



# Upholding Our Rights: Towards Best Practice in Police Use of Force

Background Research Paper

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### About the Human Rights Law Centre

The Centre promotes and protects human rights through policy analysis, advocacy, strategic litigation and capacity building. Through these activities, the Centre contributes to the alleviation of poverty and disadvantage and the promotion of freedom, dignity and equality.

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## 1. Overview

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1. This research paper forms part of the Police Use of Force Project (the **Project**) and informs the Project's Final Report (see **Final Report**). This research represented the first part of the Project and was used to develop consultation paper which set out our preliminary recommendations for a human rights-based approach to police use of force. We then sought the views of key stakeholders and conducted a series of consultations with vulnerable groups and developed the Final Report. The Final Report sets out a set of recommendations based on the extensive research in this paper and feedback from the consultation phase. For more detail on the methodology of the Project please refer to **Annexure A** of the Final Report.
2. This research paper seeks to provide a framework for a human rights-based approach to regulating police use of force in Victoria. It was prepared to inform
3. This year, there has already been one fatal police shooting and at least two non-fatal shootings.<sup>1</sup> In the ten years to 2010, 11 people were shot dead by Victoria police.<sup>2</sup> Shooting incidents, although tragic, are far less common than the use of other non-lethal force. An incident involving Victoria police and use of force occurs, on average, every 2.5 hours.<sup>3</sup> Almost three quarters of those incidents involve OC spray or foam,<sup>4</sup> and some within the police force have suggested that OC spray is often used even before attempts to communicate with the public.<sup>5</sup>
4. The political environment suggests that police are only likely to be armed with more weapons. In 2011 the Victorian government is expected to decide whether to roll out Tasers to all operational police. It has also committed to putting armed 'protective service officers', 940 in total, at every train station in Melbourne.
5. The state has a duty to protect the rights, lives and safety of people within Victoria. This duty is, to a large extent, overseen by Victoria Police. However the measures put in place to protect the community and the conduct of police involved should not unduly infringe people's human rights.

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<sup>1</sup> Adam Carey, 'Second police shooting in 24 hours' (*The Age*, 3 May 2011)  
<<http://www.theage.com.au/victoria/second-police-shooting-in-24-hours-20110502-1e54t.html>>.

<sup>2</sup> Office of Police Integrity, *Review of the Investigation of Deaths Associated with Police Contact* (2010), 21 (**2010 Review of Deaths**).

<sup>3</sup> Office of Police Integrity, *Review of the Use of Force by and against Victorian Police* (2009), 8 (**2009 OPI Report**).

<sup>4</sup> Office of Police Integrity, *Review of the Use of Force by and against Victorian Police* (2009), 26.

<sup>5</sup> Michael Williams (Victoria Police), *Meeting Operational Safety and Tactics Training and Critical Incident Management Training Standards* (2009) 7.

6. Too often, debate on law and order measures presupposes that public safety and human rights are inherently in tension or even mutually exclusive. Fundamentally, however, human rights and public safety are closely associated and intertwined. The realisation of human rights creates the conditions necessary for public safety, while public safety is a necessary precondition to the realisation of human rights.
7. Police use of force in Victoria is regulated by legislation, common law and Victoria Police's policies such as the Victoria Police Manual (**VPM**).
8. Since 2006, the legislation governing police use of force includes the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**). The Victorian Charter imposes direct legal human rights obligations on Victoria Police and its members to protect and promote human rights. The Victorian Charter enshrines some of Australia's long held international law obligations to protect fundamental human rights.
9. Since its introduction, Victoria Police has consistently expressed support for the Victorian Charter and a human rights-based approach to policing. At the launch of the Victorian Charter, Victoria Police Assistant Commissioner Luke Cornelius noted that the safeguarding of human rights has been among the fundamental objectives of policing in the Westminster tradition since such policing began.<sup>6</sup> In its submission to the National Human Rights Consultation, Victoria Police noted that "human rights protection is synonymous with good policing in liberal democratic societies".<sup>7</sup>
10. However, the Victorian Charter is relatively new in Victoria and in Australia, as compared to other western liberal democracies, there does not appear to be a developed sense of how Victoria Police's human rights obligations should be implemented on the ground. For example, the VPM contains the duty to observe 'human rights' but does not refer to the Victorian Charter or to what 'observing human rights' means in practice.
11. Despite the clear obligations on the State and on Victoria Police to protect human rights, we have not seen the development of practical human rights-based policies and guidance around the use of force by Victoria Police, although Victoria Police has moved to address human rights compliance in certain areas, such as police cells through the Human Rights Project.<sup>8</sup>
12. The Police Use of Force project aims to provide concrete advice on how Victoria Police and its members can protect human rights whilst exercising their powers to use force. A human rights framework can provide a map for decision-making and regulation of police actions, in a way that emphasises the inherent dignity of human beings.

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<sup>6</sup> Luke Cornelius (Victoria Police), 'Remarks at the Launch of the Victorian Charter' as cited in Victoria Police, *National Human Rights Consultation Victoria Police Submission* (2009) 6.

<sup>7</sup> Victoria Police, *National Human Rights Consultation: Victoria Police Submission* (2009), 10.

<sup>8</sup> Hugh de Krestler, 'Vulnerable Victorians Deserve a Stronger Charter of Rights', *The Age* (online), 8 June 2011 < <http://www.theage.com.au/opinion/politics/vulnerable-victorians-deserve-a-stronger-charter-of-rights-20110608-1fs5l.html>>.

13. This paper therefore looks at the current system of regulation of police use of force, including regulation under the Victorian Charter. The paper forms the basis of the recommendations contained in our Final Report as to how a human rights-based framework could be implemented by the state.
14. The Centre recognises that improving the interactions of some communities with police clearly needs more than better regulation of force. For example, the experience of people with mental illness who interact with police needs to be addressed with the input of health specialists and consumer advocates. However, while recognising how crucial a holistic approach to these issues is, this research is confined to the regulation of use of force in law and policy.
15. This research is structured as follows:
  - (a) Part 2 sets out the nature and extent of police use of force in Victoria.
  - (b) Part 3 sets out broadly the police obligations under the Victorian Charter and the benefits of a human rights-based approach.
  - (c) Part 4 sets out the laws (other than the Victorian Charter) and policies that currently regulate police use of force in Victoria.
  - (d) Part 5 discusses general human rights principles in relation to police use of force, including:
    - (i) the need for appropriate systems such as law, policies and training to be in place to regulate police use of force;
    - (ii) the content of the laws and policies around the use of force – i.e. when force would generally be appropriate or inappropriate; and
    - (iii) the need for accountability and monitoring of police use of force.
  - (e) Part 6 looks at the existing non-Victorian Charter regulation of firearms and then a human rights-based approach to firearms.
  - (f) Part 7 looks at the existing non-Victorian Charter regulation of Tasers and then a human rights-based approach to Tasers.
  - (g) Part 8 looks at the existing non-Victorian Charter regulation of OC spray or foam and then a human rights-based approach to OC spray or foam.
  - (h) Part 9 looks at the existing non-Victorian Charter regulation of batons and then a human rights-based approach to batons.
  - (i) Part 10 looks at the existing method of investigating deaths from police contact and allegations of torture and then posits a human rights-based approach to be followed.

## 2. The Incidence of Police Use of Force in Victoria

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### 2.1 The nature and extent of police use of excessive force in Victoria

16. Ensuring that police use force appropriately and not excessively is central to the effectiveness and public legitimacy of a police force. The Office of Police Integrity (*OPI*), Victoria's police watchdog, has clearly stated the costs and risks associated with excessive use of force and why Victoria Police must give management of those risks the highest level of priority in planning and decision making:

The risk is very real, not only to the public but also to its officers and to the Victoria Police as an organisation. The consequences for officers who find themselves in a position of needing to use force, particularly lethal force, cannot be underestimated. A fatal police shooting is a tragedy in itself and the impact profound and lifelong, for both police and the families of the victims. Further, the cost to the organisation in terms of staff morale, retention, training and experience is immense. The inappropriate use of force may also bring about a loss of confidence in Victoria Police by the general public, only adding to the difficulty of the functions officers perform.<sup>9</sup>

17. Victoria Police officers have a range of options available to them in terms of use of force. This spectrum includes verbal commands, non-weapon based physical force and the use of non-lethal, less than lethal, and lethal weapons (including batons, OC spray/foam, Tasers, handguns and semi-automatic weapons).
18. There is evidence that further developments in current systems for regulating Victoria Police's use of force are required in order to successfully manage the risks and costs identified by OPI.
19. In recent years, Victoria Police has been subject to a number of internal and external reviews of its use of force policies and practices.<sup>10</sup> According to the OPI, these reviews reveal 'a pattern of indecision, lack of accountability, poor management and attitudes that accept use of force and injuries as "part of the job"'.<sup>11</sup>
20. This type of criticism is not new to Victoria Police. The last thirty years have been characterised by both serious lapses in oversight and regulation as well as laudable initiatives to address identified problems. In the 15 year period to 1995, Victoria had double the number of fatalities as a result of police shootings compared to all other state and territory police forces combined.<sup>12</sup> In response to this trend, in 1994 Victoria Police announced Project

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<sup>9</sup> OPI, *2010 Review of Deaths*, above n 2, 55.

<sup>10</sup> OPI, *2009 OPI Report*, above n 3, 14.

<sup>11</sup> *Ibid* 35.

<sup>12</sup> Reid Sexton, 'Victoria Police's poor reporting hides use of force', *The Age* (online), 21 December 2010 <<http://www.theage.com.au/victoria/victoria-polices-poor-reporting-hides-use-of-force-20101220-1937j.html>>.

Beacon, which comprised a range of policy, procedural and training initiatives to minimise the use of force and promote police and community safety.<sup>13</sup>

21. In 2005 the OPI reviewed fatal shootings by police that occurred in Victoria between 2003 and 2005.<sup>14</sup> It found that, despite the initial success of Project Beacon, there had been a significant decline in the management of risks and costs associated with the use of force in the decade since Project Beacon was introduced:

...the requisite ongoing and continuous attention to use of force issues as part of the planning and decision-making of Victoria Police has fallen away. The result is a lack of effective risk management, a culture in which self-assessment, review and improvement are given insufficient attention, and a diminution of essential police training to accommodate other organisational priorities.<sup>15</sup>

The 2005 OPI Report made 55 recommendations on training, policies and procedures to improve the use of force culture within Victoria Police.

22. In 2009, following concerns about Victoria Police's slow progress in implementing the OPI's 2005 recommendations, and in the context of Victoria Police's 2008 decision to train and issue police with semi-automatic firearms, the OPI conducted a further review into the use of force by and against Victoria Police. The 2009 OPI Report found that since the 2005 OPI Report:

Victoria Police continued to lose strategic focus on safety and avoiding the use of force. Rather than restoring a contemporary training regime and monitoring framework, the outmoded training regime and monitoring systems associated with use of force by and against police have continued to decline.

... to date there has been no demonstrable corporate commitment to affirming that the success of any operation will be measured by the extent to which use of force is avoided or minimised. Little attention has been paid to properly measuring the prevalence or extent of the use of force by and against police members.<sup>16</sup>

23. The OPI's concerns were echoed in a 2009 Victoria Police Education Department report which reviewed critical incident management training and operational safety and tactics training provided to police.<sup>17</sup> Among other things, this report found that:

...there has been over a decade of policing in Victoria where operational police have not been exposed to the "fundamentals" underpinning police operational safety training.

As a consequence of this approach, [operational safety and tactics training (*OSTT*)] has significantly impacted on the organisation's policing style, creating a culture that on occasions was no longer supportive of the strategic direction & organisational safety philosophy.

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<sup>13</sup> OPI, *Fatal Shootings by Victoria Police* <<http://www.opi.vic.gov.au/index.php?i=88>>.

<sup>14</sup> OPI, *Review of Fatal Shootings by Victoria Police* (2005), 55 (**2005 OPI Report**).

<sup>15</sup> *Ibid* 55.

<sup>16</sup> OPI, *2009 OPI Report*, above n 3, 11.

<sup>17</sup> Williams, above n 5.

This “impact” on the policing style often emerged when studying responses to public order (street offence) incidents where there is a tendency to deploy OC [capsicum] spray as a first option.

An important observation regarding this particular term of reference has been the neglect of senior management (senior sergeants and above) to “champion” the importance of operational safety training.<sup>18</sup>

24. This 2009 report also found that insufficient attention had been given to the development of tactical communication and conflict resolution skills resulting in ‘a disproportionate focus on the use of OSTT equipment as opposed to communication and disengagement tactics’.<sup>19</sup>
25. Another recent Victoria Police review concluded that when faced with incidents, police officers have a ‘tendency to revert to the “must resolve quickly” style accompanied by a communication style that may inflame the situation’.<sup>20</sup>

## **2.2 Statistics on use of force incidents in Victoria**

26. Analysing the true nature and extent of Victoria Police use of force is complicated by the paucity and poor quality of data collected by police on use of force incidents. The OPI has noted that ‘underreporting and the accuracy of data capture make it difficult to do anything other than hypothesise about trends in the use of force by and against police’,<sup>21</sup> and that Victoria Police ‘use of force data collection and analysis systems are inflexible, antiquated and under-resourced, [and] under-reporting of use of force is largely unchallenged’.<sup>22</sup> The OPI has also found that use of force data is not analysed for trends and that connections are not made between the incidence and experience of police use of force and training programs provided to police officers.<sup>23</sup>
27. Available statistics do little to allay fears that Victoria Police are insufficiently managing use of force issues:
  - In the 2007-2008 reporting year there were 4855 reports of use of force by Victoria Police.<sup>24</sup> On average in 2008, Victoria Police engaged in an incident involving use of force every 2.5 hours and there was a critical incident every 49 hours.<sup>25</sup>
  - In the ten years to 2010, 11 people died from police shootings in Victoria.<sup>26</sup>

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<sup>18</sup> OPI, *2009 OPI Report*, above n 3, 6-7 (emphasis in original).

<sup>19</sup> *Ibid* 11.

<sup>20</sup> OPI, *2009 OPI Report*, above n 3, 13.

<sup>21</sup> *Ibid* 51.

<sup>22</sup> *Ibid* 12.

<sup>23</sup> *Ibid* 23.

<sup>24</sup> *Ibid* 38.

<sup>25</sup> *Ibid* 8.

<sup>26</sup> OPI, *2010 Review of Deaths*, above n 2, 21.

- From 2003 – 2010 there were 83 incidents involving the discharge of Tasers by Victoria Police. In this time, 85% of Taser use was against people with mental illness.<sup>27</sup>
  - 2007 data indicates that OC spray was being deployed by Victoria Police an average of 232 occasions per month (2784 times per year) and comprised 73% of reported uses of force – a pattern of use that the OPI identifies as supporting ‘the proposition that use “was creeping outside policy boundaries”’.<sup>28</sup> Police stations have also been found to order significantly more OC Spray than required for their reported levels of use.<sup>29</sup>
  - The OPI estimates that 20-70% of instances of use of force are not reported.<sup>30</sup> As a measure of underreporting, the OPI notes that the total number of charges laid for assault against police over the period 2005-2008 would account for 46% of reports made over 13 years on the Victorian Police Use of Force Register.<sup>31</sup>
28. Community legal sector advocates have emphasised that excessive use of force is particularly prevalent in the context of police interaction with people with disabilities, people with mental illness, Indigenous people, and people experiencing homelessness.<sup>32</sup>
29. The OPI reports that there is a decline in incidents of most types of force used *against* police over recent years.<sup>33</sup>
30. As of December 2010, the Victoria Police Use of Force Registry remained too inaccurate to give a meaningful breakdown of the number of use of force incidents or the type of force used by and against police prior to 2005.<sup>34</sup> It is clear this is part of a broader issue to do with data management in Victoria Police: a recent OPI report found that ‘Victoria Police is unable to produce accurate crime clearance statistics to the Victorian Government, the Australian Bureau of Crime Statistics and the Victorian community.’<sup>35</sup>

### **2.3 Current directions in use of force policy**

31. The issue of regulating police use of force is constant, although the landscape in which the discussion occurs is constantly changing.
32. Since 2009, following significant public pressure, including from the fatal shooting of 15 year old Tyler Cassidy by the Victoria Police, there have been some welcome changes to police

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<sup>27</sup> Federation of Community Legal Centres, *Taser Trap: Is Victoria falling for it?* (2010), 6.

<sup>28</sup> OPI, *2009 OPI Report*, above n 3, 26, 28.

<sup>29</sup> *Ibid* 42.

<sup>30</sup> *Ibid* 14.

<sup>31</sup> *Ibid* 44.

<sup>32</sup> Tamar Hopkins, *An Effective System for Investigating Complaints Against Police* (2009), 14.

<sup>33</sup> OPI, *2009 OPI Report*, above n 3, 46.

<sup>34</sup> Sexton, above n 12.

- training, particularly in the area of identifying and dealing with people with mental illness and in training police in communication, disengagement and de-escalation.<sup>36</sup>
33. Regardless of these recent changes, however, the Project Beacon experience suggests there is a real risk of the focus on appropriate use of force being de-prioritised by management over time, with resulting adverse impacts on the safety of the community and the police.
  34. There are two current policy developments that are likely to bring renewed public attention on the issue of use of force over the next 12 months.
  35. The first is the possible roll out of Taser weapons to police officers in Victoria. In June 2011 a 12 month pilot study in Bendigo and Morwell concluded and the Victorian Government is now due to decide whether to issue Tasers to general duties police officers. Taser use is currently restricted to specialist police units such as the Special Operations Group. The Federation of Community Legal Centres (**FCLC**) has warned of the risk that broader distribution of Tasers among Victoria Police will lead to usage creep. Moreover, the FCLC has warned that greater Taser use is likely to disproportionately affect those at greatest risk of harm in the community, such as persons experiencing mental illness and those affected by drugs or alcohol.<sup>37</sup>
  36. The second is that the Victorian Government has committed to recruiting 940 armed 'protective service officers' to guard all suburban rail stations in Melbourne. The roll out of these officers will commence from next financial year. These officers will be armed. They will receive some, but not all, police training, with twelve weeks' training, in comparison with the 23 weeks' training received by sworn police officers. Critics of the policy have raised the prospect of protective service officers misusing force.<sup>38</sup>
  37. It is in this landscape that a human rights framework can provide a map for more effective, responsible, safe and sustainable decision-making and regulation by the police.

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<sup>35</sup> OPI, *Report of Investigation into Victoria Police Crime Records and Statistical Reporting* (2011), 11.

<sup>36</sup> Victoria Police, *Victoria Police Response to Four Corners Program on Use of Force* (27 October 2009) <<http://www.vicpolicenews.com.au/our-say/1944-victoria-police-response-to-four-corners-program-on-use-of-force.html>>.

<sup>37</sup> Federation of Community Legal Centres, above n 27, 37.

<sup>38</sup> Farrah Tomazin, 'State agrees to up training for armed rail guards', *The Age* (online) <<http://www.theage.com.au/victoria/state-agrees-to-up-training-for-armed-rail-guards-20110514-1enjl.html>>.

### 3. A Human Rights-Based Approach to Use of Force

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#### 3.1 The Victorian Charter of Human Rights

38. The Victorian Charter is Australia's first state-based legislative instrument that comprehensively protects human rights. It enshrines in Victorian legislation most of the civil and political rights in the *International Covenant on Civil and Political Rights*.<sup>39</sup>
39. Under the Victorian Charter, Victoria Police and individual officers are considered to be 'public authorities',<sup>40</sup> and therefore have obligations to:
- (a) act in a way that is compatible with a human right; and
  - (b) in making a decision, give proper consideration to a relevant human right.<sup>41</sup>
40. In this way, Victoria Police and individual officers have legal obligations to protect and promote human rights.
41. The key human rights in the Victorian Charter that are relevant to the use of force include:
- The right to life (s 9, Victorian Charter);
  - The right to freedom from torture and cruel, inhuman or degrading treatment (s 10, Victorian Charter);
  - The right to freedom from discrimination (s 8, Victorian Charter);
  - The rights of the child regarding their particular vulnerable status (s 17, Victorian Charter); and
  - The right to liberty and security of the person (s 21, Victorian Charter).
42. In broad terms, obligations on a state regarding the use of force arise in three key areas:
- The regulation of the use of force by state agents (such as policies and training);
  - Ensuring that force used is proportionate (conduct during an incident); and
  - Promoting accountability when force is used and monitoring use of force (systems for accountability such as investigations of specific incidents and monitoring of the police as a whole).
43. In understanding the rights in the Victorian Charter, it is useful (and explicitly provided for in the legislation) to look at international law and relevant judgments of domestic, foreign and international courts and tribunals, given their longer history.<sup>42</sup>

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<sup>39</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force on 23 March 1976) <[http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm)>.

<sup>40</sup> See Victorian Charter s 4 (1)(a), where all public officials are defined as public authorities; see also s 4(1)(d) where Victoria Police is expressly named as a public authority.

<sup>41</sup> Victorian Charter s 38(1).

### 3.2 Benefits of a human rights-based approach to policing

44. There is widespread support among police, academic experts and the public for making the protection and respect of human rights a core purpose and methodology of policing, for a number of reasons.<sup>43</sup>

#### (a) *Human Rights Approaches Support Good Policing*

45. Victoria Police state that one of the benefits of the Charter is that it provides a platform from which Victoria Police could work towards the OECD standards for policing in democratic societies.<sup>44</sup>

46. As Victoria Police Assistant Commissioner Luke Cornelius has noted, the safeguarding of human rights has been among the fundamental objectives of policing in the Westminster tradition since such policing began.<sup>45</sup> This human rights obligation goes beyond police simply respecting human rights in the exercise of their functions; it also requires police to make the protection of human rights a core purpose of their work.<sup>46</sup> There is a strong connection between the respect and protection of human rights and good policing and as a result police have a central role in the task of fulfilling Australia's international human rights obligations.<sup>47</sup>

47. Since the introduction of the Charter, Victoria Police has consistently expressed its support for a human rights-based approach to policing. In its submission to the National Human Rights Consultation, Victoria Police noted that 'human rights protection is synonymous with good policing in liberal democratic societies'.<sup>48</sup> Cornelius has drawn the link between human rights and 'community expectations about how we should treat one another and, in particular, how police should treat all with whom we have contact'.<sup>49</sup> Human rights 'build

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<sup>42</sup> This is expressly permitted by Victorian Charter s 32(2).

<sup>43</sup> See, eg, Ralph Crawshaw et al, *Human Rights and Policing* (2007), 19 (**Policing**); Luke Cornelius, 'Remarks at the Launch of the Victorian Charter' as cited in Victoria Police, *National Human Rights Consultation Victoria Police Submission* (2009), 6; Independent Commission for Policing in Northern Ireland, *A New Beginning: Policing in Northern Ireland* (1999), 18; Benjamin Bowling et al, 'Policing and Human Rights: Eliminating Discrimination, Xenophobia, Intolerance and the Abuse of Power from Policework' (Paper prepared for the UNRISD conference on racism and public policy, 2001), 21; Office of Police Integrity, *Human Rights and Cultural Change in Policing* (2008), 10 (**Cultural Change**).

<sup>44</sup> Victoria Police, Submission to the inquiry and review of the Charter of Human Rights and Responsibilities Act 2006, June 2011, 3 (**Charter Submission**).

<sup>45</sup> Cornelius, above n 43, 6.

<sup>46</sup> Ralph Crawshaw et al, *Human Rights and Policing: Standard for Good Behaviour and a Strategy for Change* (1998) 225 (**Standard and Strategy**).

<sup>47</sup> Ibid 19.

<sup>48</sup> Victoria Police, *National Human Rights Consultation: Victoria Police Submission* (2009), 10.

<sup>49</sup> Cornelius, above n 43, 6.

confidence in the community that [police] powers are exercised under the rule of law and in the community interest'.<sup>50</sup>

48. Human rights protection is both theoretically and practically consistent with good policing.<sup>51</sup> Lack of regard for human rights strains relationships between police and the community and diminishes community confidence in the effectiveness of the police.<sup>52</sup> As the OPI notes, '[i]f the average member of the public is confident that police will treat them with dignity and respect, they are more likely to have a favourable and cooperative attitude towards police'.<sup>53</sup> Moreover, a human rights-based approach promotes a culture of transparency and receptiveness among police toward complaints about and investigations into potential police misconduct.

**(b) Keeping Up with International Best Practice**

49. There are many examples of human rights-based approaches to policing being successfully adopted and promoted in other jurisdictions. The ground breaking policing reforms in Northern Ireland over the past decade derive significantly from the Patten Report's observation that the 'fundamental purpose of policing should be ... the protection and vindication of the human rights of all'.<sup>54</sup>

**(c) Improving the Culture and Practice of Police**

50. As Victoria Police state, one of the benefits of having human rights obligations is that there has been a gradual acceptance across the organisation that policing is fundamentally human rights work.<sup>55</sup>
51. Former New Zealand Prime Minister Sir Geoffrey Palmer has observed that the introduction of the New Zealand Bill of Rights Act successfully changed the culture and practice of the New Zealand police.<sup>56</sup> Police compliance with human rights frameworks in Canada and the United Kingdom has 'fuelled debate, increased accountability for decision-making and required more thorough justifications for police actions'.<sup>57</sup>
52. Supporters of a human rights-based approach to policing note that it clarifies the link between effective policing methodologies and enhanced human rights outcomes for the

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<sup>50</sup> Ibid.

<sup>51</sup> Crawshaw, *Policing*, above n 43, 26; See also Steve James, 'Policing, Ethics and Human Rights (book review)' *Australian and New Zealand Journal of Criminology*, Vol 36 Nbr 3 (December 2003) 256.

<sup>52</sup> Independent Commission for Policing in Northern Ireland, above n 43, 18.

<sup>53</sup> OPI, *Cultural Change*, above n 43, 6.

<sup>54</sup> Independent Commission for Policing in Northern Ireland, above n 43, 18.

<sup>55</sup> Ibid.

<sup>56</sup> Sir Geoffrey Palmer SC, 'The New Zealand Bill of Rights Act and the Police' (Paper given at the Inaugural Human Rights and Policing Conference, Melbourne, December 2008), 12.

<sup>57</sup> OPI, *Cultural Change*, above n 43, 3.

community.<sup>58</sup> Human rights frameworks allow police and government to balance maintaining the social order, the protection of minorities and the safeguarding of diversity, which are crucial contributions to the upholding of human rights and strong communities.<sup>59</sup>

53. In Victoria, the Victoria Police state that ‘the Charter has provided an overarching platform for Victoria Police, upon which human rights practice standards for policing can be established and demonstrated.’<sup>60</sup> Victoria Police point to particular projects undertaken where they have improved their practices using human rights frameworks, such as in responding to gender-based violence and treatment of persons in custody.<sup>61</sup>

54. Victoria Police also state that one of the benefits of the Charter is the ‘greater emphasis on victims’ rights’ and that ‘using the human rights framework, the Victoria Police developed standards for quality assurance in relation to victims’ rights.’<sup>62</sup>

**(d) *Negotiating proper protection of public safety***

55. Under international law, Australia has committed to respect, protect and fulfil the fundamental human rights of all persons within its jurisdiction. In Victoria, some of these obligations are enshrined in the Victorian Charter.

56. A human rights law framework allows the state to strike a balance between protecting the human rights of the public generally through the work of the police, protecting the human rights of members of the public who come into contact with the police, and ensuring the human rights of police officers. A human rights framework accommodates these interests, which at times compete (although, as has been said, human rights and public safety are closely intertwined). It does so in the Victorian Charter through the limitations provision in section 7(2), which allows for limitations of human rights for the purpose of protecting public safety or for the purpose of protecting other rights. Limitations on rights will be allowed where they are strictly necessary and where the means used are proportionate and only infringe human rights to the minimum extent possible.<sup>63</sup>

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<sup>58</sup> Bowling, above n 43.

<sup>59</sup> Ibid.

<sup>60</sup> Victoria Police, *Charter Submission*, above n 44, 1.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid, 3.

<sup>63</sup> See Victorian Charter s 7(2).

## 4. Non-Victorian Charter Laws and Policies that Regulate Police Use of Force in Victoria

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57. Victoria Police are required to comply with the Victorian Charter. The content of the human rights obligations enshrined in the Victorian Charter is discussed in detail in part 7 below. This section deals with other laws and policies regulating the use of force.
58. While this section includes a general discussion of the non-Victorian Charter laws regulating police conduct, it does not consider obligations imposed on police by the *Equal Opportunity Act 2010* (Vic) (**EOA**), although Victoria Police are obliged to comply with the EOA.
59. The circumstances in and extent to which members of Victoria Police are lawfully permitted to use force are regulated at both common law and by legislation. Victoria Police policies and procedures also provide specific guidance around the use of force.

### 4.1 Legislative framework authorising the use of force

60. The key legislative provisions governing use of force in Victoria are found in the *Crimes Act 1958* (Vic) (**Crimes Act**) and the *Mental Health Act 1986* (Vic) (**Mental Health Act**).
61. Section 462A of the Crimes Act sets out the circumstances in which force may be used *by any person*, and the limitations on the extent of that force that may be used. It provides:
- A person may use such force **not disproportionate** to the objective as he **believes on reasonable grounds** to be **necessary** to prevent the commission, continuance or completion of an indictable offence or to effect or assist in effecting the lawful arrest of a person committing or suspected of committing any offence.<sup>64</sup>
62. There is also a specific provision authorising 'reasonable' force by any person in relation to the prevention of suicide.<sup>65</sup>
63. In addition, members of Victoria Police are authorised to use reasonable force in relation to apprehending mentally ill persons attempting suicide or serious bodily harm.<sup>66</sup>
64. Victoria Police officers are only permitted to use such force in the exercise of their powers as police officers, and are immune from personal liability for 'necessary or reasonable' acts or omissions which occur in the performance of their duties. They do not otherwise have any general immunity enabling them to use force.
65. These powers and immunities are discussed in further detail below.

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<sup>64</sup> Emphasis added.

<sup>65</sup> *Crimes Act* s 463B.

<sup>66</sup> *Mental Health Act* s 10.

**(a) Powers of Victorian police officers**

66. The *Police Regulation Act 1958* (Vic) (***Police Regulation Act***) confers on all sworn members of the Victoria Police the powers, privileges and duties given to police by the common law and by any Act of Parliament in force in Victoria.<sup>67</sup> These powers define the circumstances in which police can use force.
67. Victoria Police officers have powers of arrest and entry, both in their capacity as members of the public and by their status as members of the force under the *Police Regulation Act* and other enabling legislation. Police can therefore use force in the following circumstances:
- To effect an arrest;<sup>68</sup>
  - To enter into public places;
  - To enter a place for the purposes of arresting a person a police officer believes to have committed an indictable offence (police may use 'reasonable force' in exercising this power of entry);<sup>69</sup>
  - To enter a place to apprehend people suspected of committing serious indictable offences; and
  - Under powers conferred by the *Mental Health Act*, to enter premises and use reasonable force to prevent suicide or harm to other people.<sup>70</sup>
68. Further, police share the powers given to all members of the public to use force to arrest a person found committing an offence, where on reasonable grounds that person believes the arrest is necessary in order to:
- Ensure the person's attendance before a court of competent jurisdiction;
  - Preserve public order;
  - Prevent the continuation of the offence or the commission of a further offence;
  - Ensure the safety and welfare of members of the public or of the offender;
  - Prevent a person from escaping from lawful custody, or to prevent a person from aiding and abetting an escape from lawful custody;<sup>71</sup> or

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<sup>67</sup> *Police Regulation Act* s 11.

<sup>68</sup> A member of the police force may arrest a person without a warrant if the member of the force believes on reasonable grounds that the person being arrested has committed an indictable offence in Victoria (or which would be an indictable offence if it had been committed in Victoria): *Crimes Act* s 459. The fact that a person is not ultimately charged, or is not convicted of any offence, does not render an arrest unlawful if there are reasonable grounds for it: *Crimes Act* s 461(1). Police powers of arrest extend beyond situations where an immediate threat to safety or public order exists.

<sup>69</sup> See eg, *Crimes Act* s 459A (2).

<sup>70</sup> Section 10 of the *Mental Health Act* permits a member of the police force to apprehend a person who appears to be mentally ill. The member is not required to exercise clinical judgment about whether the person is mentally ill. They are required to have the person assessed or examined by a mental health practitioner as soon as is practicable.

- Prevent the commission of suicide or any act which the person using force believes on reasonable grounds would, if committed, amount to suicide.<sup>72</sup>
69. At common law, police have a duty to maintain the peace, prevent crime, and prevent criminal damage to property.<sup>73</sup> The obligations of police go further than those of ordinary citizens,<sup>74</sup> requiring police to intervene to maintain the peace in certain situations, even if it is possible or likely that doing so may require the use of force – for instance, by physically removing a person from a place so as to prevent a breach of the peace.<sup>75</sup>

**(b) Immunities of Victorian police**

70. Victorian police officers have statutory immunity from personal liability for any necessary or reasonable act or omission performed in good faith in the course of duty. The state is liable for an act or omission for which a member of the police has personal immunity under section 123 of the Police Regulation Act. Relevantly, that section provides that:
- (1) A member of the force or a police recruit is not personally liable for anything necessarily or reasonably done or omitted to be done in good faith in the course of his or her duty as a member of the force or police recruit.
  - (2) Any liability resulting from an act or omission that, but for subsection (1), would attach to a member of the force or police recruit, attaches instead to the State.
71. In applying this section, the words 'necessarily' and 'reasonably' are construed broadly. An assessment is made of whether 'having regard to all of the circumstances existing at the time and, viewed from the perspective of the member, reasonable grounds existed for the adoption of the chosen course'.<sup>76</sup>
72. Where the s 123 immunity does not apply, the state is generally not vicariously liable for the actions of members of the police force. A member of the police exercises statutory or common law powers on his or her own responsibility by virtue of his or her office.<sup>77</sup>

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<sup>71</sup> *Crimes Act* s 458. However, as to the appropriateness of action by citizens to punish and deter crime, see *Director of Public Prosecutions v Whiteside* (2000) 1 VR 331.

<sup>72</sup> Section 463B of the *Crimes Act* authorises the use of force in relation to suicide, permitting the use of such force by any person as may reasonably be necessary.

<sup>73</sup> *Re K* (1993) 46 FCR 336, 340.

<sup>74</sup> At common law any citizen has the right to act to prevent a breach of the peace, including by arresting a person committing such a breach, although there are now statutory powers of citizen's arrest in Victoria.

<sup>75</sup> *Commissioner of Police for Tasmania; ex parte North Broken Hill Limited* [1992] Tas LR 390, 396, 397 where it was held that police were obliged to assist workers to cross a picket line, where the picket line was obstructing access to public property and breaching the peace, although mandamus to compel police to do so in this instance was refused; see also *Albert v Lavin* [1982] AC 546, 565.

<sup>76</sup> *State of Victoria v Horvath* (2002) 6 VR 326, [50], and more generally [48]-[52].

<sup>77</sup> *Enever v The King* (1906) 3 CLR 969; *Bannerman v Victoria* [2009] VSC 438, [153].

## **4.2 Laws regulating unauthorised use of force**

73. Beyond the specific powers and immunities outlined above, the criminal and civil law applies to police - as it does to all private citizens. Police are not entitled, by virtue of their status, to use force without a specific legal authorisation or justification.
74. To the extent police use of force is not authorised or justified by law, it will amount to a criminal offence. Criminal offences against the person might include:
- common assault;<sup>78</sup>
  - causing serious injury, whether intentionally, recklessly, or negligently;<sup>79</sup>
  - recklessly endangering life, or recklessly placing a person in danger of serious injury;<sup>80</sup> or in the case of death, manslaughter or murder;<sup>81</sup>
  - To the extent that police use of force is considered to include the use of threats,<sup>82</sup> an unlawful threat to kill or to cause serious injury may constitute an offence.<sup>83</sup>
75. Subject to s 123 of the Police Regulation Act, police can also be sued for civil wrongs committed while using force in the course of police work. Torts which may be committed in the course of excessive use of force include: assault and battery;<sup>84</sup> negligence;<sup>85</sup> false imprisonment; and misfeasance in a public office.

## **4.3 Police policies and manuals regulating the use of force**

76. The use of force by Victorian Police members is also governed by the VPM.
77. Notably, the VPM does not contain any reference to the Victorian Charter, nor does it refer to the specific obligations the Victorian Charter places on Victorian police as public authorities.
78. The VPM provides a little more guidance than the law as to how and when Victoria Police may use force. Prior to February 2010, the VPM contained detailed guidance on some particular

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<sup>78</sup> In Victoria, an indictable offence at common law: *R v Patton* (1996) 88 A Crim R 365; as a summary offence, see *Summary Offences Act* s 23 (common assault) and s 24 (aggravated assault).

<sup>79</sup> See *Crimes Act* s 16 (intentional), s 17 (reckless) and s 24 (negligent).

<sup>80</sup> See *Crimes Act* s 22 (endangering life) and s 23 (placing in danger of serious injury).

<sup>81</sup> *Crimes Act* pt 1, div 1, sub-div 4.

<sup>82</sup> See, for instance, OPI, *2009 OPI Report*, above n 3, 8: 'The use of force is a continuum. Responses range from verbal commands to the use of lethal force'.

<sup>83</sup> See *Crimes Act* s 20 (threats to kill) and s 21 (threats to cause serious injury).

<sup>84</sup> Subject to the defences available to assault and battery generally, such as self-defence or defence of others.

<sup>85</sup> This may take a number of forms including negligence in the use of force; negligence in the planning and execution of an operation which led to the use of excessive force (as to the latter see *State of Victoria v Horvarth* (2002) 6 VR 326, [14]-[15]; *Zalewski v Turcarolo* [1995] 2 VR 562, 573); or negligently inflicting psychiatric injury through the use of force: *Walker v Hamm* [2008] VSC 596 [115] (applying *Battista v Cooper* (1976) 14 SASR 225).

uses of force, such as the use of firearms and OC spray/foam. However, in February 2010, the VPM was effectively re-written. As a result, the VPM no longer provides explicit guidance to members in relation to the circumstances in which particular force may or may not be lawfully used.

79. Instead, the VPM simply provides that the broad terms of s 462A of the Crimes Act (set out above) apply to govern all types of force (set out above). The revised VPM 'Policy-Operational Safety and Equipment' (**Policy**) states that any force used by a member must be in line with s 462A of the Crimes Act.
80. The Policy also states the philosophy that 'the success of an operation will be primarily judged by the extent to which the use of force is avoided or minimised', and that in addition to complying with s 462A of the Crimes Act, members must apply the 'operational safety principles' when responding to incidents or planning operations that may involve any potential use of force. The operational safety principles are:
- **Safety first** – *the safety of police, the public and offenders or suspects is paramount*
  - **Risk assessment** – *is to be applied to all incidents and operations*
  - **Take charge** – *exercise effective command and control*
  - **Planned response** – *take every opportunity to convert an unplanned response into a planned operation*
  - **Cordon and containment** – *unless impractical, adopt a 'cordon and containment' approach*
  - **Avoid confrontation** – *a violent confrontation is to be avoided*
  - **Avoid force** – *the use of force is to be avoided*
  - **Minimum force** – *where use of force cannot be avoided, only use the minimum amount reasonably necessary*
  - **Forced entry searches** – *are to be used only as a last resort*
  - **Resources** – *it is accepted that the 'safety first' principle may require the deployment of more resources, more complex planning and more time to complete.*
81. Policies in relation to equipment also reflect the proportionality test and the need for equipment to be used in accordance with training. The Policy requires police to carry only appropriate equipment for which they have received training, and that the equipment only be used in a manner proportionate to the threat likely to be encountered and having regard to the safety of the member and of the public.
82. The Policy explains that the use of force, including operational safety equipment, must be used only in accordance with law, such as s 462A of the Crimes Act:
- The use of force, including the use of operational safety equipment, must be in accordance with s.462A, Crimes Act. ... or other specific legislative provisions.*
- *The level of force required to bring an incident under control may need to increase or decrease depending on the situation. Members are trained in a range of techniques and a variety of equipment to enable them to have options when responding to an*

*incident. Refer to VPMG Operational safety and equipment for a representation of the Tactical Options Model.*

- *Operational safety equipment must be used in line with the principles or techniques taught in the relevant operational tactics training (OSTT). Refer VPMG Operational Safety and equipment for additional guidance on the use of specific operational safety equipment.*

83. The Operational Safety and Equipment Guidelines (**OSE Guidelines**) refer to the 'Tactical Options Model' (**Model**). This Model is stated to be designed to assist members in understanding the range of tactical options that must be considered. The Guidelines emphasise that, prior to choosing an option under the Model (e.g. of cordon and contain, baton, firearm, negotiation, empty hand tactics, OC spray, tactical engagement, other tactics and weapons, presence), members should conduct a risk assessment of the situation, prepare a plan, make all possible inquiries about the subject, and request any assistance deemed necessary.
84. The OSE Guidelines also provide guidance on when and where equipment (such as guns or other specific equipment) should or should not be carried.<sup>86</sup>
85. Special Operations Groups are required under the Policy to have approval for use of force and such approval is on the basis either that:
- (a) the incident cannot be resolved by other means; or
  - (b) any delay in resolving the incident may increase the likelihood of serious injury to the public, police, hostages or the offender.
86. The Guidelines also cover 'Preventative Measures' to be used when apprehending persons pursuant to s 10 of the Mental Health Act (discussed above at 4.1). In those circumstances, members may use 'such force as may be reasonably necessary' in the following conditions and ways:

**Use of force**

- *Members may enter premises and use such force as may be reasonably necessary, with such assistance as required, to apprehend under s.10 (s.10(2)).*
- *Members should do a risk assessment and unless urgent entry is necessary obtain authority from a Sub-officer before using force.*
- *A registered medical practitioner (e.g. doctor) or mental health practitioner (e.g. CAT team) may accompany members under s10. While these clinicians should contribute to the risk assessment, it is a police decision as to whether reasonable grounds exist to force entry.*

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<sup>86</sup> See for example *Operational Safety Equipment Guidelines*, 'Equipment carriage – planned operations' and 'Equipment carriage – other specific circumstances', which set out the need for consideration of the type of equipment to be carried and also guidance on circumstances where arming may or may not be necessary, such as attending court as a witness, where the recommendation is that no equipment is to be carried, unless with approval from a relevant person.

#### 4.4 Use of weapons

87. The use of weapons in Victoria is primarily governed by the *Control of Weapons Act 1990* (Vic) (**Control of Weapons Act**). The Control of Weapons Act creates the offences of:
- Possessing, using or carrying a 'prohibited weapon' without an exemption or approval, s 5; and
  - Possessing a 'controlled weapon' without lawful excuse, s 6.<sup>87</sup>
88. The kinds of weapons that constitute 'prohibited weapons' and 'controlled weapons' are prescribed in the *Control of Weapons Regulations 2000* (Vic) (**Control of Weapons Regulations**).
89. Exemptions from the prohibition on prohibited weapons are granted by the Governor in Council. The Governor has an express power to exempt members of the police, either by name or by description of office.<sup>88</sup> The exemptions granted to Victoria Police are discussed in more detail in the sections below dealing with particular uses of force.
90. The authority given by exemptions under the Control of Weapons Act to carry weapons does not authorise police to use weapons in any particular situation. Police may only use a weapon if the specific situation in which police find themselves in is one in which they are authorised or justified in using that weapon, consistently with the law, police policy and procedure.

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<sup>87</sup> The pursuit of a lawful employment or duty is a lawful excuse, but self-defence is not.

<sup>88</sup> *Control of Weapons Act* s 8B(1)(a)(ii). The Commissioner of Police also has the power to grant approvals relating to prohibited weapons, but cannot grant an approval to a police officer which relates to the officer's official duties: *Control of Weapons Act* s 8C(2)(b).

## 5. A Human Rights-Based Approach to Regulating Use of Force Generally

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91. A human rights-based approach can be characterised as requiring the state to act in three stages of the use of force:
- (a) Before the use of force – putting in place systems to protect human rights and avoid or minimise resort to force, such as proper policies and training;
  - (b) During – requiring that force be used in a proportionate way; and
  - (c) After – ensuring that there are accountability mechanisms in place to hold police to account for their use of force (this is dealt with in part 10 below).
92. This part considers each of these stages in turn.

### 5.1 Before the use of force: Proper regulation of the use of force by state agents

93. In regards to police use of force, human rights law requires:
- Adequate systems to protect human rights, including the existence of an adequate legal and policy framework to govern the use of force;
  - A range of means to equip law enforcement officers with non-lethal weapons;
  - Adequate training of police regarding their human rights obligations; and
  - Consideration of the needs of particular groups.
94. A human rights-compliant approach is reflected in codes which exist at both an international and regional level. The UN *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Basic Principles)*<sup>89</sup> are the pre-eminent code, setting out guidelines for human rights-compliant police conduct.<sup>90</sup> The Basic Principles were adopted by the UN General Assembly in 1990. The preamble states that the Basic Principles were formulated to assist Member States in their task of ensuring and promoting the proper role of law enforcement officials. The Basic Principles should be taken into account and respected by governments within the framework of their national legislation and practice, and be brought to the attention of law enforcement officials as well as other persons, such as judges, prosecutors, lawyers, members of the executive branch and the legislature and the public. The United Nations Human Rights Committee (*UNHRC*) recently recommended that Australia

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<sup>89</sup> The Basic Principles were adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders and welcomed by the General Assembly in its resolutions 45/121 of 14 December 1990 and 45/166 of 18 December 1990.

<sup>90</sup> The Basic Principles are used as a benchmark in other regional and international guidelines, such as the 1998 Amnesty International *10 Basic Standards for Law Enforcement Officials* and regional European guidelines.

bring its legislative provisions and policies for the use of force into line with the Basic Principles.<sup>91</sup>

95. In summary, the Basic Principles set out the relevant state obligations in relation to the use of force, including the duty to:

- Establish rules and regulations on the use of force and firearms by law enforcement officials, and appropriate content of that regulation;
- Equip law enforcement officers with a range of types of weapons, including non-lethal incapacitating weapons;
- Carefully evaluate and control the use of non-lethal incapacitating weapons; and
- Establish certain processes to be followed once force has been used.

96. The Basic Principles also set out the requirements that should be met in the process of training and recruiting law enforcement officials, as well as the reporting and review procedures that should be in place in law enforcement agencies.

97. These matters are discussed in more detail below.

**(a) A proper system of law and policy is required**

98. Victoria has a substantive obligation under the **right to life** to ensure that life is protected by law (Victorian Charter, s 9). This substantive obligation has been interpreted in international and foreign comparative jurisprudence to include that:

- States must take appropriate steps to safeguard life;<sup>92</sup>
- States have a duty to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent practicable, protect life;<sup>93</sup>
- States have a positive duty to adopt clear and detailed domestic law on the use of lethal force which should strictly regulate its use in accordance with the right to life;<sup>94</sup>
- States have a responsibility to ensure that the way in which an operation is planned and executed does not require the use of unnecessary lethal force.<sup>95</sup>

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<sup>91</sup> UNHRC, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee: Australia*, 95th sess, UN Doc CCPR/C/AUS/CO/5 (7 May 2009), [21].

<sup>92</sup> *McCann v United Kingdom* (1996) 21 EHRR 97; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 192, [13]; *R v (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [19]; *Osman v United Kingdom* (1998) 29 EHRR 245, [115]; *LCB v United Kingdom* (1998) 27 EHRR 212, [36]; *Kiliç v Turkey* (2000) 33 EHRR 38, [62].

<sup>93</sup> *McCann v United Kingdom* (1996) 21 EHRR 97, [150], [156], [161]; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, [2]; *LCB v United Kingdom* (1998) 27 EHRR 212, [36]; *Osman v United Kingdom* (1998) 29 EHRR 245, [115]; *Keenan v United Kingdom* (2001) 33 EHRR 913, [88]-[90]; *Edwards v United Kingdom* (2002) 35 EHRR 487, [54]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [30]; *Oneryildiz v Turkey* (2005) 41 EHRR 20, [89].

<sup>94</sup> *Leonidis v Greece* [2009] ECHR 5, [56]; *Simsek v Turkey* [2005] ECHR 546, [104]. See also *McCann v United Kingdom* (1996) 21 EHRR 97, [148]-[149].

99. The obligation to safeguard life is not absolute. The European Court of Human Rights (**European Court**) has held that 'the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities'.<sup>96</sup>

**(b) Range of means**

100. State authorities must do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have, or ought to have, knowledge.<sup>97</sup> Flowing from this is the requirement to equip police with a range of weapons, including non-lethal or less than lethal weapons.

101. The Basic Principles provide that:

- Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow a differentiated use of force and firearms, including non-lethal incapacitating weapons (paragraph 2); and
- The development of non-lethal incapacitating weapons should be carefully evaluated, and the use of such weapons should be carefully controlled (paragraph 3).

**(c) Training**

102. As stated above, the right to life requires that states must take appropriate steps to safeguard life,<sup>98</sup> which imposes a positive duty to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent practicable, protect life.<sup>99</sup>

103. The Basic Principles clearly provide that police should be appropriately qualified, trained and monitored (paragraphs 18, 22).

104. The right to life requires that law enforcement agents are trained to protect life by assessing whether there is an absolute necessity to use firearms, not only on the basis of the relevant regulations, but also with due regard to the pre-eminence of respect for human life as a fundamental value.<sup>100</sup> Effective systems for safeguarding life require police to be trained in a range of non-violent and non-lethal responses, including communication and negotiation. In

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<sup>95</sup> *Leonidis v Greece* [2009] ECHR 5, [55].

<sup>96</sup> *Keenan v UK* (2001) 33 EHRR 913, [89].

<sup>97</sup> *Ibid.*

<sup>98</sup> *McCann v United Kingdom* (1996) 21 EHRR 97; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, [13]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [19]; *Osman v United Kingdom* (1998) 29 EHRR 245, [115].

<sup>99</sup> *McCann v United Kingdom* (1996) 21 EHRR 97, [150], [156]; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, [2]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [30]; *Osman v United Kingdom* (1998) 29 EHRR 245, [115]; *LCB v United Kingdom* (1998) 27 EHRR 212, [36]; *Keenan v United Kingdom* (2001) 33 EHRR 913, [88]-[90]; *Edwards v United Kingdom* (2002) 35 EHRR 487, [54].

<sup>100</sup> *Leonidis v Greece* [2009] ECHR 5, [57].

order to ensure the right to life is upheld, the State of Victoria and Victoria Police must ensure that police are trained:

- in the use of alternatives to use of force and firearms, including the peaceful settlement of conflicts;<sup>101</sup>
- if police will be using firearms, in the use of firearms;<sup>102</sup> and
- generally, to respect and uphold human rights.<sup>103</sup>

**(d) Consideration of the needs of particular groups**

**Right to non-discrimination**

105. Section 8(2) of the Victorian Charter provides that '[e]very person has the right to enjoy his or her human rights without discrimination.'
106. The right to non-discrimination is therefore interconnected with all of the other Victorian Charter rights, ensuring that every person has a right to enjoy their human rights without discrimination.
107. 'Discrimination' in the Victorian Charter is defined with reference to the *Equal Opportunity Act 2010*, in which 'protected attributes' relevantly include 'age', 'race' and 'impairment', among others. 'Impairment' is defined to include a mental or psychological disease or disorder.<sup>104</sup>
108. The obligation to respect the right to non-discrimination requires the state to ensure that the protection afforded in respect of human rights recognised in the Victorian Charter is afforded to all persons equally, without discrimination.

**Children's rights**

109. Section 17 of the Victorian Charter provides that '[e]very child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.'
110. It is established in international jurisprudence that the rights of the child require every legislative, administrative and judicial body or institution to systematically consider how children's rights and interests are or will be affected by their decisions and actions<sup>105</sup> and to treat the best interests of the child as paramount or as the 'primary consideration'.<sup>106</sup>

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<sup>101</sup> Basic Principles, principle 20.

<sup>102</sup> Ibid, principle 19.

<sup>103</sup> Code of Conduct art 2; Basic Principles, principle 20; *Simsek v Turkey* [2005] ECHR 546, § 108.

<sup>104</sup> *Equal Opportunity Act 2010*

<sup>105</sup> United Nations Committee on the Rights of the Child (CROC), *General Comment No 5*, 34<sup>th</sup> sess, UN Doc CRC.GC.2003/5 (2003), [12]. See also *Case of Bulacio v Argentina – Series C No. 100* [2003] IACHR 3.

<sup>106</sup> See, eg, *ZH (Tanzania) FC (Appellant) v Secretary of State for the Home Department* [2011] UKSC 4 (1 February 2011); *R v Ashman* [2010] ACTSC 45 (21 May 2010).

111. It follows that the obligation to respect children's rights requires administrative bodies such as Victoria Police to consider in advance how children's rights may be affected by the actions of that body, and (by implication) implement policies that address the potential effect of their actions upon children.
112. In considering the actual or potential effect a decision or action may have on children's rights, the best interests of the child must be a primary consideration.<sup>107</sup>

**Concluding remarks**

113. In light of the state's positive duties under s 9 (the right to life), s 8 (equality and non-discrimination) and s 17 (rights of the child), it is clear that police systems must be developed and implemented in a non-discriminatory way and cater for the vulnerability and special needs of young people and people with mental health issues. In some instances, this may require that the state take special measures to protect and advance the rights of persons or groups disadvantaged because of discrimination.<sup>108</sup>
114. The circumstances in which force may be used by police, and the policies which guide such use of force, must be developed in consideration of, and reflective of, minority and other groups, for example, racial and religious groups, people experiencing mental illness and young persons.

**5.2 During: The proportionality test**

115. The way that police are empowered to use force in a given situation is governed by the following rights in the Victorian Charter:
- The right to life (s 9);
  - The right to freedom from torture and cruel, inhuman and degrading treatment (s 10);
  - The right to equality and non-discrimination (s 8); and
  - The rights of the child regarding their particular vulnerable status (s 17).
116. The *UN Code of Conduct for Law Enforcement Officials (UN Code of Conduct)*<sup>109</sup> provides, among other things, guidance on how law enforcement officials should exercise the use of force and otherwise uphold human rights and human dignity. It provides that:
- Law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons (Article 2).
  - Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty (Article 3).

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<sup>107</sup> *Bakhtiyari v Australia*, Communication No. 1069/2002, UN HRC, 79<sup>th</sup> sess, UN Doc CCPR/C/79/D/1069/2002 (2003).

<sup>108</sup> Victorian Charter s 8(4).

<sup>109</sup> Adopted by the General Assembly by resolution on 17 December 1979.

- Torture or other cruel, inhuman or degrading treatment or punishment is prohibited (Article 5).
117. Commentary on Article 3 of the UN Code of Conduct states that the use of force by law enforcement officers should be exceptional and proportionate, i.e. only such force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders. Further, the use of firearms is considered to be extreme:
- The use of firearms is considered an extreme measure. **Every effort should be made to exclude the use of firearms, especially against children.** In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardises the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authority.<sup>110</sup>
- (a) The right to life**
118. The concept of proportionality largely informs whether a particular use of force is permitted by human rights law. The use of force by state officials which results in a deprivation of life must have been '**absolutely necessary**' and '**strictly proportionate**' to the achievement of the permitted purpose.<sup>111</sup>
119. These broadly stated principles are supported by guidance found in the Basic Principles, which develop specific principles regarding the regulation of the use of force. These principles include:
- Law enforcement officials should, as far as possible, apply non-violent means before resorting to force and firearms (paragraph 4);<sup>112</sup>
  - Whenever the lawful use of force is unavoidable, law enforcement officials should:<sup>113</sup>
    - exercise restraint;
    - minimise damage and injury;
    - ensure assistance and medical aid are rendered at the earliest possible moment; and
    - ensure relatives or close friends of the injured person are notified at the earliest possible moment (paragraph 5).
120. International jurisprudence provides further elaboration on these concepts, establishing that:
- In assessing whether the use of force is strictly proportionate, regard must be had to the nature of the aim pursued, the dangers of life and limb inherent in the situation, and the degree of risk that the force employed might result in loss of life;<sup>114</sup> and

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<sup>110</sup> Emphasis added.

<sup>111</sup> *McCann v United Kingdom* (1996) 21 EHRR 97, [148]-[149].

<sup>112</sup> Basic Principles, [4].

<sup>113</sup> *Ibid*, [5].

- The use of force will be disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life without putting the lives of others at risk.<sup>115</sup>
121. The UN Code of Conduct states that police must only use force when strictly necessary and to the extent required for the performance of their duty (Article 3). The Basic Principles state that when persons are in custody or detention, force should only be used when strictly necessary to maintain security and order, or when personal safety is threatened (paragraph 15).
122. Article 2(2) of the European Convention of Human Rights (**ECHR**) approaches the use of force from a different perspective and sets out the instances where use of force will *not* breach the right to life:
- 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
    - (a) in defence of any person from unlawful violence;
    - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
    - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.
123. The European Court has noted that Article 2(2) does not primarily define instances where it is permitted intentionally to kill an individual as such, but describes the situations where it is permitted to 'use force' which may result, as an unintended outcome, in the deprivation of life.<sup>116</sup>
124. These exceptions have been held to be exhaustive, and to require strict construction.<sup>117</sup> In considering whether state actions can be justified under the exceptions provided in the ECHR, the circumstances are subject to careful scrutiny. This scrutiny will include examination of whether the operation was planned and controlled so as to minimise the risk to life.<sup>118</sup>
125. Respect for the right to life of a police suspect requires that the nature and degree of force used be proportional to the threat posed by the suspect to the safety and security of the police officers, other individuals and society as a whole.<sup>119</sup>
126. When considering whether the force used was 'absolutely necessary', the European Court has considered whether the individual who used force honestly believed that it was necessary. For example, in *Brady v United Kingdom (2 April 2001)*, the European Court of Human Rights considered the shooting of a person during a police operation to prevent what was believed to be an armed robbery, in circumstances where he had made what had been interpreted as a

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<sup>114</sup> *McCann v United Kingdom* (1996) 21 EHRR 97, [193]-[194].

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ergi v Turkey* (1998) 32 EHRR 19, [79].

<sup>117</sup> *Nachova v Bulgaria* (2005) 19 BHRC 1 (GC), [94].

<sup>118</sup> *Isayeva, Yusupova and Bazayeva v Russia* (2005) 41 EHRR 39, [171].

<sup>119</sup> *Govender v Minister of Safety and Security* 2001 (11) BCLR 1197 (SCA), [24].

threatening movement. The European Court found that the officer had honestly believed it was necessary to shoot the deceased to protect himself, and the use of force could be regarded as being 'absolutely necessary' within the meaning of Article 2(2)(a).

127. Similarly, in *Bubbins v United Kingdom*<sup>120</sup> the European Court found there was no breach of Article 2 on the basis that the officer honestly believed the force used was necessary, where a man holding a replica gun was shot by an officer and the officer believed that his life was in danger.

**(b) Right to freedom from torture and inhuman and degrading treatment**

128. Police must ensure use of force, in particular during interrogations, does not constitute torture or cruel treatment or punishment. Conduct which may constitute torture has been found to include severe beating, and a police officer threatening or humiliating a prisoner in order to obtain a confession.<sup>121</sup> In particular, treatment during interrogations which has been found to constitute torture includes beating all parts of the body, including genitals; electric shock treatment; mock executions; head vice squeezing and sleep deprivation through water-dripping on the head and intense noise.<sup>122</sup>
129. The severity required to establish torture will depend on the circumstances of each case. Factors such as duration of treatment, its physical and mental effects and the sex, age and health of the victim may be relevant.<sup>123</sup> An increasingly high standard is being required in respect of protection from torture.<sup>124</sup> The European Court has indicated that mental anguish, if sufficiently serious, may also amount to torture.<sup>125</sup>
130. The UN Code of Conduct sets out a number of obligations on police regarding the use of force, including:
- Not to inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment (Article 5);<sup>126</sup> and
  - To ensure the full protection of the health of persons in their custody (Article 6).

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<sup>120</sup> (2005) 41 EHRR 24.

<sup>121</sup> *Selmouni v France* (2000) 29 EHRR 403, [92]-[99].

<sup>122</sup> *The Greek Case* (1969) 12 YB 1.

<sup>123</sup> *Cyprus v Turkey* (1976) 4 EHRR 482.

<sup>124</sup> *Selmouni v France* (2000) 29 EHRR 403, [101].

<sup>125</sup> *Ireland v United Kingdom* (1978) 2 EHRR 25, [162].

<sup>126</sup> See UN Code of Conduct art 5. 'Torture' is defined by the UN *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)* as: 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.' (Article 1(1)).

**(c) Right to freedom from discrimination**

131. The right to non-discrimination is particularly important in the context of proportionality. The European Court has held that the existence of reasonable and objective justification for differential treatment 'must be assessed in relation to the "aim and effects" of the measure under consideration, regard being had to the principles which normally prevail in democratic societies'.<sup>127</sup>
132. Where differential treatment pursues a legitimate aim, it may constitute a violation of the freedom from discrimination where 'there is no reasonable relationship or proportionality between the means employed and the aim sought to be realised'.<sup>128</sup>
133. Reference has been made to the proportionality test as being one of 'fair balance'.<sup>129</sup> However, little detailed consideration by the European Court of the application of the proportionality test has been identified.

**(d) Rights of the child**

134. Article 3 of the UN Code of Conduct, which requires police to use force only when strictly necessary, makes particular reference to children, stating that every effort should be made to exclude the use of firearms, **especially against children**.
135. In regards to juvenile justice, the juvenile justice system should be focussed on the well-being of the juvenile, and any punishment must be proportionate to the circumstances of the offender and the offence.<sup>130</sup> Police officers who frequently or exclusively deal with juveniles should be given specialist training and instruction on the prevention of juvenile crime and, in large cities specialist groups should be set up to deal with juvenile justice issues.<sup>131</sup>

**5.3 After: Accountability and monitoring**

136. An adequate legal framework for regulating force would include systems for monitoring and reviewing use of force. As stated above, the Basic Principles clearly provide that police should be appropriately monitored (paragraphs 18-22).
137. The human rights-based approach to investigation of police-related deaths, deaths in police custody and of credible allegations of torture, has been the subject of considerable human rights jurisprudence. That issue is discussed in detail in part 10 below.
138. The OPI has also reported on systemic issues within Victoria Police in terms of its institutional response to known problems such as those relating to collecting use of force data through the

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<sup>127</sup> *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, 284, [34].

<sup>128</sup> *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, 284, [34].

<sup>129</sup> *Sheffield and Horsham v United Kingdom* (1999) 27 EHRR 163, [76].

<sup>130</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice, GA Res 40/33, UN GAOR, 33rd sess, 96th plenary meeting, UN Doc A/RES/40/33 (the **Beijing Rules**), [5].

<sup>131</sup> Beijing Rules, [12].

Use of Force Register and monitoring use of force through the Critical Incident Management Review Committees. The OPI stated in the 2009 OPI Review that there was a disconnect between the recognition of use of force as a strategic risk and activities of Victoria Police to manage this risk.<sup>132</sup> The OPI found that, despite its 2005 report, since that time Victoria Police had 'continued to lose strategic focus on safety and avoiding the use of force'. The OPI concluded that:

An overview of reviews conducted by Victoria Police demonstrates a pattern of indecision, lack of accountability, poor management and attitudes that accept use of force and associated injuries as 'part of the job'.<sup>133</sup>

139. It is extremely important that Victoria Police address the systemic issues identified by the OPI and the recommendations in the 2005 Report.
140. **Schedule 1** sets out a discussion of the forms of monitoring bodies for police that exist in other comparable jurisdictions which have a comprehensive protection of human rights in law.

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<sup>132</sup> OPI, *2009 OPI Report*, above n 3, 56.

<sup>133</sup> *Ibid* 35.

## 6. Firearms

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### 6.1 Non-Victorian Charter laws and policies that regulate police use of firearms in Victoria

141. Police are exempt from the licensing regime for firearms imposed by the *Firearms Act 1996* (Vic) and are therefore lawfully permitted to carry firearms.<sup>134</sup> Last year, Victoria Police announced its intention to arm its officers with semi-automatic pistols in place of the current Smith & Wesson revolvers.<sup>135</sup>

142. Prior to February 2010, the VPM contained specific rules governing the use of firearms by Victoria Police. The old operational safety principles relevantly provided:

#### **VPM 101-3 Operational Safety and other equipment**

##### *1 Policy:*

- *Sworn employees must carry operational equipment that is appropriate to the duties they are performing*
- *Operational safety equipment must only be used in accordance with Victoria Police policies, procedures and training.*
- *Only sworn employees with current OSTT qualifications can carry operational safety equipment...*

...

##### *6 Firearms*

###### *6.1 Purpose for being armed*

*Sworn employees are issued with firearms:*

- *to protect themselves and the public*
- *for the lawful destruction of animals (clause 6.1)*

###### *6.2 When employees are permitted to carry firearms*

- *To be issued with or to carry a firearm, sworn employees must have a current OSTT qualification*

...

###### *6.3 Justification for use of firearms*

- *Except for the lawful destruction of animals, a sworn employee issued with a firearm:*
  - *must not draw the firearm unless extreme danger is anticipated*
  - *may only discharge the firearm when they reasonably believe it is necessary to protect life or prevent serious injury. Warning shots should not be fired.*

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<sup>134</sup> *Firearms Act 1996* (Vic) schedule 3, item 2.

<sup>135</sup> Paul Millar 'Victoria police switches to semi-automatic weapons', *The Age* (online), 29 April 2010 <<http://www.theage.com.au/victoria/victoria-police-switches-to-semiautomatic-weapons-20100429-tt44.html>>.

143. The VPM no longer provides any explicit guidance to members in relation to the circumstances in which firearms may be lawfully used, relying instead on the general use of force guidelines in law and policy set out in part 4 above and the Tactical Options Model.

## **6.2 A human rights-based approach to firearms**

144. Firearms are the primary method by which police employ lethal use of force. The principles discussed in part 5 above regarding use of force generally are also relevant to the use of firearms.

145. Given that firearms are lethal weapons, the right to life<sup>136</sup> is particularly relevant to their use. The following rights are also relevant: the right to freedom from torture and inhuman and degrading treatment;<sup>137</sup> the right to freedom from discrimination;<sup>138</sup> and the rights of the child regarding their particular vulnerable status.<sup>139</sup>

146. International human rights jurisprudence establishes a number of principles specific to the use of firearms by police to ensure compliance with these rights.

147. In particular, law enforcement agents must be trained to assess whether there is an absolute necessity to use firearms, not only on the basis of the relevant regulations, but also with due regard to the pre-eminence of respect for human life as a fundamental value.<sup>140</sup>

148. The UN Code of Conduct relevantly states:

The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. In every instance in which a firearm is discharged, a report should be made promptly to the competent authorities. (Article 3(c)).

149. The UN Code of Conduct sets out a number of principles specifically addressing the use of firearms:

- The state should adopt and implement rules and regulations for the use of firearms and must keep the ethical issues regarding their use under constant review (paragraph 1);
- Police should only use firearms in the following circumstances (paragraph 9):
  - self-defence or defence of others where there is an imminent threat of death or serious injury;

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<sup>136</sup> Victorian Charter s 9.

<sup>137</sup> Ibid s 10.

<sup>138</sup> Ibid s 8.

<sup>139</sup> Ibid s 17.

<sup>140</sup> *Leonidis v Greece* [2009] ECHR 5, [57].

- to prevent the perpetration of a particularly serious crime involving grave threat to life and / or to arrest a person presenting such a danger and resisting their authority or to prevent their escape; and
  - only when less extreme means are insufficient to meet any of these objectives.
- Police must identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless this would create a risk of death or serious harm to persons (paragraph 10);
  - Rules and regulations on the use of firearms should specify the following (paragraph 11):
    - the circumstances in which police may carry firearms and the types of firearms they may carry;
    - the appropriate circumstances in which firearms may be used;
    - a prohibition on firearms that cause unwarranted injury or present an unwarranted risk; and
    - regulation of the control, storage and issuing of firearms.
  - There must be an effective system of reporting and review of the use of firearms, and independent administrative or prosecutorial authorities should have jurisdiction in appropriate circumstances (paragraphs 22-24).
150. In *Makaratzis v Greece*,<sup>141</sup> the European Court found that the wounding of a person by police gunfire constituted a violation of the right to life in circumstances where there were no clear guidelines or criteria governing the use of force in peace time. It commented that:
- So far as their positive obligation under the first sentence of Article 2.1 to put in place an adequate legislative and administrative framework was concerned, the Greek authorities had not, at the relevant time, done all that could be reasonably expected of them to afford to citizens...the level of safeguards required and to avoid real and immediate risk to life which they knew was liable to arise, albeit only exceptionally, in [the pursuit of police operations].<sup>142</sup>
151. In *Gülec v Turkey*,<sup>143</sup> the European Court found that firing into a crowd to disperse demonstrators breached the right to life, and commented that the unavailability of less forceful means of crowd control was 'incomprehensible and unacceptable'.<sup>144</sup>
152. In the context of political demonstrations, the European Court has stated that the discharge of firearms should, whenever possible, be preceded by warning shots.<sup>145</sup> This requirement is said to be based on the need for the state to show that use of force was absolutely necessary.

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<sup>141</sup> (2005) 41 EHRR 49.

<sup>142</sup> *Makaratzis v Greece* (2005) 41 EHRR 49, [71].

<sup>143</sup> (1999) 28 EHRR 121.

<sup>144</sup> *Gülec v Turkey* (1999) 28 EHRR 121.

<sup>145</sup> *Guiliani and Gaggio v Italy* [2011] ECHR 513, [177] and *Kallis and Androulla Panayi v Turkey* [2009] ECHR 1662, [62], both of which quote Basic Principles, [10].



## 7. Tasers

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### 7.1 Non-Victorian Charter laws and policies that regulate police use of Tasers in Victoria

153. A Taser is a prohibited weapon for the purposes of the Control of Weapons Act.<sup>146</sup> In 2003, Victoria Police Special Operations Group were granted an exemption by the Governor in Council entitling the Group to use Tasers. This was subject to the proviso that the Tasers were used in accordance with the VPM and stored like firearms.<sup>147</sup> In 2004, this exemption was extended to all members of Victoria Police.<sup>148</sup>
154. Within Victoria Police, however, only the Specialist Support Department, comprising the Special Operations Group and the Force Response Unit, have been authorised to use Tasers.<sup>149</sup> In February 2010, Victoria Police announced it would conduct a one-year trial of Tasers by police at the Bendigo and Morwell police stations.<sup>150</sup> That trial is continuing.
155. According to the 2009 Special Operations Group Standard Operating Procedure, Tasers may be used only in the following circumstances:
- In situations of serious and violent physical confrontation (or in situations where a member believes on reasonable grounds that such a confrontation is imminent);
  - Where a person is involved in conduct likely to seriously injure or kill themselves; or
  - Where appropriate to deter attacking animals.<sup>151</sup>
156. The Standard Operating Procedure states that Tasers should not be used on:
- The elderly;
  - Pregnant women; and
  - Children, except in 'extreme circumstances'.
157. The Guidelines for Use of Tasers, set out in the Special Operations Group's Standard Operating Procedure, state that a member of the police should warn a person, where practical, before using the Taser, and should ensure other reasonable and appropriate options are available as a contingency.<sup>152</sup>

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<sup>146</sup> Control of Weapons Regulations sch 2, item 22.

<sup>147</sup> State of Victoria, *Victoria Government Gazette*, No G48, 27 November 2003, 3016.

<sup>148</sup> State of Victoria, *Victoria Government Gazette*, No G47, 18 November 2004, 3171.

<sup>149</sup> OPI, *2009 OPI Report*, above n 3, 28-29.

<sup>150</sup> Victoria Police, 'Country police to trial conduct[ed] energy devices (CED)' (Media Release, 25 February 2010).

<sup>151</sup> Section 4.15.1, Special Operations Group Standard Operating Procedure, (November 2009), available at <[http://www.communitylaw.org.au/cb\\_pages/taser\\_trap.php](http://www.communitylaw.org.au/cb_pages/taser_trap.php)>.

<sup>152</sup> Special Operations Group, *Standard Operating Procedure*, November 2009, s 4.15.3, available at <[http://www.communitylaw.org.au/intranet/public\\_resource\\_details.php?resource\\_id=1607](http://www.communitylaw.org.au/intranet/public_resource_details.php?resource_id=1607)>.

158. The Victoria Police Force Response Unit Standard Operating Procedures – Electronic Control Device (Taser), are in substantially the same terms.<sup>153</sup>

## **7.2 A human rights-based approach to Tasers**

159. The use of Tasers by police in the course of their duties has the potential to infringe the following key human rights, as protected under the Victorian Charter:
- The right to life (s 9, Victorian Charter);
  - The right not to be subjected to torture and cruel, inhuman or degrading punishment (s 10, Victorian Charter);<sup>154</sup>
  - The right to freedom from discrimination (s 8, Victorian Charter);
  - To the extent that Tasers are used on a person in custody, the right to humane treatment while deprived of liberty (s 22(1), Victorian Charter); and
  - The obligation to ensure that in all actions concerning children, the best interests of the child are a primary consideration (s 17(2), Victorian Charter).
160. The UN Code of Conduct and Basic Principles outlined in section 5.1 above also have particular relevance to the adoption and use of Tasers.
- (a) To what extent does human rights law permit Tasers to be used?**
161. There is a threshold question as to whether Tasers are a lethal or non-lethal weapon, or whether they fit somewhere in between. A human rights-based approach to police use of force requires the state to make available less-than-lethal weapons in law enforcement. Whether Taser are a 'less than lethal' alternative is debatable, as the evidence on whether Tasers have 'caused' deaths can be difficult to interpret. There is divergent literature and evidence on the impact of Taser use.<sup>155</sup>
162. This report proceeds on the basis that Taser are best treated as potentially lethal, although less lethal than a firearm.<sup>156</sup>

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<sup>153</sup> Victoria Police Force Response Unit, *Standard Operating Procedures – Electronic Control Device (Taser)*, November 20999, ss 1-1.5, available at [http://www.communitylaw.org.au/intranet/public\\_resource\\_details.php?resource\\_id=1614](http://www.communitylaw.org.au/intranet/public_resource_details.php?resource_id=1614)..

<sup>154</sup> Section 10. Cruel, inhuman or degrading punishment or treatment by a public official which does not amount to torture is also prohibited under CAT art 16.

<sup>155</sup> See, eg, Crime and Misconduct Commission, *Tasers: A Brief Overview of the Research Literature* (2008); Bruce Barbour, *The Use of Taser Weapons by New South Wales Police Force* (November 2008); Keir Starmer QC and Jane Gordon, *The PSNI's Proposed Introduction of Taser: Human Rights Advice* (2007); Dr David Vissenga and Inspector Bruce Thomas, *Advanced TASER M-26 Safety Analysis* (29 June 2004); Amnesty International, *Excessive and Lethal Force? Amnesty International's Concerns about Deaths and Ill-Treatment Involving Police Use of TASERs* (2004).

<sup>156</sup> This was the approach taken by Keir Starmer QC and Jane Gordon, giving advice to the Police Service of Northern Ireland on its proposed introduction of Tasers. See Starmer and Gordon, above n 155.

163. The Basic Principles recognise that potentially lethal weapons such as Tasers have the potential to assist police to uphold the right to life by offering an alternative to the use of firearms. Further, Coronial inquiries into fatal shootings by police in Australia have pointed to the possibility that the availability of Tasers may prevent deaths at the hands of police by the use of firearms.<sup>157</sup> In this way, the proper use of Tasers can be seen to promote the right to life.
164. On the other hand, the use of Tasers may infringe human rights norms in a number of ways:
- Misuse or overuse of Taser may cause death, in breach of the right to life;<sup>158</sup>
  - Use of Tasers by police may be disproportionate to requirements of the situation, contrary to the UN Code of Conduct and the Basic Principles;
  - The intentional use of Tasers which results in severe physical or mental pain or suffering may constitute torture, or cruel, inhuman or degrading treatment;<sup>159</sup> and
  - Use of Tasers against vulnerable groups, such as persons in custody or children, may infringe rights specific to those groups, or if the vulnerability makes them susceptible to harm, then it could lead to breaches of the right to life.
165. Human rights literature reflects a number of divergent views as to the appropriate standards for the use of Tasers by police, and has identified particular dangers for certain groups.
- (b) Differing standards for use of Tasers**
166. The highest standard for Taser use is put by the United Nations treaty bodies, which have commented on Tasers during their periodic reviews of states. The UNHRC has suggested that Tasers are really a substitute for lethal force, and so Tasers should only be used in situations where greater or lethal force would otherwise have been used.<sup>160</sup> The UNHRC has expressed concern about the use of Tasers in situations where lethal force would not have been contemplated, or against 'vulnerable groups' (discussed below).<sup>161</sup>

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<sup>157</sup> State Coroner of Victoria (Graeme Johnstone), *Record of Investigation into Death: Mark Andrew Kaufmann 19 January 2002*, Case No 201/02; State Coroner of Queensland (M Barnes), *Findings of Inquest: Inquest into the deaths of Thomas Dion Waite, Mieng Huynh, James Henry Jacobs and James Michael Gear*, 17 March 2008.

<sup>158</sup> A recent example is the 2009 death of a 39 year old Queensland man after the deployment of a Taser. Taser data showed the weapon had been discharged 28 times: Crime and Misconduct Commission Queensland, *Evaluating Taser Reform: A Review of Queensland Police Service Policy and Practice* (2011) 2.

<sup>159</sup> CAT art 1(1).

<sup>160</sup> UNHRC, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee: Australia*, 95th sess, UN Doc CCPR/C/AUS/CO/5 (7 May 2009), [21].

<sup>161</sup> UNHRC, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee: United States of America*, 87th sess, UN Doc CCPR/C/USA/CO/3 (21 December 2006), [30].

167. In reviewing some States, the UNHRC has suggested relinquishing the use of Tasers.<sup>162</sup>
168. The United Nations Committee Against Torture (**CAT**) also takes a strong view in respect of Tasers. The CAT has more than once expressed concern about the use of Tasers by police forces, and has stated that Tasers can be used so as to result in severe pain amounting to torture and may in some cases be lethal.<sup>163</sup> This is particularly the case where there is a lack of information on the use of Tasers, and a lack of training for those who use them.<sup>164</sup>
169. The CAT has:
- On occasion, recommended the complete cessation of the use of Tasers by police forces;<sup>165</sup>
  - On other occasions recommended Tasers be substituted for lethal weapons and never used against those already in custody;<sup>166</sup> and
  - Recommended the use of Tasers on children be prohibited.<sup>167</sup>
170. The Starmer Report<sup>168</sup> to the Police Service of Northern Ireland on the human rights implications of the use of Tasers posed a slightly different test. That report classes Tasers as

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<sup>162</sup> UNHRC, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee: New Zealand*, 98th sess, UN Doc CCPR/C/NZL/CO/5 (7 April 2010), [30].

<sup>163</sup> UNCAT, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture: Switzerland*, 34th sess, UN Doc CAT/C/CR/34/CHE (21 June 2005), [4]; UNCAT, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture: Austria*, 44th sess, , CAT/C/AUT/CO/4-5 (20 May 2010), [17].

<sup>164</sup> UNCAT, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture: France*, 44th sess, UN Doc CAT/C/FRA/CO/4-6 (20 May 2010), [30].

<sup>165</sup> UNCAT, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture: Spain*, 43rd sess, CAT/C/ESP/CO/5 (9 December 2009), [12].

<sup>166</sup> UNCAT, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture: United States of America*, 36th sess, CAT/C/USA/CO/2 (25 July 2006), [35]. See also Amnesty International, 'Less Than Lethal?': *The Use Of Stun Weapons in US Law Enforcement*, (2008), available at <  
<http://www.amnesty.org/en/library/asset/AMR51/010/2008/en/530be6d6-437e-4c77-851b-9e581197ccf6/amr510102008en.pdf>>.

<sup>167</sup> CROC, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, 49th sess, UN Doc CRC/C/GBR/CO/4 (20 October 2008), [31].

<sup>168</sup> See Starmer and Gordon, above n 155, [126-129]. The authors, giving advice to the Police Service of Northern Ireland on its proposed introduction of Tasers, examined the evidence as to the safety of Tasers and concluded that the overall risk of Taser use was low or even very low yet concluded that much of the evidence on the safety of Tasers was unsatisfactory and inconclusive, and that anecdotally it appeared that those being Tasered by police were often people who were most vulnerable to the Taser's effects.

'potentially lethal' weapons, and considers that potentially lethal force can be compatible with the right to life (under European human rights law) in certain circumstances. It recommended:

- Taser use be permitted 'where use is absolutely necessary to prevent individuals from unlawful and serious violence'.<sup>169</sup>
- As Tasers are less dangerous than firearms, the test for their use should be less strict. Where the use of a Taser is 'immediately necessary to prevent or reduce the likelihood of recourse to lethal force',<sup>170</sup> a test less strict than firearms, but stricter than other forms of non-lethal force, should apply.

**(c) Particular risks for certain groups**

171. The Starmer Report identified evidence of particular risks arising from the use of Tasers on particular groups:

- Tasers are potentially more dangerous to children due to a potential increased risk of ventricular fibrillation (which risk may increase in smaller children) and from injury from the Taser barbs that administer electric shocks;<sup>171</sup>
- There is some evidence that individuals under the effects of drugs or alcohol, or those with pre-existing heart conditions, are at greater risk from Tasers;<sup>172</sup> and
- The effect of Taser use on pregnancy is not fully known, but there have been claims that Tasers can cause miscarriages when used on pregnant women.<sup>173</sup>

172. The UNHRC has expressed concern about the use of Tasers against such vulnerable groups as:

- Schoolchildren;
- People experiencing mental illness or intoxicated individuals involved in disturbed but non-life threatening behaviour;
- Elderly people; and
- Pregnant women.<sup>174</sup>

173. It has also expressed concerns about the use of Tasers against:

- Unarmed suspects fleeing minor crime scenes; and
- People who argue with officers or simply fail to comply with police commands.<sup>175</sup>

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<sup>169</sup> Ibid [137].

<sup>170</sup> Ibid [143] (emphasis in original).

<sup>171</sup> Ibid [53-57].

<sup>172</sup> Ibid [40-49], [65].

<sup>173</sup> Ibid [58-60].

<sup>174</sup> UNHRC, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee: United States of America*, 87th sess, UN Doc CCPR/C/USA/CO/3/Rev.1 (21 December 2006), [30].

<sup>175</sup> Ibid.

174. However, the Canadian Police Research Centre has argued that overly prescriptive rules should not apply to vulnerable groups, as there may be situations where Tasers are the best option even in relation to these groups.<sup>176</sup>
175. Similar concerns about the dangers of Taser use on 'vulnerable groups' have been expressed by the US National Institute of Justice, the research agency of the US Department of Justice.<sup>177</sup> The National Institute of Justice suggests:<sup>178</sup>

The purported safety margins of CED [Taser] deployment on normal healthy adults may not be applicable in small children, those with diseased hearts, the elderly, those who are pregnant and other at-risk individuals. The effects of CED exposure in these populations are not clearly understood and more data are needed. The use of a CED against these populations (when recognized) should be avoided but may be necessary if the situation excludes other reasonable options.

Studies examining the effects of extended exposure in humans to CED are very limited. Preliminary review of deaths following CED exposure indicates that many are associated with continuous or repeated discharge of the CED. The repeated or continuous exposure of CED to an actively resisting individual may not achieve compliance, especially when the individual may be under drug intoxication or in a state of excited delirium. The medical risks of repeated or continuous CED exposure are unknown and the role of CEDs in causing death is unclear in these cases. There may be circumstances in which repeated or continuous exposure is required but law enforcement should be aware that the associated risks are unknown. Therefore, caution is urged in using multiple activations of CED as a means to accomplish subdual.

176. The United Nations Committee on the Rights of the Child (**CROC**) has expressed concern at the use of Tasers on children, and has recommended their use on children be prohibited.<sup>179</sup>

**(d) Comment on contrasting approaches**

177. The UNHRC appears to view Tasers as a substitute for firearms, and thus permissible for police to use only where a firearm could otherwise have been used. The CAT appears to have reservations as to whether Tasers are ever appropriate, given their potential to be used as instruments of torture. By contrast, the Starmer Report expressly states that, given the lower threshold for Taser use, it would not be surprising if Tasers were used more often than firearms, and in circumstances where firearms would not be used.<sup>180</sup> In formulating the standard used in the Starmer Report, the authors criticised the view of the UNHRC that Tasers

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<sup>176</sup> Canadian Police Research Centre, *Review of Conducted Energy Devices* (2005) <<http://www.css.drddc-rddc.gc.ca/cprc/tr/tr-2006-01.pdf>> 27.

<sup>177</sup> National Institute of Justice, *Study of Deaths Following Electro-Muscular Disruption: Interim Report* (2008) <<http://www.ojp.usdoj.gov/nij/pubs-sum/222981.htm>>.

<sup>178</sup> *Ibid* 3.

<sup>179</sup> CROC, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, 49th sess, UN Doc CRC/C/GBR/CO/4 (20 October 2008), [31].

<sup>180</sup> Starmer and Gordon, above n 155, [176-177].

can never be used against vulnerable people, arguing that the Starmer Report's proposed threshold for use of Tasers would protect the most vulnerable.<sup>181</sup>

178. The key advantages of an approach which imposes the same restrictions on the use of Tasers as on lethal weapons are that it:
- recognises the potential for Tasers to inflict fatal injury;
  - ensures potentially lethal force is not inadvertently used in circumstances which would not justify the use of lethal force under human rights standards; and
  - restricts the possibility of force which can cause serious harm or suffering being misused as a compliance tool by police.
179. The key disadvantage of such an approach is that it denies police access to a weapon which is less lethal than a firearm and which could be used to de-escalate potentially fatal situations and to decrease the use of lethal force which carries greater risk of causing more serious harm.
180. The key advantage of an approach which imposes less stringent restrictions on the use of Tasers than on lethal force is that it:
- allows police to have recourse to less-lethal weapons before a situation escalates to a point where recourse to firearms becomes necessary or appropriate; and
  - may diminish the use of firearms which carry greater risk of serious harm and death.
181. There is some evidence that the availability of Tasers reduces the resort to lethal force, including:
- evidence from United States and United Kingdom police departments which demonstrated that the introduction of Tasers reduced the use of force against police.<sup>182</sup> (Although note conflicting evidence from an independent risk assessment commissioned by the New South Wales Police force, which found that assaults on police increased when Tasers were introduced in Western Australia);<sup>183</sup> and
  - a report by the Canadian Police Research Centre, reviewing available statistics for North America, which found that the introduction of Tasers substantially reduced injuries to police, injuries to suspects, and uses of other kinds of force, including lethal force.<sup>184</sup>

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<sup>181</sup> Ibid [149-150].

<sup>182</sup> That research is collected in NSW Ombudsman, *The Use of Taser Weapons by New South Wales Police Force* (2008) <<http://www.ombo.nsw.gov.au/publication/PDF/specialreport/The20use20of20Taser20weapons20by20NSW20Police20Force.pdf>> 9.

<sup>183</sup> Armour, *NSW Police Draft Risk Review of the Use of Less Lethal Technologies* (2008) 14, cited in *ibid*, 9.

<sup>184</sup> Canadian Police Research Centre, *Review of Conducted Energy Devices* (2005) <<http://www.css.drdc-rddc.gc.ca/cprc/tr/tr-2006-01.pdf>> 20-23. The report discussed studies from Cincinnati, Ohio; Orange County, Florida; Madison, Wisconsin; and Toronto, Ontario. See also the reports cited in Queensland Police, *Review of the Queensland Police Service Taser Trial* (2009)

182. There is also evidence that in many cases Tasers can de-escalate conflicts without actually having to be discharged, in cases where they are drawn and people are 'painted' with Tasers' targeting lasers.<sup>185</sup>

183. Accordingly, there is some evidence to support the view that Tasers may assist in upholding the right to life by reducing the resort to more lethal forms of force.

**(e) 'Taser creep'**

184. An issue for the operation of any human rights standard in practice is the risk that Taser use may extend beyond its original functions, for instance to force compliance or co-operation where the police officer would not otherwise have resorted to force at all. The risk of 'Taser creep' or 'mission creep' is acknowledged by many Australian law enforcement agencies.<sup>186</sup>

185. Statistics on the use of Tasers by the Western Australian police force suggest the risk of Taser creep in Australia is significant. According to a 2010 report, in 2009, Western Australian police used Tasers more than twice as often as all other kinds of force options put together.<sup>187</sup>

**(f) Managing the risks of Taser misuse**

186. There are differing views as to whether human rights standards require the use of Tasers on particular vulnerable or high risk groups of people to be excluded or further restricted. There is evidence to support the view that certain groups of people face a higher risk of injury or death, or that the likely impact of Tasers on certain groups is uncertain.<sup>188</sup>

187. Accordingly, best practice would be to adopt further restrictions on the use of Tasers in particular circumstances or against vulnerable or high risk groups to ensure human rights standards are met.

188. Examples of jurisdictions where clear, detailed guidance on the use of Tasers have been implemented include Northern Ireland and New Zealand.

189. The Police Service of Northern Ireland's Guidelines on the Operational Use of Taser:

- Set out the general principles governing use of force by Northern Ireland police;

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<<http://www.police.qld.gov.au/Resources/Internet/news20and20alerts/campaigns/taser/documents/ReviewoftheQPSTasertrial.pdf>> 52.

<sup>185</sup> See for instance Western Australia Police, *Post Implementation Review of Taser* (2010) <<http://www.police.wa.gov.au/LinkClick.aspx?fileticket=qHmOdYYIvNc3D&tabid=1068>> 7, 79, 81, 83; PricewaterhouseCoopers LLP, *Association of Chief Police Officers: Independent Evaluation of the Operational Trial of Taser* (2004) <[http://www.westmercia.police.uk/assets/\\_files/documents/sep\\_09/wmp\\_\\_1252486572\\_Independent\\_Evaluation\\_of\\_the\\_.pdf](http://www.westmercia.police.uk/assets/_files/documents/sep_09/wmp__1252486572_Independent_Evaluation_of_the_.pdf)> [36]-[42].

<sup>186</sup> Queensland Police, above n 184, 28; NSW Ombudsman, above n 182, 21, 22.

<sup>187</sup> Western Australia Police, *Post Implementation Review of Taser* (2010) <<http://www.police.wa.gov.au/LinkClick.aspx?fileticket=qHmOdYYIvNc3D&tabid=1068>> 7. The review acknowledged a 'perception' that WA Police were over-reliant on Tasers.

<sup>188</sup> See, eg, Starmer Gordon, above n 155.

- Set out the legal basis for the use of force;
- Discuss briefly the need for a range of less lethal options for police which are adapted to different circumstances, in order to protect the right to life;<sup>189</sup> and
- Set out procedures for authorising the issue and use of Tasers, refer to operational procedures and post-incident procedures, and set out a highly prescriptive set of rules of post-incident evidence recovery, which include the need for:
  - recovering wires and probes to show the range at which the Taser was fired;
  - collecting the tags released by the Taser on firing;
  - photographs of the scene;
  - medical examination of any person Tasered;
  - Taser evaluation form and use of force report; and
  - a print-out of the Taser use record.<sup>190</sup>

190. New Zealand also provides detailed guidance to its police officers on the use of Tasers. These guidelines also cover:<sup>191</sup>

- The source of police officers' power to carry Tasers;
- The general law relating to the use of force by police;
- Individual accountability for use of Tasers (with an express warning that Tasers are not to be used on passively resisting individuals);
- The need to make a Perceived Cumulative Assessment of the threat posed by an individual before using a Taser;
- The obligation to use a Taser only to:
  - Defend themselves, or others, if they fear physical injury to themselves, or others, and they can not reasonably protect themselves, or others, less forcefully, or
  - Arrest an offender if they believe on reasonable grounds that the offender poses a threat of physical injury and the arrest cannot be effected less forcefully, or
  - Resolve an incident where a person is acting in a manner likely to physically injure themselves and the incident cannot be resolved less forcefully, or
  - Prevent the escape of an offender if they believe on reasonable grounds that the offender poses a threat of physical injury to any person, and the escape cannot be prevented less forcefully, or
  - Deter attacking animals.

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<sup>189</sup> Police Service of Northern Ireland, *Guidelines on the Operational Use of Taser* (2008) <[http://www.psnl.police.uk/taser\\_egia\\_appendix\\_3\\_part\\_1.pdf](http://www.psnl.police.uk/taser_egia_appendix_3_part_1.pdf)>, 4.

<sup>190</sup> Ibid 5-6. As to investigations of deaths of people who have been Tasered, see also National Institute of Justice, n 176, 6.

<sup>191</sup> See New Zealand Police, *Operational Evaluation of NZ Taser Trial, 2008*. Available at [http://www.policecouncil.ca/reports/Operational\\_Evaluation\\_of\\_the\\_NZ\\_Taser\\_Trial\\_August\\_2008.pdf](http://www.policecouncil.ca/reports/Operational_Evaluation_of_the_NZ_Taser_Trial_August_2008.pdf)

- The need for particular caution when dealing with armed individuals, and the need to ensure a safe distance;

## 8. OC spray/foam

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### 8.1 Non-Victorian Charter laws and policies that regulate police use of OC spray/foam in Victoria

191. OC spray and foam, or 'capsicum' spray, are prohibited weapons for the purposes of the Control of Weapons Act.<sup>192</sup> In Victoria, all operational police now carry OC spray/foam as part of their operational safety equipment.
192. Prior to February 2010, the VPM contained specific rules around the use of OC spray/foam. The old Operational Safety Principles relevantly provided:

***VPM 101-3 Operational Safety and other equipment***

*7 OC spray/foam*

*7.1 Issue*

*7.1.1 Criteria for issue and carriage*

- *OC spray/foam must only be issued to sworn employees who hold a current OSTT qualification and have been specifically trained in the use of OC spray/foam*

...

*7.2 Use*

*7.2.1 Criteria for use*

*Members may only use OC spray/foam where they believe on reasonable grounds it is necessary:*

- *in situations of violence and serious physical confrontation;*
- *in situations where a member believes on reasonable grounds that a violent or serious physical confrontation is imminent;*
- *in situation where a person is involved in violent or other physical conduct likely to seriously injure themselves or result in suicide; or*
- *to deter attacking animals (clause 7.2.1).*

*Members must not use OC spray/foam when a person is passively resisting e.g. hanging limp or refusing to comply with instructions.*

193. The VPM no longer provides any explicit guidance to members in relation to the circumstances in which OC spray/foam may be lawfully used. Instead, the general principles on using force under s 462A of the Crimes Act and the Safety First Philosophy in the VPM (discussed above) apply.

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<sup>192</sup> Control of Weapons Regulations sch 2, item 20.

194. Victoria Police has, however, acknowledged issues with the use of OC spray/foam 'creeping outside policy boundaries'.<sup>193</sup>

## **8.2 A human rights-based approach to OC spray/foam**

195. As has been mentioned in the context of Tasers, the Basic Principles recognise that non-lethal (or less-lethal) weapons such as OC spray/foam have the potential to assist police to uphold the right to life by offering an alternative to the use of lethal force, particularly firearms. The Basic Principles require that governments and law enforcement agencies equip law enforcement officials with various types of weapons and ammunition to allow for the differentiated use of force and firearms, including non-lethal incapacitating weapons.
196. The use of OC spray/foam must, however, be explicitly regulated and officers must be properly trained in relation to the circumstances in which it may be used. Explicit policies controlling the use of OC spray/foam are essential to ensure that this tactical option is only deployed when strictly necessary, after all non-violent means have been exhausted in accordance with human rights standards governing the use of force by police.<sup>194</sup>
197. Although OC spray/foam is a less than lethal option, its use must be properly regulated to ensure that it is not deployed unnecessarily or for compliance reasons. It is concerning that one of the impacts of training deficiencies over at least the last 10 years in Victoria Police is that OC spray/foam is often used as a first option, particularly in dealing with public order or street offences.<sup>195</sup>
198. There is relatively little international guidance on the human rights principles that apply to OC spray/foam. One European case, *Oya Ataman v Turkey*,<sup>196</sup> held that being subjected to OC spray was not an inhuman or degrading treatment or punishment in that case, primarily because the applicant was unable to show any medical harm as a result of being sprayed. On the other hand, the CAT has criticised the use of OC spray against demonstrators in Canada.<sup>197</sup> Although the basis of the criticism was unclear, it seems the CAT believed the use of OC spray inappropriate in the circumstances.
199. As OC spray/foam works by inflaming the respiratory tract and causing swelling of the eyelids, burning and blistering to incapacitate a person, intentionally spraying a person may amount to torture, if the spraying is not justified as a lawful use of force.

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<sup>193</sup> Victoria Police, *OC Spray and Foam Review* (2007), 3. That concern has also been expressed by the OPI in the *2009 OPI Report*, above n 3, 25-29, and in Jude McCulloch, 'Policing the Mentally Ill' (2000) 25 *Alternative Law Journal* 241, 243.

<sup>194</sup> Basic Principles, principles 3 and 4.

<sup>195</sup> Williams, above n 5, 7.

<sup>196</sup> [2007] ECHR 493, [24]-[27].

<sup>197</sup> CAT, *Conclusions and Recommendations of the Committee Against Torture: Canada*, 34<sup>th</sup> sess, UN Doc CAT/C/CR/34/CAN (7 July 2005), [4(i)].

200. Further, although OC spray/foam is undoubtedly less lethal than firearms, some reports have found that use of OC spray/foam has contributed to the deaths of people suffering from pre-existing asthma,<sup>198</sup> and that OC spray /foam may cause death in combination with so-called 'positional restraint' techniques.<sup>199</sup>
201. At a practical level, academics such as Jude McCulloch have criticised reliance on OC spray/foam as creating additional risks of fatal shooting in that:
- As the effective range of OC spray/foam is potentially smaller than the 'danger zone' for edged weapons, the use of OC spray/foam can increase the risk that a confrontation with a person with an edged weapon will result in a shooting if the spray/foam fails.
  - OC spray/foam is said to be less likely to work on those affected by drugs or in psychiatric crisis, making it more likely such people will be shot in a confrontation if the spray/foam does fail.
  - To the extent that it encourages police to get close to potential assailants, OC spray/foam tends to discourage maintaining a distance and using conflict resolution tactics.<sup>200</sup>

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<sup>198</sup> National Institute of Justice, *The Effectiveness and Safety of Pepper Spray* (2003)  
<<http://www.ncjrs.gov/pdffiles1/nij/195739.pdf>> 9-10.

<sup>199</sup> 'Positional restraint' includes such techniques as the hobble restraint or 'hog tie'. See eg, American Civil Liberties Union of Southern California, *Pepper Spray Update: More Fatalities, More Questions* (1995)  
<[http://www.aclu-sc.org/attach/p/Pepper\\_Spray\\_New\\_Questions.pdf](http://www.aclu-sc.org/attach/p/Pepper_Spray_New_Questions.pdf)> 3-4.

<sup>200</sup> McCulloch, above n 193, 243.

## 9. Batons

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### 9.1 Non-Victorian Charter laws and policies that regulate use of batons

202. Extendable batons are prohibited weapons for the purposes of the Control of Weapons Act.<sup>201</sup> Exemptions allow police to use extendable batons.<sup>202</sup> Non-extendable batons are controlled weapons.<sup>203</sup>

203. The VPM does not set out any specific guidance as to when batons may be used. Therefore, police find guidance in the broad provisions of s 462A of the Crimes Act and the broadly stated Safety First Philosophy of the VPM. The OPI has previously commented that '[u]nlike other operational safety equipment, there is no specific written policy within the VPM setting out the circumstances for using a baton' and noting that the general law requires the use of a baton to be proportionate to the threat.<sup>204</sup>

204. As noted in section 4 above, legally, the use of force by Victoria Police cannot be justified in advance of any particular incident in anticipation of circumstances that may require police to defend themselves: police cannot issue 'blanket' authorisations to use force. Criticism of Victoria Police has been made in relation to the issuing of general authorisations to use batons, without specific reference to whether the circumstances demand that level of force.<sup>205</sup>

### 9.2 A human rights-based approach to batons

205. The use of batons, particularly in effecting an arrest, can have significant human rights implications.

206. The human rights which are particularly relevant to physical uses of force, such as baton use, include:

- The right to freedom from torture and inhuman and degrading treatment (s 10, Victorian Charter); and
- The right to liberty and security of the person, in particular regarding arrest and detention (s 21, Victorian Charter);

207. Additionally, the following rights under the Victorian Charter may also be impacted by the use of batons:

- The right to life (s 9);

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<sup>201</sup> Control of Weapons Regulations sch 2, item 25.

<sup>202</sup> State of Victoria, *Victoria Government Gazette*, No G36, 8 September 2005. Police are also exempted from the *Control of Weapons Act* when using weapons for training purposes.

<sup>203</sup> Control of Weapons Regulations sch 3, item 2.

<sup>204</sup> OPI, *2009 OPI Report*, above n 3, 75.

<sup>205</sup> See Hopkins, above n 32, 62-63.

- The right to freedom from discrimination (s 8); and
- The rights of the child regarding their particular vulnerable status (s 17).

208. There is little international jurisprudence about the use of batons or, generally, the physical use of force by police. However, police should be guided by the UN Code of Conduct principle that force should only be used when strictly necessary and only to the extent required for the performance of their duties.<sup>206</sup> The following general human rights principles are also relevant in the context of physical use of force.

**(a) Right to freedom from torture and inhuman and degrading treatment**

209. Assault or the use of unnecessary force where a person is in custody or during an arrest may constitute a breach of the right to protection from inhuman or degrading treatment or punishment.<sup>207</sup> Assaults that occur in transit or interrogation have also been found to violate this right.<sup>208</sup> The European Court has applied a proportionality test when considering whether the degree of force used to effect an arrest was necessary.<sup>209</sup>

210. The European Court has further found that the use of any force against a person in custody or during an arrest which has not been made necessary by the conduct of the person diminishes human dignity, and is, in principle, a violation of human rights.<sup>210</sup>

211. The UNHRC has indicated that whether a particular type of punishment or treatment will amount to torture or other prohibited treatment, depends on the nature, purpose and severity of the treatment applied, and the mental anguish involved, rather than simply physical pain.<sup>211</sup>

212. The UNHRC has emphasised that police officers involved in the arrest and detention of persons must be properly trained and instructed on their obligations regarding the freedom against torture.<sup>212</sup>

**(b) Right to liberty and security of the person**

213. Individuals may be deprived of liberty, but only where the exercise of powers of arrest and detention by state authorities is governed by due process of law and is consistent with recognised standards.

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<sup>206</sup> UN Code of Conduct art 3.

<sup>207</sup> *Ribitsch v Austria* (1995) 21 EHRR 573, [38]; *Balogh v Hungary* [2004] ECHR 361, [45].

<sup>208</sup> *Ireland v United Kingdom* (1978) 2 EHRR 25.

<sup>209</sup> *Hurtado v Switzerland* [1994] ECHR 1.

<sup>210</sup> *Rehbock v Slovenia* [2000] ECHR 645; *Balogh v Hungary* [2004] ECHR 361; *Afanasyev v Ukraine* (2006) 42 EHRR 52.

<sup>211</sup> UNHRC, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, (44<sup>th</sup> sess, 10 March 1992), [10].

<sup>212</sup> *Ibid* [4]-[5].

214. In Canada, 'security of the person' has been interpreted to include freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself.<sup>213</sup>
215. Canadian courts have found that there will be sufficient basis for a violation if the threat is to 'psychological integrity'.<sup>214</sup> However, emotional stress will not be sufficient.<sup>215</sup>
216. The Canadian Supreme Court considered the use of force during physical apprehension in *R v Wilson*.<sup>216</sup> It found that the use by a security guard of excessive force in the apprehension and arrest of a thief violated the right to security of the person. In that case, the guard followed the accused, who had stolen meat, from the store to his car. Without identifying himself as a guard, the guard asked the man to stop and climbed into the passenger side of the vehicle as the accused began to drive away. During the ensuing struggle, the guard applied a carotid throat hold to the accused, rendering him unconscious. The guard arrested the accused when he regained consciousness. The guard's actions were found to have deprived the accused of his security of person contrary to the principles of fundamental justice. The Court further found that the degree of force used was not reasonable and proportionate to the seriousness of the offence. While this case involved a security guard, the principles derived are equally applicable to police officers.
217. Notably, where persons with physical or mental disabilities are imprisoned, the standards imposed by human rights law are higher.<sup>217</sup>

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<sup>213</sup> *Singh v Canada (Minister of Employment and Immigration)* [1985] 1 SCR 177.

<sup>214</sup> *R v Morgentaler (No 2)* (1988) 44 DLR (4<sup>th</sup>) 385; *New Brunswick (Minister of Health and Community Services) v G (J)* (1995) 131 DLR (4<sup>th</sup>) 273.

<sup>215</sup> *Downes v MEI* (1986) 4 FTR 215.

<sup>216</sup> [2004] 1 SCR 76.

<sup>217</sup> *R v Shetty (Responsible Medical Officer)* [2003] EWHC Civ 275.

## 10. Independent Complaints and Investigations of Police Misconduct

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### 10.1 What is the current system for complaints and investigations?

218. A complaint against Victoria Police may be made to:

- the local police command;
- the Police Conduct Unit (Complaints and Compliments) of the Ethical Standards Department (**ESD**); or
- the OPI.

219. In general, complaints made to the OPI will first be referred to the ESD, Victoria Police.

220. The Director, Police Integrity (OPI):

- *must* investigate complaints against the Chief Commissioner or against a Deputy or Assistant Commissioner;
- *may* investigate complaints if the conduct complained of:
  - is of such a nature that the Director considers that investigation of the complaint by the Director is in the public interest; or
  - is in accordance with established practices or procedures of Victoria Police and the Director considers that those practices or procedures should be reviewed.<sup>218</sup>

221. The Director, Police Integrity may also commence an investigation into police conduct, or police policies and procedures, on his or her own motion.<sup>219</sup>

222. The Chief Commissioner must investigate an allegation of serious misconduct against a member of the force which is made to a member of the force.<sup>220</sup> The Chief Commissioner may attempt to resolve a complaint by conciliation.<sup>221</sup> Where a complaint is made to a member of the force, the Chief Commissioner must advise the complainant in writing of the results of the investigation and any action that has been or is proposed to be taken.<sup>222</sup>

223. Hopkins has described the system, in practice, as operating in the following manner:

When the Victoria Police receive a complaint from the OPI, the ESD will classify it and either investigate it, or send it to the regional offices for resolution or in some cases investigation. Matters that involve corruption or serious misconduct, if they are correctly classified, are investigated by ESD.

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<sup>218</sup> *Police Integrity Act 2008* (Vic) s 40(2).

<sup>219</sup> *Ibid* s 44.

<sup>220</sup> *Police Regulation Act* s 86M.

<sup>221</sup> *Police Regulation Act* s 86.

<sup>222</sup> *Police Regulation Act* s 86T.

Between 80-90% of complaints are managed through investigation or alternative dispute resolution by police in regional offices. The remaining 10% of complaints involving “serious misconduct” or corruption are investigated by the Ethical Standards Department. Overall 30-40% of all complaints will be investigated.

The OPI will review complaints in the serious misconduct and corruption bracket, and will provide occasional audits of the remaining 80-90% of complaints. The OPI does not provide information to or invite comment from the complainant prior to completing a review. [notes omitted]<sup>223</sup>

224. A complainant may also bring court proceedings against a member of the Victoria Police, and there is no requirement that a complainant go through a Victoria Police or OPI complaints procedure before commencing proceedings in court.

**(a) Court proceedings**

225. A complaint may result in the criminal prosecution of the police officer/s involved for a criminal offence. This prosecution would be brought by Victoria Police or the Department of Public Prosecutions. The offence would have to be proved against the police officer/s to the criminal standard – that is, beyond reasonable doubt.

226. A complainant in Victoria could also choose to bring court proceedings against a police officer/s themselves. This could take the form of:

- a private prosecution, by the complainant laying an information for an offence, provided the offence is of a public nature;<sup>224</sup> or
- civil proceedings against police in respect of use of force against them. Torts such as assault and battery, negligence, false imprisonment, and misfeasance in a public office, may be committed in the course of the use of excessive or wrongful use of force by police (see section 4 above). The tort would have to be proved against the police officer/s to the civil standard – that is, on the balance of probabilities.

**(b) Investigation of deaths associated with police contact**

227. Deaths associated with police contact are currently investigated by the Victorian Homicide Squad, with oversight from ESD, or, in the case of deaths on the roads such as police disputes, by the Major Collisions Investigations Unit (**MCIU**) with oversight from ESD.<sup>225</sup>

228. The ESD has a responsibility to **actively oversee** investigations into all deaths.<sup>226</sup> 'Active oversight' includes:

- continuous monitoring of the investigation;

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<sup>223</sup> Hopkins, above n 32, 103-104 (notes omitted).

<sup>224</sup> *Armstrong v Hammond* [1958] VR 479; *National Australia Bank v Macfarlane* [2005] VSC 438 [34]-[36].

<sup>225</sup> VPM Policy Rule on Critical Incidents.

<sup>226</sup> Memorandum of Understanding between the Assistant Commissioner (ESD) and the Assistant Commissioner (Crime) signed on 18 July 2003; ESD Investigation Oversight Framework in Appendix Q of the Discipline Investigation Manual.

- making any relevant comment or directing further inquiries if it is considered necessary to satisfy any future internal or external examination of the adequacy and probity of the investigation;
  - ensuring the member investigating the incident advises the ESD officer of developments during the investigation;
  - ensuring the investigation is conducted without bias for or against any police or civilians involved;
  - early proactive identification of both internal and external policy issues; and
  - on-going case management and liaison with the relevant investigator.
229. Following the introduction of the new version of the VPM in February 2010, the relevant policy regarding ESD oversight of critical incidents includes information regarding:
- drug and alcohol testing of police members following involvement in a critical incident; and
  - introduction of an Initial Action Checklist for Managing Critical Incidents, which provides clearer guidance to investigators regarding the appropriate treatment of police members involved in critical incidents, including forensic testing and separation of members.
230. However, no further guidance is available regarding ESD oversight beyond that in existence prior to the introduction of the new VPM.

## **10.2 What independent complaints and investigations mechanisms does a human rights-based approach require?**

231. States are obliged to establish a framework of laws which will protect life to the greatest extent practicable. To this end, states must also ensure any police who wrongfully use force are held accountable, and that use of force is properly monitored to ensure human rights are protected.
232. The European Court has considered the adequacy of states' regulation of the use of force in a number of cases. It has observed that, in addition to being authorised by domestic law, police operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against abuse of force and arbitrariness.<sup>227</sup> The Basic Principles clearly require monitoring of use of force.
233. States have an obligation to ensure there is a prompt, impartial and effective investigation of allegations of breaches of human rights, which must be capable of leading to the identification and punishment of those responsible.<sup>228</sup>

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<sup>227</sup> *Hilfa Hafsteinsdóttir v Iceland*, Judgment of 8 June 2004, [56]; *Makaratzis v Greece* (2005) 41 EHRR 49 [58].

<sup>228</sup> *Aksoy v Turkey* (2002) 34 EHRR 533m [98]-[99]; *Aydin v Turkey* (1998) 25 EHRR 251, [88]-[98]; *Assenov v Bulgaria* (1998) 28 EHRR 652, [102]; *Selmouni v France* (2000) 29 EHRR 403, [79]; *Caloc v France* (2002) 35 EHRR 14.

234. Following a death caused by state use of force, or allegations of torture or ill treatment by police, states must provide an effective independent system to investigate the death or misconduct, determine the cause of any death and, if necessary, to hold those responsible for it accountable.<sup>229</sup>
235. The following human rights under the Victorian Charter are particularly relevant in regard to complaints and investigations mechanisms relating to the use of force by police:
- The right to life (s 9); and
  - The right to freedom from torture and inhuman and degrading treatment (s 10).
236. In the context of the right to life, human rights law has identified a need for an independent complaints and investigations mechanism where a death is associated with police conduct.
237. An actual or potential breach of the substantive obligations imposed by the right to life engages a 'procedural obligation'. The procedural obligation requires states to ensure that there is an independent, impartial, effective and open investigation of deaths, particularly where individuals have been killed as a result of the use of force by state agents.<sup>230</sup> Put broadly, the purpose of the investigation is to ensure the effective implementation of domestic laws that protect life and to ensure accountability for deaths occurring in state custody.
238. In relation to the right to be free from torture, as long as a credible assertion is made, states are also required to have an effective official investigation into any alleged breaches by state agents.<sup>231</sup>
239. Complaints and investigations mechanisms must be human rights compliant to ensure police are held accountable for any breaches of state obligations due to the use of force, and so that public confidence in police is upheld. To avoid any perceived or real risk of collusion, corruption or bias, bodies and individuals investigating potential breaches of the right to life must be truly independent from the individuals they are investigating.
- (a) Independence of investigation**
240. True independence is only achieved when an investigation is hierarchically, institutionally and practically independent of the organisation being investigated, that is:
- (a) the investigators are not from the same chain of command as those being investigated;
  - (b) the investigators are not from the same organisation as those being investigated; and

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<sup>229</sup> *Dodov v Bulgaria* (2008) 47 EHRR 41, [80]; *Vo v France* (2005) 40 EHRR 12, [90]-[91]; *Calvelli and Ciglio v Italy* [2002] ECHR 3, [49]; *Powell v United Kingdom* (2000) 30 EHRR CD 362, [49].

<sup>230</sup> *McCann v United Kingdom* (1996) 21 EHRR 97, [161]; *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [20].

<sup>231</sup> *Labita v Italy* [2000] ECHR 161, [131].

- (c) the investigators do not uncritically rely on the version of events they have received from members of the body being investigated.<sup>232</sup>
241. This means, for example, that investigations into excessive use of force by police will lack sufficient independence when they are carried out by other members of the same police force, even if the investigators work in a different department, or an independent body oversees the investigation.<sup>233</sup>
242. Further, a formally independent body may not be genuinely independent if it employs a significant number of former police officers who still identify culturally as police because there is a risk that, consciously or otherwise, police investigators will be sceptical of complainants and 'softer' on the police concerned.<sup>234</sup>
243. Neither internal nor external oversight can cure the deficiencies of an investigation of a death associated with police contact that is conducted by a department of the police or an associated body of the police. The investigative body itself must be independent. A number of decisions<sup>235</sup> establish that it is not sufficient for an independent body to have oversight of an investigation, where the primary investigation 'on the ground' is carried out by police officers connected organisationally with those under investigation. Supervision of a police investigation by another authority, 'however independent', has been found not to be a sufficient safeguard for the independence of the investigation.<sup>236</sup>

**(b) Adequacy and effectiveness**

244. UK and European case law establishes that, in order adequately to discharge the state's responsibilities in respect of the right to life, an investigation into a death at the hands of state agents should be aimed at:
- bringing the full facts to light;
  - exposing culpable and discreditable conduct (if any) and bringing it to public notice;
  - dispelling suspicion of deliberate wrong doing (if justified);
  - rectifying dangerous practices and procedures (if any); and
  - ensuring that those who have lost their relative may have the satisfaction of knowing that lessons learned from their death may save the lives of others.<sup>237</sup>

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<sup>232</sup> *Ramsahai v Netherlands* [2007] ECHR 393, [335], [338], [340]–[341]; *Jordan v United Kingdom* (2001) 37 EHHR 52, [120].

<sup>233</sup> *Ramsahai v Netherlands* [2007] ECHR 393, [335], [338], [340]–[341]; *Jordan v United Kingdom* (2001) 37 EHHR 52, [120].

<sup>234</sup> Hopkins, above n 32, 43-45, 48.

<sup>235</sup> *Jordan v United Kingdom* (2001) 37 EHHR 52, [120]; *McKerr v United Kingdom* (2002) 34 EHRR 20, [128]; *Kelly v United Kingdom* [2001] ECHR 328, [114].

<sup>236</sup> *Ramsahai v The Netherlands* [2007] ECHR 393, [337]; *Bati v Turkey* [2004] ECHR, [135].

<sup>237</sup> *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [31]; *McKerr v United Kingdom* (2002) 34 EHRR 20, [111]; *Edwards v United Kingdom* (2002) 35 EHRR 487, [69]; *Jordan v United Kingdom*

245. To be effective, the investigation must be capable of achieving these outcomes. It must be capable of leading to a determination of whether the force used was justified and the identification and punishment of those responsible.

**(c) Public scrutiny of investigations**

246. The duty to investigate requires investigations of deaths associated with police contact to be sufficiently open and publicly accountable. There must be sufficient public scrutiny of investigations into deaths associated with police contact to 'secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts'.<sup>238</sup> An investigation which is not open to public scrutiny and fails to give a convincing explanation of events may engender mistrust of investigating authorities.<sup>239</sup>

247. The conduct of coronial inquests in open court will generally satisfy this obligation of public scrutiny. However, it will be necessary for the coroner to be empowered, where necessary in the interests of justice, to conduct a full examination of the primary investigation during the coronial process. Where police officers are not required to give evidence, it will raise legitimate doubts as to the overall integrity of the investigative process.<sup>240</sup>

**(d) Involvement of the next-of-kin**

248. The European Court has placed increasing emphasis on involving the next-of-kin in investigations.<sup>241</sup>

249. The next-of-kin have a legitimate interest in an investigation capable of leading to a determination of whether the force used was justified and the identification and punishment of those responsible. Further, the investigation has among its purposes to ensure, so far as possible, that 'those who have lost their relative may at least have the satisfaction of knowing that lessons learned from [his or her] death may save the lives of others'.<sup>242</sup>

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(2001) 37 EHRR 52, [105]; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, [16]-[19]; *Leonidis v Greece* [2009] ECHR 5, [67].

<sup>238</sup> *Anguelova v Bulgaria* (2004) 38 EHRR 31, [140].

<sup>239</sup> The European Court has tended to find violations of the right to life when such suspicious circumstances arise, a notable example being *Anguelova v Bulgaria* (2004) 38 EHRR 31.

<sup>240</sup> *McKerr v United Kingdom* (2002) 34 EHRR 20, [127].

<sup>241</sup> *Jordan v United Kingdom* (2001) 37 EHRR 52, [105], [133]; see also *Nachova v Bulgaria* (2006) 42 EHRR 43.

<sup>242</sup> *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, [31].

## Schedule 1: Police Monitoring Bodies in Comparable Jurisdictions

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This annexure considers models of external priority setting, monitoring and policy development, from other jurisdictions. It is based on a recent survey of international frameworks and models for police accountability and civilian oversight conducted by Mark Shaw.<sup>243</sup>

### **External review and policy input**

Independent investigation into, and oversight of, systemic issues in police policy, culture and practice is important for ensuring high ethical and professional standards within a police force.

Often this function is exercised by the same body that conducts investigations of complaints.<sup>244</sup> The Police Ombudsman of Northern Ireland (**PONI**) is an example of this. PONI's principal function is to independently investigate complaints against police. However PONI is also empowered to investigate practices or policies without a complaint, provided there is reason to believe doing so would be in the public interest, and is equipped to carry out inquiries as directed by the Secretary of State.<sup>245</sup>

Similarly, the New Zealand Independent Police Conduct Authority, established by the *Independent Police Conduct Authority Act 1988 (NZ)*, receives complaints against police and may investigate any practice, policy or procedure affecting the person making the complaint.<sup>246</sup>

The review and policy function may be ancillary to other functions of an oversight body (such as investigations) or split across several bodies within a jurisdiction.<sup>247</sup> Organisational models also vary according to:

- how investigations may be initiated;
- who conducts investigations;
- whether and the extent to which the oversight body makes recommendations; and
- whether the oversight body is empowered to monitor implementation of recommendations.

The following main organisational models for external review and policy input oversight bodies have been identified in Shaw's international survey<sup>248</sup>:

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<sup>243</sup> Mark Shaw, 'International Frameworks and Models for Police Accountability and Civilian Oversight' (presentation to United Nations Office on Drugs and Crime Roundtable - National Police Reform Efforts: Strengthening Accountability, 7 July 2010).

<sup>244</sup> Ibid.

<sup>245</sup> See Police Ombudsman for Northern Ireland, <<http://www.policeombudsman.org/>>.

<sup>246</sup> *Independent Police Conduct Authority Act 1988 (NZ)* s 12.

<sup>247</sup> Shaw, above n 243, 263.

<sup>248</sup> Ibid.

<b>Model</b>	<b>Features</b>	<b>Example jurisdiction</b>
Civilian audit function	Policy review and recommendations can be triggered by (1) individual complaints; (2) issues raised by a pattern of complaints; or (3) own-motion investigations.	Sao Paulo, Brazil Selected US cities
Civilian policy body	Broad responsibility for public safety policy development and strategy.  May undertake special studies and reports and submit to Government.	South African civilian Safety and Security Secretariats
Representative body	Includes political representatives and responsibility for the appointment and dismissal of senior officers.  May initiate independent reviews of or seek reports from police on particular issues.	Police authorities in the United Kingdom
Standing commissions	Civilian members with broad mandate to 'ensure optimal efficiency' and 'identify factors inhibiting discipline'	Nigerian Police Service Commission

***Setting and monitoring priorities***

Across jurisdictions there are different organisational approaches to the formulation and monitoring of the strategic priorities to which police work. The influence of a civilian agency on the strategic priority setting of a police force depends upon:

- whether elected representatives are included as members;
- whether the body has sufficient resources and permanent staff dedicated to this function;
- whether reports and assessments are open to public scrutiny;
- how consultation processes are structured; and
- whether the body is empowered to appoint and dismiss police leadership.

Shaw's review of priority setting organisations in other jurisdictions shows variance in the level of input and effectiveness:<sup>249</sup>

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<sup>249</sup> Ibid.

<b>Model</b>	<b>Features</b>	<b>Example jurisdiction</b>
Set and monitor police priorities	<p>Determine police priorities after consultation with police</p> <p>Include longer-term strategic objectives, annual objectives and targets</p> <p>Full time staff</p> <p>Performance assessment published for public review</p>	Northern Ireland Police Board
Joint setting and monitoring of priorities	<p>Police and civilian body jointly agree on priorities</p> <p>Process built on premise of building relations between police and public</p> <p>Actively involved in performance monitoring, although not with full time staff</p>	Selected Canadian Police Boards
Police formally consult with civilians	<p>Not specifically aimed at holding police accountable but at building relations</p> <p>No formal monitoring role, rather a forum for raising concerns</p> <p>Often personality driven and unrepresentative of the community</p>	South African Community Policing Forums