7. THE CRIMINAL JUSTICE SYSTEM: RELATIONS WITH POLICE (RECOMMENDATIONS 60 - 61)

1. Introduction

The National Report,¹ completed in 1991, made various related recommendations aimed at improving relationships between Indigenous peoples and the non-Indigenous community. The focus of this Chapter 7 is upon the two recommendations made by the RCIADIC that were aimed at improving the relationships between Indigenous peoples and the police. The National Report emphasised that the relationships between Indigenous peoples and the police ought to be viewed not only with regard to the behavior of individuals, but also in the context of the criminal justice system as a whole, in which the police forces represent the first point of contact between Indigenous peoples and the criminal justice system.

The National Report analysed the historical basis for the current poor relationships between Indigenous and the police and concluded that this was part of the legacy of that history. The National Report concluded with an overview of Indigenous peoples-police relationships existing in each State and the Northern Territory; and in so doing identified improvements in some areas which were identified as providing possible models for further, more wide-ranging and lasting improvement.

2. Elimination of specific Police conduct (Recommendation 60)

**Recommendation 60:** That Police Services take all possible steps to eliminate:

(a) Violent or rough treatment or verbal abuse of Aboriginal persons including women and young people, by police officers; and

(b) The use of racist or offensive language, or the use of racist or derogatory comments in log books and other documents, by police officers. When such conduct is found to have occurred, it should be treated as a serious breach of discipline.

Recommendation 60 contains a number of different key components, which might be summarised as the requirement on the part of the police services to take "**all possible steps**" for the elimination of:

- violence and rough treatment; and

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7. THE CRIMINAL JUSTICE SYSTEM: RELATION WITH POLICE
(RECOMMENDATIONS 60-61)

- racist, abusive or derogatory language generally, and specifically in police log books; and
- that such conduct be regarded as a serious breach of discipline.

The need for Recommendation 60 is echoed in other reports and inquiries that were conducted during a period contemporaneous with the RCIADIC, such as the Report of the National Inquiry into Racist Violence in Australia.²

This Report finds that implementation of Recommendation 60 is generally not explicit or uniform across the Federal, State and Territory jurisdictions. Despite government self-reporting that claims full or partial implementation of Recommendation 60,³ this Report has been unable to locate any legislation, police procedure or guideline that explicitly responds to Recommendation 60 in its entirety.

Although the legislation, policies and procedures and guidelines discussed below are broadly consistent with aspects of Recommendation 60, they generally fall short of complete implementation, and as such fall short of representing "all possible steps" having been taken on the part of the police services and the Commonwealth, State and Territory governments.

2.1 Violence and Rough Treatment

One of the features that distinguish policing from other occupations is the lawful authority given to police to apply force when circumstances call for it. This authority to use coercive force is difficult to reconcile with the elimination of violence and rough treatment reflected in Recommendation 60. As will be discussed below, efforts to identify and articulate the authority to use force, and its limits, are often expressed in general terms, which do not ordinarily refer to the RCIADIC.

A police officer may use such force as is reasonably necessary in order to effect an arrest or to prevent the commission of an indictable offence.⁴ The amount of force

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⁴ See New South Wales Police Force, Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence) (at January 2012) 14; Criminal Code Act 1889 (Qld) sch 1 ('Criminal Code (Qld)') ss 254, 283, 615, 616; Criminal Code Act 1924 (Tas) sch 1 ('Criminal Code (Tas)') ss 26, 30, 31; Crimes Act 1958 (Vic) ss 462A; Criminal Code Act Compilation Act 1913 (WA) s 231. The Courts have recognised that, in some cases, lethal force is justified: R v Turner [1962] VR 30.
the police officer may use will vary according to the resistance to the arrest. The
defence of self defence is available to members of the police forces. Generally, a
police officer can only use such force as is reasonably necessary to make the arrest
or to prevent the escape of the person after arrest. The actions of the police officer
will ordinarily be judged on the reasonableness of their actions on the basis of the
circumstances at the time.

Police may be authorised to use reasonable force upon persons already in custody to:

- secure compliance with lawful and reasonable instructions; or
- prevent escape, injury, damage to property or destruction of evidence.

Reasonable force may also be used in the execution of a search warrant or to
conduct a search.

There is also recognition in the legislation and police codes of conduct that a police
officer may use reasonable force to prevent suicide or any act which they believe will
result in self harm. In certain jurisdictions, such as NSW, it is explicitly recognised
that communication (and not physical force) is the key to suicide intervention.

Although limitations on the use of force are reflected in the legislation and various
police codes of the State and Territory jurisdictions, this Report has not been able to
identify explicit reference to Indigenous peoples in the articulation of the powers and
responsibilities of members of the police force. Rather, the rationale of such
limitations is variously reflected in more general terms as:

- a limitation conditioned by reasonableness, such that police will resort to the
  use of force only when strictly necessary and to the extent required for the

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5 See, eg, Criminal Code Act 1995 (Cth) s 10.4; Criminal Code 2002 (ACT) s 42; Crimes Act 1900
(NSW), ss 418 - 423; Criminal Code (NT) s 29; Criminal Code (Qld) ss 271 - 273; Criminal Law
Consolidation Act 1935 (SA) s 15; Criminal Code (Tas) s 46; Criminal Code (WA) s 248. The defence
of self defence in respect of assault is recognised at common law in Victoria: Zecevic v DPP (Vic)
6 See, eg, Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)
(at January 2012) p 45.
7 Crimes Act 1914 (Cth) s 3G; Police Administration Act 1978 (NT), ss 117, 120D, 120E; Summary
Offences Act 1953 (SA) s 81; Criminal Investigation Act 2006 (WA), ss 16, 43; s 70 Law Enforcement
(Powers and Responsibilities) Act 2002 (NSW). We also note that in the case of searches of the
person, there is a requirement that the search be carried out by a member of the same sex as the
person to be searched Crimes Act 1914 (Cth) 3ZR; Police Administration Act 1978 (NT) s 120E, Law
Enforcement (Powers and Responsibilities) Act 2002 (NSW) s 32(7). In Victoria, specific Acts allow
search warrants to be executed with force where necessary: see, for example, Drugs, Poisons and
Controlled Substances Act 1981 (Vic), section 81(3)(a). There are no equivalent provisions in the
Australian Capital Territory, Queensland or Tasmania.
8 See, eg, Crimes Act 1958 (Vic) s 463B; Code of Practice for CRIME (Custody, Rights, Investigation,
Management and Evidence) (at January 2012) 38.
9 Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence) (at
January 2012) 38.
performance of their duty,\textsuperscript{10} or

- a recognition of the particular nature of police officers' work as being such that they enjoy a special authority that should not be abused, including the right to lawfully use reasonable force to restrain, effect an arrest or execute a warrant.\textsuperscript{11}

For example, the Victoria Police Manual - Breach of the Peace relevantly provides that

"under common law police have the power to take whatever actions are reasonably necessary to prevent a breach of the peace occurring or continuing:

- There must also be a reasonable belief that the threat is imminent;
- Reasonable force may be used;
- All powers cease once the breach or threat ends."\textsuperscript{12}

Similarly, in Queensland, the Operational Procedures Manual\textsuperscript{13} stipulates that all use of force applications by police officers and watch house officers must be:

(i) authorised;
(ii) justified;
(iii) reasonable / proportionate / appropriate;
(iv) legally defensible; and
(v) tactically sound and effective.

The use of force by police officers when effecting arrests and exercising other statutory powers can easily become controversial when the force used is beyond that permitted by the law. Unreasonable or excessive force is an assault, and can attract civil and/or criminal liability.

In our view, the ambiguity in the test for "reasonable force" (and hence identifying what constitutes "excessive force") has the potential to make the legality of the actions of police officers contestable, and allegations of violence or excessive force contestable and difficult to prove. Such problems with proof are also impacted by

\textsuperscript{10} See, eg, Tasmania, which recognises that in the pursuit of their responsibilities, police will resort to the use of force only when strictly necessary and to the extent required for the performance of their duty (based upon the National Police Code of Ethics). See also Police Service Act 2003 (Tas) s 42.
\textsuperscript{12} See, eg. Victorian Police Manual - Procedures and Guidelines, "Breach of the peace" (at 26 March 2015), p.1

7. THE CRIMINAL JUSTICE SYSTEM: RELATION WITH POLICE (RECOMMENDATIONS 60-61)
what is often a lack of independent corroborating evidence of the circumstances giving rise to the use of force, which can be compounded by the apparent under-reporting of uses of force by police.\textsuperscript{14}

2.2 Racist and Derogatory Language

The various anti-discrimination Acts of the Commonwealth, and each State and Territory, contain a prohibition on discrimination, which may include harassment,\textsuperscript{15} on the basis of race.\textsuperscript{16} Although not identical, the coverage under this legislation is broadly similar. Racial discrimination is unlawful in various areas of public life, including, relevantly, the provision of goods and services.\textsuperscript{17} The anti-discrimination legislation defines "services" to include governmental services (which would include the various police forces).\textsuperscript{18}

This prohibition applies to each of the various police forces either as a matter of interpretation, on the basis that the various police forces are providers of "services" within the terms of the legislation, or explicitly via confirmation in policies and guidelines.

For example, section 19 of the Anti-Discrimination Act 1997 (NSW) (‘ADA’) prohibits discrimination on the grounds of race. The police are subject to the ADA on the basis that they are providers of goods and services for the purposes of section 19 of the Act.\textsuperscript{19}

In New South Wales the Courts have also confirmed that police services must be provided in a non-discriminatory manner. In Russell v Commissioner of Police, New South Wales Police Service & Others,\textsuperscript{20} the Tribunal confirmed the application of the ADA to the NSW police force and considered section 6 of the then Police Services Act 1990 (NSW). The Tribunal concluded that the responsibilities of the police

\begin{footnotesize}
\textsuperscript{15} Racial Discrimination Act 1975 (Cth) ss 18C; Equal Opportunity Act 1984 (WA) s 49A; Anti-Discrimination Act 1992 (NT) s 20(1)(b).
\textsuperscript{16} Racial Discrimination Act 1975 (Cth) ss 10 - 16; see definition of "services" Discrimination Act 1991 (ACT) s 20; Anti-Discrimination Act 1997 (NSW) s 19; Anti-Discrimination Act (NT) s 41; Racial Vilification Act 1996 (SA); Equal Opportunity Act 1984 (SA) pt 4, div 5 s 61; Civil Liability Act 1936 (SA) s 73; Anti-Discrimination Act 1998 (Tas) s 17; Equal Opportunity Act 2010 (Vic) s 44; Racial and Religious Tolerance Act 2001 (Vic) s 7; Equal Opportunity Act 1984 (WA) Pt III s 4.
\textsuperscript{19} The Anti-Discrimination Board has undertaken a review of the Police Act 1990 (NSW) in relation to discrimination against a wide variety of people, including Indigenous persons - see: http://www.lawlink.nsw.gov.au/lawlink/adb/l_adb.nsf/pages/adb_review_police_service_act
\textsuperscript{20} Russell v Commissioner of Police, NSW Police Service and Others [2001] NSWADT 32.
\end{footnotesize}
service "include the protection of persons and property from injury and damage, whether arising from criminal acts or in any other way." The Tribunal held that, in relation to section 19 of the ADA, the police service will act unlawfully "when it provides those services, inter alia, in terms which discriminate against a person on the grounds of race."

In addition to the anti-discrimination legislation noted above, there are significant examples of key attitudinal changes within the manuals and statements of principle of the various Commonwealth, State and Territory police forces that reflect Recommendation 60.

The State and Territory police forces often have specific publications dedicated to Indigenous issues, which include strategic direction documents and various brochures governing the relationship between police and the Indigenous community and expressing intolerance to any form of abusive behaviour, physical or verbal. The police forces are also actively recruiting Indigenous peoples to join the police forces, in addition to appointing Aboriginal Community Liaison Officers (‘ACLOs’) (or their equivalent), with responsibility for providing advice and support to police in the management of Indigenous issues across their Local Area Commands. ACLOs are intended to assist in developing, implementing, monitoring and reviewing programs that aim to improve relationships and bring about positive outcomes between police and Indigenous communities. The roles and responsibilities of the ACLO programs include establishing good communication between police and Indigenous communities, encouraging Indigenous communities to communicate and work with police members to solve problems, attending to welfare needs, supporting

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7. THE CRIMINAL JUSTICE SYSTEM: RELATION WITH POLICE (RECOMMENDATIONS 60-61)
Indigenous peoples in custody and helping to resolve disputes involving police and Indigenous communities.

The following discussion provides an indication of certain of the representative policies and guidelines currently on foot in the various State and Territory jurisdictions.

The NSW Police Force Handbook makes special reference to the RCIADIC, and includes the following specific reference to derogatory language:

"Do not use terms such as part Aboriginal, half-caste, quarter-caste and the like - these are offensive to Aboriginal people. When addressing or speaking to Aboriginal persons, you should do so as you would any member of the community. You should never use names, words or terms which may be considered derogatory or which may be taken as offensive."

Following the RCIADIC, Western Australia, Victoria, Queensland, New South Wales and the ACT each established Aboriginal Justice Agreements (AJAs), creating partnerships between state governments (including their respective police forces) and Indigenous communities on justice-related social issues. The AJAs in ACT, Western Australia, Queensland and NSW have expired. Western Australia and Queensland have subsequently introduced the WA Aboriginal Justice Program and the Queensland Just Futures Strategy 2012-2017, respectively. The Victorian AJA is currently in phase 3 (launched on 13 March 2013) and its focus is on "improving justice outcomes by building stronger families and safer communities". The relationship between Indigenous people and the police has been identified as an important point of reform in AJAs and the agreements are considered to be "important in establishing a negotiated policy and service delivery framework for government agencies in their contact with Indigenous people".

The Operational Procedures Manual of the Queensland Police Service contains the following clauses relevant to Recommendation 60:

- clause 6.3.6 largely repeats section 420 of the Police Powers and Responsibilities Act 2000 (Qld), which confirms that Indigenous peoples should be interviewed only with a support person present
- clause 6.3.8 provides that "all communication will be framed, as far as possible, in non-discriminatory and non-offensive language. Guidelines contained in the Service Non-discriminatory Language Guide should be followed when describing persons by appearance"; and
- clause 6.4 deals with cross-cultural issues and provides for education and training for police officers "as a part of an overall strategy to improve service to Indigenous and multicultural community groups."

The Code of Conduct for the Queensland Public Service, which applies to the Queensland Police Service, includes high level commitment to issues such as ethical

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25 State of Queensland Public Service Commission, Code of Conduct For the Queensland Public Service (1 January 2011)
standards and respectful engagement with the community, but does not refer to specific standards regarding the issues captured by Recommendation 60, such as rough treatment, verbal abuse, or offensive language.

The Tasmania Police have issued an Aboriginal Strategic Plan, which identifies as certain of its guiding principles:

- "Tasmanian Police will provide a service which is sensitive to the needs and requirements of the Aboriginal community and free of racist and discriminatory behavior by its personnel;
- personnel will act consistently in a humane, ethical and accountable way, recognising that their use of discretion is central to improving the relationship Aboriginal people have with Tasmania Police and the criminal justice system; and
- Aboriginal people have the right to live in an environment free of the threat of violence, crime and fear."

The WA Police Service Code of Conduct and the Strategic Policy on Police and Aboriginal People relevantly outline the WA Police Service's policies for engagement with Indigenous people in relation to the delivery of police protection and services.

Sections 2.6, 2.7, 2.12 and 2.13 of the Code of Conduct provide:

**Section 2.6**
Your private interests cannot conflict, or be perceived to conflict with, your public duty. You must ensure that you behave or act in a manner that is objective and without bias of:
- personal beliefs or attitudes;
- personal or business interests or rights; or
- the interests or rights of your family, friends or colleagues.
You are expected to conduct yourself, whether on or off duty, in a manner which preserves public confidence and trust in the integrity, objectivity and impartiality of the WA Police.

**Section 2.7**
It is unethical and unlawful to discriminate in the workplace and in service delivery on the following grounds:
- Race
- Racial Harassment
Victimisation is also treated as discrimination.
Harassment is any unwelcome comment or action of a sexual or racial nature which results in a person feeling intimidated, offended, humiliated or

See also Public Sector Ethics Act 1994 (Qld), which is referred to by the Code of Conduct.

Department of Police and Emergency Management, Aboriginal Strategic Plan (13 February 2014)

Tasmania Police 3


7. THE CRIMINAL JUSTICE SYSTEM: RELATION WITH POLICE
(RECOMMENDATIONS 60-61)
embarrassed. Discrimination, harassment and victimisation, both direct and indirect, will not be tolerated.

Section 2.12
You must not use your powers or office for personal gain or abuse your powers to cause a detriment to any other person. Always ensure that you do not exceed your legal powers. In exercising discretion within the law, take heed of relevant facts, be honest, impartial and consistent, and never act arbitrarily or with malice. Treat all individuals fairly and without bias. Be objective and impartial in your investigations and presentation of evidence. Noble cause corruption or strengthening a case against a suspect through coercion, selective or biased investigations or non-disclosure of critical evidence is totally unacceptable."

Section 2.13
Inappropriate, offensive, crude or obscene language or images are unacceptable at all times.

In its Strategic Policy on Police and Aboriginal People, the WA Police Force emphasises an ongoing commitment to enhancing the level and quality of its police protection and services in collaboration with the Indigenous community. The policy states that the primary focus of the WA Police Service is the provision of equitable and accessible policing services while fostering a beneficial relationship with Indigenous people. It also states that it is the fundamental right of all Australians to live in a safe and secure environment an upholding this right is a core function of the WA Police Service.

The WA Police Service Code of Conduct stipulates that “discrimination, harassment, and victimisation”, will not be tolerated, although it is not clear whether any breach of the code will constitute a serious breach of discipline in the sense reflected in Recommendation 60. This Report has not been able to locate any information on the steps taken to enforce or check compliance with the relevant provisions of the Code of Conduct and Strategic Policy.

This Report was also unable to locate any specific police procedure or guideline that explicitly responds to Recommendation 60 within the Northern Territory. Nevertheless, the Northern Territory Police Service is subject to the Principles and Code of Conduct of the Public Sector, published in accordance with Part 2 of the Public Sector Employment and Management Regulations. Clause 18 of the Code of Conduct requires that employees comply with the provisions of the Anti-Discrimination Act (NT) in their dealings with members of the public.

2.3 Police Log Books

This Report has been unable to locate any widespread express prohibition on the use of racist or derogatory language in police log books. Rather, such policy documents that refer to police log books are expressed in more general terms. For

example, clause 14.26.7 of the Operational Procedures Manual\(^{30}\) of the Queensland Police Service provides for random checks of the entries of official police notebooks for their correct use. The clause does not, however, define what "correct use" is.

### 2.4 Breach of Discipline

Nor have we been able to locate universal acknowledgment that instances of the racist or offensive conduct the subject of Recommendation 60 will be regarded as a serious breach of discipline, or which set out the sanctions that will apply in such circumstances.

In all Commonwealth, State and Territory jurisdictions, there are provisions for disciplinary proceedings against police officers.\(^ {31}\) Various disciplinary offences are set out in the legislation embracing specified types of misconduct, including:

- breaching legislation or regulations which govern the police force;\(^ {32}\)
- failing to comply with standing orders or instructions;\(^ {33}\)
- disgraceful or improper conduct in office or in any other capacity;\(^ {34}\)
- acting in a manner prejudicial to good order and discipline in the police force;\(^ {35}\)
- acting in a manner likely to bring discredit to the police force;\(^ {36}\) and
- committing an offence against the law.\(^ {37}\)

In the Northern Territory, the Commissioner of Police may dismiss a police officer where he or she believes the officer has committed a breach of discipline and it is in

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\(^{31}\) *Australian Federal Police Act 1979* (Cth) s 40; *Police Administration Act 1978* (NT) s 14A, 14C, 76-84J, 94; *Police Act 1990* (NSW) pt 9 div 1; *Police Service Administration Act 1990* (Qld) s 7.2, 7.4; *Police Act 1998* (SA) s 38-41; *Police (Complaints and Disciplinary Proceedings) Act 1985* (SA); *Police Service Act 2003* (Tas) s 43, 54; *Victoria Police Act 2013* (Vic) Pt 7; *Police Act 1892* (WA) s 23, 33, 33A to 33J.

\(^{32}\) See, eg, definition of "breach of discipline" in *Police Service Administration Act 1990* (Qld) s 1.4; *Police (Complaints and Disciplinary Proceedings) Act 1985* (SA) s 3(1); *Victoria Police Act 2013* (Vic) Pt 7 s 125(1).

\(^{33}\) See, eg, *Police Administration Act 1978* (NT) s 76(d); *Police Service (Discipline) Regulations 1990* (Qld) s 9(1)(c)-(d); *Victoria Police Act 2013* (Vic) Pt 7 s 125(1).

\(^{34}\) *Police Administration Act 1978* (NT) s 76(a); *Police Service Administration Act 1990* (Qld) s 1.4; *Victoria - Victoria Police Act 2013*(Vic), section 125(1)(j). There are no equivalent provisions in the other jurisdictions.

\(^{35}\) *Victoria Police Act 2013* (Vic) s 125(1)(m). There are no equivalent provisions in the other jurisdictions.

\(^{36}\) *Victoria Police Act 2013* (Vic) s 125(1)(h). There are no equivalent provisions in the other jurisdictions.

\(^{37}\) See, eg, *Police Administration Act 1978* (NT) s 76(g); *Police Service (Discipline) Regulation 1990* (Qld) s 9(1)(g); *Victoria Police Act 2013* (Vic) s 125(1)(n). There are no equivalent provisions in the other jurisdictions.
the public interest for the officer to be dismissed. The results from investigations of breaches of discipline may be used in criminal proceedings.

In Queensland, "breaches of discipline" and "misconduct" are punishable under the Police Service Administration Act 1990 (Qld). In addition, if a police officer is found, by a prescribed officer, to be guilty of misconduct, the Commissioner of the Police Service must give written notice of the finding and discipline imposed to the officer and the Crime and Corruption Commission. The Commission also has powers to make decisions concerning "official misconduct" which is conduct amounting to criminal offences or disciplinary breaches of sufficient seriousness to warrant termination of services. The Commission released a report into policing in Indigenous communities in November 2009. Further, in 2010 a report was released by the Crime and Corruption Commission into the death, initial investigation and inquest into the death of an Indigenous person in police custody on Palm Island in 2004. In addition, the QPS Ethical Standards Command has the goal of ensuring that the community has full confidence in and respect for the Queensland Police Service. The Command manages the internal discipline process whilst being responsible for promoting ethical behaviour, discipline and professional practice. However, we were unable to locate any information about specific complaints concerning Indigenous peoples.

While it is likely that the broad instances of misconduct outlined above might capture racist or offensive conduct or the inappropriate use of police log books, this is by no means clear.

It is beyond the scope of this Report to examine in detail the history of utilisation of the procedures in place for making formal complaints regarding police misconduct (including allegations of violence or rough treatment) during the criminal investigation process, other than to note a general lack of awareness among Indigenous peoples of these procedures, and a reluctance on the part of Indigenous peoples to exercise the complaints process.

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38 Police Administration Act 1978 (NT) s 78.
39 Police Administration Act 1978 (NT) s 160A. There are no equivalent provisions in the other jurisdictions.
40 Police Service Administration Act 1990 (Qld) s 7.4(2).
41 Police Service Administration Act 1990 (Qld) s 7.4(2A).
42 The Crime and Corruption Commission (previously the Crime and Misconduct Commission) has been established as an investigatory unit operating on its own initiative and on complaints of official misconduct by police officers: see Crime and Corruption Act 2001 (Qld) s 35 (previously the Crime and Misconduct Act 2001). Official misconduct is conduct of specified types amounting to criminal offences or disciplinary breaches of sufficient seriousness to warrant termination of services: see Crime and Corruption Act 2001 (Qld) s 50. There are no equivalent provisions in the other jurisdictions.
2.5 Ongoing reporting of violence and discrimination

Despite the reported implementation of Recommendation 60 by the State and Territory governments, there are continuing allegations of violence and verbal abuse being perpetuated by members of the police forces against members of the Indigenous community. If such allegations are true, this has the capacity to call into question the effectiveness of implementation measures, and the limitations of State and Territory government monitoring such implementation, and may be suggestive of gaps between implementation and practice.

Statistical and other information suggests ongoing concern on the part of the Indigenous community about relations with police. As discussed below, this information suggests that, in some instances, instead of improvement in the relations between the Indigenous community and the police forces, there seems to have been little improvement, or perhaps even deterioration. This concern includes allegations relating to harassment, over policing and, in some instances, allegations of the use of excessive physical force by police officers.

The Australian Bureau of Statistics (‘ABS’) National Aboriginal and Torres Strait Islander Surveys (‘NATISS’) provide significant data on the contact between Indigenous people and the criminal justice system. The NATISS is conducted every six years. The ABS conducted the 1994 NATISS between April to July 1994. The 2002 NATISS was conducted between August 2002 and April 2003. The 2008 NATISS was conducted between August 2008 and April 2009. There have been no further NATISS social surveys published by the ABS since 2008.

The 1994 Survey asked questions relating to what it described as "incidences of friction with police", including whether a person reported being "hassled" or physically assaulted by the police in the last year. For the purposes of the 1994 Survey, "hassled" was defined to include "being harassed, picked on, bullied, caused worry or embarrassment." The 1994 Survey found that approximately ten per cent of all Indigenous persons interviewed aged thirteen years and over reported being "hassled" by police during the twelve months prior to being interviewed. Some fourteen per cent of males and five per cent of females said they were hassled. The Survey found that an estimated twenty-two per cent of males aged between fifteen and nineteen years reported being hassled. Approximately three per cent of persons aged thirteen years and

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47 Australian Bureau of Statistics, National Aboriginal and Torres Strait Islander Social Survey 1994 (Survey, 4190.0, 1994) 68.
48 Australian Bureau of Statistics, National Aboriginal and Torres Strait Islander Social Survey 1994 (Survey, 4190.0, 1994) 59.
over said they had been physically assaulted by police in the twelve months before the interview. 49

The subsequent ABS survey conducted in 2002 reflected differences in how the data was collected, and the inclusion of new survey items. The 2002 Survey did not require the same information on the nature of the survey respondents’ contact with police. However, sixteen per cent of Indigenous peoples aged fifteen or over reported being arrested at least once in the previous five years, and seven per cent reported being imprisoned during the same time frame. 50 The ABS noted that the proportion of Indigenous people who reported having been arrested at least once in the previous five years declined by about one-fifth between 1994 (20%) and 2002 (16%). The proportion who reported being arrested once only in the previous five years was also down in 2002 (7% compared to 9% in 1994), contributing to what the ABS described as “the overall improved outcome”. 51

According to the NATISS, in 2008, 15% of Indigenous peoples aged 15 years and over had been arrested in the last five years either once, or more than once. 52 This rate was higher in remote (19%) than non-remote (14%) areas.

Similar concerns are also reflected in the Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody (‘Victorian Implementation Review’), 53 which was tabled in Parliament on 27 October 2005.

The Victorian Implementation Review noted:

"It would be no exaggeration to say that the positive accounts put forward by police and some Aboriginal individuals or groups pale into virtual insignificance when set against what can only be described as an avalanche of complaints about police attitudes and behaviour received by the review team from the Aboriginal community. The content of these complaints about matters allegedly [ranged] from straightforward, systemic harassment to very serious acts of violence …" 54

Reference was made in the Victorian Implementation Review to “what was seen as the systemic harassment built into police operations with regard to the Aboriginal community”, with such allegations “far too numerous to be quoted in their entirety”,

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49 Australian Bureau of Statistics, National Aboriginal and Torres Strait Islander Social Survey 1994 (Survey, 4190.0, 1994) 59.
50 Australian Bureau of Statistics, National Aboriginal and Torres Strait Islander Social Survey 1994 (Survey, 4190.0, 1994) 14.
53 Victoria, Royal Commission into Aboriginal Deaths in Custody, Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody (2005) vol 1
and that the examples indicate "how strongly this phenomenon is perceived and resented by Aboriginal people, particularly in relation to youth". Similar issues are also raised by the Report on Indigenous Deaths in Custody 1989 to 1996 prepared by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner for the Aboriginal and Torres Strait Islander Commission (the 'ATSIC Report'). The ATSIC Report used findings of coronial inquests in the relevant reporting period as a means of auditing the implementation of the recommendations of the RCIADIC. In relation to Policing Practices, the ATSIC Report noted that:

- "6.1 … the circumstances outlined in some of the profiles indicate that major problems still exist in policing and police custodial practices. There were allegations of rough treatment by police in a number of profiles, although these allegations were not accepted by the coroners."

...  

- 6.6 There has been some patchy commitment to Aboriginal and Torres Strait Islander community involvement in setting police methods, but recent indications are that the commitment must be reaffirmed."  

The ATSIC Report referred to the 1994 NATISS, discussed above, which it said cast doubts on governmental claims of full or partial implementation of Recommendation 60, and instead indicated that nearly one quarter of all Indigenous young people aged 15-19 years reported police harassment during the survey period.

The ATSIC Report concluded that the cases investigated by the coroners and reviewed for the preparation of the Report also cast doubts upon the claims of implementation of Recommendation 60. The Report noted that several of the deaths during the reporting period involved allegations of rough treatment by police, although any such cases were not listed as breaches of Recommendation 60 because the Coroner did not accept the claims.

The ATSIC Report also noted that Aboriginal Legal Services in various State and Territory jurisdictions regularly receive complaints about offensive and abusive language and behaviour from police, and dispute that racist behaviour is regarded by police as a "serious breach of discipline."
It appears that, at the very least, there may be significant differences between the government assessments and views and experiences of the Indigenous community, and concerns about violent or rough treatment, verbal abuse and racist or offensive language by police officers remain.

3. Review of the use of para-military forces (Recommendation 61)

Recommendation 61: That all Police Services review their use of para-military forces such as the New South Wales SWOS and TRG units to ensure that there is no avoidable use of such units in circumstances affecting Aboriginal communities.

At present, each Federal, State and Territory jurisdiction maintains a police paramilitary unit or police tactical group ("PTG"). Generally, these PTG units form part of each Federal, State or Territory’s policing apparatus, although often with their own executive, administrative, operational and training components.

The RCIADIC was very critical of the use of police paramilitary units to police Indigenous communities, particularly in light of the death of David Gundy in New South Wales. The Gundy Report was critical of the methods of police paramilitary units, and provided a detailed account of what it regarded as systemic problems in investigatory procedures, police culture, and the processes of accountability of such units. The Gundy Report was damning of the fatal raid which resulted in Gundy’s death; noting that Gundy was killed during "an unlawful raid on his home … Police had no lawful right to be in his home at all, much less to point a cocked and loaded shotgun at him." The Gundy Report also suggests that at the time of the inquiry, lessons from the raid had not been learnt, with Commissioner Wooten noting that:

"Regrettably to this day, police have refused to recognise the shortcomings in the training and methods of SWOS, the unlawfulness of their raid, or the patent untruth on which it was based. Instead they have sought to denigrate and blame David Gundy for what happened, although he was in truth a law-abiding, hard-working family man. The killing of this man was followed by an assassination of his character." (at page 4).

The need for Recommendation 61 is also confirmed in other contemporaneous reports, including the report prepared by the Human Rights and Equal Opportunity Commission on Aboriginal-Police Relations in Redfern, New South Wales, in May 1990 ("HREOC Report"), and, more generally, the Report of the National Inquiry into Racist Violence in Australia. The HREOC Report examined various paramilitary units of NSW Police, variously named the Special Weapons and Operations Squad (SWOG) and the Tactical Response Group (TRG), and outlined instances of violence against Indigenous persons.

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63 Aboriginal-Police Relations in Redfern: With Special Reference to the "Police Raid" of 8 February 1990, Report Commissioned by the National Inquiry into Racist Violence, C Cunneen, Aboriginal Law Centre, Law Faculty, University of NSW, May 1990.

May 2015
Without question, the evidence presented to the RCIAD, HREOC and the National Inquiry into Racist Violence suggested that the use of paramilitary police units in Indigenous communities challenged the authority and effectiveness of local police and jeopardised accountability, consultation and community policing strategies.

The hearings for each of these inquiries heard substantial criticism by Indigenous peoples of particular police practices, including harassment and the use of the police paramilitary units, such as the TRG, which it was said broke down attempts to establish better community relations. The inquiries considered that the use of police paramilitary units was responsible for the further deterioration in Indigenous-police relations in areas where they are deployed, and more broadly, led to feelings of provocation and over-policing, and could lead to unnecessary confrontations between the Indigenous community and the police forces.

The Report of the National Inquiry into Racist Violence noted:

"Of fundamental importance to the questions of Aboriginal/police relations and notions of community policing is the fact that the TRG is the very antithesis of any notion of the relationship between police and community. There is a predetermined absence of any relationship to a local community. One consequence of tactical response policing is that there is no requirement to consider the long term effects of particular methods of control. In addition, because of the nature and duties of the squad, the style of intervention is likely to revolve around the routine use of force. The consequence of such policing methods is further antagonism, alienation and resistance from those groups the subject of control." 66

3.1 Police Tactical Groups (PTGs) at the Federal, State and Territory Level

In order to understand the findings and recommendations of this Report in relation to the implementation of Recommendation 61, it is helpful to understand the background and role of the PTGs.

Since 1978, the Australian government's National Counter-Terrorism Plan 67 has required each state and territory police force to maintain a specialised counter-terrorist and hostage rescue unit or PTG jointly funded by the federal government and respective State and Territory governments. 68

PTGs are intended to provide specialised police capability to the community and to support police operations. PTGs are capable of deployment at short notice to undertake a variety of specialist policing tasks, including the resolution of higher risk planned and emergency policing operations. PTGs directly respond to and support their respective State and Territory Police forces in high-risk incidents, such as sieges, with specialised tactical, negotiation, intelligence and command-support services which are generally beyond the scope of, or otherwise exceed, normal

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67 National Counter Terrorism Committee, 'National Counter-Terrorism Plan' (Committee Report, 3rd edition, National Counter Terrorism Committee, 2012).
68 Ibid.
police capabilities. PTGs often have available a variety of “use of force” options (including less lethal options) that are not necessarily available to general duties members of the Police Forces.

At present, the Federal, State and Territory Police Tactical Units comprise:

- Australian Federal Police - Specialist Response Group;
- New South Wales - Tactical Operations Unit;
- Northern Territory - Territory Response Group;
- Queensland - Special Emergency Response Team;
- South Australia - Special Tasks and Rescue Group;
- Tasmania - Special Operations Group;
- Victoria - Special Operations Group; and
- Western Australia - Tactical Response Group.

Our review of the limited publicly available material regarding PTGs confirms that their tasks and responsibilities generally include a selection of the following:

- Resolving siege and hostage situations, as well as armed offender situations;
- Counter-terrorism, hijacking and bomb disposal operations;
- Close personal protection and the escort and security of VIPs, internationally protected persons; Heads of State and vulnerable or endangered witnesses;
- Providing a negotiation service in high risk and critical situations;
- Undertaking execution of warrants and searches of premises in high risk situations;
- The arrest of armed and dangerous offenders;
- Escorting and securing dangerous prisoners in high risk situations;

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74 Note the South Australia Police website does not currently contain any information on the South Australian police force’s Tactical Unit.


- Civil disorder and riot / crowd control;
- Disaster response; and
- Providing support services for major operations assessed as being high risk.

On the basis of the above examples of the common PTG roles, it is difficult to see a basis for deployment in the ordinary course or as a matter of routine, in relation to Indigenous communities or Indigenous individuals.

There is limited material publicly available that sets out a mission statement, or the bases upon which a PTG ought be deployed. Such publicly available material as there is does not explicitly refer to Indigenous communities.

For example, the NSW Police Force Handbook\(^\text{78}\) describes the mission of the Tactical Operations Unit (TOU) as being:

"to provide extraordinary operational support on a 24-hour basis to all police with the intent of resolving high risk situations without loss of life, injury of persons or damage to property. The TOU response to a high risk situation will generally occur in conjunction with the deployment of Police Negotiators."

The NSW Police Force Handbook confirms that the TOU may be deployed to the following high risk situations:

- Siege/hostage situations;
- Arrest of armed and dangerous offenders;
- Conducting high risk entries and searches of premises;
- Escorts deemed to be of a high risk nature;
- Security of Internationally Protected Persons, Heads of State and holders of high public office assessed at risk; and
- Providing support services for major operations considered high risk.

The definition of a "high risk situation" utilised by the NSW Police Force for the purposes of ascertaining the appropriateness of TOU deployment is derived from the National Guidelines for Deployment of Police to High Risk Situations, Deployment of Police Negotiators and the Use of Lethal Force developed by the Australian Centre for Policing Research;\(^\text{79}\) and provides:

**High Risk Situations.**

*The circumstances and types of situations which may be defined as High Risk vary widely. The essential judgement that needs to be exercised is whether the real or*


impending violence or threat to be countered is such that the degree of force that could be applied by the police is fully justified. In this context, one or more of the following criteria may be used to define High Risk for the purpose of these guidelines.

(a) Seriousness of the offence committed by the suspect / offender;

(b) Expressed intention by suspect/s to use Lethal Force;

(c) Reasonable grounds to believe that the suspect:
   - may use Lethal Force;
   - has or may cause injury / death;
   - has issued threats to kill or injure any persons;

(d) The suspect has:
   - a prior history of violence
   - is exhibiting violence now.

(e) Involvement of innocent participants (e.g., hostages, VIPs, or bystanders).

A similar definition based upon the National Guidelines is also contained in the Operational Procedures Manual of the Queensland Police Service,\(^{80}\) which also sets out the bases upon which deployment of the Special Emergency Response Team (SERT) will take place.

The NSW Police Force Handbook sets out the processes regarding requests for assistance from the TOU for both emergency responses and pre-planned operations, and required authorisations for deployment of the TOU and the use of specialised weapons and tactics and the proposed use of force.\(^{81}\) The use of specialised weapons and the proposed use of force must be authorised by the relevant Assistant Commissioner within the NSW Police Force. We note that the public version of the NSW Police Force Handbook does not appear to require such operational decisions to be approved by any official external to the NSW Police Force. Our review of the publicly available material for other jurisdictions suggests that this is the norm throughout the States and Territories.

The Victoria Police Website states the following in relation to Specialist Operations Group (SOG) of the Victoria Police:\(^{82}\)

"The Special Operations Group was formed in 1977. Its main function was to provide a response to politically motivated and criminal terrorist activity. Today, this remains the number one priority for the Special Operations Group.

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\(^{82}\) Victoria Police, ‘Special Operations Group’ (20 February 2012) Victoria Police
Responding to critical incidents

The SOG responds to unplanned operational critical incidents such as sieges and siege hostage situations, armed offender tasks and bomb response incidents. The squad also assists operational police in planned operations involving apprehension of dangerous suspects.

Developing non-lethal tactics

In recent years the SOG has developed a range of non-lethal options for dealing with violent suspects. Less-lethal tactics have been used to resolve situations involving violent criminal suspects and persons with a mental disorder."

Providing specialist skills and equipment

The SOG also provides specialist assistance in performing tasks which are beyond the scope of operational police. Some of these tasks may require specialist equipment or expertise in certain areas.

The Victoria Police Special Operations Group has a proud history of excellence in a difficult field of policing. The SOG’s highly trained professional officers provide a valuable service to Victoria Police and the Victorian community."

The Operational Procedures Manual of the Queensland Police Service details the process for authorisation of call out of the Special Emergency Response Team (SERT) and call out procedure, as well as the command, control and coordination of SERT operational activities.

The use of the SERT is contemplated in situations which are regarded as "Major Incidents". Chapter 17 of the Manual, entitled "Major Incidents", does not include any mention of Indigenous communities. Major Incident is defined in the Operational Procedures Manual as:

Major incident
means: 
(i) any occurrence that requires the implementation of a major incident response by one or more of the emergency services, Queensland Health, other State Government authority (e.g. biosecurity threat response by Primary Industries and Fisheries) or a local government authority (e.g. Gold Coast City Council) for:
(a) the rescue and transport of a proportionate number of casualties;
(b) the involvement, directly or indirectly, of a large number of people;
(c) the handling of a large number of enquiries likely to be generated from both the public and news media in response to the incident;

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7. THE CRIMINAL JUSTICE SYSTEM: RELATION WITH POLICE (RECOMMENDATIONS 60-61)
(d) any incident that requires the large scale combined resources of the emergency services; or
(e) the mobilisation and organisation of the emergency services, local government authority and supporting organisations (e.g. Red Cross, Salvation Army) to cater for the threat of death, serious injury or homelessness to a large number of people; or
(ii) an emergency situation declared under the Public Safety Preservation Act.

3.2 Implementation of Recommendation 61

In light of the serious nature of the background to the making of Recommendation 61, including the suggestion of discriminatory policing practices and the excessive use of force in relation to Indigenous communities recognised by the National Report, the HREOC Report, and the Report of the National Inquiry into Racist Violence, it is of concern that this Report has been unable to locate any explicit legislative or administrative implementation of Recommendation 61 at the Commonwealth, State or Territory level.

Despite that, it appears that all jurisdictions claim to have either fully or partially implemented Recommendation 61.85 The Queensland Government confirmed that it "supported" Recommendation 61 in its 1993 Implementation Report,86 and confirmed it had fully "implemented" the Recommendation in its 1997 Implementation Report.87 The Victoria Police have also claimed that Recommendation 61 has been "fully implemented".88 To the extent that such self-assessment is based in whole or in part upon policies that are not published, much less implemented in legislation, it is difficult to properly monitor or assess such measures.

The sensitive nature of the operational activities carried out by the various PTGs may readily explain this lack of publicly available information and records, although in our view this may do little to counter the concerns expressed within the National Report, and by the Indigenous community, about Indigenous relations with police and the use of PTGs.

In relation to Recommendation 61, it is however promising to note that the ATSIC Report89 found that concerns about the inappropriate use of PTGs or specialist response units arose in only one of the cases that it considered in the relevant

reporting period for the Report, which related to the shooting of a psychiatrically disturbed traditional Indigenous man by a member of a police paramilitary unit. The Indigenous community felt that the use of the unit was unnecessary. The Coroner did not accept this criticism of the police, although he did mention the failure to attempt negotiation through the use of the Aboriginal Police Aides present.  

The ATSIC Report also identified what it described as "the responsible use of such a unit" as being evident in the recapture of an Indigenous prisoner on 16 March 1996. According to the ATSIC Report, the New South Wales Police Service State Protection Group negotiator used taped messages from family members to achieve the peaceful surrender of a prisoner within forty minutes, following earlier unsuccessful negotiations during a ten hour siege. 

Similarly, in 2005 Victoria Police advised the Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody that there had been no incidents where the Special Operations Group (SOG) has been required to specifically attend any incidents involving Indigenous communities since 1991.

4. Conclusion

The legislative and policy documents available for review for the purposes of the preparation of this Report confirm that significant and promising attitudinal changes have been made to the police system since the National Report, with some element of reforming legislation and/or high level policy documentation being promulgated in all States and Territories.

Despite this, the structure and regulation of the police forces remains varied throughout Australia. There has been no uniform approach to the issue of relations between the Indigenous community and the various police forces, and its impact upon indigenous deaths in custody, with different State and Territory legislation and administrative policies in operation. This lack of co-ordination has limited our ability to monitor the implementation of the National Report's recommendations and the effectiveness of reform.

Positive relations with the police forces can make a key contribution to the prevention of deaths in custody. In our view, this contribution will be enhanced by a concerted effort to effectively and explicitly implement a comprehensive response to the recommendations aimed at improving police relationships and the deployment of special police services. This implementation will be assisted by consistent monitoring and analysis to assess whether action has been taken to rectify the practices and systems criticised in the National Report.

It has been difficult to accurately measure the implementation of Recommendations 60 and 61, as the key documents that contain this information often take the form of

police rules, operating manuals, policies, guidelines, codes of practice and other internal documents. Generally, this information is not readily accessible to the general public. For example, at the time of writing, only two police forces (New South Wales and Queensland) publish police handbooks on their websites as a matter of course. Until recently, the Tasmania Police Manual was also posted on the Tasmania Police website. At present, the Tasmania, Northern Territory, Australian Capital Territory and South Australian police manuals are not publicly available. The Victorian and Western Australian police manuals are available for purchase by the public.

Incomplete legislative frameworks and a lack of public information regarding the charters, methodologies, and operational basis for deployment of the specialist PTGs means that the role of these services is not well understood. This lack of information itself might foster suspicion, especially in light of previous criticism of the role and use of PTGs in relation to Indigenous communities. Furthermore, it appears that the current legislation and police procedures, to the extent that they are published in some jurisdictions, may not necessarily reflect the reality of how the specialist PTGs operate “on the ground”.

We have noted in this Chapter the apparent difference between the government assessments and views and experiences of the Indigenous community. This Report is not in a position to make any definitive pronouncement on either the existence or the extent of racism and abusive behaviour towards Indigenous peoples within the various police forces. We recognise, however, that a strengthening of the implementation of Recommendations 60 and 61 provides an important opportunity for the police forces to enhance their legislative and policy frameworks and to entrench an explicit requirement that police exercise their functions in a way that promotes, respects and protects human rights, and confirms that violence, unlawful discrimination, and harassment are forms of prohibited conduct that constitute grounds for disciplinary action. This Report recommends that police forces continue to develop and maintain a strategic focus on safety and avoiding or minimising the use of force.

In our view, clearer directions and guidelines should be provided to the police and made public so that there are efficient mechanisms, frameworks and tools in place to ensure the police forces are publicly accountable for their actions, which is crucial if relationships between Indigenous peoples and police are to continue to improve.

This Report accepts that any legislative implementation of Recommendations 60 and 61 should also acknowledge the realities of policing and the difficult nature of the policing role, especially with the wide requirement for and use of discretion at all levels of operational policing. To the extent that any amendments to relevant legislative or administrative policy provisions are proposed to be made to align with, or more explicitly reflect, Recommendation 61, we think those amendments ought to have regard to the broad police powers afforded under such legislation as the Terrorism (Community Protection) Act (2003) (Vic) and similar State and Territory enactments.