in conducting investigations. For officers primarily engaged as investigators, a Certificate IV in Government (Investigation) is recommended, and officers without this qualification should be under the supervision of a qualified investigator. For officers primarily engaged in the coordination and supervision of investigations, a Diploma of Government (Investigation) is recommended.

4 The question about education was phrased as: 'How many years of formal school education (or their equivalent) did you complete (starting with primary school)?' Data about level of tertiary education is predicated on the assumption that 13 years of formal education is the completion time for primary and high school (as is the case in the Australian education system).

Research design

The study took the form of an online survey, administered via the website psychsurveys.org. The survey evaluated participants' general interviewing experience, the requirements that governed their interview recording practices, their beliefs about the recording of interviews, and demographic information.[5] Notably, the survey methodology cannot establish the interviewing practices actually used by law enforcement professionals, or their actual compliance with interview recording legislation, but instead registers their self-reported practices. As the researchers were not permitted access to any objective records of interviews (for example, videorecordings, audiorecordings or written notes), the degree to which this self-reported practice corresponds with actual practice is unknown. Self-reports are subject to the limitations of memory (for example, law enforcement officers are likely to err, to some degree, when reporting the approximate number of interviews they have conducted across their entire careers). The survey methodology was chosen because it most directly achieved the research aim of this study — to examine law enforcement professionals' attitudes towards strategies employed in investigative and intelligence gathering contexts — but the data presented below are self-reported perceptions and practices of interviewers. A copy of the survey questions is included as an appendix to this article.

Procedure

An email invitation containing a link to the survey was sent to contacts in policing agencies with a request to forward the invitation to eligible participants and co-workers. Before completing the survey, participants read a participant information form and a consent information statement that outlined the nature of the study and explained that completion and submission of the survey implied consent to voluntarily participation. The full survey took approximately 20–25 minutes to complete. Data collection commenced in July 2012 and was completed in October 2013.

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5 Data analysed for this article were a subset of Australian responses to questions included in a larger international survey. Questions included in the larger survey also evaluated participants' personal approaches to investigative interviewing, their countries' approach to interviewing, participants' beliefs about their ability to detect deception, and participants' favoured interviewing techniques, their interviewing goals, their comfort and experience in interviewing members of other cultures, and their common interviewing practices.

Results

Previous experience

As noted above, the overall sample was highly experienced, averaging over 15 years of professional experience in law enforcement. Participants reported having conducted an average of 251.45 interviews (SD = 440.19) across their career, ranging between four and 3000 interviews. Participants were asked about the average number of times each interviewee was questioned about the same matter, and indicated that each interview required an average of 2.28 questioning sessions (SD = 4.11), ranging between one and 35. The average length of interviews conducted was approximately one hour (M = 62.52 minutes, SD = 36.15 minutes) and ranged between 15 and 180 minutes. Participants were also asked to report the single longest interview session they had previously conducted. In response, participants reported that their longest interview session had lasted an average of approximately four hours (M = 3.52 hours, SD = 2.87 hours), although the duration ranged between 0.12 and 20 hours.

Because fundamental differences may exist in interviews conducted for investigation versus intelligence purposes, analyses were conducted to compare the responses of interviewers who work in investigative versus intelligence contexts. In addition, because the majority of participants in this sample were members of the NSWPF, analyses were conducted to test for differences between those who identified as members of the NSWPF and those who did not.

Analyses were conducted to examine whether members of the NSWPF had different levels of experience from individuals outside of that police force, by examining years in the field and number of interviews conducted. Differences in the number of years of experience were not significant (p = 0.488) between NSWPF (M = 15.47 years, SD = 8.74 years) and non-NSW police (M = 16.68 years, SD = 9.45 years). Subsequently, analyses were implemented to evaluate whether levels of experience varied based on whether participants' current or most recent assignment was a criminal investigation or an intelligence collection. Differences in the number of years of experience were not significant (p = 0.796) between professionals performing criminal investigation (M = 15.24 years, SD = 8.72 years) and intelligence collection (M = 14.56 years, SD = 7.22 years).

Comparisons of estimates of the total number of previous interviews conducted yielded no significant differences (p = 0.579) between NSW police (M = 264.52, SD = 433.62) and non-NSW police (M = 216.00, SD = 462.12). Differences with respect to the average number of questioning sessions conducted with each interviewee were also not significant (p = 0.974) between NSW police (M = 2.27, SD = 4.39)

and non-NSW police (M = 2.30, SD = 3.39). The average length of interviews conducted (minutes) was not significantly different (p = 0.092) between NSW police (M = 58.53, SD = 30.25) and non-NSW police (M = 73.14, SD = 47.41). In the number of previous interviews conducted, differences were also not significant (p = 0.482) between criminal investigation (M = 267.77, SD = 423.73) and intelligence collection (M = 373.75, SD = 837.31). Differences were also not significant (p = 0.831) with regard to the average number of questioning sessions conducted between criminal investigation (M = 2.36, SD = 4.53) and intelligence collection (M = 2.05, SD = 1.61). The average length of interviews conducted (minutes) was also not significantly different (p = 0.515) between criminal investigation (M = 65.68, SD = 34.66) and intelligence collection (M = 77.08, SD = 57.50). In short, these comparisons confirmed that on all measures of general practice and experience, the Australian sample was homogenous.

Interview procedures reported by participants

When asked whether they were required to record the questioning of interviewees, almost all participants (99%, n = 137) indicated that they were, with 94% reporting that interviews were videotaped, 74% reporting that interviews were audiotaped, 26% reporting that interviews were recorded via written notes (stenographs), and 10% reporting that other forms of recording were used. (Since participants could select multiple recording methods in response to this item, these figures do not sum to 100%.) Participants who selected the 'other' category were asked to provide an open-ended response describing the specific recording method used, but all participants who did so described recording options already provided (that is, of those who selected 'other', 50% reported using handwritten notes; 28% reported some other form of videorecording, such as DVD; and 21% reported some combination of recording options already provided).

The findings indicated that NSW police interviewers were more likely to use videotape recordings than were non-NSW police, $\chi 2$ (1, N = 137) = 5.12, p = 0.024, but there were no significant differences between NSW police and others with respect to the use of other recording methods. As might be expected, there were also significant differences in recording practices based on type of assignment, with videotaped recordings, $\chi 2$ (1, N = 105) = 9.35, p = 0.002, and 'other' recording types, $\chi 2$ (1, N = 105) = 8.91, p = 0.003, more frequently used in criminal investigations than in intelligence operations.

Given that the answers to the former question tapped the policies and guidelines in place in different jurisdictions, a follow-up question sought more explicit information about actual practices. Participants were asked how often certain types of recordings were actually used in the interviews in which they had previously been involved. In

response to this question, 78% of participants indicated that videorecording was used most of the time (that is, in more than 50% of the interviews in which they had been involved) and 69% of participants indicated that audiotapes were recorded most of the time. Fewer than 15% of participants indicated that written records (stenograph) were taken most of the time, and only 1% of participants indicated that 'other' recording methods were used most of the time.

Participants reported that it was very rare that interviews were not recorded at all, with 64% of participants reporting that sessions were always recorded in some form. However, 16% of participants indicated that interview sessions were not recorded up to 10% of the time, 5% reported non-recording 11–20% of the time, and a further 5% reported non-recording 21–30% of the time.

The extent to which participants supported the policy of recording interviews was ascertained by asking whether interviews should be recorded. A very high proportion — 95% of the sample — indicated that they should. They indicated that their preferred recording methods were videotape (64%) and audiotape (22%), with lower support for written notes (4%) and other recording forms (5%). Preferences for whether interviews should be recorded were not associated with whether participants were NSW police, $\chi 2$ (1, N = 139) = 632, p = 0.427, or whether their most recent assignment was a criminal investigation or an intelligence operation, $\chi 2$ (1, N = 107) = 663, p = 0.416.

The reasons that participants supported or did not support the policy of recording interviews were investigated by asking participants why interviews should or should not be recorded. Those who had indicated in response to the previous question that interviews should be recorded were asked why they believed this. Open-ended responses were given by 128 participants and these responses were coded into four categories. (Participants' answers were coded so that they could indicate multiple categories — up to four.) According to 64% of these participants, interviews should be recorded because they provide an aid to memory and accurate evidence; 39% responded that recordings address evidence admissibility requirements in court and promote procedural fairness; 28% stated that recordings protect interviewer integrity and enable transparency of interview proceedings; and 27% reported that recordings are useful in viewing the body language and credibility of the interview parties.

Those participants who had indicated in response to the previous question that interviews should *not* be recorded were asked why they believed this. Of the sample, 11 responded with open-ended answers, which were coded into three categories. (Participants' answers were coded so that they could indicate multiple categories — up to three.) According to 46% of these participants, interviews should not be

recorded because discretion should be applied based on the circumstances (for example, when a witness or informant does not wish to be recorded or placed on record); 27% indicated that they should not be recorded where consent was not given; and 27% stated that recordings of interviews were not required for intelligence collection purposes.

Discussion

The current study aimed to evaluate to what extent law enforcement professionals conducting investigative and intelligence interviews within Australia report adherence to universal principles of individual human rights. This was explored by analysing interviewers' reports of the amounts of time they spent conducting interviews, the frequency of interviews, and the recording practices of interview sessions. Findings of the present study revealed that the interviewers who participated in the study tended to have significant professional experience as interviewers, were well educated, and reported that their longest interviews were on average less than four hours (consistent with LEPRA guidelines for NSWPF and comparable guidelines for police in other Australian jurisdictions). Additionally, interviewers conducted an average of fewer than three interview sessions with each interviewee, which (to the extent that the interviews described were suspect interviews) appeared reasonable within the constraints of human rights principles restricting length of detention without trial — for example, see General Comments and Recommendations on Liberty and Security of the Person, paras 1 and 2, as well as the Universal Declaration of Human Rights, which states in Art 29:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Interview recording practices

Overall, the majority of the sample endorsed the recording of interviews, but 10% of the sample reported that they had been involved in interviews that were not recorded in any way between 10% and 30% of the time. To the extent that participants were referring to suspect interviews in criminal investigations that did not meet one of those criteria, this is problematic. Given the potential for human rights violations in an interview (particularly when the process is focused on confession and prosecution), the failure to comply with recording practices leaves interviews open to the problem, recognised by the ICCPR General Comments and Recommendations, that in order to compel the accused to confess or to testify against himself or herself,

methods that violate human rights provisions may frequently be used. Compliance with interview recording requirements not only offers protection to detainees against such compulsion to confess, but also offers a degree of protection to interviewers from accusations of the violation of these principles.

However, it is important to note that the questions asked in this survey did not refer specifically to *suspect* interviews. So, there are several alternative explanations for participants' reports that some interviews are not recorded, and nuances in recording requirements and investigative demands must qualify interpretation of this data. In addition, a large proportion of the interviews reported may have been conducted informally or in the field for intelligence collection, and others may have been conducted prior to the time that recording protocols were implemented. Considering the level of experience of our sample (which raises the possibility that some of the interviews they refer to were conducted prior to the current recording regulations), the breadth of our sample (many of whom conduct interviews in criminal investigations where recordings are required, and also for intelligence gathering where recordings are not required), and the breadth of our participants' interview tasks (which include interviews with suspects, witnesses and other sources), the finding that some interviews are not recorded should not be interpreted as noncompliance with recording requirements, or as a violation of human rights principles. Rather, these data could indicate that interviews are being conducted in line with an array of varying recording requirements and human rights concerns. This interpretation was supported by participants' own reports about why they endorsed (and the circumstances in which they did not endorse) recording of interviews. Future research should investigate these potential nuances further, testing whether interviewers' strategies differ depending on whether a suspect, witness or informant is being interviewed.

Balancing human rights concerns: attitudes towards recording interviews

When participants were surveyed on why they thought interviews should be recorded, the majority (64%) referred to videotaped recording and described several key elements of this procedure. First, they described recordings as useful as an aid to memory, noted that they resulted in more accurate evidence, and referred to the fallibility of human memory and the tendency for confabulations to increase over time. They also discussed recordings as important to meet court admissibility requirements in prosecutions, and noted their value in promoting procedural fairness with both parties aware that the interviews would be recorded. Additionally, interviewers commented that having interviews recorded helped to protect their professional integrity and documented the transparency of their interview proceedings. Videorecordings were also considered valuable in enabling

the interviewer, colleagues and juries to view the body language, verbal responses and credibility of the interviewee, and recorded video footage could be valuable in attempting to detect deception. (This last element lent support to the findings of Dixon (2006), who noted that the use of visual images in evidence is problematic when defendants are judged on their appearance and body language because research shows that these visual features are not, in fact, indicative of deception.) Finally, videorecording was commended because it promoted the safety and respectful treatment of interviewees by increasing the accountability of interviewers with respect to both the content of the questions and the treatment of the detainee.

Given the fact that the study predominantly used NSWPF interviewers as participants, the preference for a videotaped record (providing visual cues about the suspects' interview responses) was hardly surprising, as recording is one of the requirements under the NSW Code of Practice for Crime. However, it was interesting to note that a majority of the 11 participants who opposed videotaping were also NSWPF interviewers.

Analyses of open-ended responses as to why participants opposed the recording of interviews was restricted, since only 11 participants gave reasons for disfavouring this practice. Reasons cited included denial of consent to record the interview (one of the exceptions to the recording requirements in New South Wales), that this procedure was not required for intelligence collection, and that investigators should be allowed to exercise professional discretion in circumstances where witnesses or informants would be discouraged by being placed 'on record' or recorded unnecessarily.

This result suggested that very few experienced interviewers believed that videotaping should not be standard practice, and that the rare circumstances under which interviewers would endorse the absence of a recording were consistent with human rights principles, such as the need to employ discretion where witnesses and informants are concerned. The views of interviewers in this regard were consistent with those of justice scholars. Crenshaw (1998) noted that in instances where no legal provisions exist to regulate police action (for example, interviews with non-suspects such as witnesses or human intelligence sources), and where no other guidelines have been developed, the legal principles for respect for human dignity and equal and inalienable rights should inform police action. Exempting witnesses and human intelligence sources from recording practices can be framed as exercising a duty of care to protect the human rights of the witness or informant. Bronitt (2004, 47) noted that police 'vigilantly protect' undercover police and informers. Although the ICCPR states that everyone accused of a crime shall be entitled 'To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him' (Art 14,

para 3e), this must be balanced against the recognised danger to victims, witnesses and other informants in criminal and intelligence contexts. The need to maintain this balance was acknowledged in the *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism,* which recommended:

> Where victims of terrorism have given information to the authorities, or are called upon to provide testimony during a prosecution, their rights to life, physical security and privacy must be fully protected, subject to safeguards to ensure that any protective measures adopted are compatible with the accused person's right to a fair and public hearing under Article 14 ICCPR. [United Nations Human Rights Council 2012, 20.]

In some jurisdictions, judicial decisions have explicitly articulated reasoning consistent with this principle; for example, in *Monfils v Taylor,* 1999, the United States Seventh Circuit Court of Appeals held that police were liable for releasing a tape of a telephone call from an informant regarding an alleged theft. The informant had requested that his taped telephone call not be released to the suspect. After the tape was released, the suspect killed the informant. The court held that the release of the tape by the deputy chief created a danger to the informant, who otherwise would not have been in danger. In some jurisdictions, such as Canada, tort law provisions can protect the rights of suspects and non-suspects who are injured as a result of a negligent or unreasonable police investigation (*McCreight v Canada (AG),* 2013). Besides Canada, no other common law jurisdiction has imposed liability on police officers who conduct an investigation that results in harm that was reasonably foreseeable (Mazzuca, Nash and Szymanski 2010). Although this is not a right, it is a source of protection for suspects and non-suspects. Recognition by interviewers in our sample that discretion is required in decisions to record interviews, as well as our finding that some participants have been involved in interviews that were not recorded, could be indications that our participants were engaging in some balancing of the human rights concerns of suspects, witnesses and other informants.

Further research is needed to determine whether the police may feel restricted in their powers to obtain information or whether there is a negative impact on police of having their performance regularly monitored and evaluated. Additionally, future research should explore whether interviewees who may be nervous or fearful of being recorded become more reluctant to cooperate during an interview. Regarding both open-ended sets of responses, it was noteworthy that while the majority were commenting on videotaping practices, a minority of these responses were in reference to other forms of recording (audiotape, written notes and other forms). The relatively small number of participants who reported reasons supporting or not supporting these alternative forms of recording precludes firm conclusions about reasons for

these preferences, and further research is needed to investigate whether different recording methods are perceived by interviewers to be differentially effective in achieving the desired balance between preserving an accurate record of the interview and serving interviewers' human rights considerations, such as informant protection. For example, it is likely that interviewers will be more supportive of audio or written recording of interviews in cases where protection of an informant is a concern.

Strengths and limitations

The present study has contributed a unique component to research on Australian policies and practices by examining perceptions of investigative interviews within the NSWPF and other Australian law enforcement agencies. Specifically, the study examined interviewers' reports of how often recordings are taken, and in what form, along with the attitudes of the professionals who use them. Additionally, this research explored how long and how often interviewees are subjected to interviews, and compared how these practices change depending on whether the interviewers are conducting criminal investigations.

By asking open-ended questions about interviewers' views on whether videorecording of interviews was beneficial, insights were gained that can inform future directions about policy and practice. The findings suggested that Australian policy guidelines to record suspect interviews in some form was being consistently met, and indicated that criminal and intelligence interviewers have strong explicit motivations for upholding recording practices that are consistent with human rights concerns. In particular, the police expressed a desire to record suspect interviews because they themselves recognised that recordings were helpful in obtaining admissible evidence and preserving information about the evidence and interview. Where reluctance to record interviews was expressed by this sample, reported reasons for that reluctance were consistent with regulations, as well as with a desire to protect the human rights of witnesses and other informants.

The dominance of the NSWPF in this sample may limit our ability to draw conclusions about interviewing practices across other Australian jurisdictions, and some of our data are inconsistent with previous empirical investigations of police interviewing in other states in Australia. For example, in an audit of Queensland Police interview tapes of suspects, the average interview length was approximately 24 minutes (Queensland Crime and Misconduct Commission 2004, xi), much shorter than our participants' reports that the average length of an interview session was just over an hour. While we conducted analyses to test for differences between NSW police and others in our sample, comparisons between groups in the study were limited by low power, due to uneven group sizes, with the vast majority of the

sample associated with the NSWPF. The restrictive size of non-police in the sample also meant that there were very few interviewers whose most recent assignments were related to intelligence collection, limiting the opportunity to compare criminal investigation practices within the police to those in other agencies who exclusively conduct investigative interviews for intelligence gathering. Therefore, results and interpretations of findings in the present study based on comparisons between these groups should be interpreted with caution, given the limited sample size.[6]

Overall, the vast majority of participants expressed attitudes showing strong support for the recording of interviews. This finding was consistent with other empirical research that revealed that concerns expressed about electronic recording were not substantiated: the interviewer's task has not become impossible and suspects continued to confess and make admissions (Cohen 1988). The mandatory recording of interviews for NSWPF has reduced previous difficulties with evidence and admissibility in court (Mills 2011).

The requirement in Australia that police videorecord suspect interviews has been instrumental in ensuring that interviews are conducted in conformity with human rights principles, and has reduced the potential for human rights abuses. The impact of these regulations in constraining abuses was demonstrated vividly by the conduct in 2006 of a group of Queensland police who, when they believed that there was no videorecord, threw the suspect across the room and intimidated him (Moston 2009). As this example shows, and as academics such as Dixon (2009; 2010) have noted, the requirement for a record of interview on video does not preclude coercion prior to the commencement of the recording, or, as Justice Adams observed in reviewing the videorecorded interview in *R v ul-Haque* (Nolan 2009; Dixon 2008), the verbal statement on tape by a suspect that he is voluntarily participating in an interview does not necessarily end the inquiry into the question as to whether the suspect is in fact voluntarily cooperating or is simply compliant after earlier unrecorded coercion. Thus, these videotaped records of interview are not a panacea, and do not

6 For reliable statistical analysis, available power to detect differences between groups should be 80% or greater (Cohen 1988). Power analyses were conducted using the G*Power statistical software package (Faul et al 2007). Effect sizes were defined as 0.2 for small, 0.5 for medium and 0.8 for large (Cohen 1988). Analyses testing differences between NSWPF and non-NSW police interviewers had 12% statistical power to detect a small effect, 48% power for a medium effect, and 87% power for a large effect. Thus, the present study was not equipped with enough participants to reliably detect small to medium-sized effects. For comparisons between criminal investigations and intelligence collection, the study did not have a large enough sample size to reliably detect a small to large effect between groups, based on type of most recent assignment.

guarantee compliance with human rights principles. Accordingly, while self-reported survey responses have limitations in terms of a research method, it is important to acknowledge that access to records of interview, where granted, is also a method subject to limitation, in that these records do not capture the entire interaction between a suspect and an interviewer.

Conclusion

The present study offered a preliminary view of factors that can impact upon policy and practice regarding investigative interviewing and intelligence collection, particularly in relation to the human rights of the suspect and non-suspect interviewees. Findings indicated that videorecordings of interviews were supported by the majority of interviewers, for the protection of both themselves and their interviewees. The majority of interviews conducted were reported to be within length requirements and recorded as required by policy, demonstrating substantial perceptions of compliance by interviewers with Australian guidelines, as well as human rights principles such as the ICCPR principles of liberty and security of the person, protection from self-incrimination, treatment with humanity and respect for inherent dignity, and protection from cruel, inhuman or degrading treatment. Future directions for policy and practice of investigative interviewing would benefit greatly from additional research with larger sample sizes and an international scope. Collectively, these findings suggested that interviewing professionals were engaging in procedures designed to uphold the human rights of suspects, witnesses and other human intelligence sources in their interviewing practices. ●

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Appendix
Interview questionnaire

1. What is your gender?
   ☐ Male ☐ Female

2. What is your age?
   _____

3. How many years of formal school education (or their equivalent) did you complete (starting with primary school)?
   ☐ 10 years or less
   ☐ 11 years
   ☐ 12 years
   ☐ 13 years
   ☐ 14 years
   ☐ 15 years
   ☐ 16 years
   ☐ 17 years
   ☐ 18 years or over

4. For which service and in what country do you (or did you) conduct interviews?
   _____

5. What is your current status?
   ☐ Active ☐ Retired

6. Is your current or most recent assignment:
   ☐ Civilian
   ☐ Military
   ☐ Police
   ☐ Other: _____

7. Is your current or most recent assignment:
   ☐ Criminal investigation
   ☐ Intelligence collection from human sources (including counterintelligence)
   ☐ Other: _____

8. In total, approximately how much professional experience do you have in law enforcement?
   Years _____ Months _____

9. Approximately how many interviews with a source or suspect have you conducted, alone or with others?
   _____

10. What was the average number of times each interviewee was questioned about the same matter?
    _____

11. What was the average length of an interview session?
    _____ (hours) _____ (minutes)

12. What was the longest interview session you were involved in?
    _____ (hours) _____ (minutes)

13. Do you have to record your questioning of interviewees?
    Yes / No
    IF YES, what procedure is used? (Select all that apply)
    ☐ Videotape recording
    ☐ Audiotape recording
    ☐ Written (stenographic)
    ☐ Other (Describe): _____

14. Considering all the interviews in which you have been involved, please estimate the percentage (0–100) in which the following was true:
    _____% The session was videotaped
    _____% The session was audiotaped
    _____% A written record was kept by a stenographer
    _____% The session was not recorded in any way

15. Should all interviews be recorded in some way?
    Yes / No
    IF YES, how? (Select one)
    ☐ Videotape recording
    ☐ Audiotape recording
    ☐ Written (stenographic)
    ☐ Other (Describe): _____
    If YES, why?
    _____
    _____
    If NO, why not?
    _____
    _____

Law, morality and the authorisation of covert police surveillance

Clive Harfield*

Management of covert investigations is a complex and multifaceted arena that engages the rights of individuals, the legitimate expectations of the wider community, and criminal justice practitioner judgments about lawfulness and legitimacy. This article examines two legal regimes (Australia and the United Kingdom) within which police surveillance may lawfully be conducted and considers the making of moral judgments in relation to prior authorisation as a mechanism of management and governance. It is argued that for police surveillance to be legitimate, it must be morally justifiable as well as legally justifiable. Prior authorisation is a mechanism that seems to have been devised primarily to ensure the lawfulness of police surveillance. It is a mechanism through which moral justification can also be ensured, but the operation of the current mechanisms considered here is each, in different ways, morally problematic. The vulnerability exists that any given use of police surveillance may be lawful but unethical, and therefore devoid of legitimacy, to the moral detriment of the community and the criminal justice system.

Keywords: police surveillance, prior authorisation, covert investigation governance, legitimacy, investigation ethics

Introduction

This article contends that to be legitimate, police use of covert investigation methods must be not only lawful but also ethical. Lawfulness is a matter of statute; ethical use is a matter of management and governance.

Policing, particularly that purportedly delivered by consent (see Dixon 1997, ch 3), depends for its effectiveness and efficacy upon being perceived as legitimate. Two characteristics of legitimacy are lawfulness and moral justification. Policing must be undertaken in order to protect justifiably enforceable individual moral rights (Miller and Blackler 2005, 26), and in a manner that ensures that the conduct of

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policing does not itself unjustifiably infringe individual rights.[1] This is particularly so in relation to the covert acquisition of information and/or evidence through surveillance or through infiltration by informers and undercover investigators.[2] With increasing reliance upon, and capacity to undertake, covert (or at least unnoticeable) surveillance, the potential for policing to intrude against the privacy of persons other than the investigation subject is significantly increased. For surveillance to be a legitimate investigative policing tool, its use must be morally sound as well as lawful. Governance framework mechanisms purporting to protect those surveilled from unlawful and/or arbitrary interference and infringement must accommodate demonstrable moral justifications, as well as meeting the relevant statutory tests of lawfulness.

The apparent need to balance or offset competing values and interests when contemplating otherwise morally harmful conduct is an area that deserves robust scrutiny and requires critical thinking and faultless logic (Waldron 2003; see also Ashworth 1999; 2002; Bronitt 2002; 2004). In seeking to contribute to this debate, this article takes as its starting point the proposition that the characterisation of any given surveillance as morally justifiable in the circumstances begins with the decision to authorise such conduct. Those whose role it is in law to assess whether surveillance can lawfully be authorised are simultaneously making a decision about whether the moral harm inherent in surveillance is justifiable in the circumstances. The way in which such decisions are made will in turn characterise whether or not the decision is morally sound. Decision-making is itself characterised by the procedural architecture within which decisions are constructed. If the decision-making regime is morally problematic, then the decisions made using the regime consequently may be morally problematic.

Ethical problems in criminal justice and in policing have been considered elsewhere (Kleinig 1996; Miller and Blackler 2005; Kleinig 2009; Miller 2014; Miller and Gordon 2014), as have different models of statutory governance of covert investigation (Harfield 2010). Here it is intended to focus on one particular element of the surveillance management process — the decision to authorise the use of covert investigation methods — to explore the relationship between statutory governance structures and ethical decision-making in an area where competing moral claims are ever present.

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1 It is suggested here that this holds true even if there is no enforceable human rights statute in the relevant jurisdiction.

2 Hereafter, unless otherwise stipulated, surveillance will be taken to include infiltration.

This article examines the proposed moral theory of policing and then considers moral issues inherent in the process of authorising covert investigation, before discussing the relationship between the moral theory of policing and the function of authorisation, and the risks of an authorisation regime becoming simply a rubber-stamping process. The article then considers prior authorisation of covert investigation in general and two current authorisation regimes and the specific moral issues to which they each give rise.

Protecting rights within a moral theory of policing

Policing is viewed as an institutional activity essential to a peaceful society in which individuals can flourish and lead fulfilling lives to the extent that, in doing so, they do not cause harm to others. The moral purpose of policing, argues Miller, is derived from the collective good it provides:

> … the protection of fundamental moral rights — specifically justifiably enforceable (aggregate) moral rights — is a collective good to which the members of the community have a joint right, and it is the central and most important collective end of police work. [Miller 2010, 250.]

It is paradoxical, therefore, that policing (the purpose of which is the protection of justifiably enforceable moral rights) is facilitated by three kinds of conduct, each of which is a species of prima facie moral harm. The first is coercion (constraining individual liberty through arrest, search and seizure); the second is deception (undermining trust in relationships through the use of informers and undercover officers); and the third is surveillance (intrusion into private life by various mechanisms) (Miller 2010, 263). The ability to lead one's life according to and in fulfilment of one's interests (to the extent that doing so does not unjustifiably harm others), without interference from others that prevents such an aim being achieved, is a fundamental moral good that is interfered with by police when coercion, deception and surveillance are employed directly against individuals, or when individuals are collaterally subject to such infringements of their moral interests because of their association with a person under investigation. Interference with a moral good

3 Interference may range from minor infringement to serious violation of an individual's (or the community's) moral claim or interest. It is recognised that this idea of an interference range, and the range of (morally and materially) harmful consequences which can arise from different degrees of interference with a moral interest — for example, from causing a setback in someone's interests to treating someone wrongfully or unjustly — warrants more detailed discussion, which is beyond the scope of this article. For consideration of various categories of harm within the context of the criminal law, see Feinberg 1984.

is morally wrong.[3] Either form of harm should not be perpetrated unless there is 'special justification' for doing so founded on countervailing, weightier moral claims (Miller and Blackler 2005, 26). All things being equal, individuals and communities have a collective interest in maintaining a well-ordered and peaceful society. In enforcing legislatively enshrined social values against those acting in self-interest against established social values, the wider interests of the community are considered to outweigh individual criminal self-interest.[4]

The protection of an individual's moral rights by using otherwise morally harmful means is clearly problematic because of the inherent moral contradiction present in such circumstances. What is needed is a moral account that can accommodate this confrontation. Seumas Miller and John Blackler propose a moral theory of policing in which 'harmful and normally immoral methods are on occasion necessary in order to realise the fundamental end of policing, namely the protection of (justifiably enforceable) moral rights' (Miller and Blackler 2005, 26), on which occasions will be determined by the circumstances of the case (Miller 2010, 265). This overarching moral theory of policing provides an account within which, if the police are to fulfil their proper institutional purpose, occasional recourse to otherwise morally harmful methods is required. Such recourse cannot be unfettered. It should be utilised only within strict parameters, and when police act outside those parameters, there is a risk that the integrity of the criminal justice system and the rule of law itself will be undermined (which would constitute harms against both the moral interests of individuals and the collective interests of the community).

Miller and Blackler's moral theory of policing is adopted here as a justification benchmark for investigators' actions, including recourse to covert surveillance that would otherwise cause moral harm. Police investigators called upon to make morally significant decisions about whether or not to apply for authorisation and decision-

4 Each of these moral harms is also a potential infringement of the human rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms: coercion in the form of arrest infringes the right to liberty (Art 5) and all three conducts infringe in various ways the right to respect of private and family life (Art 8) and also the right to a fair trial. These issues have been considered many times by the European Court of Human Rights. See, for example, *Jersild v Denmark,* 1995, on whether sufficient and relevant reasons based on reliable information support the proposed use of covert investigation; *Campbell v United Kingdom,* 1993, on whether the same investigative outcome could be achieved through less intrusive methods; *Klass v Germany,* 1979–80, on safeguards in place to prevent police abuse of an investigation technique; and *W v United Kingdom,* 1988, *McMichael v United Kingdom,* 1995, and *Buckley v United Kingdom,* 1997, on whether authorisation decisions are demonstrably fair.

makers authorising the infringement of a qualified statutory right (or what would otherwise be an intrusion into an individual's private life) have a duty to take moral issues into consideration when making such determinations. Miller and Blackler's account does not absolve such decision-makers of this duty.[5]

Moral issues inherent in authorisation

To be conducted in a manner consistent with the moral theory of policing, surveillance must be simultaneously lawful, legitimate, proportionate and necessary.[6] No matter how professional or dispassionate in their approach, the vested interests of investigators in furthering their investigation potentially conflict with the requirement (inherent in Australian law relating to natural justice and procedural fairness) for an unbiased and objective decision. Equally, such vested interests may, wittingly or unwittingly, unduly influence determinations in respect of legitimacy (use of covert surveillance for an approved purpose), proportionality and necessity within the European human rights context. These propositions support the rationale for requiring prior independent authorisation of the use of such methods.

If the moral theory of policing is accepted as an ethical benchmark, then it follows that surveillance authorisation regimes should be consistent with, and certainly should not militate against, the theory. To the extent possible, authorisation regimes should be structured so that authorisation decision-makers are independent from the investigation for which use of surveillance is being sought. If the authority regime is not sufficiently independent from either the investigation or the investigators, then the objectivity that

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5 The duty does not fall upon police decision-makers alone — it falls upon anyone whose role requires them to make such decisions in relation to the use of covert surveillance methods on behalf of the state when investigating a citizen or citizens. It is acknowledged in passing here that communal interest in prosecuting serious crimes can find itself in conflict with the communal interest in preserving a criminal justice system characterised by integrity: that society may occasionally be faced with a decision about whether the ends justify the means or whether the means would debase the values that were purportedly being protected. How such a balancing act might be approached was recently considered at length in *Warren v Her Majesty's Attorney General of the Bailiwick of Jersey*, 2011, when reviewing on appeal whether a stay should be ordered when 'but for an abuse of executive power, [the defendant] would never have been before the court at all' (*Panday v Virgil (Senior Superintendent of Police)*, 2008 at [28], quoted by Lord Dyson in *Warren* at [27]).

6 It is recognised that this assertion warrants further detailed examination, but that is not possible within the editorial parameters for this article. So, for the sake of argument, let this three-part proposition stand. Lawfulness, proportionality and necessity are considered more fully below in the section entitled 'Surveillance governance and prior authorisation'.

it purports to invest in the overall process of covert intrusive surveillance governance may be superficial in nature or even merely symbolic (a mere 'rubber stamp'), rather than a substantive merits review of the authorisation. The potential harm arising from an insufficient or inadequate authority regime is that the proposed conduct, when executed, will fail to comply with the moral theory of policing and so any moral and/or material harm arising from an investigator's conduct will be morally unjustifiable, even if the given authorisation regime is provided for in law. Such a disconnection between legal justification and moral justification calls into question the legitimacy of the law and the law enforcement institutions.

The use of police power that is deployed to the disadvantage of others always requires moral consideration, even in instances where that police power is prescribed by law as mandatory (the officer *shall*), rather than merely discretionary (the officer *may*). In the case of covert investigation, there is no requirement to use such methods; such methods are not mandatory, they are merely a tactical option available to police — sometimes only in certain specified circumstances. Statutorily required considerations about the necessity and proportionality of such methods point to the need for moral consideration on the part of applicant and authorising officer, but meeting the legal criteria will not, in and of itself, provide moral justification because that which is legally justified is not necessarily also morally justified; moral limits may be crossed before legal limits are reached (Miller, Roberts and Spence 2005, xvi; Kleinig 1996, 135). Nor does the fact that potentially immoral methods have been made available to the police service as an *institution,* in and of itself, justify *individual* police investigator use of such methods.[7]

Surveillance may be covert, and there may exist sound reasons to refrain from full public disclosure of such methods, but such constraints do not excuse investigators from the requirements of transparent accountability. Transparent accountability is not necessarily the same thing as public accountability: accountability can be transparent to an independent entity rather than the general public. Thus, in the United Kingdom, the Chief Surveillance Commissioner (acting under the authority of parliament as a representative body of public interest in a fair, efficient and effective criminal justice system) is one such example — without being transparent to the

7 This point is explored more fully in the next section of the article. Such methods include, for example, the use of deception (informers, undercover officers) and the infringement of respect of private life (surveillance, communication interception, infiltration by informers and undercover officers).

general public.[8] In other words, there should be no place to hide from appropriate scrutiny when conducting covert investigation within the context of a governance regime. There is a requirement to engage in moral justification and there is no means of disguising — from those who wish to scrutinise properly — the fact that one has acted without moral considerations.

The deployment of remotely operated surveillance devices similarly engages moral considerations because the devices are intended to be used to intrude into an individual's private life in order to acquire information that may be used by police to the detriment of the surveillance subject (for example, prosecution potentially leading to conviction and sanction). As will be seen below, Australian laws are framed in a way that has the appearance of legislating for moral considerations when deploying such devices. That surveillance conducted without the assistance of a surveillance device seems not to require specific authorisation in Australian jurisdictions does not mean that moral considerations are not required. There just appears to be no statutory requirement to be satisfied. (This is all the more reason for investigating agencies to have documented moral consideration protocols in place.)

The moral theory of policing and the function of authorisation

How does the authority regime — the mechanism intended to ensure that investigators do not infringe the relevant qualified human rights without justification — engage with the moral theory of policing? To reiterate: Miller and Blackler's moral theory of policing provides an account that explains why, on occasion, morally harmful methods may be used justifiably in pursuit of the moral purpose of policing. The theory can accommodate accounts of justification for otherwise morally harmful conduct at three levels: the *institutional* level, the *management* level and the level of policing by *individual* officers (which includes any given investigation). What it cannot accommodate is an account that provides a single cover-all justification simultaneously across all three levels. The theory has to be applied individually and according to the particular circumstances at each level. It does not follow that because the moral theory of policing can accommodate at the institutional level the occasional recourse to otherwise morally harmful methods as a tactical option that recourse to such methods will automatically be justifiable in any given operational instance when such an option is being contemplated. The availability of a tactic within the

8 A similar role is performed in Queensland, which has created an independent Office of Public Interest Monitor, who has the powers to intervene in surveillance and telephone interception warrant proceedings, and will advocate for the rights and interests of the affected person and broader community: *Police Powers and Responsibilities Act 2000* (Qld), s 743; *Crime and Misconduct Act 2001* (Qld), s 328.

institutional armoury is not a justification for any given individual use of the tactic. Just because it *can* be used does not mean that it *should* be used.

In practical terms, were the justification provided by the moral theory of policing at the institutional level to be relied upon as justification for deployment of otherwise morally harmful tactics at the operational level, the effect would be that of providing a blank cheque: investigators could employ otherwise morally harmful methods simply because the police (as an institution) could justify theoretically the use of such methods. This, in effect, would absolve the applicant and the authorising officer from having to undertaken any moral consideration about the proposed use of morally harmful methods. It could be used to provide a readymade response to the statutory considerations of legitimacy, necessity and proportionality without giving actual or sufficiently serious consideration to the underlying moral justification that needs to be claimed and demonstrated in such circumstances.

Risk and moral management: avoiding tick boxes and rubber stamps

The existence of a governance regime primarily addresses the *institutional* level of justification within the moral theory of policing: this generates the requirement that individual investigators as agents of a state organisation must seek an authority external to the investigation (if not actually external to the organisation) to use otherwise morally harmful covert methods. At the same time, at the *individual* level of justification, investigators must secure authorisation of covert methods in each specific operational context.

Any given investigation will give rise to numerous instances in which covert methods might be relied upon. The investigation *as a whole* would fall within the institutional level of moral justification for covert action, but each planned use of otherwise morally harmful methods must be *individually* legally authorised and *individually* morally justified throughout the progress of the investigation. Furthermore, a single covert tactic may involve a process comprising separate constituent elements each requiring individual authorisation and justification. For example, the placing of a listening device inside a building will require, first, a covert feasibility reconnaissance to identify what sort of surveillance device will be needed and where it might be placed and for how long; second, covert deployment of the device; third, covert use of the device; and fourth, covert recovery of the device (which, if circumstances have changed since deployment, might itself require a further covert preliminary feasibility reconnaissance). Changing circumstances may change the validity and strength of any moral justification that previously existed: for example, the feasibility reconnaissance (morally justifiable in the circumstances) may reveal new information about previously unknown countervailing moral claims that undermine any moral

justification for the actual deployment and use of the equipment.[9] It is not sufficient merely to assert that covert investigation is, in principle, capable of being morally justified within the overarching moral theory of policing. The moral complexity of such methods is multilayered and contextual, requiring regular and ongoing review of decisions made and actions proposed.

Legal risk management in policing requires demonstrable transparency in the authorisation process. This has the potential to foster a bureaucratic approach towards decision-making that is inimical to the moral deliberation required above: put simply, authorisation processes are vulnerable to the 'ticking of boxes' and 'rubber stamping'. Technology has accentuated this risk: the advent of bespoke computer software programs provides police agencies with a means of documenting transparency (albeit to a discrete audience) in covert investigations. Such programs serve a number of purposes: primarily, they document 'what, when and who' for the purposes of accountability; they provide a secure environment for such documentation; and they ensure consistency of process. This last characteristic is a double-edged sword: the desirable characteristic of achieving consistency in decision-making, rather than improving the quality of individual decisions, can itself come to define the process. The danger exists that the process ceases to service the decision-making; instead, the decision-making comes to service the process. This becomes evident in the repeated use of stock phrases and formulaic expressions in written applications for authorisation.

Bureaucratic process-adherence may militate against considered decision-making, including the making of complex moral judgments. This can be so even when the recording of moral considerations is part of the process. In assessing the risks involved in mounting an operation of any kind, including a covert operation, investigators in the United Kingdom have at their disposal a risk assessment matrix (known as the PPPLEM model) in which six categories of risks are identified: political, physical, psychological, legal, economic and moral. In applying for authorisation to utilise covert investigation tactics, investigators identify foreseeable risks within each category and indicate how the risks are to be managed. While working as an intelligence manager receiving draft applications for review prior to

9 A covertly deployed surveillance camera and/or microphone, if automated and set simply to record, will record everything that falls within its range of image or sound capture, regardless of whether what is being recorded involves the subject of the investigation or persons entirely unconnected with and not suspected of involvement in the alleged offence. Such a device might be placed in a public space, or in a communal place within premises that the suspect but also other innocent passengers and bystanders frequent.

their being considered by a superintendent, the author did not recall *ever* seeing a risk assessment in which moral risks were explicitly identified.[10] Some software versions of the authorisation process documentation appeared erroneously to have mis-labelled the 'economic' risks category as an 'ethical' risks category, thus purportedly requiring investigators to identify both ethical risks and moral risks! Interestingly, this iteration at least prompted applicant references to the ethical risk of collateral intrusion (persons other than the named surveillance subject also being surveilled due to their coincidental presence in the surveillance arena).

A number of points follow from this. First, the author's professional experience suggests that, among practitioners, there is a widespread lack of understanding of what constitutes a 'moral issue' in the practice and methodology of covert investigation — at least beyond the limits of professional standards and a basic requirement to adhere to police codes of conduct. If police practitioners do not fully appreciate the wider moral complexities, they cannot reasonably be expected to make sound moral judgments or even to recognise the relative merits of a countervailing moral claim. This is a significant training issue not only for investigator applicants and authorising officers within an administrative authorisation regime, but also, it is suggested, in the authorisation framework involving oversight by judicial officers or tribunal members — perhaps 'judicious' would be a better label, given that members must act in a personal capacity.[11] Law and morality are not the same thing and it does not necessarily follow that in having the qualities necessary to perform judicial office well, the office-holder is equally well equipped to make moral judgments within the operational context of covert investigation management.

The fact that some iterations of the authorisation documentation software used in some organisations in the United Kingdom included both 'ethical' and 'moral' risk categories, and that investigator applicants often responded to the notion of an 'ethical' risk by recognising collateral intrusion and suggesting a management strategy for its minimisation and for managing the product of collateral intrusion, suggests that the seeds of training would not fall on barren ground. But the formulaic nature of both these responses and 'management' strategies makes the second point that needs to be noted: the repeated use of standard phrases seems to evidence the concern above that applications can be drafted so as to serve the purpose of the bureaucracy and not the purpose of authorisation. Investigators using this particular construction of the process had learnt what was expected under the label 'ethical'

10 This anecdotal observation is based on many dozens of applications drafted within a single organisation: it does not represent the findings of a systematic and properly designed survey.

11 I am grateful to Professor Simon Bronitt for this observation, which will be elaborated below.

and responded accordingly in a manner that seemed to owe more to Pavlovian institutionalisation than to any inherent moral intuition.

The third point is this: the need for proper consideration of uncomfortable moral complexities seems to have been lost in the convenience of bureaucratic language and the design of a risk management model that, for the most part, focuses on risks to the investigator, investigation and institution, rather than risks to others (innocent associates of the suspect, passengers and bystanders). The determination of whether a risk should be removed, avoided, reduced or accepted may well involve moral considerations, but protecting a justifiably enforceable moral right (the moral purpose of policing, and argued here to be the ultimate purpose of an investigation governance regime) ought not to be reduced simply to operational risk management. Through their actions, investigators will be causing otherwise unjustifiable moral harm to one or more others: it is these others who are primarily at risk of moral harm, not the investigation itself or the investigators.[12] Risk management is not rights protection. Any given qualified right must be respected and protected unless there is a countervailing, stronger moral claim. This is a matter of moral judgment, not risk management. Notwithstanding the undoubted good intentions of including the need for a documented moral justification in the application process, the manner in which it has been included appears to have misconstrued — or to have created circumstances in which practitioners might misconstrue — the sort of consideration that should be being made: a misconstruction compounded by the lack of practitioner awareness in relation to the moral complexities of covert investigation methodologies.[13]

Surveillance governance and prior authorisation

Two generic authorisation decision-making frameworks relating to covert police surveillance, currently in use, are considered here. Common to both models is the device of prior authorisation as part of the governance mechanism for police

12 An argument can be made, of course, that requiring practitioners to operate a regime, and within the context of a process that is morally unsound, exposes the practitioner to moral risk in doing so.

13 It should be noted in passing that the PPPLEM is not the only risk assessment model used in planning and applying for covert investigation operations. Covert investigators from the Metropolitan Police Service came to view the PPPLEM model as unsuited to the covert operational environment and consequently devised an alternative: the PLAICE risk assessment model (physical risks, legal risks, risks to assets, information/IT risks, risks of compromise of staff or tactics, and environmental risks). On its face, this model (presented in Billingsley 2006) omits any reference to the risk of moral harm to investigation subjects, third parties or innocent passengers and bystanders, which removes moral judgment from the management of risk but leaves unanswered whether moral considerations are adequately addressed at some other stage of the planning and application process.

covert surveillance, but this common paradigm has two significantly different manifestations, each with its own moral implications. The first model of covert surveillance authorisation considered here is the regime set out in the *Regulation of Investigatory Powers Act 2000* (UK) (RIPA) that enacts in UK criminal procedural law the key principles enshrined within Art 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and given domestic effect in the United Kingdom through the *Human Rights Act 1998* (UK).

The right to respect for family and private life protected by Art 8 is not an absolute right. Infringement by state officials or agents is considered capable of being justified, and so permissible, when certain circumstances exist together. First, the exercise of a power likely to lead to an infringement must be *provided for in law*. In relation to police use of surveillance and other covert investigation methods, such as communication interception, the primary purpose of RIPA is to establish the lawfulness of such methods. In essence, the use of a method is either provided for in law or it is not. Second, where police methods are likely to infringe Art 8, there is a requirement that their use should not be arbitrary: in other words, such recourse should be legitimate (for a specified purpose[14]), and it should be necessary and proportionate, not just desirable, useful or reasonable (Bingham 2010, 74–76; Harfield and Harfield 2012, 16–22). These are judgment calls that require an objective basis. The (perception of) objectivity in determining whether a proposed action is legitimate, necessary and proportionate in any given circumstance potentially is enhanced if those determinations are arrived at by someone other than the investigator seeking to use such methods, because the latter will likely have a vested interest is using the methods proposed that may unduly influence his or her own decision-making. Herein lays the second purpose of RIPA, because it provides governance frameworks for such matters to be considered and authorisation for the deployment of the method to be either granted or refused.

14 What constitutes a legitimate purpose is defined in RIPA: ss 28(3), 81(2) and 81(5) specify that police may conduct surveillance for the purposes of preventing or detecting crime, preventing disorder or apprehending a suspected offender. In limited circumstances, certain other agencies may conduct surveillance in the interests of national security; in the interests of the economic wellbeing of the United Kingdom; in the interests of public safety; for the purpose of protecting public health; or for the purpose of assessing or collecting certain fiscal levies. The relevant secondary legislation, the *Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2003* (SI 2003/3171), details which other agencies can utilise surveillance in respect of these other defined legitimate purposes.

RIPA defines 'surveillance' (s 48(2)) as including the monitoring, observing or listening to of persons, their movements, their conversations or their other activities and communications; the recording of such activities; *and also* any surveillance by or with the assistance of a surveillance device.[15] RIPA categorises covert surveillance as either *directed* (s 26(2)) or *intrusive* (s 26(3)), depending on the circumstances in which the covert surveillance is being conducted, providing different authorisation frameworks accordingly. Thus, RIPA does not focus on specific surveillance technologies (for example, asset location devices, audio recording devices and video recording devices), but on surveillance in general as a species of conduct that engages the Art 8 rights and which, when conducted covertly for specific purposes, is held to require prior authorisation as part of the mechanism for determining lawful justification. It is a rights-centric statute that provides an administrative authorisation framework largely internal in character.[16]

The second generic authorisation model is that which forms the basis of many of the Australian covert surveillance regimes: the statutory paradigm is fundamentally

15 Thus, surveillance is distinguished from other forms of covert investigation, such as communication interception and entrapment. Arguably, this passive listening and watching is also distinguishable from what Gans et al (2011, 341) term 'participant surveillance' — the use of undercover officers and informers — which might also be labelled interactive surveillance. The moral issues arising from the deployment of undercover officers and/or informers warrant separate consideration (see, for example, Harfield 2012): this article focuses on surveillance as defined in s 48(2) of RIPA.

16 RIPA incorporates in Pt 1 of the Act revised and updated provisions in relation to the interception of communications formally provided for in the now repealed *Interception of Communications Act 1985* (UK). Again, this is not technology-specific — the policy intention being that as far as possible the provisions should be technology-neutral for future-proofing purposes (the present author represented the police service in pre-legislative policy discussion with Home Office officials during the drafting of the Regulation of Investigatory Powers Bill (UK)) — but focuses on an overall conduct and its consequential engagement of Art 8 rights.

different.[17] First, Australian laws appear to be silent on surveillance as a law enforcement conduct, in and of itself worthy of regulation. Instead, the statutory starting point generally in relation to surveillance is the *criminalisation of the use of* surveillance *devices*, to which general prohibition exemptions are available in certain circumstances for the purposes of law enforcement (Gans et al 2011, 302). In other words, when Australian police officers apply for authorisation to install, use,[18] maintain and retrieve surveillance devices, they are not seeking authorisation to engage in conduct that would otherwise arbitrarily infringe protected rights: rather, they are seeking exemption from culpability in specific conduct otherwise legislated as criminal.[19] These two different authorisation paradigms thus generate two different contexts with which moral judgments must be made by authorising officers.

17 There is no overarching human rights legislation in Australia. The state of Victoria and the Australian Capital Territory have passed a *Charter of Human Rights and Responsibilities Act 2006* (Vic) and a *Human Rights Act 2004* (ACT) respectively, but arguably these are not as robust or as comprehensive in their considerations as European human rights legislation. Section 13 of the Victorian Charter asserts that a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; s 20 asserts that a person must not be deprived of his or her property other than in accordance with the law. In the absence of defined qualifications and parameters (such as those outlined in Art 8(2) of the ECHR), the limits of the Victorian Charter are in essence defined by other statutes: if conduct is lawful under another statute, by definition it will not offend against the Victorian Charter. The ACT legislation is crafted in a similar vein, but with the qualification (s 40B) that it is unlawful for a public authority to act in a way that is incompatible with a human right unless the law requires the authority to act in such a way. The statutory protection of human rights within Australia's various jurisdictions has been subject to significant criticism: see, for example, O'Neill, Rica and Douglas 2004. Unlike the United Kingdom, the Australian Commonwealth jurisdiction does have a Privacy Act (the *Privacy Act 1988* (Cth)) governing the acquisition, collection, management and dissemination of personal information, which, as of a 2012 amendment, incorporates the conduct of surveillance activities, intelligence-gathering activities and monitoring activities as 'enforcement-related activity' which is often exempted from many of the information-protecting Australian Privacy Principles: see the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth).

18 The 'use' of surveillance devices is defined in functional and technical terms by characterising the product (including a recording) obtainable by the technology being used. See, for instance, s 4 of the *Surveillance Devices Act 1999* (Vic) or s 3 of the *Surveillance Devices Act 2007* (NSW).

19 The Australian states and territories, together with the Commonwealth jurisdiction, enforce their own individual criminal jurisdictions with their own individual criminal procedural laws. See Gans et al 2011, 334 for a brief comparison of the different regimes. It is not necessary for the purposes of this article to discuss the different regimes in detail. Suffice it here to consider in general terms common features of the different regimes and the implications of these for those officials making authorisation decisions. The criminalisation of the use of surveillance devices is intended to be a means of protecting personal privacy absent any statutory protections beyond the regulated use of personal information.

In the former model, the context requiring moral justification has an external focus, protecting others from police abuse of power; in the latter model, the requirement for moral justification has an internal focus, protecting the police from what would otherwise be criminal liability. Engaging in surveillance without the assistance of specific devices does not generally appear to require authorisation in Australian jurisdictions. Such unaided surveillance may not engage statute, but it still engages moral concerns because such conduct will be otherwise morally offensive unless justified by a weightier moral claim.

Another key difference between the general formats of the UK and Australian covert surveillance authorisation regimes is the character of the authorising official. In the RIPA administrative authorisation regime, the authorising officer for directed surveillance is a senior manager from the agency concerned (Harfield and Harfield 2012, 37), while for intrusive surveillance it is a senior executive from the agency concerned whose decision to authorise is subject to independent, quasi-judicial scrutiny and prior approval *before* the intrusive surveillance can commence (Harfield and Harfield 2012, 6–58).[20] In most of the Australian regimes that permit the use of surveillance devices by the police, sworn affidavit application for a warrant must be made by a police officer (sometimes stipulated to be of a senior rank) to a judicial officer or tribunal member (although for tracking devices in some jurisdictions a magistrate may authorise deployment, use and retrieval).[21] The Australian Federal Police may also apply to specified members of the Administrative Appeals Tribunal for a warrant to deploy and use surveillance devices.[22]

These different models engage different moral implications and considerations at different levels. First, there is the issue of the character of what is being authorised: infringement of individual privacy or exemption from criminal prohibition, and the

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20 The power to conduct covert surveillance under RIPA is not confined to the police but is invested in a large number of law enforcement, regulatory and government agencies as prescribed in Sch 1 of RIPA.

21 See, for example, ss 14 and 16 of the *Surveillance Devices Act 2004* (Cth); s 16 of the *Surveillance Devices Act 2007* (NSW); s 328 of the *Police Powers and Responsibilities Act 2000* (Qld); s 14 of the *Surveillance Devices Act 1999* (Vic); and ss 12–13 of the *Surveillance Devices Act 1998* (WA). Note that Pt 4 of the *Surveillance Devices Act 2004* (Cth) makes provision for limited use of surveillance technology without warrant in circumstances where there is no entry onto premises or interference with vehicles, where the law enforcement officer is party to the recorded conversation, and where the use of a tracking device for limited purposes has been authorised by a senior member of the same agency. The latter circumstances bring s 39 of the *Surveillance Devices Act 2004* (Cth) within the context of the discussion below on administrative authorisation.

22 Sections 11 and 13 of the *Surveillance Devices Act 2004* (Cth).

influence that these two different approaches might have on the moral consciences of investigators. Second, there is the issue of what it is that the authorising officer is being asked to consider when determining whether to grant or withhold authorisation, and whether either species of authorising officer — internal administrator or external (sometimes quasi-)judicial officer — is being asked to make a morally appropriate determination within the context of their office and position.

Moral management and administrative authorisation: the UK model

To what moral harms does an administrative authorisation scheme, such as that enacted by RIPA, potentially give rise? And to whom will such harm be caused? To be consistent with the moral theory of policing, the authorising officer in an administrative authorisation regime must make dispassionate and objective determinations about the use of covert surveillance in circumstances of organisational affinity and perceivable conflicts of interest.[23] The role of an investigator is impartially to discover, secure and present relevant and reliable facts — both incriminating and exculpatory — for an independent decision-maker (jury and/or judge) to use to determine whether guilt is proven beyond reasonable doubt. Nevertheless, political and popular rhetoric posits the police as crime-fighters,[24] a perception which privileges the interests of the investigator,[25] and the interests of individual victims in restoration and retribution, over the wider collective interests of the community in having a dispassionate criminal justice system operating with integrity to serve democratic society.[26] The perception of police as crime-fighters is reinforced through performance measures which, although they change in detail and character from time to time, have in common the ultimate purpose of conviction. In

23 Conflicts of interest in policing sometimes cannot be avoided and must be managed. For a discussion on unavoidable conflicts of interest in policing, see Coleman 2005.

24 Consider, for example: the slogan seen on Australian Federal Police (AFP) advertising hoardings around Canberra, where the AFP, in addition to its national duties, undertakes community policing in the Australian Capital Territory: 'To fight crime and win'; the recruitment campaign for the new National Crime Agency in the United Kingdom describes the Agency as one of 'operational crime fighters' (National Crime Agency 2012); and election campaigns are fought on manifestos that promise police will be crime fighters, not form fillers (Lincolnshire Conservative Association 2011).

25 For example, and in no particular order, meeting performance targets, earning professional kudos, and being seen to be worth his or her salary.

26 In this latter construction, the victim's interests are addressed relative to the victim's status as a member of society rather than as an aggrieved individual: these issues are insightfully discussed in Kennedy 2004, 13 and 24.

this context, investigators primarily tend to see their role not as neutral fact-finders but as the builders of the strongest-possible prosecution case.[27]

The authorising officer in such an administrative regime must not be a member of the team investigating the matter at hand. Yet, inevitably, at the same time, this individual cannot be entirely divorced from the context of organisational culture and objectives within which he or she makes authorisation decisions. Consequently, these important decisions (which are simultaneously statutory and moral in character) are made in an environment of vested interest and an arena in which objectivity is robustly confronted by bias, be it conscious or subconscious.

Police surveillance conduct that would otherwise give rise to moral harm will be justifiable within the context of the moral theory of policing if certain criteria exist; the authorisation process is intended to ensure that consideration of whether these criteria exist is undertaken before the conduct commences. Authorisation thus becomes integral to the moral legitimacy of covert surveillance. But this also requires that the authorisation decision itself is morally sound. That decision will itself be morally harmful if the decision-maker (the authorising officer) is unduly influenced by bias. If the circumstances in which the authorisation is granted are morally problematic, then the covert surveillance will fail to satisfy the moral theory of policing and the consequent moral harm arising will be compounded; the legitimacy of the investigating agency will be compromised and not only will the subject of the surveillance suffer the moral harm of unjustified infringement of respect for his or her family life, but also the community will suffer moral harm arising from the improper actions of a criminal justice agency the legitimacy of which is part of the foundations of a democratic society.

A second category of potential moral harms is associated with administrative authorisation: that the applicant seeking authorisation will wish to, and will have the means to, exaggerate the intelligence case upon which the application is founded, thus deceiving the authorising officer in order to induce an authorisation that might

27 The author's experience of serving in five different policing organisations was that this was the prevailing organisational culture. It is also evidenced through instances of miscarriage of justice, where investigators have withheld relevant exculpatory facts from the prosecutor (see, for example, Walker and Starmer 1999) and through instances of police misusing covert surveillance methods in order to try to secure incriminating evidence in circumstances that breach legal privilege and other due process protections (see, for example, *R v Sutherland,* 2002; *R v Sentence,* 2004; and *R v Grant,* 2005, discussed in Harfield and Harfield 2012, 27; since this discussion was first published, aspects of the original judgment in *Grant* have been disapproved: see Hyland and Walker 2014, 565).

not otherwise have been granted. Such misrepresentation is itself a moral harm because it undermines the integrity of the authorisation process that is intended to serve the public interest, and because it manifests disrespect to the authorising officer by using (or merely seeking to use) that individual as a means to an unjustifiable end.[28] Further, once authorising officers come to recognise (as in my experience I came to recognise) that the applications of certain officers must be treated not with a healthy scepticism but with suspicion, the trust upon which fruitful and purposeful collaboration with colleagues depends is broken; the organisation is the poorer for it; and service to the public and in the public interest suffers (each of these being a morally harmful outcome).[29]

Performance targets and competition for scarce covert surveillance resources can act as perverse incentives that tempt investigators to exaggerate the intelligence case upon which their application for covert surveillance authority is founded in order to secure access to resources and so enhance the prospects of achieving performance targets. The authorisation regime is thus devalued and undermined because of the way in which it and the intelligence-led policing paradigm function — a further moral harm because the integrity of the investigating agency, which society is entitled to expect and demand, is thus compromised. Perverse incentives can corrupt those who might not otherwise have been corrupted,[30] in the sense that officers who would not conceive of trying to deceive an external authority, such as a judge, might yet feel less scrupulous about manipulating a colleague.[31]

Moral management and (quasi-)judicial authorisation: the Australian model

If the lack of a truly independent authorisation decision-maker is perceived to be the inherent weakness of the UK administrative authorisation model, then removing that function outside the investigating agency presents itself as a potential

28 Using another individual as a means is a moral wrong; abusing their ignorance is a moral wrong; and the unjustifiable ends are also a moral wrong.

29 One method employed by some applicants was to populate their application with large numbers of intelligence unique reference numbers in the hope that I would be impressed by the weight of numbers and accept the intelligence case on this basis alone, without actually reading each and every intelligence log. Some officers soon came to realise that I would read every log; others never gave up trying the tactic.

30 Corruption is conceived here to be a continuum of debasement ranging from functional incompetence, through deliberative evasion of required protocols (howsoever motivated) to deliberate abuse of power for private gain. I am grateful to Professor John Kleinig for discussing this idea with me.

31 For judicial consideration of exactly this police train of thought, see the judgments in *Warren v Her Majesty's Attorney General of the Bailiwick of Jersey*, 2011.

and straightforward solution. A number of Australian jurisdictions require use of surveillance devices to be authorised by a judicial officer. At first glance, this requirement seems to satisfy the independence principle.[32] But is this really the case? And, even if it is the case, is the Australian authorisation framework yet free from intrinsic moral hazard?

Across the various Australian jurisdictions, a number of statutory tests must be met before law enforcement agencies may lawfully utilise a surveillance device. The judicial officer from whom authorisation is sought must be satisfied of certain specified matters. What specified matters must be considered varies between the different Australian jurisdictions, but common to all are the following requirements: first, the authorising judicial officer must be satisfied that there exist reasonable grounds for suspicion or belief upon which the application is founded;[33] second, the authorising judicial officer must consider the extent to which privacy is likely to be affected by the use of a surveillance device;[34] and third, the authorising judicial officer must take into consideration whether warrants have previously been issued in relation to the investigation to which the current application relates.

Also common is the requirement for the authorising judicial officer to consider the 'nature and gravity' of the offence suspected or being investigated. On its face, this requirement would seem to address the issue of proportionality. But it is a very different test from the consideration of proportionality within the schemes such as RIPA in the United Kingdom that implement the ECHR principles. The rationale underpinning RIPA is that the desired product of a given method must be proportionate to the intrusiveness of the method employed.[35] The seriousness of the suspected offence under investigation (characterised by the maximum length

32 See, for example, s 16 of the *Surveillance Devices Act 2007* (NSW); s 328 of the *Police Powers and Responsibilities Act 2000* (Qld); s 14 of the *Surveillance Devices Act 1999* (Vic); and ss 12–13 of the *Surveillance Devices Act 1998* (WA).

33 New South Wales and Victoria require a 'suspicion or a belief', Queensland and Western Australia require belief. Elsewhere in the regulation of police powers, the triggers of suspicion and belief are deliberately distinguished (Spears, Quilter and Harfield 2011, 218–30) and in the United Kingdom belief is a higher threshold than suspicion. In relation to applying for the use of surveillance devices, the law in New South Wales and Victoria operates in a context of ambiguity not tolerated in other state laws.

34 In the Australian jurisdictions, there is no hierarchy of authorisation related to the seriousness of the intrusion as there is in the RIPA scheme — albeit that the latter has only the most basic two tiers in its hierarchy.

35 See, for example, McKay 2006; McKay 2011, ch 2; Ormerod 2006; Taylor 2006 — all of which inform the discussion of proportionality and RIPA in Harfield and Harfield 2012, 19–22.

of sentence upon conviction) is of relevance only in determining whether the RIPA threshold for intrusive surveillance has been met (distinguishing circumstances in which directed surveillance may be used but not intrusive surveillance). No matter how grave or serious an offence is suspected or alleged, in the European context the use of covert surveillance in any given circumstance may yet be prohibited because the intrusion of the method intended to be used is deemed disproportionate to the intelligence or evidential value of the product that would be obtained. This construction protects the suspect, the investigator and the community from the moral harm arising from unjustifiably disproportionate use of state power. Not so in Australian jurisdictions, where it is the seriousness of the offence that founds justification for using intrusive investigation methods. The danger that arises in the Australian construction is that it is always possible to argue that suspicious conduct is symptomatic of or in preparation for serious crime. Consequently, seriousness is no real or reliable measure of proportionality (and so this test is no adequate protection against morally harmful conduct arising from a disproportionate response).[36]

The investigator's suspicion (or, where applicable, belief) can always be framed in such a way as to trump rights — a concern recognised in the *Covert Surveillance and Property Interference Revised Code of Practice* accompanying RIPA: 'The fact that a suspected offence may be serious will not alone render intrusive actions proportionate' (para 3.5; see also Bronitt 2002; 2004; Waldron 2003). The moral legitimacy of the law depends in part upon appropriate and proper statutory tests and thresholds being set. To the extent that statutory tests are theoretically unsound, the law in this respect is likely to be morally unsound also because of the failure of legislators to recognise and adequately protect important social values. When investigation powers engage other important social values, significant moral harm, and likely also material harm, will arise and the proposed use of the powers therefore must be morally as well as legally justifiable (see, generally, Kleinig 2009).

What constitutes lawful necessity in using a surveillance device is dealt with in different ways among Australian jurisdictions. Judges (or, as applicable, magistrates) in New South Wales must consider the 'existence' of alternative means of obtaining the evidence and whether those alternative means may assist or prejudice the investigation (as must their counterparts in Queensland). In Victoria, judges (or, as applicable, magistrates) must consider the 'availability' of alternative means of obtaining the same product and the extent to which such means would assist or prejudice the investigation. In Western Australia, judges (or, as applicable,

36 See Kleinig 2009, 204 for further detailed consideration of the misuse of 'vague appeals' to seriousness 'cloaked in the language of proportionality'.

magistrates) must consider the extent to which the evidence of information sought is likely to be obtained by methods other than using a surveillance device.[37] Detailed discussion of the difference between these requirements must be undertaken elsewhere: of relevance here is that the operation of different standards in neighbouring jurisdictions that may be called upon to collaborate on cross-border investigations is morally problematic because the possibility exists that criminal co-conspirators who happen to live in different jurisdictions may be subject to different coercive powers in otherwise identical circumstances. The moral harm arising here is that of unfairness: those who are co-accused but who live and operate in different jurisdictions within a single nation receiving unequal treatment before the law. To the extent that these circumstances occasion different adverse material consequences for individuals co-accused, unfairness is manifest within the criminal justice context. Assuming procedural fairness, natural justice and due process are held to be primary social values. Cross-border collaboration may be seen consequently to be morally unjustifiable if the outcome of collaborating within the context of incompatible regimes is inequity, particularly in relation to the use of surveillance against citizens.[38]

Judges (or, as applicable, magistrates or tribunal members) in each of the Australian jurisdictions are required to make 'judgment calls' that require them to be thoroughly briefed about all aspects of the investigation (not just those aspects that the investigator chooses to include in the application affidavit): such judgments are essentially investigation determinations. For example, in New South Wales, judicial officers authorising covert investigation technologies must consider how the information sought would assist the investigation and (separately) the evidentiary value of the information. In Victoria, Queensland and Western Australia, judges must consider the intelligence and evidentiary value of the information being sought. The

37 Section 19(2) of the *Surveillance Devices Act 2007* (NSW); s 330 of the *Police Powers and Responsibilities Act 2000* (Qld); s 19 of the *Surveillance Devices Act 1999* (Vic); and s 13 of the *Surveillance Devices Act 1998* (WA). Mere 'existence' seems to be a weaker test than 'availability': neither seems, on face value, to be definitive. It is unclear whether Victorian judges may legitimately regard a surveillance device as necessary in circumstances where scarce resources that might otherwise have secured the desired product in a less intrusive way are deployed elsewhere and so are not 'available'.

38 In ECHR case law, variation between different jurisdictions is accommodated within the concept of the margin of appreciation: local differences are permissible to the extent that the fundamental principles of the ECHR are promoted and protected by the given domestic law. The scope of the margin of appreciation 'will depend not only on the nature of the legitimate aim pursued but also on the particular nature of the interference [with a protected right] involved': *Segerstedt-Wiberg v Sweden*, 2006 at [88]. See Hopkins 2009, 31 for further discussion.

requirement to make such determinations brings the decision-maker much closer to the management of the investigation than would normally be the case for a judicial officer, imperilling the decision-maker's independence in doing so.[39] Further, unless the decision-maker has access to an independent review of the investigation, such decisions must be made entirely on the information provided by the investigator (albeit on oath in an affidavit).[40] The 'independence' of the authorisation decision-maker is potentially compromised because of their total dependence upon what information the investigator chooses to disclose in application. This vulnerability was highlighted recently in *Seven West Media Ltd v Commissioner, Australian Federal Police*, 2014, when a combination of 'erroneous statements and what the [affidavit] material did not say' led to magistrates, acting as authorisation decision-makers, making legally unsound decisions (at [79]), thus contributing to a miscarriage of justice (at [84]).[41] In the federal jurisdiction, judges who authorise such investigator conduct do so in a *personal capacity* rather than as a function of their office, because the separation

39 It can be argued, I believe, that a judge-issued search warrant ordering the seizure and production of evidence for use at trial is distinct from a surveillance device warrant, which is concerned with the investigative function of discovering whether evidence actually exists and of capturing information in order that it can then become evidence. The product of an executed search warrant will be tested as evidence in open court, which is a test of the integrity of the original application for the warrant: the product of covert investigation may never be examined at court (particularly if the product is desired for intelligence purposes), and so applications to use such methodologies and technologies may never be tested in a transparent setting.

40 When draft applications were submitted for review prior to onward transmission to an authorising officer, the author had access to the intelligence database, the contents of which had been 'prayed in aid' by the applicant in drafting the application. This provided the author with an opportunity to check claims made and make verifiable further enquiries if doubts existed about the applicant's assertions. Judges can merely question an applicant, but little more.

41 The Federal Court held that the AFP had failed properly to explain the context of its application for a search warrant (at [72]); the magistrates would necessarily have taken the wording of the affidavit very seriously and literally (at [76]); the affidavit sworn by the AFP had serious factual errors and significant omissions (at [79]); and these errors led to a fundamental miscarriage of justice (at [84]). This combination of circumstances meant that a coercive search was unjustifiable not only legally but also morally. The misuse of coercive powers is morally harmful because: (a) coercive powers infringe individual moral interests and in some cases can violate such interests to the extent that not only moral harm but also material harm is occasioned; (b) misuse of legislated power entrusted to an investigator violates the interests of both citizen and community in power being used on their behalf justly; and (c) misconduct simultaneously violates the legitimate, lawful and moral interests of investigated persons who are entitled to be treated according to the law, especially when the law is being used (justifiably) against them.

of powers intrinsic in the Australian Constitution demands that the judiciary must not act in an executive capacity.

This merely highlights the moral ambiguities inherent in judge-authorised covert surveillance. A constitutional principle is preserved through political artifice because the independence of the judiciary is called into question when members are asked to issue a surveillance device warrant.[42] There exists moral (and perhaps also legal) ambiguity about the necessity of having to manufacture a constitutional interpretation to fit laws subsequently enacted. Moral ambiguity also arises because of the statutory considerations that a member of the judiciary must work through when considering an application for a surveillance device warrant: such determinations mean that the authorising judicial officers are not truly the fully independent decision-makers that they might at first appear to be. A framework that requires conduct, the outcome of which could result in a loss of public confidence in the judiciary (an independent judiciary being a key pillar of democratic society), is a regime the operation of which causes a moral harm in and of itself (in this case, loss of public confidence in, and compromise of the status of, the judiciary). Again, if the position of the decision-maker (in respect of decisions about authorising otherwise morally harmful conduct) is itself morally unsound, then the authorisation and conduct pursuant to it is likely to be morally unjustifiable within the context of the moral theory of policing.[43]

In reviewing Australian and UK law, two broad types of authorisation framework for covert police surveillance are identifiable. Neither type is entirely free from morally problematic issues concerning the role and status of the authorisation decision-maker: neither is ideal. The focus of the UK RIPA regime is compliance with the principles of the ECHR, which are independently enforced through the supranational

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42 'The maintenance of public confidence in the independence and impartiality of … judges … in hearing disputes between the citizen and the government and its agencies is contingent upon the public perception that the judges … are impartial and entirely independent of the executive arm of government. That public perception must be diminished when the judges … are involved in secret, ex parte administrative procedures, forming part of the criminal investigative process, that are carried out as a routine part of their daily work': *Grollo v Palmer*, 1995 at 380. In relation to telephone interception — another form of covert surveillance and investigation — this issue is discussed from a legal perspective by Bronitt and Stellios (2005, 883).

43 Sections 11 and 13 of the *Surveillance Devices Act 2004* (Cth) make provision for members of the Administrative Appeals Tribunal to act as authorising officers for the use of surveillance devices. Both this alternative provision (anecdotally reported to be the preferred port of call for law enforcement agents seeking authority), and the fact that judges when authorising must do so in a personal rather than judicial capacity, render the character of the authorisation process quasi-judicial.

European Court of Human Rights. The rights of the citizen form the keystone in this overarching paradigm.[44] The considerations that Australian judges, magistrates and Administrative Appeal Tribunal members must bring to bear on issues such as intelligence value and the gravity of the suspected offence operate in a framework that primarily serves to exempt investigators from the general criminal prohibition against using surveillance devices. The framework can be argued to have the interests of the investigator more firmly sighted than the rights of the citizen. There is moral implication in the underpinning purpose of legislation.[45]

Conclusion: Protecting human rights or exempting police from criminal liability?

In the governance of covert investigation methods in Australia and the United Kingdom, one of two underpinning rationales is generally applied: *protecting human rights* (in the United Kingdom made manifest through the administrative authorisation regime established by RIPA) or exempting police from criminal liability (in Australia made manifest through a quasi-judicial authorisation framework). The 'protecting rights' approach is evident in the construction of RIPA within the context of the *Human Rights Act 1998* (UK). The 'regulating police exemption' approach may be seen not only in regard to surveillance device warrants (for example, the *Surveillance Devices Act 2004* (Cth) and similar provisions in state laws) but also in

44 It should be noted that elsewhere in Europe, where there exists the role of the investigating prosecutor or the *juge d'instruction*, which role forms part of the judiciary within the Napoleonic Code criminal system, the authorisation for covert surveillance comes from a judicial office-holder whose role it is to oversee investigations. There is no equivalent in England, Wales or Northern Ireland — although the Procurator Fiscal is a close approximation in Scotland — so the RIPA system has been designed to keep the judiciary separate from investigation management decisions.

45 Through their legislatures, different communities define the values they wish to protect. Societies affording precedence to state or national security (the security of the state and its official entities) might be expected to favour legislation that privileges the powers of state agencies over the interests of the citizen. Prioritising the rights and interests of individual citizens is an approach consistent with the philosophy of community safety, rather than state security.

Australian police powers to conduct controlled operations, such as s 15 of the *Crimes Act 1914* (Cth) (and the various equivalent instruments in the states and territories).[46]

Despite different philosophical approaches, the moral harms at issue would seem to be the same: individual autonomy and privacy are being intruded upon by state agents and, to the extent that policing infringes personal freedoms, there must be a justification for doing so that outweighs the moral claims of the individual whose moral interests are being infringed. The Australian emphasis on exempting police conduct — absent an overarching enforceable human rights framework that sets clear parameters for investigators[47] — provides a perspective that is different from that of those operating in the RIPA regime. *Legal compliance* (making lawful police actions that would be otherwise unlawful in order to ensure that evidence for the prosecution is admissible at trial) rather than *human rights protection* seems to be the driving force.[48] This approach provides a different nuance to moral considerations. It might be interpreted as offering different moral weighting to competing claims from the emphasis provided by a rights protection approach.

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46 The rationale for the regulation of controlled operations in Australian law — and the exemption of investigators and third parties from criminal liability in certain circumstances for which prior authorisation is preferred but retrospective authorisation is available in limited circumstances — is derived from *Ridgeway v The Queen,* 1995, in which Ridgeway's conviction for heroin importation to Australia was quashed because of the extensive role played by AFP investigators in facilitating the importation so that Ridgeway could be arrested and prosecuted. The High Court found that the AFP had aided and abetted the offence, contrary to s 233B(1)(d) of the *Customs Act 1901* (Cth). Among the legislative developments following *Ridgeway* was the enacting of s 138 of the *Evidence Act 1995* (Cth) — and its state equivalents — enabling courts to adduce evidence improperly obtained when the undesirability of admitting tainted evidence is outweighed by the desirability of admitting the evidence: see Bronitt 2004, 38–39; Chernok 2011, 362–64; Harfield 2010, 791–92; and Mellifont 2010, 20–21, and 139–42.

47 As noted above, two Australian jurisdictions have enacted human rights instruments. The Victorian *Charter of Human Rights and Responsibilities Act 2006* recognises the right of individuals not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with but, unlike the ECHR, does not set parameters defining lawful interference (s 13(a)). The ACT *Human Rights Act 2004*, on its face, seems not dissimilar from the *Human Rights Act 1998* (UK), but on closer inspection, and reading it in conjunction with other legislation, it seems that there is a number of ways in which the actions of police investigators are exempt from the rights protection framework.

48 For example, Pt 1AB of the *Crimes Act 1914* (Cth) begins with the stated premise that the Part serves 'to exempt from criminal liability, and to indemnify from civil liability' individuals (both police and non-police) who participate in a controlled operation (s 15G). Moral judgments will be made within the context of this premise.

Within this context, it is conceivable that individuals might misconstrue exemption from criminal liability, consciously or subconsciously, as incorporating exemption from moral liability. In the Australian regime, the authorisation focus is the facilitation of the investigation rather than the protection of individual rights. In justifying self for the purposes of legal compliance, the Australian investigator loses sight of — because the regime does not direct their sight towards — the moral obligations owed by investigators to others. The United Kingdom's RIPA regime may have a greater focus on human rights protection, but the perception that governance is largely a bureaucratic exercise eclipses the value of this approach and obscures from investigators the significance of their moral obligations.

Regardless of within which of these two approaches covert investigation is being conducted, in terms of moral justification the decision-making that an investigator has to engage with seems to be the same:

> … what I propose to do will cause moral (and possibly material) harm to others, possibly including law-abiding non-suspects. I recognise that all these individuals have competing moral claims to be able to enjoy their lives free from intrusion and interference, and that the ultimate purpose of policing is to provide a social environment in which legitimate freedoms can be pursued. The proposed investigative conduct is justified not just because it is a policing method provided in law; not just because within the institutional context of policing the proposed conduct is consistent with the moral theory of policing. It is specifically justified in this particular operational instance *because* … [at which point, the investigator explains why the specific product to be obtained by the proposed method cannot be obtained by any other method of investigation, and how and why the product sought in this instance characterises the proposed method as proportionate].

That both the administrative authorisation model and the (quasi-)judicial model remain morally problematic, notwithstanding that they are lawful within their different jurisdictions, seems to call into question whether the authorising officer in either regime is being asked to undertake such an important function in a way that is morally appropriate. At the very least, it highlights a need for training in investigation ethics (which is distinct from police professional ethics[49]), alongside training in investigation law.

This article has considered the relationship between a moral theory of policing and the architecture of governance; the management of risk in covert surveillance; and two

49 Police professional ethics are often articulated in the form of published codes of conduct. For discussion of ethical shortcomings in police codes of conduct, see Cawthray, Prenzler and Porter 2013.

generic types of authorisation framework for covert surveillance. It has illustrated the complexities of the moral landscape for covert investigation that confronts authorising officers. When considering collateral intrusion, for instance, intuitively it will *never be necessary* (in fact or in law) to intrude on the privacy of innocent persons when conducting surveillance, thus the question arises as to whether intrusion of an innocent interlocutor's, passenger's or bystander's privacy can ever be morally justifiable, even if the intrusion against the suspect's privacy is justifiable in relation to the counter-claims of the victim and the wider community to a peaceful and safe social environment in which to live their lives. Collateral intrusion into the privacy interests of innocent persons is one instance in which policing will create more victims, even if the harms are predominantly (or exclusively) moral rather than material. When police methods create victims, including victims of moral harm, even if the degree of material harm is negligible, the legitimacy of policing is corroded. That is why mechanisms for rights protection, such as covert policing authorisation regimes (whether internal or external), must not only promote legality but must also demand sound ethical deliberation. To ensure that this takes place, sufficient understanding is required on the part of practitioners — both investigators and decision-makers — which itself has significant training implications.[50] For the police use of covert investigation methods to be legitimate, such use must be both justified in law and morally justified. Prior authorisation is a mechanism primarily focused (in both the Australian and the UK contexts) on demonstrating the lawfulness of proposed conduct, but it is also a mechanism that can ensure proper determination of moral justification. The inherent ambiguities in the two authorisation models considered here add to the complications of making such judgments and making them soundly. It is not in the interests of policing, the police or the policed to have to rely upon unsound and problematic law. It cannot but imperil the legitimacy of policing, and so ultimately the legitimacy and purpose of the criminal justice system, if investigators are equipped with poorly designed law when acting on behalf of the community. A mechanism that addresses or focuses on legal criteria without also addressing moral contexts of decision-making is insufficient, even if on its face it seems to deliver legal compliance, in terms of both procedural and human rights protection. The mechanism may be lawful, but inadequate design and implementation may mean in practical terms that it falls short of being ethical. ●

50 It seems axiomatic that practitioners insufficiently well trained are incapable of delivering policing or judicial practice that will serve the ultimate moral purpose of policing or the criminal justice system.

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Human rights, police corruption and anti-corruption systems for police organisations

Seumas Miller*

My concern in this article is with the nature and causes of police corruption and the methods used to combat it. However, I will argue that human and other moral rights are deeply implicated in police corruption and anti-corruption systems — not least because the fundamental institutional purpose of police organisations is to protect the human and other moral rights of citizens. The principal institutional anti-corruption vehicle is what is referred to as an integrity system. Accordingly, the matter resolves itself into designing an integrity system for police organisations that is sensitive to the fundamental purposes of policing, to the moral rights of victims of police corruption, and to the rights of police officers. I also discuss two key challenges faced in devising integrity systems for police organisations — namely, the reluctance of police officers to inform on their corrupt colleagues (the so-called 'blue wall of silence') and the quality of internal affairs investigations into police corruption.

Keywords: police ethics, corruption, professional reporting, human rights, integrity systems, internal affairs investigations

Introduction

Recent and not-so-recent commissions of inquiry into police corruption — including the Knapp and Mollen Commissions into the New York City Police Department, the Rampart investigation into the Los Angeles Police Department, the Fitzgerald Royal Commission into the Queensland Police Service and the Wood Commission into the New South Wales Police Service — have uncovered corruption of a profoundly disturbing kind (Knapp 1972; Mollen 1994; Rampart Independent Review Panel 2000; Fitzgerald 1989; Wood 1997). Police officers have been involved in perjury, fabricating evidence, protecting pederast rings, taking drug money and selling drugs. In South Africa, police have been involved in murder, armed robbery and rape, as well as theft, fraud, fabrication of evidence, and the like. High levels of police corruption have been a persistent historical tendency in police services throughout the world.

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My general concern in this article is with the nature and causes of police corruption and the methods used to combat it. However, I will argue that human and other moral rights are deeply implicated in police corruption and anti-corruption systems — not least because the fundamental institutional purpose of police organisations is to protect the human and other moral rights of citizens. The principal institutional anti-corruption vehicle is what is referred to as an integrity system. Accordingly, the matter resolves itself into designing an integrity system for police organisations that is sensitive to the fundamental purposes of policing, to the moral rights of victims of police corruption, and to the rights of police officers. I also discuss two key challenges faced in devising integrity systems for police organisations — namely, the reluctance of police officers to inform on their corrupt colleagues (the so-called 'blue wall of silence') (Kleinig 2001) and the quality of internal affairs investigations into police corruption (Punch 1983; Richardson 1987).

Human rights, police corruption and anti-corruption challenges

There are historically important and interconnected challenges that confront police organisations in combating corruption. These are:

- conditions conducive to corruption — for example, the use of harmful, normally immoral, methods by police (such as use of force, deception and intrusive surveillance) which infringe (but hopefully do not violate) human and other moral rights; and
- conditions antithetical to anti-corruption and, in particular:
  - » the blue wall of silence, whereby the professional reporting of corrupt police officers by their colleagues is widely regarded in many police organisations as 'ratting' on one's colleagues; and
  - » poor quality internal affairs investigations of corrupt police officers.
- (See Knapp 1972; Mollen 1994; Rampart Independent Review Panel 2000; Fitzgerald 1989; Wood 1997; Newburn 1999; Miller 1989a.)

An important contributing factor to police corruption is the inescapable use by police officers of what in normal circumstances would be regarded as morally unacceptable activity by virtue of its constituting an infringement of human and other rights, such as the rights to personal security, to freedom and to privacy.[1] The use of coercive force — including, in the last resort, the use of deadly force — is in itself both harmful and an infringement of the human right to personal security.

1 Such moral rights are typically enshrined in legal and quasi-legal documents such as the Universal Declaration of Human Rights.

Accordingly, in normal circumstances, its use is morally unacceptable. So it would be morally wrong, for example, for a private citizen forcibly to take someone to his or her house for questioning. Similarly, locking up individuals deprives them of their liberty, and as such is an infringement of the human right to freedom and is, therefore, morally wrong. Again, deception, including telling lies, is under normal circumstances morally wrong. Intrusive surveillance is in itself morally wrong — it is an infringement of the right to privacy. And the same can be said of various other methods used in policing.

Coercion, depriving individuals of their liberty, deception and so on are harmful methods; they are activities which, considered in themselves and under normal circumstances, are morally wrong by virtue of being infringements of human rights or other moral rights. Therefore, they stand in need of special justification. In relation to policing, there is a special justification. These harmful and normally immoral methods are on occasion necessary in order to realise the fundamental end of policing — namely, the protection of moral rights. More specifically, the use of any of these methods constitutes an infringement, but not a violation, of the human and other moral rights of suspects, provided that three conditions are met:

- the infringement is morally justified in the circumstances — for example, use of coercive force is necessary, proportionate, reasonable and so on;
- the infringement is lawful in that there is an explicit legal power to undertake the action; and
- the infringement is communally sanctioned — for example, by virtue of being in compliance with a law enacted by a democratically elected legislature.
- (For further discussion, see Miller 2010a, ch 8; Miller and Blackler 2005, ch 1.)

In short, and at the risk of oversimplification, I am suggesting that police use methods that infringe moral rights in order to protect moral rights.

However, the fundamental point that needs to be made here is that the use by police officers of these harmful methods — albeit methods that in the right circumstances are morally justifiable — can have a corrupting influence on police officers. A police officer can begin by engaging in the morally justifiable activity of telling lies to criminals, and engaging in elaborate schemes of deception as an undercover agent, and end up engaging in the morally unjustifiable activity of telling lies and deceiving innocent members of the public or fellow officers. A police officer can begin by engaging in the morally justifiable activity of deploying coercive force to arrest violent offenders resisting arrest, and end up engaging in the morally unjustified activity of beating up suspects to obtain a confession and conviction.

It might be suggested that such methods could be wholly abandoned in favour of the morally unproblematic methods already heavily relied upon in relation to investigating suspects, such as engaging in rational discourse with the suspect (for example, simply asking questions), appealing to the moral sentiment of witnesses to assist police, relying on upright citizens to come forward with information, and so on. Doubtless, in many instances, morally problematic methods could be replaced. And, certainly, overuse of these methods is a sign of bad police work, and perhaps of the partial breakdown of the police–community trust that is so necessary to police work. However, the point is that the morally problematic methods could not be replaced in *all* instances. For one thing, the violations of moral rights that the police exist to uphold are sometimes violations perpetrated by persons who are unmoved by rationality, appeals to moral sentiment, and so on. Indeed, such persons — far from being moved by well-intentioned police overtures — may seek to influence or corrupt police officers for the purpose of preventing them from doing their moral and lawful duty. For another thing, the relevant members of the community, for one reason or another, may be unwilling or unable to provide the necessary information or evidence, and police may need to rely on persons of bad character, or methods such as intrusive surveillance. So, unfortunately, harmful methods that are in normal circumstances considered to be infringements of human rights, or otherwise immoral, are on occasion necessary in order to realise the fundamental end of policing — namely, the protection of human and other moral rights.

The paradox whereby police necessarily use methods that are normally morally wrong — that are indeed infringements of moral rights — in order to secure morally worthy ends — notably, the protection of human rights — sets up a dangerous moral dynamic. The danger is that police will come to think that 'the ends always justify the means' and will come to accept the inevitability and desirability of so-called 'noble cause corruption' (see Delattre 1994; Miller 2004). From noble cause corruption, police can in turn graduate to straightforward corruption — corruption motivated by greed and personal gain.

A particularly significant contributing factor to police corruption is the widespread use in contemporary societies of illegal drugs such as heroin, cocaine and Ecstasy.[2] Police officers, especially detectives, are called on to enforce anti-drug laws in circumstances having the following features:

- the illicit market involves large amounts of money and a willingness on the part of drug-users, and especially drug-dealers, to bribe police;

2 This was a key finding in the Wood Report (Wood 1997), for example.

- there are no identifiable complainants — the 'victims' are not persons who would come forward to the police and report that they have been the victim of a criminal act;
- corrupt police officers can accept bribes or steal drugs or drug money with relative impunity, given the absence of identifiable complainants and identifiable victims;
- there is a feeling in some sectors of the community that drug addiction is not so much a crime as a medical condition, and that therefore drug-taking should not be regarded as a crime;
- young police officers typically share the attitudes of their peers outside policing, and thus may regard the use of illegal drugs as a relatively minor offence; and
- police officers who are especially vulnerable, such as young police officers or those working in drug investigations, may out of fear turn a blind eye to drugs, or even succumb to drug-taking themselves, and thereby enter the spiral of corruption that moves from moral vulnerability to moral compromise, and then to corrupt activities.

Let us now list some of the general conditions contributing to police corruption. These conditions include:

- as discussed above, the necessity at times for police officers to deploy harmful methods, such as coercion and deception, which are normally regarded as infringements of human and other moral rights;
- the high levels of discretionary authority and power exercised by police officers in circumstances in which close supervision is not possible and in the context of the key ideal of constabulary independence in the United Kingdom and Australia, which permits police at all levels discretion in whether or not to enforce the law in a given case (see, for example, Miller 1989b);
- the ongoing interaction between police officers and corrupt persons who have an interest in compromising and corrupting police;
- the necessity for police officers to make discretionary ethical judgments in morally ambiguous situations (Miller 1989b); and
- the operation of police officers in an environment in which there is widespread use of illegal drugs and large amounts of drug money.

In addition to these conditions that are conducive to corruption, there are conditions that impede anti-corruption measures — notably, the blue wall of silence and, although this is changing in many modern well-resourced police organisations, poor-quality internal affairs investigations.

Organisational integrity systems, including integrity systems for police organisations, rely heavily on the members of organisations to report the ethical misconduct of their colleagues and, in the case of criminal offences, to be prepared to provide sworn evidence against them. Historically, police officers have been very reluctant to 'rat' on corrupt colleagues, and this reluctance has been explained in large part in terms of police culture and, specifically, the above-mentioned blue wall of silence. Police culture is a complex phenomenon and one much-commented on (Reiner 1985, ch 3). Moreover, we need to distinguish the sociological description of police culture from the ethical or, more broadly, normative analysis of it. As noted earlier, a feature of police culture is the strong sense of loyalty felt by police officers to one another. Police work is inherently dangerous and requires a high level of cooperation and trust, particularly among street police. So it is unsurprising that police culture is characterised in part by a strong sense of solidarity among police officers. Moreover, at least in many large metropolitan police services, this solidarity goes hand in glove with an 'us-versus-them' mentality in respect of both the general public and police management. The general public is often thought by police to misunderstand, dislike and/or fear the police — after all, it is members of the public who are being policed and in urban crime-ridden areas it may be difficult for police to separate offenders from ordinary law-abiding citizens. Police managers are often thought by street police to be unsupportive, untrustworthy and punitive — after all, it is the managers who are 'policing the police', and in police organisations with an acknowledged corruption problem, street police are likely to be especially distrustful of the police managers who are under political pressure to be seen to be doing something about the corruption (Reuss-Ianni and Ianni 1983).

Numerous inquiries into police corruption have noted that police officers typically expect fellow police officers not to report them (Knapp 1972; Mollen 1994; Rampart Independent Review Panel 2000; Fitzgerald 1989; Wood 1997), even when they have engaged in criminal acts and notwithstanding the legal requirement that they do so. This blue wall of silence depends in part on the feelings of loyalty described above. Perhaps it also draws support from the feeling among many police officers that at times they are justified in breaking the law, whether by failing to report corruption or by engaging in (at least) noble cause corruption.

Police solidarity can often be a virtue. It enables officers to cooperate with one another and to stand solid in the face of danger — for example, to successfully discharge their responsibilities in relation to crowd control or when two police officers 'on the beat' confront a violent offender. It also reinforces the individual capacity for physical courage, including a preparedness to die in the service of others. And it generates a willingness to help other police when they most need help. But such solidarity can also be a vice. Historically, in many police organisations solidarity has manifested

itself in a willingness to elevate organisational interests above those of the public, including by tolerating corruption in the ranks. Notoriously, police have engaged in cover-ups of the crimes of fellow officers. Such cover-ups represent examples of the immorality that solidarity can bring about.

As mentioned earlier, one dimension of police culture is the schism between 'street cops' and 'management cops' and, more specifically, between street cops and internal affairs investigators (Reuss-Ianni and Ianni 1983). This aspect of police culture can have profound implications for the effectiveness of the police organisation. If there is an us-versus-them attitude between lower and upper echelon employees, an organisation is hardly likely to perform at optimum levels of efficiency and effectiveness. For example, it is conducive to a punitive culture in which minor ethical misconduct on the part of subordinates, once exposed, is harshly punished — often following an internal affairs investigation in the service of a police management hell-bent on demonstrating a tough anti-corruption stance to its political masters and the public at large — when a remedial/development response would be far more appropriate. Naturally, such a punitive culture reinforces the blue wall of silence, particularly among lower echelon police officers. Moreover, it generates an attitude of animosity towards internal affairs departments and a marked reluctance, in particular, to undertake an investigative role in such departments.

It is not surprising, then, that, historically, the quality of internal investigations of police corruption and misconduct has been poor. Numerous police commissions in the United States, Australia and elsewhere have found major deficiencies when 'police investigate police' (Knapp 1972; Mollen 1994; Rampart Independent Review Panel 2000; Fitzgerald 1989; Wood 1997). The deficiencies identified have included inadequate planning of investigations, inadequate use of electronic surveillance, failure to interview key witnesses, breaches of confidentiality, and lack of timeliness. Doubtless, the problem is less now than in the past — due, for example, to the widespread introduction of more effective vetting practices, better education, increased use of modern methods of covert investigation, many more competent and committed internal investigators and, more generally, the implementation of processes of professionalisation. However, the problem has by no means disappeared.

Having elaborated on conditions conducive to police corruption and conditions antithetical to anti-corruption measures, let us now turn to integrity systems in police organisations.

Integrity systems in police organisations

An integrity system is an assemblage of institutional entities, mechanisms and procedures whose purpose is to ensure compliance with minimum *ethical* standards and to promote the pursuit of *ethical* ideals. Integrity systems can be contrasted with regulatory frameworks (Miller, Roberts and Spence 2005; see also Alexander and Miller 2010). A regulatory framework is a structured set of explicit laws, rules or regulations governing behaviour, issued by some institutional authority and backed by sanctions. It may serve to ensure compliance with minimum ethical standards (namely, those embodied in a law, rule or regulation), but this is only one of its purposes. There are numerous laws, rules and regulations that have little or nothing to do with ethics.

Integrity systems for police organisations can and do vary. However, it has been suggested that such systems ought to have at least the following components or aspects (Miller and Prenzler 2008; see also Prenzler 2009):

- an effective streamlined complaints and discipline system;
- a comprehensive suite of stringent vetting and induction processes reflective of the different levels of risk in different areas of the organisation;
- a basic code of ethics and specialised codes of practice — for example, in relation to the use of firearms — supported by ethics education in recruitment, training, and ongoing professional development programs;
- adequate welfare support systems — for example, in relation to drug and alcohol abuse, and psychological injury;
- intelligence gathering, risk management and early warning systems for at-risk officers — for example, officers with high levels of complaints;
- internal investigations — that is, the police organisation takes a high degree of responsibility for its own unethical officers;
- pro-active anti-corruption intervention systems — for example, targeted integrity testing;
- ethical leadership — for example, promoting police who give priority to the collective ends definitive of the organisation rather than their own career ambitions; and
- external oversight by an independent well-resourced body with investigative powers.

As the foregoing points suggest, a key element in an integrity system for police organisations is an organisation-wide, intelligence-based, ethics risk assessment process. This involves good intelligence and an organisation-wide ethics risk assessment plan and — based on good intelligence and the risk assessment plan —

the identification of corruption, rights violations and ethical misconduct risks in the police organisation.

Ethical risks in a contemporary police organisation might include risks in many, if not most, of the following areas (Miller and Prenzler 2008; see also Prenzler 2009):

- data security, notably electronic data;
- drug investigations, given the massive funds involved and the absence of victims who might complain;
- excessive use of force;
- informant management, given that most informants are themselves criminals; and
- infiltration by organised crime.

Other areas of concern in many police organisations are the ethical risks stemming from severe stress among police officers and the inability of managers to identify and respond effectively to severe stress in their subordinates; noble cause corruption, in which officers break the law to achieve good outcomes — for example, by doctoring statements and even fabricating evidence; and political and/or media and/or police hierarchy pressure for results, or even actual interference in high profile investigations, thereby compromising the investigative process and (potentially) its outcome.

Once ethical risk areas have been identified, preventive countermeasures need to be put in place. These countermeasures should track the identified risks. Some countermeasures and the risks that they track include the following (Miller and Prenzler 2008; see also Prenzler 2009):

- in relation to data security: segregation of, and controlled access to, internal affairs databases; audits of data base access;
- in relation to drug investigations: early warning systems — for example, profiles of at-risk officers and locations, as well as high risk areas; intelligence-driven targeted integrity testing of individuals and locations; audits of drug squads and forensic laboratories;
- in relation to excessive use of force: complaints-driven investigations informed by intelligence — for example, a high number of complaints of excessive use of force;
- in relation to informant management: accountability mechanisms, such as documentation naming the informant, ensuring that a police officer with an informant has a supervisor who meets with the officer and the informant, having a supervisor who monitors the police officer's dealings with the

informant, and recording all payments (including electronic transfers) to prevent theft);
- in relation to infiltration by organised crime: stringent and constantly updated vetting procedures (especially for officers in sensitive areas), ensuring adequate supervision of all officers, and monitoring and utilisation of intelligence databases (including criminal associations);
- in relation to stress: ensuring adequate supervision of all officers; introduction of stress management tools; and
- in relation to all of the above: ongoing ethics training based on identified risks in specific roles.

Professional reporting and internal affairs investigations

Having outlined integrity systems for police organisations in general terms, I now turn to a detailed consideration of two more specific interrelated problems described earlier — namely, the blue wall of silence and poor quality internal investigations.[3] Police culture, it is suggested, is not the pervasive, monolithic and dominant force that it is often presented as being. Rather, it is a malleable phenomenon; in principle, it can be changed and, in particular, its malignant features can be curtailed — even if they cannot be removed entirely. Curtailment depends on a number of things, notably designing and implementing appropriate integrity systems. However, in the context of an appropriate overall integrity system, curtailment typically depends in part on adjusting the incentive structures in place so as to make compliance with the dictates of malignant features of police culture much less rational than it otherwise would be. (This is perhaps most obvious in the case of the deterrence mechanisms that are a necessary feature of most integrity systems.)

Unfortunately, in dysfunctional, corruption-riddled police organisations, compliance on the part of any given police officer with the malignant features of police culture may be quite rational. This is not to say that the malignant features of police culture are an irresistible force. Far from it; these features of police culture are by no means the only important factors at work, and compliance, though rational, is not the only choice available. However, it is to say that the particular configuration of factors in play is such that these malignant features of police culture end up being the decisive factors at work. Accordingly, the challenge facing those seeking to design an appropriate integrity system is how to bring it about so that the malignant features of police culture cease to be the decisive factors at work; it is not necessarily, at least in the first instance, a matter of directly removing these features.

3 An earlier version of the material in this section of the article can be found in Miller 2010b.

Here I want to narrow my focus and explore, in particular, an apparently important relationship between a reluctance on the part of police to report corrupt fellow police officers, on the one hand, and the quality of internal affairs investigations, on the other hand. Good, though by no means decisive, empirical evidence of this relationship has been provided in the Victoria Police study, of which the author was one of the lead researchers (Miller et al 2008). The relevant parts of the study comprise a survey of ethical attitudes, an analysis of all internal affairs corruption investigation files over a five-year period, and the conducting of 70 focus groups of serving police officers (approximately 500 police officers out of a police force of 10,000). Moreover, the evidence for this relationship is further strengthened by the consideration that it has an intuitively rational structure to it.

The first point to be made here is that in well-ordered liberal democratic states, such as Australia, the majority of police officers in many, if not most, contemporary police organisations are evidently not themselves corrupt and do not engage in ongoing corrupt activities. Moreover, a finding of the Victoria Police study was that the majority of police officers believe that morally (and not simply legally) they ought to report and provide evidence in relation to the minority of colleagues who are corrupt. Notwithstanding this belief, most police officers are apparently unwilling to report their corrupt colleagues; this was a further finding of the Victoria Police study. How can this be so?

According to the empirical evidence provided in the Victoria Police study, one important aspect (I do not say that it is the only important aspect) of the rational structure of the situation is as follows:

> *Conclusion (C)*: Police officers (junior and senior) are reluctant to provide evidence in relation to corrupt officers because (for the reason that):
>
> > *Premise (A)*: Police *believe* that internal investigations are unlikely to result in convictions and/or termination and that they are, in any case, often management-driven witch-hunts of innocent police or of police who have, at most, engaged in minor ethical misconduct.
> >
> > *Premise (B)*: If honest police officers report/provide evidence in relation to corrupt officers and those officers are exonerated and remain in the force, then the police culture is such that their own careers will suffer from the stigma of having sided with a punitive management/internal affairs department and 'ratted on' their colleagues (who are widely believed to have been innocent or at least only guilty of a minor infraction).

Of course, the fact that their exonerated colleagues are widely believed to be innocent, or at most guilty of only a minor infraction, is a function in large part of police culture. The loyalty of fellow police officers (one's 'brothers') surely demands a strong presumption in favour of one's innocence or, at the very least, a presumption in favour of the offence in question being an understandable breach of a legal or ethical principle. (The breach may be regarded as understandable because the principle in question is a minor one, or because the circumstances were such that compliance was not unproblematic, or some other justification or excuse.)

Notice, however — to return to the rational structure of (A) and (B) therefore (C) above — that police culture (the blue wall of silence) gets traction here only on the assumption that police believe that internal investigations are unlikely to result in convictions and/or termination of corrupt officers, and that there will be, as a consequence, a widespread view that the officers investigated were not guilty of any serious offence, but merely the victims of a punitive management/internal affairs department. The widespread belief of police in many, but by no means most, police organisations that internal affairs investigations are unlikely to result in convictions and/or terminations of corrupt officers is well founded, at least historically. Internal investigations in many, if not most, large metropolitan police organisations have as a matter of historical *fact* (and not simply of officers' beliefs) had relatively little success; certainly, they have typically resulted in low rates of conviction and/or termination of officers under investigation (see, for example, Ratcliffe et al 2005; see also Punch 1983; Richardson 1987). The lack of success of internal police investigations is, of course, in large part dependent on the reluctance of police officers to provide evidence regarding their corrupt colleagues. There has also been a reluctance on the part of police officers to become internal investigators, albeit, as noted above, this reluctance is much less prevalent now than in the past. Solidarity dictates that investigating allegations of corruption against one's fellow officers is unlikely to be an attractive role, and highly unlikely to be preferred to the role of investigating alleged offenders who are not police officers.

So, there is a vicious circle in operation: the blue wall of silence undercuts the efficacy of internal investigations, which in turn reinforces the blue wall of silence. However, the point I want to stress here is that — in the current circumstances — it would be irrational of police officers to report, or provide evidence in relation to, their corrupt colleagues. For, on the one hand, they reasonably believe that this will not result in the conviction/termination of these corrupt officers and, on the other hand, they reasonably believe that it will ruin their own careers. Moreover, the irrationality of reporting corrupt colleagues is, I suggest, the decisive factor in determining their action (or at least inaction). They believe that it is morally wrong not to report their

corrupt colleagues (at least in serious cases), feelings of loyalty notwithstanding; however, they believe that no good will come of it but only harm to themselves.

What is the way out of this impasse? There is a need for the following countermeasures.

First, internal affairs departments within policing organisations ought to investigate only criminal matters and serious disciplinary matters that warrant termination. (And perhaps the difficulty of terminating police officers also needs to be looked at — for example, by recourse to 'Loss of Commissioner Confidence' provisions, although there are procedural rights issues in this area.[4]) Other ethical misconduct ought to be regarded as a management/remedial issue. The latter is important partly as a means of reducing the possibility that initial minor ethical lapses on the part of new recruits will come to be regarded, by the offending officers themselves as well as others, as fatal moral compromises that forever impugn their integrity and prevent them from ever reporting the serious ethical misconduct of their corrupt colleagues.

Second, the rates of internal investigations leading to conviction/termination of employment need to be improved to a high level of success. In the first instance (that is, in the context of a reluctance on the part of officers to inform on their corrupt colleagues), this can be partly achieved by the following strategies:

- increasing the quality of internal investigations (for example, by head-hunting high quality investigators, including from other police organisations), increasing data security measures (for example, the use of 'sterile corridors', the stringent vetting of internal affairs personnel, including administrative staff), undertaking audits of investigations, and ensuring the adequate resourcing of internal affairs departments;
- the use of well-resourced proactive anti-corruption strategies, notably targeted integrity tests and intrusive surveillance methods that do not rely heavily on the willingness of police to provide evidence regarding corrupt colleagues; and
- recourse to well-resourced external oversight bodies with an independent investigative capacity, especially in relation to serious corruption in the upper echelons of a police organisation.

Third, the stigma attached to being an internal investigator and to reporting, or providing evidence against, corrupt police needs to be reduced by:

4 Loss of Commissioner Confidence provisions exist in a number of Australian police services, including Victoria Police and New South Wales Police. There is, of course, already a distinction between civil administrative breaches of police discipline and investigation of suspected criminal behaviour.

- consistent with maintaining the highest standards, normalising the role of internal investigator — for example, by making two years as an internal investigator mandatory for all police investigators seeking promotion to senior investigative positions;
- instituting measures to protect (physically and career-wise) those who provide evidence against corrupt colleagues — for example, the implementation of internal witness protection programs and transparent promotion processes; and
- introducing ongoing tailor-made ethics education programs that sensitively and squarely address the issues of police culture, internal affairs investigations and professional reporting.

In short, it needs to become rational, and not simply legally and ethically mandated, for police officers to report, and provide evidence in relation to, their corrupt colleagues. Given that most police officers are not themselves corrupt and believe that they ought morally to report or provide evidence in relation to their corrupt colleagues, they will do so — or at least are more likely to do so — if conditions are created under which it will be rational for them to do so; that is, if it works for them and brings rewards rather than punishment.

These conditions will need to include a reasonable number, and a high rate, of convictions/employment terminations of corrupt police officers as a result of a well-resourced, high quality, internal affairs investigation department focused only on criminal and serious disciplinary matters, and operating in the context of:

- the normalisation of the role of internal investigator; and
- the felt duty on the part of most police to report and provide intelligence or evidence regarding criminal and corrupt colleagues in the knowledge that if they do:
  - » the persons in question are likely to be convicted and terminated; and
  - » they themselves will suffer no harm or adverse career consequences.

These specific conditions are consistent with, and conducive to, a functional and defensible police culture — one in which loyalty is felt to be owed to police officers who embody the ideals and legitimate ends of policing, but not to corrupt colleagues. Such a functional police culture is likely in turn to facilitate the emergence of these specific conditions. ●

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Crime, Justice and Human Rights

By Leanne Weber, Elaine Fishwick and Marinella Marmo
Palgrave Macmillan, Basingstoke, 2014, 246 pages

I write this review at a time when state responses to crime, and even imagined crime, can be judged as violating human rights. In the interests of counter-terrorism, police arrests are reframed as raids, followed by the rapid introduction of legislation that reduces civil liberties. *Crime, Justice and Human Rights* is timely with its emphasis on 'everyday' policing, as contemporary events reveal how the everyday can become the exception. As noted by the authors in their introduction, where security looms as a political goal, human rights can provide the language and concepts to pose critical questions about the harms, benefits and limits of state action and inaction.

This is a standout book. It is an achievement in moving criminologists and aspiring criminologists from their comfort zones by enabling them to see the potential of intertwining criminology and human rights. The book does this well, not least because it is an accessible read, and applied sections of the text enable the reader to grasp the synergies in a tangible way.

But one is first required to do a bit of hard work. By necessity, the authors take us along the human rights journey through schools of philosophical thought and tenets of international law. The focus here is less specific to criminology and hence likely to be an attraction for other disciplines with a burgeoning interest in human rights. These early sections do not presuppose prior knowledge, which makes it likely that human rights novices will take to the book.

Governments frequently position human rights as applicable only to countries that Western democracies condemn as human rights violators. The book's venture into domestic issues alone is significant for two reasons. First, it avoids overly navigating tensions between the universal and relativist human rights contest. Second, it pays attention to human rights concerns within Australia, which are frequently glossed over by government, professions, media and the community.

I found that the text particularly spoke to me in its analysis of human rights and civil society. In Australia, human rights is not a favoured concept in political discourse and, despite a robust consultation a few years back, national human rights legislation has not been introduced. This causes Australia to stand out among Western nations as a human rights avoider. Particularly pertinent in this chapter is that it locates human

rights beyond government by appealing to the moral responsibility of all of us as civil society actors.

Another section that resonates is the call to build a culture of human rights, which can be as important as legislative and policy measures by privileging a moral perspective. For people working in everyday environments or in more complex policing or correctional settings, a human rights culture can set the scene for how people are treated by those holding powerful positions. As only two jurisdictions in Australia have introduced human rights legislation, it remains untested as to whether the laws have resulted in social and cultural change — an argument that human rights advocates often propose in favour of law, as the authors highlight.

Discussion that moves beyond prevailing constructs of individual rights is in chapter 4, which discusses collective rights. It is these rights that most directly challenge neo-liberal conceptions, resulting in divided opinion on protections for specific groups — usually minorities that experience discrimination. Although the authors refer to the quest for recognition of collective rights for a range of groups, the Indigenous pursuit of self-determination is one of the most pressing matters facing the Australian nation. This is well recognised in criminology, as Indigenous disadvantage in the criminal justice system receives considerable attention from academic and practising criminologists. The long struggle to recognise Indigenous collective rights in Australia illustrates how collective rights are publicly debated and often negated. The pursuit of collective rights, along with arguments by supporters and opponents, is becoming increasingly apparent in the quest for constitutional recognition of Indigenous peoples — including the form of wording that this will take.

With my radical tendencies, I am attracted to the term 'protest human rights criminology' in chapter 5, which explores the views of those subscribing to critical criminology principles. In doing so, the authors draw from the work of critical criminologists with varying ideological positions, including those who assert the moral obligation to incorporate human rights in both theory and research and those who advocate solidarity with the human rights movement as a foundation for activism.

For newcomers to human rights, I highly recommend the section on applying human rights in criminology. In seven chapters, this section presents issues of concern to everyday criminology. The first in this section provides some nuance on criminal law, which exceeds most texts on this topic by including counter-terrorism and state crime. This chapter is highly engaging. Other chapters include crime prevention, including violence against women, policing, criminal courts, detention, juvenile

justice and victims. Readers will find synergies with their own worldviews, schools of intellectual thought and criminology principles to which they may subscribe. From my perspective as a critical human rights social worker, I was pleasantly surprised to see commonalities with critical criminology. And social work too is a profession that has been slow to embrace human rights in practice. As with criminology, many adherents perceive legal dominance rather than visioning the prospects of adopting a discursive, interdisciplinary and applied human rights approach to practice.

The text is striking in its breadth, depth, academic rigour and accessible writing style. A co-authored book is not an easy achievement, but the pooling of collective wisdom has enabled the work to fully achieve its goal of building bridges between the knowledge domains of criminology and human rights. As the authors posit from the outset, human rights can be fraught territory, but they see human rights as an important framing for criminologists and they present convincing arguments that have the potential to ensure that human rights and criminology are conjoined. In concluding, the authors point out that although a criminology for human rights may take many forms, it is recognised by the primacy it accords to the wellbeing of all people and the social groups to which they belong. If this is an accepted premise by criminologists from different theoretical and applied persuasions, then it seems that the discipline has much to offer the quest for a better Australia and for realising the rights of the marginalised groups that criminologists encounter. ●

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The Politics of Global Supply Chains

By Kate Macdonald
Polity Press, 2014, 254 pages

In recent years, much has been written about globalisation and the positive and negative impacts of business on human rights, and how, why and if the corporate sector should be more engaged in both respecting and protecting rights. The debate has largely moved from 'if' business should be engaged with human rights, to 'how' (although there remains a set of persistent objectors who dispute this paradigm shift). But, as the role and influence of corporations have increased globally, so too has the confusion around what specifically is required of them. And, if there are expectations that companies should be engaged more substantially with human rights, what is the best mechanism for doing so? *The Politics of Global Supply Chains* tackles the thorny issue of how the 'independent republic of the supply chain' can be effectively regulated and what the roles of both government and non-state actors should be in this process.

Today's global supply chains — which some regard as not only ungoverned but ungovernable — link individual workers with large and small companies across national, political and cultural boundaries. 'In a world of 80,000 transnational corporations, ten times as many subsidiaries and countless national firms, many of which are small and medium-sized enterprises' (Human Rights Council 2010, para 82), any attempt to regulate this intricate web of production encounters multiple challenges. Human rights violations of workers in these supply chains are common and include harassment, discrimination, unsafe working conditions, low pay and long hours. Attempts to enforce fair labour standards on the factories and fields within these supply chains that stretch around the globe have had varied and somewhat limited success. The collapse of the Rana Plaza building in Bangladesh in April 2013, killing over 1100 workers, indicates that there is still some way to go in establishing safer and more humane conditions for workers at the bottom of these supply chains.

What is becoming increasingly apparent, and what is examined in this book, is that for sustained improvements to occur, a multiplicity of stakeholders (both state and non-state actors) must be involved. Some of the most powerful global actors today

are companies, not governments.[1] Logically, recourse to local laws and a system of enforcement and judicial relief in the host countries where global corporations operate should be the first option for ensuring greater respect for human rights. However, the reality is that in many countries this simply is not happening. In developing countries (but not exclusively so), laws are sometimes weak but enforcement weaker still and corruption can be endemic — reflecting that chronic failures of states to ensure that human rights are protected remains a long-term proposition. In this interesting study, Macdonald notes that in Nicaragua (the geographical focus of her book), there are only five factory inspectors working in the industrial sector in Managua (the capital of Nicaragua). The problem is not only their limited number, but that, in addition, 'they have no money and no petrol for the car. Between them they only have one small car, and sometimes it isn't working' (p 37). In order to overcome basic problems such as this, attempts to regulate supply chains such as those in the garment and coffee sectors in Nicaragua have looked beyond the state to involve multiple stakeholders, including unions, non-government organisations and companies.

The Politics of Global Supply Chains is a timely study of the power and governance structures at play in the value chains of some of the many and varied multinational companies that produce goods all around the world. As Macdonald notes, globalisation has resulted in an economy where 'firms and countries no longer trade simply in raw materials and final products. Rather different firms and countries specialize not just in producing different products, but in different *parts* of different products, each focusing variously on design, assembly, marketing and so on' (p 2). The regulatory challenges in policing this vast network of specialised supply chains extend beyond the control of any one nation state and increasingly need to involve a variety of non-state actors. Macdonald provides an overview of the development of, and reliance on, some of these private governance models and provides an in-depth case study of some multi-stakeholder initiatives at play in the garment and coffee sectors in Nicaragua. Not everyone agrees that non-state governance is always either appropriate or effective, but too often criticisms are based on generalities and many of these multi-stakeholder mechanisms differ vastly from one to another. By delving deeply into the mechanics of the governance models that have been tried and tested

1 For example, in 2013, the revenue of Wal-Mart ($473 billion) was equivalent to the GDP of Taiwan ($484 billion). Wal-Mart employs over 2.2 million people worldwide. As the the world's third-largest employer, it 'has a workforce that trails only the militaries of the United States and China in size' (Human Rights Watch 2013, 29). Other top Fortune 500 companies include Exxon Mobil ($407 billion; Thailand's GDP is $400 billion); Chevron ($228 billion; Ireland's GDP is $220 billion); Berkshire Hathaway ($182 billion; New Zealand's GDP is $181 billion); and Apple ($170 billion; Vietnam's GDP is $170 billion). See Fortune 2014; Central Intelligence Agency 2013.

in Nicaragua, Macdonald is able to provide the reader with much-needed lessons learned — including the need for improved collaboration and alignment between state and non-state governance mechanisms.

Improving workplace conditions is a process of progressive realisation. Global supply chains are characterised by relentless pressures on prices and lead-times and the corresponding effect is the deterioration of working conditions at the bottom of the supply chain. While a diverse range of initiatives (some initiated by states and others by non-state actors) aimed at curbing violations of workers' rights have proliferated in recent decades, it is also clear that such initiatives have been unable to stem the flow of human rights violations. This should not be taken as an indication that such measures are altogether devoid of merit. Initiatives, including those highlighted in this book, that have relied on the development of soft law via such tools as codes of conduct can play a vital role in internalising human rights norms within corporations and solidifying the notion that corporations have duties with respect to shareholders *and* stakeholders (including workers in their supply chain) alike — a process that, in time, can shape the standards of care that are legally expected of business. ●

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