

## **YOU CAN'T CHARGE ME, I'M A COP: SHOULD POLICE, CORRECTIONS STAFF AND LAW ENFORCEMENT OFFICERS BE IMMUNE FROM CRIMINAL LIABILITY FOR ACTIONS CARRIED OUT AGAINST VULNERABLE PEOPLE IN THE COURSE OF THEIR DUTIES?**

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*This article will argue that current Australian laws which provide for immunity from criminal liability for police, corrections staff and other law enforcement officers for actions carried out in the course of their duties should be repealed. It will, firstly, survey and analyse a number of such provisions in different Australian jurisdictions. The laws cover several different occupations and contexts: from police officers arresting or holding people in custody; to prison or juvenile detention centre officers carrying out their duties; and to immigration detention centre guards. In the process, it will consider the extent to which such provisions operate more favourably to the defendant than the ordinary law of self-defence. Secondly, the article will consider what policy justifications there may be for or against the existence of such provisions. This will include a discussion of the historical origin of criminal immunity provisions in Australia, including the policy implications of the history of the use of force against Aboriginal people by police. It will conclude that a human rights-based perspective requires the repeal of such provisions, which operate primarily upon vulnerable people (prisoners, people being arrested or detainees), and are consequently liable to abuse.*

### **I INTRODUCTION**

On 25 July 2016, the Australian Broadcasting Commission's ('ABC') Four Corners documentary broadcast a set of images from Darwin's Don Dale Juvenile Detention Centre. The images, which included one showing a young Aboriginal boy, Dylan Voller, shackled in a restraint chair and wearing a spit

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hood,<sup>1</sup> sparked strong and immediate feelings of revulsion among many Australians. The next morning the Prime Minister, Malcolm Turnbull, announced a Royal Commission, and within a few days the responsible Northern Territory ('NT') Minister for Corrections, John Elferink, had been removed from his portfolio.<sup>2</sup> In March 2017, that Royal Commission provided an Interim Report, with the Final Report ('*NT Royal Commission Final Report*') published in November 2017.<sup>3</sup>

It may not have been obvious from the initial media coverage, but many of the allegations raised by Four Corners had been ventilated in court before. One of the detention centre officers, Derek Tasker, had been charged with aggravated assault in relation to the 'ground stabilising' incident, in which the detainee, Dylan Voller, was forcibly swung down onto a mattress in order to be dressed in a non-rip gown.<sup>4</sup> At issue was whether the force used was for the purpose of 'maintain[ing] discipline', and hence fell within section 153 of the *Youth Justice Act 2005* (NT), which strictly excluded 'physical violence' from the definition of 'reasonably necessary force' for disciplinary purposes.<sup>5</sup>

The NT Supreme Court held that section 153 was irrelevant because the force used was not for disciplinary purposes, but rather to protect the victim by denying him the means of self-harm. Thus, the only applicable provision was the more general requirement that the officer do what is 'necessary or convenient' for the custody and protection of persons within the detention centre. Consequently, the prosecution appeal against the officer's original acquittal was dismissed.<sup>6</sup>

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1 A spit hood, sometimes known as a spit guard, is a device made of breathable fabric intended to prevent the transfer of diseases by spitting or biting. The use of handcuffs and similar devices to protect the detainee was provided for at the relevant time under *Youth Justice Act 2005* (NT) ss 153(4), 155 (ss 153 and 155 were amended in May 2018 by the *Youth Justice Legislation Amendment Act 2018* (NT)). It is questionable whether this authorisation extended to the use of spit hoods: see discussion in Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) vol 2A, 228, 245–6 ('*NT Royal Commission Final Report*').

2 For the Four Corners footage, see *Australia's Shame* (Australian Broadcasting Commission, 2016) <<http://www.abc.net.au/4corners/australias-shame-promo/7649462>>. For a more general recent discussion, see, eg, Bronwyn Naylor, 'Protecting Human Rights in Detention: Rights, Monitoring and OPCAT' (2016) 41 *Alternative Law Journal* 151. See also Gabrielle Appleby and Alexander Reilly, 'Taking Responsibility for Don Dale' (2016) 8(27) *Indigenous Law Bulletin* 4.

3 *NT Royal Commission Final Report*, above n 1.

4 *Police v Tasker* [2014] NTMC 2; *Edwards v Tasker* (2014) 34 NTLR 115.

5 Section 153 provides, in part, as follows:

**153 Discipline**

- (1) The superintendent of a detention centre must maintain discipline at the detention centre.
- (2) For subsection (1), the superintendent may use the force that is reasonably necessary in the circumstances.
- (3) Reasonably necessary force does not include:
  - (a) striking, shaking or other form of physical violence.

6 Under *Justices Act 1928* (NT) s 163(1), the prosecution can appeal against the dismissal of a charge laid on information: *Edwards v Tasker* (2014) 34 NTLR 115, 188 (Barr J). Note that the NT Royal Commission criticised the conclusion of the NT Supreme Court in this case: see NT Royal Commission Final Report, above n 1, vol 2A, 186.

Amidst this technical reasoning, an arguably decisive argument for the officer's acquittal appears to have been overlooked. The NT's youth justice legislation contains an immunity provision preventing employee officers from being found criminally liable in such circumstances at all. The argument arises by virtue of section 215 of the *Youth Justice Act 2005* (NT), which at the relevant time provided as follows:

**215 Immunity**

- (1) This section applies to a person who is or has been:
  - ...
  - (e) an employee, within the meaning of the *Public Sector Employment and Management Act*, performing functions under this Act.
- (2) The person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith in the exercise or purported exercise of a power, or the performance or purported performance of a function, under this Act.
- (3) Subsection (2) does not affect any liability the Territory would, apart from that subsection, have for the act or omission.

The effect of this provision appears to be that a detention centre officer would not be criminally liable for an assault, providing she or he was performing or purportedly performing a function under the Act, such as maintaining discipline or order, and was acting in good faith.<sup>8</sup>

It might be argued that an officer who assaults a detainee is not performing a function under the Act, since assaulting detainees is not part of his or her duties. Alternatively, perhaps, it might be argued that an assault is not an act done in good faith. However, case law suggests that arguments along these lines are unlikely to be accepted.

For example, in *Hamilton v Halesworth*,<sup>9</sup> the question arose whether a police officer who had wrongfully arrested the plaintiff was acting 'in pursuance of' the relevant legislation, the *Police Offences Act 1901* (NSW). According to Starke J in the High Court, the defendant was acting pursuant to the Act 'if he had a bona fide belief in the existence of facts which if existing would have justified him in so acting'.<sup>10</sup> Provided the defendant was acting in pursuance of powers he supposed he possessed, his actions fell within the scope of the phrase. The reasonableness or otherwise of the defendant's belief was irrelevant. Moreover, the burden of proving lack of good faith lay upon the plaintiff, according to the High Court.<sup>11</sup>

7 *Youth Justice Act 2005* (NT) s 215. This section has been amended twice since 2010: *Correctional Services (Related and Consequential Amendments) Act 2014* (NT) s 54; *Youth Justice Legislation Amendment Act 2017* (NT) s 9. However the immunity from criminal liability for youth justice employees under s 215(2) remains in the same terms. Note that the *NT Royal Commission Final Report*, above n 1, recommended the amendment, but not the repeal, of this provision: see further discussion below.

8 This argument was put in *The NT Youth Justice Royal Commission: What Can We Expect?* (29 July 2016) Constitution Education Fund Australia <<http://www.cefa.org.au/ccf/nt-youth-justice-royal-commission-what-can-we-expect>>.

9 (1937) 58 CLR 369.

10 Ibid 376 (Starke J).

11 Ibid 381 (Dixon and McTiernan JJ). More recent High Court decisions support this view: see *Little v Commonwealth* (1947) 75 CLR 94; *Webster v Lampard* (1993) 177 CLR 598.

More recently, in *R v Whittington* ('Whittington'),<sup>12</sup> the question arose of whether a police officer who shot and killed an Aboriginal man was acting 'in pursuance of' the *Police Administration Act 1978* (NT). This question was relevant because section 162 of the *Police Administration Act 1978* (NT) provided a two-month time limit for the commencement of prosecutions for acts done in pursuance of the Act.<sup>13</sup> Effectively, therefore, police were immune from prosecution for such acts after two months. The prosecution conceded that there was no evidence to suggest that the 'accused was acting otherwise than according to what he believed to be the lawful execution of his duty at the relevant time'.<sup>14</sup> Following the High Court decision in *Hamilton v Halesworth*, Mildren J in the NT Supreme Court held that there was no evidence on which a jury could conclude that the police officer was not acting 'in pursuance of' the Act. In February 2007, and for similar reasons to those advanced by Mildren J, the Court of Criminal Appeal rejected a prosecution appeal.<sup>15</sup>

In other related contexts, phrases such as 'in pursuance of' a duty or 'in the exercise or purported exercise' of a power have been given a similarly wide interpretation. Provisions in a 1963 Status of Forces Agreement between Australia and the United States ('US') give the US the primary right to exercise jurisdiction over a crime alleged against a member of the US military where the offence arises out of 'any act or omission done in the performance of official duty'.<sup>16</sup> The phrase 'in the performance of official duty' has been interpreted broadly, to cover, for example, culpable driving while on duty.<sup>17</sup> It is possible that drink driving might also be covered, as well as other crimes committed by US Marines while intoxicated, provided the defendant believed they were acting in pursuance of their duties (for example, to protect the honour of the US military) at the time.<sup>18</sup>

The next Part will consider a number of such provisions in different Australian jurisdictions, and in different contexts: police officers, prison or juvenile detention centre officers, and immigration detention centre guards. It will assess the extent to which such provisions operate more favourably to the defendant than the ordinary law of self-defence. The article will then consider what policy justifications there may be for or against the existence of such provisions, arguing that the policy considerations in favour of their existence are outweighed by those against.

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12 (2006) 17 NTLR 235.

13 See discussion and analysis of this case in Stephen Gray, 'Case and Comment: *R v Whittington*' (2007) 31 *Criminal Law Journal* 250 ('Case and Comment').

14 *Whittington* (2006) 17 NTLR 235, 237 (Mildren J).

15 *R v Whittington* (2007) 19 NTLR 83.

16 Stephen Gray, 'War Games, Sex and Uncle Sam's Umbrella: Will Australian Courts Try US Marines Who Commit Crimes on Australian Soil?' (2015) 40 *Alternative Law Journal* 82, 83.

17 Robert McClelland, 'Statement from the Attorney-General: Queensland Case involving US Navy Officer' (Media Release, 17 August 2011) <<http://pandora.nla.gov.au/pan/21248/20111214-1249/www.attorneygeneral.gov.au/Mediareleases/Pages/2011/Thirdquarter/Media-Statement---Statement-from-the-Attorney-General-Queensland-case-involving-US-navy-officer.html>>.

18 See for further discussion Gray, 'War Games, Sex and Uncle Sam's Umbrella', above n 16.

## II CRIMINAL IMMUNITY PROVISIONS IN AUSTRALIAN LAW

Australian law contains a variety of criminal immunity provisions. Such provisions may grant full and complete immunity for actions carried out in the course of duty, or they may give only partial immunity, operating as a broader alternative to the ordinary law of self-defence. Of all Australian jurisdictions, the NT makes the greatest use of such provisions; however, other jurisdictions either have, or have recently considered the introduction of, full or partial criminal immunity provisions.<sup>19</sup> Thus, the policy considerations surrounding the existence of these immunity provisions are relevant in a broader context than the NT.

### A Police and Law Enforcement Officers

As was noted above, section 162(1) of the *Police Administration Act 1978* (NT) once provided a complete immunity for police from criminal prosecution in relation to acts done ‘in pursuance of’ the Act, except in the unlikely event that the prosecution commenced within two months after the act complained of was committed.<sup>20</sup> This immunity was removed in 2005.<sup>21</sup> However, it was replaced with a more limited criminal immunity provision in section 208E of schedule 1 to the *Criminal Code Act 1983* (NT) (‘*NT Criminal Code*’):

#### 208E Law enforcement officers

A person is not criminally responsible for an offence against this Part if:

- (a) the person is, at the time of the offence, a public officer acting in the course of his or her duty as a police officer, correctional services officer or other law enforcement officer; and
- (b) the conduct of the person is reasonable in the circumstances for performing that duty.

This provision is found in part VI, which deals with ‘offences against the person and related matters’. Offences found within part VI include murder and manslaughter, as well as attempted murder, reckless endangerment offences, and various forms of assault.<sup>22</sup> Thus, the provision is a defence to most of the offences police and other law enforcement officers might commit while acting in the course of their duties.<sup>23</sup>

19 See further the discussion of immunities for youth detention and adult corrections officers in Part II(B), below, and immigration detention centre guards in Part II(C), below. It should also be noted that criminal immunity provisions for police responding to a terrorist act were introduced in New South Wales following the Lindt Café siege: see *Terrorism Legislation Amendment (Police Powers and Parole) Act 2017* (NSW). A discussion of police responses to terrorism is, however, beyond the scope of this article.

20 Gray, ‘Case and Comment’, above n 13.

21 See *Police Administration Amendment (Powers and Liability) Act 2005* (NT) s 11.

22 *NT Criminal Code* ss 156 (murder), 160 (manslaughter), 165 (attempt to murder), 166 (threats to kill), 174C (recklessly endangering life), 181 (causing serious harm), 186 (causing harm), and 188 (assault). See generally Stephen Gray and Jenny Blokland, *Criminal Laws: Northern Territory* (Federation Press, 2<sup>nd</sup> ed, 2012).

23 A police officer would not be able to raise the defence if charged with an offence other than under the *NT Criminal Code*. One possibility might be threatening violence under *Summary Offences Act 1923* (NT) s 47AB. The *Summary Offences Act 1923* (NT) does not contain a general offence of assault.

The provision operates as an alternative to the law of justification, or self-defence. In the NT, the applicable self-defence provision will vary depending on whether the offence is classed as a schedule 1 offence. Schedule 1 offences are, broadly, the more serious offences such as murder, manslaughter and endangerment offences. For these offences, the test requires, in essence, that the conduct carried out by a person in self-defence be a 'reasonable response in the circumstances as he or she perceives them'.<sup>24</sup> For less serious offences such as assault, the test for self-defence is slightly stricter, requiring that the person's conduct be 'a reasonable response in the circumstances as the person *reasonably* perceives them'.<sup>25</sup>

Thus, a person other than a police, corrections or law enforcement officer who wishes to argue they were justified in committing an assault or homicide has to navigate a complex set of provisions. The conduct must be carried out to defend the person or another, or in a very strictly defined further set of circumstances;<sup>26</sup> and the conduct has to be a reasonable response in the circumstances.

If the person is a police, corrections or law enforcement officer, however, section 208E will apply. Provided that the person is acting 'in the course of' their duties (a phrase which has been interpreted widely in the past, as has been noted above), all that is necessary is that the person's conduct be 'reasonable in the circumstances for performing that duty', an objective test.

There has been no NT case law since the introduction of section 208E interpreting this phrase. The defence was not raised in the only reported NT case since 2006 involving a police officer charged with assault, *Burkhart v Bradley*.<sup>27</sup> In this case a service police officer struck a prisoner to the side of the jaw with his elbow. Three other police officers were present, two of whom gave evidence unfavourable to the defendant. The case was argued as one of defensive conduct, with section 208E not being raised. This was presumably because it was apparent on the evidence of police witnesses that the defendant police officer was not acting in the course of his duty, but had instead decided on his own initiative to assault the defendant. As will become clear from the later discussion, this situation is relatively rare. More frequently, police give evidence supportive of each other, and of the version of events most favourable to the police. This has the result of strengthening the defence, where it is available, that the police were acting in pursuance of duty.<sup>28</sup>

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24 These include s 43BD of the *NT Criminal Code*, which imposes a subjective and objective test for the existence of self-defence. The provision is based on the criminal responsibility provisions of the Commonwealth Criminal Code. See more detailed discussion of this provision in Gray and Blokland, above n 22, 161.

25 *NT Criminal Code* s 29 (emphasis added), and the more detailed discussion of s 29 in Gray and Blokland, above n 22, at 159–60.

26 Such as to prevent or terminate unlawful imprisonment: see *NT Criminal Code* s 43BD(2)(a); discussion in Gray and Blokland, above n 22, 161.

27 (2013) 33 NTLR 79.

28 See, eg, Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of David John Gundy* (1991), discussed below in Part IV.

Providing a police officer is acting in the course of duty, it appears the test under section 208E is easier to satisfy than the general test for justification or self-defence. It could provide a defence, for example, to a police officer who killed a youth in the course of carrying out an arrest, or while seeking to prevent a property offence such as vandalism. The jury's attention in such a case is not directed to the reasonableness of the officer's response to the victim's conduct, as it would be in an ordinary case of justification, but to the reasonableness of the conduct for performing the defendant's duty. This is a separate question to which different and broader considerations might be relevant.

Consider, for example, the facts in *Whittington*,<sup>29</sup> the police shooting case in which the immunity defence under section 162 of the *Police Administration Act 1978* (NT) was originally raised. The defendant was a relieving police officer at Wadeye (Port Keats), a remote Aboriginal community about 400 kilometres west of Darwin. According to the coronial findings, police sanctioned and helped organise fistfights between rival gangs as a means of resolving tribal or extended family tensions.<sup>30</sup> One such fight on the sports oval got out of control when people appeared with axes, rocks, baseball bats and other weapons. The escalation culminated in a man named Worumbu appearing with a single-shot shotgun.<sup>31</sup> Worumbu swung the shotgun in an arc at a crowd of people. Whittington, who had observed all this and was concerned for the safety of the people in the crowd, fired his police-issue Glock pistol at Worumbu from a distance of about 40 metres. His bullet hit and killed the victim, Robert Jongmin, an 18-year-old man who had appeared from the direction of the oval and was wrestling with Worumbu for control of the shotgun.

Whittington claimed in evidence that he did not see Jongmin.<sup>32</sup> According to the Coroner, he

was under considerable stress when he discharged his Glock and probably suffered from tunnel vision and possibly auditory exclusion, which prevented him from clearly seeing anything or anyone other than Worumbu and his shotgun.<sup>33</sup>

This was described in evidence as a 'common "physiological reaction to a psychological threat"'.<sup>34</sup> Whittington had not received interactive training with moving targets,<sup>35</sup> was a poor shot who breached fundamental safety rules for the discharge of weapons, and was assessed by the Coroner as probably in a 'blind panic' at the time.<sup>36</sup>

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29 (2006) 17 NTLR 235.

30 *Inquest into the Death of Robert Jongmin* [2007] NTMC 80, [17]–[22] (Cavanagh SM).

31 *Ibid* [32] (Cavanagh SM).

32 *Ibid* [80] (Cavanagh SM).

33 *Ibid* [81] (Cavanagh SM).

34 *Ibid*.

35 The Coroner referred to the 'considerable evidence adduced at the Inquest about the benefits of interactive training, which involved dynamic, moving targets, and where police officers are trained to make quick and optimal judgement calls': *ibid* [106] (Cavanagh SM).

36 *Ibid* [89]–[93] (Cavanagh SM). Whittington had trained to fire his Glock pistol at distances up to 12 metres, not the 40 metres from which he shot his victim. He breached the safety rule for the discharge of his weapon requiring him to be sure of his target and not shoot at anything he had not positively identified: at [91] (Cavanagh SM).

Whittington was originally charged with manslaughter, as well as the crime of dangerous act under the then-section 154 of the *NT Criminal Code*. Arguments concerning justification or the reasonableness of the officer's actions were not ventilated in court because, as was noted above, Mildren J quashed the indictment as out of time due to the two-month immunity provision contained in the then-section 162 of the *Police Administration Act 1978* (NT).<sup>37</sup>

Nevertheless, it is possible to see how an argument based on section 208E might lead to a more favourable result for the defendant on these facts than an argument of defensive conduct. Under the ordinary law of self-defence, Whittington would need to show evidence sufficient to satisfy a jury that his actions were a reasonable response in the circumstances. This might be difficult to establish, given his 'blind panic', his failure to see Jongmin, and his breach of fundamental safety rules including his decision to shoot without being sure of his target. Indeed, the Coroner concluded that there was sufficient evidence to satisfy a jury that a crime under the then-section 154 of the *NT Criminal Code* had been committed, that is, a crime

which caused serious actual danger to the life, health and safety of Robert Jongmin and Tobias Worumbu in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done the act.<sup>38</sup>

If, however, the fact-finder's attention were to be directed to whether Whittington's conduct was reasonable in the circumstances for performing his duty, his argument seems somewhat stronger. His duty was to prevent injury or death to those at risk from Worumbu's shotgun. Firing his own weapon might be seen as a reasonable response to his duty of preventing injury or death, particularly if the 'circumstances' are regarded as being those actually perceived by Whittington, rather than those an objective person might perceive. Requiring the jury to focus on the officer's duty tends to focus attention on Whittington's state of mind when he made the decision to fire, and away from the broader surrounding circumstances. This might lead the jury to pay less attention to issues such as the risk to Jongmin or others from Whittington's decision to fire multiple shots.

As noted above, section 208E was enshrined into the *NT Criminal Code* in 2006. This was done as part of the sweeping reforms to the criminal responsibility provisions, which introduced a new part IAA,<sup>39</sup> substantially incorporating the criminal responsibility provisions of schedule 1 chapter 2 of the *Criminal Code Act 1995* (Cth), including its provisions regarding self-defence, and applying them to particular offences, including murder and manslaughter.<sup>40</sup> This had the effect of reducing the scope of the old defence for police and prison officers in section 28 of the *NT Criminal Code*, which would no longer apply to murder and manslaughter. The defence in section 28 did provide that force was justified when police or prison officers were carrying out a lawful arrest, or were

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37 *Whittington* (2006) 17 NTLR 235.

38 *Inquest into the Death of Robert Jongmin* [2007] NTMC 80, [108] (Cavanagh SM).

39 *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* (NT) s 7.

40 See discussion in Gray and Blokland, above n 22, 98.



attempting to prevent an escape. However this was only the case when the force used was not ‘unnecessary force’.<sup>41</sup> This test requires that the force not exceed what an ordinary person similarly circumstanced would regard as necessary and proportionate. While this is arguably a more favourable test for the defendant than the ‘reasonable response’ test for self-defence, it is still a more stringent test than that created by section 208E.

It is not easy to say whether section 208E was introduced as part of a deliberate policy to expand the scope of criminal immunity for police. It is hard to see what other motive there could have been for the creation of an alternative and separate provision on this issue. Parliamentary debates are silent on the matter. However, the section was introduced at the same time as the *Whittington* case was making its way through the appeal process in the NT Supreme Court. It is very likely that legislators were aware of the issue of police immunity from prosecution, which would have been drawn to their attention by Mildren J’s decision to quash the indictment against Whittington in August 2006.<sup>42</sup> In fact, they had acted swiftly and as early as March 2005 to repeal the two-month time limit on criminal prosecution contained in section 162(1) of the *Police Administration Act 1978* (NT). Again, though, there is no reference to the issue of criminal immunity in the Police Minister’s Second Reading Speech.<sup>43</sup>

The NT goes further than other Australian jurisdictions in the degree of immunity from criminal liability it provides to police and law enforcement staff. Most Australian jurisdictions have passed laws making it legal for police and others to use reasonable force in making an arrest, or preventing an escape from lawful custody.<sup>44</sup> The Western Australian and NT Criminal Codes provide

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41 The defence still exists under s 28 for non-schedule 1 offences alleged against police or prison officers carrying out lawful arrests or attempting to prevent an escape. ‘Unnecessary force’ is defined in s 1 as force that the user knows is unnecessary and disproportionate, or that an ordinary person similarly circumstanced would know was unnecessary and disproportionate. This section thus imposes an ‘ordinary person similarly circumstanced’ test similar to the test used in some jurisdictions for provocation: see further discussion in Gray and Blokland, above n 22, 154–6.

42 On 11 August 2006, Mildren J quashed the indictment because the charge against Whittington had not been laid within two months of the act complained of as required by s 162 of the *Police Administration Act 1978* (NT): *Whittington* (2006) 17 NTLR 235. It would have been natural for the victim’s family and community to conclude that the police investigation into the death was deliberately delayed in order to take advantage of this strict time limit. The Coroner, Greg Cavanagh, concluded however that this was not the case: ‘I accept that the police, and indeed the legal community in the Northern Territory did not appreciate the full ambit of section 162(1) of the *Police Administration Act*’: *Inquest into the Death of Robert Jongmin* [2007] NTMC 80, [101]. The Coroner went on to note that there were 17 cases prior to Whittington’s case in which criminal charges were laid against police officers outside the two-month period because police did not appreciate the significance of the statutory time limit.

43 See discussion of this issue in Gray, ‘Case and Comment’, above n 13, 253.

44 See, eg, *Criminal Code Act 1924* (Tas) sch 1 ss 26, 30. For a discussion of these laws in Tasmania, see Tasmania Law Reform Institute, ‘Consolidation of Arrest Laws in Tasmania’ (Issue Paper No 10, 2006). Under *Criminal Code Act 1924* (Tas) sch 1 s 30(3), the use of force intended to or likely to cause death or grievous harm is prohibited in arresting a person escaping from lawful custody, unless the arrest relates to the commission of particular serious crimes, and the person has been called on to surrender: see Tasmanian Law Reform Institute, ‘Consolidation of Arrest Laws in Tasmania’ (Issue Paper No 10, July 2006) 36. This appears to permit police to kill a person who is escaping after having committed particular offences, and who has been asked to surrender. In Victoria, *Crimes Act 1958* (Vic) s 462A allows a person to use reasonable force to prevent the commission of an indictable offence or make a lawful arrest.

defences where an act is 'authorised', or done in conformity to or in execution of the law.<sup>45</sup> However, these provisions are generally unlikely to provide a defence beyond those already available in the law of justification or self-defence to an officer who assaults, let alone kills, a person while they are being arrested or detained.<sup>46</sup>

Thus, in theory, police and law enforcement officers outside the NT are in broadly the same position as ordinary citizens if they are charged with offences relating to assault or causing death. It is also true that police are rarely charged with assault for actions short of causing death carried out in the course of their duty.<sup>47</sup> One obvious reason for this is that the decision whether to prosecute a police officer suspected of assaulting a person is taken by the police themselves. It is more likely that complaints of this type against police will be played out in the civil courts, with the arrested person claiming civil damages and perhaps malicious prosecution after being charged themselves with assaulting police.<sup>48</sup>

However, this is not necessarily the case. There are occasions in which police officers are charged with assaults or even homicide allegedly committed either during the process of arrest, or upon prisoners in custody. For example, in 2017 a Victorian police officer, Timothy Baker, was tried for murder after he shot a man during a routine traffic stop in 2013. Baker argued self-defence, claiming the victim pulled a flick knife and tried to hit him during a short scuffle immediately before the shooting. The police officer was ultimately acquitted.<sup>49</sup> However, if the defence of acting in the course of duty had been available, it is possible he would not have been tried at all. This is because, as discussed above, the first relevant question would have been whether he believed he was acting in the course of duty, not whether objectively he was so acting in fact. The second relevant question, whether his conduct was reasonable in the circumstances for performing that duty, would also have been more likely than the ordinary test for self-defence to have been resolved in the defendant's favour, because, as discussed above, the relevant 'circumstances' would be those perceived by the

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45 *Criminal Code Act Compilation Act 1913* (WA) s 31; *NT Criminal Code* s 26.

46 For a discussion of situations in which a defence of 'authorisation' might arise in the NT, see Gray and Blokland, above n 22, 99 n 33. In a case such as *Whittington*, the question of whether the police officer's act was 'authorised' would appear to be of little assistance to the defence. If Whittington was acting in the course of his duty, and within the parameters of the law of self-defence, his conduct might be regarded as 'authorised'; if he was not, a defence of 'authorisation' would not succeed.

47 For a recent example in the NT, see *Burkhart v Bradley* (2013) 33 NTLR 79, discussed in the text accompanying above n 27.

48 This occurred in *Vivoda v Kealy* [2013] VCC 130.

49 On the *Baker* case, see, eg, Adam Cooper, 'Melbourne Police Officer Timothy Baker Acquitted of Murder', *The Age* (online), 15 September 2017 <<http://www.theage.com.au/victoria/melbourne-police-officer-timothy-baker-acquitted-of-murder-20170915-gyid0h.html>>. Compare this with an incident at Ballarat Police Station in January 2015, in which police officers kicked and stamped on a vulnerable mentally-unwell woman, herself a former police officer, as she lay handcuffed on the ground inside the station. The incident was investigated by Victoria's Independent Broad-Based Anti-Corruption Commission, which recommended that Victoria Police consider whether to lay charges against the officers involved. In February 2017 the officers were charged: Liam Mannix, 'Ballarat Police Officers Charged with Assault over Kicking of Drunken Colleague', *The Age* (online), 16 February 2017 <<http://www.theage.com.au/victoria/ballarat-police-officers-charged-with-assault-over-kicking-of-drunken-colleague-20170216-guecff.html>>.

defendant to be his duty. Thus, if the defence that the action was carried out in the course of duty was available in other jurisdictions, as it is in the NT, it is logically evident that it would be used.

## B Youth Detention and Adult Corrections Officers

As was noted above, section 215 of the *Youth Justice Act 2005* (NT) provides a broad immunity from criminal as well as civil liability for the actions of the Territory's youth justice centre employees, including probation or parole officers and the superintendent. The immunity exists provided the officer acted in good faith, and in the exercise or purported exercise of a power under the Act. There is no requirement that the act be 'reasonable', or even that the act in fact be done in the course of duty.<sup>50</sup>

The *NT Royal Commission Final Report* of November 2017 contains some brief discussion of this provision.<sup>51</sup> Significantly, it recommends that the provision be amended to insert requirements that the acts be not only done in good faith, but also be 'reasonable' and 'without recklessness'.<sup>52</sup> If implemented, this would be broadly consistent with the partial immunity from criminal prosecution already granted to the Territory's law enforcement and public officers, including correctional service officers, under section 208E of the *NT Criminal Code*, discussed above.

It is not immediately clear why the Royal Commission recommended that the immunity provision be amended rather than repealed altogether. The only indication of the reason for this is the following sentence from chapter 22 of the *Report*:

The Commission acknowledges that there may be good reasons to include a section restricting liability and understands that this is reflected in the Western Australian and Australian Capital Territory jurisdictions.<sup>53</sup>

It is incorrect to assert that the restriction on criminal liability for youth justice centre employees is reflected in the laws of Western Australia ('WA') and the Australian Capital Territory ('ACT'). In fact, section 182 of the *Young Offenders Act 1994* (WA), and section 878 of the *Children and Young People Act 2008* (ACT) both contain immunity from civil suit only. Both the WA and the ACT provisions are quite explicit on this point.<sup>54</sup> In any case, the fact that the NT

50 On these issues, see discussion of *Hamilton v Halesworth* (1937) 58 CLR 369.

51 *NT Royal Commission Final Report*, above n 1.

52 Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations*, 39 (Recommendation 22.6), which recommends that

[t]he Northern Territory Government amend section 215 of the *Youth Justice Act* (NT) to the effect that the person is not civilly or criminally liable for an act reasonably done or omitted to be done by the person in good faith and without recklessness in the exercise or purported exercise of a power, or the performance or purported performance of a function, under this Act.

53 *NT Royal Commission Final Report*, above n 1, vol 2B, 122. In a footnote, the Royal Commission refers to the *Young Offender Act 1994* (WA) s 182, and the *Children and Young People Act 2008* (ACT) s 878 (see below n 54).

54 Under s 878 of the *Children and Young People Act 2008* (ACT):

provision might mirror other legislation is not a convincing justification for the retention of the immunity. It would have been preferable for the Royal Commission to specify the 'good reasons' for the immunity's retention.

Arguably, the NT is the only Australian jurisdiction which grants immunity from criminal prosecution to youth detention centre guards. In Tasmania, the *Youth Justice Act 1997* (Tas) contains a protection against prosecution in relation to certain disclosures of information (section 167A), but no broader protection against criminal prosecution. The *Youth Justice Act 1992* (Qld) contains no criminal immunity provision; nor does the *Young Offenders Act 1993* (SA) or the *Youth Justice Administration Act 2016* (SA).

The situation is, however, slightly ambiguous in Victoria and New South Wales. In Victoria, section 30 of the *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic) inserted a new section 487A into the *Children, Youth and Families Act 2005* (Vic).<sup>55</sup> This provision states that an officer is 'not personally liable for injury or damage caused by the use of reasonable force in accordance with section 487'. Section 487 prohibits the use of physical force except where it is reasonable and necessary for security purposes, or to prevent harm. Section 487A is similar (although not identical) to section 72 of the *Young Offenders Act 1997* (NSW), which states that a person acting under the direction of the Secretary is not subject personally to any action, liability, claim or demand for acts done in good faith under the Act.

Similarly, there are many examples of immunity provisions in Australia's adult corrections legislation. Most of these clearly refer to civil liability only. Under section 223 of the *Corrections Management Act 2007* (ACT), for example, a person exercising functions under the Act does not incur civil liability for an act or omission done honestly and without recklessness for this Act. In WA, section 94 of the *Court Security and Custodial Service Act 1999* (WA) provides that an action in tort does not lie against a person for anything done in good faith in the performance of a function under the Act. A similar provision is found in section 111 of the *Prisons Act 1981* (WA), which provides that no claim for damages shall lie against any person for an act done in carrying out the provisions of the Act. Under the *Correctional Services Act 1982* (SA), no liability attaches to the Commissioner for an act or omission in good faith in the exercise or purported exercise of powers under the relevant division. Under *Corrective Services Act 2006* (Qld) section 349, an official does not incur civil liability for act or omission done honestly and without negligence under the Act.

However, not all these provisions are as explicitly confined to the civil sphere. In Victoria, section 23(5) of the *Corrections Act 1986* (Vic) states that a prison officer is not liable for injury or damage caused by the use of force in

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An official, or anyone engaging in conduct under the direction of an official, is not civilly liable for conduct engaged in honestly and without recklessness – (a) in the exercise of a function under this Act; or (b) in the reasonable belief that the conduct was in the exercise of a function under this Act.

Section 182 of the *Young Offenders Act 1994* (WA) provides that '[a]n action in tort does not lie against a person for anything that the person has, in good faith, done in the performance or purported performance of a function under this Act'.

55 This provision was assented to on 26 September 2017, and commenced on 1 June 2018.

accordance with the section. In New South Wales, regulation 254 of the *Crimes (Administration of Sentences) Regulations 1999* (NSW) provides that contraventions of that Regulation should not lead to criminal liability but should instead be dealt with as misconduct. There are also a few narrowly defined grants of criminal immunity which are irrelevant for present purposes.<sup>56</sup>

There would appear to be a strong argument that the ambiguous immunity provisions in both the youth and adult detention spheres are in fact concerned only with immunity from civil suit. The argument is based on the history, purpose and wording of the provisions, which use terms such as ‘injury’ or ‘damage’ more familiar to the civil than the criminal law. It might also be based on evidence from elsewhere in the applicable legislation that where the legislature wished to confer criminal immunity it did so in clear terms.<sup>57</sup> However, there is some scope for argument that at least some of these provisions confer criminal as well as civil immunity.

Of all Australian provisions in the adult corrections sphere, the clearest provision granting criminal immunity, once again, is that in the NT. The *Correctional Services Act 2014* (NT) states quite plainly that ‘[a] person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith in the exercise of a power or the performance of a function’ under the Act.<sup>58</sup>

It might be argued that the question of criminal immunity has little practical significance for either adult corrections officers or youth detention centre officers, since such people are unlikely in any case to be the subject of criminal charges. There is some truth in this statement. When allegations of serious assault against prison officers reach the courts, they more commonly do so by way of civil suit than criminal charge.<sup>59</sup> As was noted above in relation to police officers, one reason for this is that those investigating allegations of assault are most immediately likely to be the prison officers themselves.

However, the history of the *Tasker* case itself shows that it is possible for such allegations to be the subject of criminal charge, even where there has clearly been an attempt to cover them up. Dylan Voller’s initial complaint of assault by detention centre officers including Tasker was made in December 2010. A police

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56 For example, s 72(2) of the *Young Offenders Act 1997* (NSW) states that a person is not liable for an offence under the *Crimes Act 1900* (NSW) in respect of information obtained in the course of a conference. Under s 16A of the *Young Offenders Act 1994* (WA), no civil or criminal liability is incurred in respect of information disclosed in good faith in accordance with the section. Under s 167A of the *Youth Justice Act 1997* (Tas), a person who discloses information in accordance with the section does not incur civil or criminal liability in respect of that disclosure.

57 Compare the provisions in above n 56. It is arguable that where the legislature wished to exclude criminal liability, as it did for example in relation to the disclosure of confidential information provisions in s 72 of the *Young Offenders Act 1997* (NSW), it used express language to that effect.

58 *Correctional Services Act 2014* (NT) s 199.

59 For an example of a criminal prosecution of a prison guard, see *R v Eastham* [2008] VSCA 67. The appellant was employed at Melbourne Custody Centre, and pleaded guilty to recklessly causing serious injury after he kicked a prisoner several times in the stomach, causing him to go to hospital and ultimately have his spleen removed. For civil suits arising from assaults on prisoners, see, eg, *Dixon v Western Australia* [1974] WAR 65; *L v Commonwealth* (1976) 10 ALR 269. See also *New South Wales v Bujdosó* (2005) 227 CLR 1; *Price v New South Wales* [2011] NSWCA 341.

officer began to investigate, but closed the investigation when he was told that CCTV footage had been lost. Some time prior to February 2012, the Children's Commissioner was sent the CCTV footage by email. On this subject the magistrate stated that '[w]ho this email was from, or how this CCTV footage came to be created or preserved was not canvassed in the evidence before me'.<sup>60</sup> The footage led to Tasker being charged in November 2012, nearly two years after the original incident and complaint.<sup>61</sup>

It is perhaps difficult to say whether this circuitous course of events would have been different if those involved had been aware from the beginning of the broad immunity in section 215 of the *Youth Justice Act 2005* (NT). Perhaps this would have led to earlier public ventilation of the footage, given the evident unavailability of a remedy in the criminal law. However, neither this possibility, nor the broader criminal immunity itself, does a great deal to encourage public confidence in the justice system. Certainly it suggests that the public policy reasons for criminal immunity in such circumstances ought to be discussed more explicitly than occurred in the NT Royal Commission's Final Report.

### C Immigration Detention

Immunity provisions have recently been controversial in other closed environments. In the context of immigration detention, a Bill introduced into the Commonwealth House of Representatives in February 2015, and to the Senate in May, proposed a very broad-ranging immunity for actions by detention centre staff under the *Migration Act 1958* (Cth). The Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill (2015) provided as follows:

#### **197BF Bar on proceedings relating to immigration detention facilities**

- (1) No proceedings may be instituted or continued in any court against the Commonwealth in relation to an exercise of power under section 197BA if the power was exercised in good faith.

Under section 197BF(4), 'Commonwealth' included an officer of the Commonwealth, and any other person acting on behalf of the Commonwealth. This provision was clearly aimed at protecting 'authorised officers', or detention centre guards (in practice, often private contractors),<sup>62</sup> from criminal or civil liability resulting from their actions.

Under section 197BA, these actions included the power to use such 'reasonable force' against any person as the officer 'reasonably believes is necessary' for various purposes. The purposes include preventing property damage and moving a detainee between facilities, as well as protecting from harm or threat of harm, or maintaining the good order, peace or security of the facility.

60 *Police v Tasker* [2014] NTMC 2, [8] (Trigg SM).

61 *Ibid* [9] (Trigg SM).

62 Employees of the immigration detention service provider are authorised officers for the purposes of pt 2 div 7B of the *Migration Act 1958* (Cth): see Explanatory Memorandum, Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (Cth) [97].

According to the Second Reading Speech before the Senate, the Bill was ‘only a small change which will help provide greater power and more options for the employees who put their own safety at risk in our detention centres’.<sup>63</sup>

On the question of immunity from criminal liability, the Bill’s Explanatory Memorandum referred to the need for authorised officers to exercise police-like powers in the event of a disturbance in the facility, in order to protect life and health, and also to maintain good order. It was alleged that without the immunity provided by the Bill, in so doing:

employees of the immigration detention services provider would not be afforded the same protection against criminal or civil action that police officers have. Without at least some degree of this kind of protection, employees of the immigration detention services provider may be reluctant to use reasonable force to protect a person or contain a disturbance in an immigration detention facility, even if they are expressly authorised to do so.<sup>64</sup>

Similar arguments were put in the Second Reading Speech before the Senate.<sup>65</sup>

It is clearly wrong to assert that the Bill only gives ‘authorised officers’, or detention centre service providers, the same immunity from criminal prosecution that police officers have. The Bill gives detention centre employees complete immunity from prosecution in respect of the exercise of their powers, provided the powers are exercised in good faith.<sup>66</sup> In contrast, and as noted above, most Australian jurisdictions do not provide police officers with immunity from criminal prosecution. Even the NT’s partial immunity provision is clearly a more difficult test for a potential defendant to satisfy than one simply based on ‘good faith’.<sup>67</sup>

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63 Commonwealth, *Parliamentary Debates*, Senate, 20 August 2015, 5909 (Matthew Canavan).

64 Explanatory Memorandum, Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (Cth) [97].

65 Senator Canavan argued that the

bill reflects the rights and privileges that are provided to other officers in state and territory environments. Obviously police forces have such rights and privileges, but even more reflective of this bill is that often wardens and other officers of state or territory prison facilities would have similar rights and privileges under state and territory acts. And often, in modern times, those officers are also employed by private contractors in a state or territory environment.

Commonwealth, *Parliamentary Debates*, Senate, 20 August 2015, 5911 (Matthew Canavan).

66 On the ‘good faith’ requirement, see discussion in Elibritt Karslen, *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015*, No 86 of 2014–15, 23 March 2015, 15–16.

67 On this issue, see various submissions to the Senate Legal and Constitutional Affairs Committee, at Parliament of Australia, *Submissions* (2015) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Maintaining\\_Good\\_Order/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Maintaining_Good_Order/Submissions)>. For example, the submission from the Andrew and Renata Kaldor Centre for International Refugee Law states that ‘most state laws provide personal protection from liability to prison officers, but do not *bar* the bringing of proceedings against the government’: Jane McAdam, Gabrielle Appleby and Claire Higgins, Submission No 8 to Senate Legal and Constitutional Affairs Committee, *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015*, 1 April 2015, 8 (emphasis in original).

There was significant opposition to the Bill,<sup>68</sup> which was referred to the Senate Legal and Constitutional Affairs Committee in March 2015, and that Committee reported in June 2015. While the Committee recommended in favour of passing the Bill, there were major amendments proposed. In April 2016, the Bill was allowed to lapse.<sup>69</sup>

However, the question of whether 'authorised officers' in detention centres should be immune from criminal liability remains both legally and politically controversial. In *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* ('*Behrooz*'), Gleeson CJ stated clearly that '[a]n alien does not stand outside the protection of the civil and criminal law. If an officer in a detention centre assaults a detainee, the officer will be liable to prosecution, or damages'.<sup>70</sup> McHugh, Gummow and Heydon JJ also accepted in *Behrooz* that officers in detention centres could be criminally or civilly liable for their actions, subject to the provisions of the *Migration Act 1958* (Cth).<sup>71</sup>

In *Behrooz*, however, the appellant was held onshore, at Woomera Immigration Reception and Processing Centre in South Australia, an immigration detention centre established under section 273 of the *Migration Act 1958* (Cth). The position would appear to be different in relation to offshore facilities such as those in Papua New Guinea and Nauru. Such facilities, known as 'regional processing centres', are funded by Australia but are situated outside Australian waters.<sup>72</sup> The management and operation of these facilities has, of course, been the subject of extensive criticism both inside and outside Australia, including criticism based on alleged violation of international human rights law.<sup>73</sup>

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- 68 See, eg, discussion in Michael Gordon, 'New Law Will Increase Violence against Asylum Seekers: Former Judge', *The Sydney Morning Herald* (online), 17 April 2015 <<http://www.smh.com.au/federal-politics/political-news/new-law-will-increase-violence-against-asylum-seekers-former-judge-20150416-1mmf56.html>>.
- 69 On the Bill's history and progress through Parliament, see: Parliament of Australia, *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015* (2015) <[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_LEGislation/Bills\\_Search\\_Results/Result?bId=5415](https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=5415)>.
- 70 *Behrooz* (2004) 219 CLR 486, 499 (Gleeson CJ).
- 71 Ibid 506 (McHugh, Gummow and Heydon JJ).
- 72 For discussion of the history and policy arguments surrounding Australia's regional processing centres, see Azadeh Dastyari and Maria O'Sullivan, 'Not for Export: The Failure of Australia's Extraterritorial Processing Regime in Papua New Guinea and the Decision of the PNG Supreme Court in Namah' (2016) 42 *Monash University Law Review* 308.
- 73 For example, international human rights experts from Stanford Law School suggested in 2016 that companies managing Australia's offshore immigration detention facilities might be liable under international law for crimes against humanity: see Patrick Kingsley, 'Refugee Camp Company in Australia "Liable for Crimes against Humanity"', *The Guardian* (online), 25 July 2016 <<https://www.theguardian.com/australia-news/2016/jul/25/ferrovial-staff-risk-prosecution-for-managing-australian-detention-camps>>. Their submissions are at James Cavallaro et al, 'Communiqué to the Office of the Prosecutor of the International Criminal Court under Article 15 of the Rome Statute: The Situation in Nauru and Manus Island: Liability for Crimes against Humanity' (Communiqué, Stanford Law School, 14 February 2017) <<https://law.stanford.edu/publications/communique-to-the-office-of-the-prosecutor-of-the-international-criminal-court-under-article-15-of-the-rome-statute-the-situation-in-nauru-and-manus-island-liability-for-crimes-against-humanity/>>. See generally, Maria O'Sullivan and Dallal Stevens (eds), *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (Hart Publishing, 2017).



One effect of the political decision to establish offshore regional processing centres is that such places are outside the jurisdiction of state or territory-based criminal laws such as the *Crimes Act 1958* (Vic) or the *NT Criminal Code*. These are the laws governing assault, sexual assault or most of the offences which might be alleged against ‘authorised officers’ within regional processing centres. State and territory jurisdiction is limited by the principle of territoriality to crimes committed in a place with a sufficient territorial or geographical nexus with the jurisdiction in question. This means that it is most unlikely that a crime committed in an offshore detention centre would fall within the jurisdiction of state or territory criminal law.<sup>74</sup> While there is a scheme for the extraterritorial operation of the *Criminal Code Act 1995* (Cth), that Code does not regulate offences like assault or sexual assault, except where these offences are committed in circumstances which bring it within the Commonwealth’s constitutional powers.<sup>75</sup>

As is well known, there have been many allegations of mistreatment of asylum seekers in offshore detention centres, including allegations of mistreatment by ‘authorised officers’.<sup>76</sup> To the extent that such incidents have been officially dealt with at all, they have been considered as possible breaches of work, health and safety legislation, with the question being whether the relevant department had fulfilled its responsibility to notify of ‘potential criminal or regulatory breaches’.<sup>77</sup> The Department of Immigration and Border Protection (now the Department of Home Affairs) does not itself investigate or prosecute allegations of crimes committed in offshore detention centres, arguing that Australia should respect the sovereignty of other nations. It appears to regard its responsibility as being merely to conduct a ‘full audit’ of all allegations of criminal conduct, while leaving actual investigation and prosecution of complaints to local police forces such as those of Nauru.<sup>78</sup>

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74 See at common law: *Ward v The Queen* (1980) 142 CLR 308; David Lanham, *Cross-Border Criminal Law* (Pearson Professional, 1997) 11.

75 For example, the assault, kidnapping or sexual assault of United Nations personnel under sch 1 div 71 of the *Criminal Code Act 1995* (Cth), or the offences of harming Australians overseas under sch 1 div 115 of the *Criminal Code Act 1995* (Cth). See sch 1 div 15 for the detailed scheme governing the extraterritorial operation of the Code.

76 See, eg, Australian Lawyers Alliance, Submission No 14 to Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, *Inquiry into the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru*, 27 April 2015.

77 For discussion of this issue, see Martin McKenzie-Murray, ‘Criminal Charges Possible in Detention Centre Operations’, *The Saturday Paper* (online), 25 June 2016 <<https://www.thesaturdaypaper.com.au/news/immigration/2016/06/25/criminal-charges-possible-detention-centre-operations/14667768003417>>. The Australian Lawyers Alliance has pointed out that offences under the *Work, Health and Safety Act 2011* (Cth) are subject to extended territorial jurisdiction under the Commonwealth Criminal Code: see sch 1 s 15.1(1)(c) of the *Criminal Code Act 1995* (Cth); Emily Mitchell and Anna Talbot, ‘Untold Damage: Workplace Health and Safety in Immigration Detention under the *Work, Health and Safety Act 2011* (Cth)’ (Report, Australian Lawyers Alliance, 2014) 18–19 (‘*Untold Damage Report*’).

78 *Untold Damage Report*, above n 77, 131–2. See further Australian Government, ‘Response to the Report of the Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru: Taking Responsibility: Conditions and Circumstances at

In this fraught legal and political environment, it remains possible that the Australian government will again propose that 'authorised officers' in Australia's immigration detention centres be immune from criminal liability. The policy justifications given by government in the past for such a proposal are similar to the justifications advanced for the criminal immunity of police and detention centre officers in the other contexts considered above.

The next part will consider what policy justifications there may be for this type of immunity.

### III POLICY ARGUMENTS IN FAVOUR OF CRIMINAL IMMUNITY

Perhaps the most obvious policy justification lies in the nature of the work police and law enforcement officers are required to perform. According to this argument, police and others in similar jobs must regularly expose themselves to direct physical danger, as well as deal effectively with situations in which the general public is exposed to danger. They would not be able to do their jobs properly if they were constantly in fear of criminal liability should their decisions fall short of the ideal. This would increase the level of risk not only to themselves, but also the general public, as well as the prisoners or detainees with whom they were required to deal.

This argument was made explicit in the Second Reading Speech introducing the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill (2015), discussed above. In introducing the Bill, Senator Canavan referred to the fact that detention centre officers have to deal with detainees who have been assessed as security risks, or who have breached visa conditions, or are members of a gang. Officers dealing with such people, the Senator asserted, put their own safety at risk, and 'we should make sure that we give them the appropriate powers to make sure that they can maintain their own health and safety in having to deal with these high-risk detainees'.<sup>79</sup>

More specific reasons were advanced in the Explanatory Memorandum introducing the Bill. As noted above, the Memorandum suggested that detention centre employees might be reluctant to use 'reasonable force' to protect people or

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Australia's Regional Processing Centre Nauru' (December 2015)

<[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regional\\_processing\\_Nauru/Regional\\_processing\\_Nauru/Additional\\_Documents](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Additional_Documents)>.

The Department of Immigration and Border Protection ('DIBP') stated, at [5.85], that:

Alleged criminal conduct in Nauru is a matter for Nauruan authorities. The Department and its service providers refer all allegations of a criminal nature to the Nauru police force (NFP). While the Australian Federal Police has been providing general assistance to Nauru police, the AFP does not actively investigate matters as it doesn't have jurisdiction on Nauru.

See also, more recently, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Serious Allegations of Abuse, Self-Harm and Neglect of Asylum Seekers in relation to the Nauru Regional Processing Centre, and Any Like Allegations in Relation to the Manus Regional Processing Centre* (2017).

79 Commonwealth of Australia, *Parliamentary Debates*, Senate, 20 August 2015, 5909 (Matthew Canavan).

prevent a disturbance if they were not afforded protection from criminal prosecution for their actions. This reluctance, the Memorandum asserted, ‘could result in the death of a person or people in the immigration detention facility or serious harm to such people, or major destruction of the immigration detention centre facility itself’.<sup>80</sup>

An illustration of this argument might be the facts of the *Whittington* case, discussed above.<sup>81</sup> The police officer, Whittington, had to make a split-second decision whether or not to fire his pistol. He had to make that decision in a situation in which he, or at the very least other members of the public, were exposed to danger from Worumbu, who was threatening to fire a shotgun. His ability to make that decision, the argument runs, would have been hampered if he had been concerned that he might be criminally liable should his decision subsequently turn out to have been wrong. He might, for example, have failed to fire his pistol, and this decision might have led to greater harm than that which actually occurred.

Moreover, the notion of ‘danger’ in this context need not be direct. It might also apply to the juvenile detention centre officer Derek Tasker, the defendant in the ‘ground stabilising’ assault case referred to at the beginning of this article. Tasker was more than twice the size and weight of the 13-year-old Dylan Voller,<sup>82</sup> and so was unlikely to have felt directly physically threatened by the child, particularly as there ‘was no suggestion that [Voller] might have any weapon on his person’.<sup>83</sup>

Tasker might, however, have argued that he was indirectly exposed to danger through being spat on, and possibly being bitten, by the detainee. Evidence was given of Voller being verbally aggressive, of falsely accusing staff of hurting him, and of threatening suicide or self-harm.<sup>84</sup> He destroyed property, and was known as a ‘spitter’, having repeatedly spat at staff over a number of years.<sup>85</sup> Staff alleged that he ‘was a biter as well ... none of us want to be bitten’,<sup>86</sup> although the magistrate rejected this suggestion as having no factual basis.<sup>87</sup> The NT Royal Commission Final Report noted that there was evidence that a directive authorising the use of spit hoods as part of behavioural management was introduced in 2015 ‘as a result of increasing occurrences of staff being spat on by detainees, and their concerns included the risk of transmission of diseases through contact with saliva’.<sup>88</sup>

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80 Explanatory Memorandum, Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (Cth) [97].

81 *Whittington* (2006) 17 NTLR 235.

82 See *Police v Tasker* [2014] NTMC 2, [37] (Trigg SM). Voller weighed about 45–50 kilograms at the time, and Tasker about 110–15 kilograms.

83 *Ibid* [69] (Trigg SM).

84 *Ibid* [38] (Trigg SM).

85 *Ibid* [52] (Trigg SM). He was said to be an ‘extremely difficult child to deal with ... notorious for banging his head on the wall, the floor, the doors’: at [57] (Trigg SM).

86 *Ibid* [57] (Trigg SM).

87 *Ibid* [58] (Trigg SM).

88 *NT Royal Commission Final Report*, above n 1, vol 2A, 246.

It is difficult to see how Tasker's reaction to the risk of being spat upon in this context could have been influenced by the existence of immunity from criminal liability. However, there is another related aspect to this argument. It stems from the strong element of dislike or disgust in the evidence given by the juvenile detention centre officers at Don Dale. Staff were 'increasingly upset' by being spat on, according to evidence given to the NT Royal Commission.<sup>89</sup> They did not think they were 'there as punching bags'.<sup>90</sup> Part of this 'upset' stems from the difficulty of the job, and the regularity with which police and others in law enforcement can expect to be exposed to unpleasant or repellent human behaviour. The argument in this context reflects the belief that police and law enforcement officers whose job it is to defend the security and safety of the community should not be subject to the taint of a criminal prosecution, particularly where they have acted to protect community members from the consequences of their own actions.

Thus, the argument in favour of criminal immunity is not solely based on the inherently dangerous nature of law enforcement work. In addition, and as a result of that inherent danger, the argument is that officers might be hindered in the performance of their duties, or become more defensive or reluctant to carry them out, if they knew they might subsequently be subject to criminal prosecution. Underlying this seems to be the view that there is an overriding public interest in officers of the law being able to carry out their duties unhindered.

This argument is reminiscent of similar justifications traditionally given for the immunity of barristers, judges and others connected with the administration of justice from civil liability for negligence. In *Rondel v Worsley*, for example, the House of Lords concluded that it was in the public interest that barristers should be protected from civil suit in respect of their actions in court, because imposing liability might lead barristers to be less attentive to their overriding duties to the court.<sup>91</sup> Other participants in the legal process, such as witnesses, jurors and judges, enjoy a similar immunity, and for broadly similar reasons.<sup>92</sup>

The United Kingdom courts have referred to similar factors in considering whether the public interest should lead to the conclusion that police officers are immune from civil liability for negligence in the course of carrying out their duties. In *Hill v Chief Constable of West Yorkshire*, for example, the House of Lords was concerned with whether the police had negligently failed to catch the West Yorkshire serial killer Peter Sutcliffe, and whether that negligence was the cause of the loss suffered by the plaintiff, whose daughter was Sutcliffe's last victim.<sup>93</sup>

The Court confirmed that there was no doubt that a police officer might be 'liable in tort to a person who is injured as a direct result of his acts or omissions'.<sup>94</sup> However, this did not extend to a general liability for failure to

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89 Ibid.

90 *Police v Tasker* [2014] NTMC 2, [57] (Trigg SM).

91 *Rondel v Worsley* [1969] 1 AC 191, 227–8 (Lord Reid); 251 (Lord Morris); 259–60 (Lord Pearce).

92 Ibid 269–70 (Lord Pearce).

93 *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53.

94 Ibid 59 (Lord Keith).

catch an unidentified criminal in time to prevent him from committing further offences. The imposition of liability in such a situation would not tend ‘towards the observance of a higher standard of care in the carrying on of various types of activity’, but might rather ‘lead to the exercise of a function being carried on in a detrimentally defensive frame of mind’.<sup>95</sup> Moreover, it might lead to a

significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted.<sup>96</sup>

The following section will argue that criminal immunity from prosecution offers no practical benefit to police and law enforcement officers in carrying out their duties, and therefore no practical benefit to the broader community. On the contrary, it will argue, there are good arguments of both practice and principle that criminal immunity should not exist.

## IV POLICY ARGUMENTS AGAINST CRIMINAL IMMUNITY

### A Practical Arguments

The first argument requires examination of what effect, if any, criminal immunity might have on the decisions of police and law enforcement officers facing dangerous and emergency situations. Such situations are rarely encountered by ordinary citizens in their everyday lives. They require people to make split-second decisions in circumstances of extraordinary stress. Thus, as the Coroner noted in the *Whittington* case, discussed above, the policeman’s stress probably caused him to suffer from ‘auditory exclusion’ and prevented him from seeing anything other than the man, Worumbu, who was causing the threat.<sup>97</sup> This caused him to make fundamental errors of judgment, including breaches of basic rules regarding the safe use of firearms, which led to the victim’s death.

The Coroner’s conclusion is borne out by psychological research into the influence of anxiety on performance. A study in the Netherlands, for example, found that ‘police officers perform relatively well on (low-pressure) shooting tests (ie with hit percentages above 90 per cent) but perform substantially worse when actually firing in the line of duty (ie with hit percentages varying between 36 and 54 per cent ...)’.<sup>98</sup> Similar results were found with arrest and self-defence skills, which clearly suffered under pressure. One theory suggests that performance suffers in stressful situations because ‘more attention goes to task-irrelevant sources of information (eg one’s thoughts, feelings, behaviour or

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95 Ibid 63 (Lord Keith).

96 Ibid. In Australia, see *Cran v New South Wales* (2004) 62 NSWLR 95; *Australian Capital Territory v Crowley*; *Commonwealth v Crowley* (2012) 7 ACTLR 142; Mandy Shircore, ‘Police Liability for Negligent Investigations: When Will a Duty of Care Arise?’ (2006) 11(1) *Deakin Law Review* 33.

97 *Inquest into the Death of Robert Jongmin* [2007] NTMC 80, [81] (Cavanagh SM).

98 Arne Nieuwenhuys et al, ‘Quantifying Police Officers’ Arrest and Self-Defence Skills: Does Performance Decrease Under Pressure?’ (2009) 52 *Ergonomics* 1460, 1460–1.

appearance) while less attention is paid to information that is task-relevant'.<sup>99</sup> Whatever the reason, it seems apparent that performance in stressful situations is improved by training in those situations, the goal being for the individuals to learn to 'invest extra mental effort in a more efficient way'.<sup>100</sup>

The Australian experience reflects the suggestion that training is the most important factor in improving the responses of law enforcement officers in emergency situations. In the *Whittington* case, the Coroner concluded that errors occurred primarily because of the police officer's deficiencies in training.<sup>101</sup> A significant recommendation in that case was that 'consideration be given to improving or enhancing training given to all recruits and operational members'.<sup>102</sup>

A striking illustration of this point is the 1991 report of the Royal Commission into Aboriginal Deaths in Custody into the death of David Gundy, an Aboriginal man shot by police in Sydney in 1989.<sup>103</sup> Gundy was shot in his bedroom by members of a police Special Weapons and Operations Section ('SWOS') team who were raiding his flat in the mistaken belief that a violent armed robber who had recently shot a police officer might be hiding there. The Royal Commissioner was highly critical of a serious deficiency in the preparation and training of the SWOS squad:

It is in the nature of things that a unit such as SWOS will develop a very high degree of self-esteem, confidence and certainty about its own proficiency and rectitude. The confidence of a SWOS member in himself and his team mates is the very basis of the high-risk operations which they undertake. But the down side of this necessary confidence is the risk of self-satisfaction, self-righteousness, arrogance and lack of concern for the law or those who may stand in the way of successful operations.<sup>104</sup>

The police officer who shot Gundy had not been prepared by his training for the possibility that a person would not freeze when confronted with a shotgun. More disturbingly, the officer and other members of his team were 'for the most part unwilling to admit that their operation was less than perfect or that they have anything to learn from it or from their Victorian colleagues'.<sup>105</sup> The Commissioner was particularly struck by the response from a senior officer, Superintendent Harding, to a question about his failure to investigate the issue of lawfulness of the investigation. Harding replied '[i]n this sterile atmosphere most certainly, but out in the field where it's happening, no'.<sup>106</sup>

If the chance of such incidents occurring into the future is to be reduced, it is clear that everything possible should be done to foster a police culture of training

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99 Ibid 1460.

100 Ibid 1467.

101 See generally discussion in Part IIA above, and n 35.

102 *Inquest into the Death of Robert Jongmin* [2007] NTMC 80, [107] (Cavanagh SM). This recommendation was the result of the considerable evidence 'adduced at the Inquest about the benefits of interactive training, which involved dynamic, moving targets and where police officers are trained to make quick and optimal judgment calls': at [106] (Cavanagh SM).

103 Commonwealth, *Report of the Inquiry into the Death of David John Gundy*, above n 28.

104 Ibid 12.

105 Ibid 11.

106 Ibid 14.

and accountability. Recommendations of this type have been made in many coronial inquests and other contexts over the past few decades,<sup>107</sup> including that into the death of David Gundy.<sup>108</sup> Giving police and other law enforcement officers immunity from criminal liability for their actions is unlikely to help in this aim. On the contrary, it is likely to add to the level of insulation or lack of accountability they already possess.

## B Community Relations – An Argument Based on History

To understand the historical context in which criminal immunity provisions operate, it is necessary firstly to appreciate something of the historical origins of the criminal law governing the operations of police. At common law, police could not be prosecuted for their use of reasonable force. While the basis for this rule is not entirely clear, it is grounded in the related doctrines of necessity, coercion, duress and superior orders. The rule recognises that police use of force is reasonable, lawful and necessary for carrying out their duties.<sup>109</sup>

It is important to point out that the rule recognises and reflects the reality of police work of an earlier era. Police often did not carry firearms themselves, and certainly did not have modern weapons such as tasers or capsicum spray. Consequently, they had limited practical ability to arrest potentially armed people suspected of serious felonies. Such people were likely to face the death penalty if apprehended and convicted, and so had every incentive to use violence in resisting arrest.<sup>110</sup> No doubt partly in response to this situation, courts were sympathetic towards police dealing with danger, and disinclined to believe evidence that their use of force was excessive.<sup>111</sup>

However, this natural ‘sympathy’ on the part of the law for its enforcement officers can easily become something far more dangerous: a legal and cultural environment that encourages police abuse of power. In the US, as is well-known,

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107 See, eg, the recommendations of the Office of Police Integrity in its 2009 report into the management of the use of force by Victoria Police: Parliament of Victoria, *Review of the Use of Force by and against Victoria Police*, Parl Paper No 165 (2009). See also the coronial report into the death of Tyler Cassidy: Coroner’s Court of Victoria, ‘Redacted Finding into Death with Inquest: Tyler Jordan Cassidy’ (23 November 2011). See generally discussion in Simon Bronitt, ‘Editorial: Rethinking Police Use of Force: Linking Law Reform with Policy and Practice’ (2012) 36 *Criminal Law Journal* 71. See also Terry Goldsworthy, ‘Shoot to Kill: The Use of Lethal Force by Police in Australia’, *The Conversation* (online), 25 November 2014 <<http://theconversation.com/shoot-to-kill-the-use-of-lethal-force-by-police-in-australia-34578>>.

108 Commonwealth, *Report of the Inquiry into the Death of David John Gundy*, above n 28, 105–8.

109 For example, Brownlie argues that police have a ‘paramount duty’ to preserve the peace, and that this justifies their use of reasonable force: see Ian Brownlie, ‘The Law Relating to Public Order’ (Butterworths, 1968) 109.

110 For further discussion of this point, see Tasmania Law Reform Institute, ‘Consolidation of Arrest Laws in Tasmania’, above n 44, 37. The Law Reform Institute comments that

[t]he law relating to force in arrest developed at a time when police had limited powers of arrest for serious offences (felonies). These offences were punishable by death. The means to effect arrest were comparatively unsophisticated. Today the police have advanced technology and weaponry at their disposal in apprehending suspects.

111 For example, Brownlie notes that ‘some courts still find it very difficult not to believe the police evidence even when its lack of cogency has been successfully demonstrated’: see Michael Supperstone, *Brownlie’s Law of Public Order and National Security* (Butterworths, 2<sup>nd</sup> ed, 1981) 333 n 11.

law enforcement officers are responsible for a high rate of killing of vulnerable individuals, especially African-Americans, often in suspicious circumstances of 'self-defence'.<sup>112</sup> Critics have argued that laws such as Florida's 'Stand Your Ground' laws have helped foster a culture that encourages this type of action.<sup>113</sup>

Taken to extremes, police immunity from prosecution could lead to a situation where they act with complete impunity, in the knowledge that they are above the law. Where this is the position, police and law enforcement officers are less likely to be respected than they are to be feared and despised by those most likely to come into contact with them. The possibility of such a culture developing in Australia is illustrated in the Four Corners footage of the Don Dale Detention Centre of July 2016. Unfortunately, this culture of police immunity is not unknown in Australian history.

In Australia as much as in the US, it is impossible to ignore the fact that policing and law enforcement has a racial aspect. It is disproportionately exercised against Indigenous people, who are incarcerated at a rate many times higher than non-Indigenous people.<sup>114</sup> Indigenous people are over-represented at even higher rates in juvenile detention, with approximately 96 per cent of juveniles in detention in the NT, for example, being Aboriginal.<sup>115</sup> Police killing of Aboriginal people and Aboriginal deaths in custody remain an intensely controversial issue, particularly amongst Aboriginal communities, as is apparent from several high-profile cases in recent decades, as well as the Royal Commission into Aboriginal Deaths in Custody itself.<sup>116</sup>

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112 For a recent example, note the fatal shooting of Australian woman Justine Diamond in Minneapolis in July 2017: see Rick Sarre, 'Charges in Justine Diamond Case a Reminder of the Dangers of a "Warrior Cop" Mentality', *The Conversation* (online), 21 March 2018 <<https://theconversation.com/charges-in-justine-diamond-case-a-reminder-of-the-dangers-of-a-warrior-cop-mentality-93725>>. The US had about 400 fatal police shootings per year in 2014. This contrasts with the UK, where (at least until very recently) police were unarmed, and where there were around nine fatal police shootings per year. See discussion in Goldsworthy, above n 107.

113 Since 2005, a number of US states have enacted immunity provisions in their law of self-defence. They are now collectively known as 'Stand Your Ground' laws. The first such law, passed in Florida in 2005, established a presumption that force was used reasonably where a defendant was faced with an unlawful intruder in the home, and stated that a person using such force is immune from criminal prosecution and civil action. Approximately half of the US states have now enacted similar laws: see Jennifer Randolph, 'How to Get Away with Murder: Criminal and Civil Immunity Provisions in "Stand Your Ground" Legislation' (2014) 44 *Seton Hall Law Review* 599, 604, 613–14.

114 According to the Australian Bureau of Statistics figures from June 2016, the Aboriginal incarceration rate was approximately 13 times higher than the non-Aboriginal incarceration rate: see Australian Bureau of Statistics, 'Prisoners in Australia, 2016' (Publication No 4517.0, December 2016). See also Attorney-General's Department, 'Terms of Reference – ALRC Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' (9 February 2017) <<https://www.ag.gov.au/Consultations/Documents/ALRC-inquiry-incarceration/Terms-of-reference-ALRC-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples.pdf>>.

115 See, eg, Stephen Gray, 'Scoring the Intervention: Fail Grades on Closing the Gap, Human Rights' (2016) 8(23) *Indigenous Law Bulletin* 10, 13. Approximately 30 per cent of the NT's population is Aboriginal: see Australian Bureau of Statistics, 'Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016' (Publication No 2071.0, October 2017).

116 See, eg, the death of Mulrunji (Cameron Doomadgee) at Palm Island: *Inquest into the Death of Mulrunji* (27 September 2006). The case is discussed in Chloe Hooper, *The Tall Man: Death and Life on Palm Island* (Hamish Hamilton, 2008).



Police and police trackers were intimately involved in some of the most notorious frontier massacres in Australian history. Queensland police, including their Native Police Force, played a leading role in the peculiarly savage and violent history in that State.<sup>117</sup> In central Australia, Constable William Willshire was personally responsible for the shooting of numerous Aboriginal people.<sup>118</sup> In 1891, he ordered native constables to shoot and burn two Aboriginal men known as Donkey and Roger for cattle-killing.<sup>119</sup> For this crime, Willshire was the first police officer ever put on trial for murder of an Aboriginal person.<sup>120</sup> He received strong public support, the benefit of defence by former Attorney-General and Premier of South Australia, Sir John Downer, whose services were paid for by pastoralists,<sup>121</sup> and a prosecution which cast aspersions on the evidence of Aboriginal witnesses.<sup>122</sup> The jury took fifteen minutes to find Willshire not guilty.<sup>123</sup>

A further chilling example of police behaviour can be found in the minutes of evidence given in Western Australia in 1927, to a body entitled, in a self-explanatory manner, the Royal Commission of Inquiry into Alleged Killing and Burning of Bodies of Aborigines in East Kimberley, and into Police Methods when Effecting Arrests.<sup>124</sup> During this episode, perhaps better known as the Forrest River massacre, a punitive expedition of six Europeans, including police, and seven Aboriginal trackers was mounted to seek the killers (or rather, avenge the death) of a European named Hay. The white evidence ‘consisted mainly of denials of any knowledge whatever of the shooting or burning of natives during the course of the expedition. The whites, one and all, agreed on that point’.<sup>125</sup> The Commission commented on, but was apparently unable to do anything about, the absence of crucial evidence which might have been unfavourable to

117 See, eg, Timothy Bottoms, *Conspiracy of Silence: Queensland's Frontier Killing-Times* (Allen & Unwin, 2013). Native Police were Aboriginal troopers under the command of a white police officer, often used to track dissident or rebellious Aboriginal people.

118 See Amanda Nettelbeck and Robert Foster, *In the Name of the Law: William Willshire and the Policing of the Australian Frontier* (Wakefield Press, 2007) 2. Willshire himself admitted that he ‘shot dead innumerable Aboriginal people in the course of his patrols in the Interior’: at 2.

119 Ibid 115.

120 Nettelbeck and Foster review the practice of policing the frontier in the period prior to Willshire’s trial, concluding that the true purpose of policing was not to arrest offenders, but to subdue Aboriginal resistance, with Aboriginal aggressions being countered by ‘exemplary shows of force’: ibid 32–3. On Willshire as the first policeman to be charged for murder of an Aboriginal person in Australian history, see D J Mulvaney, *Willshire, William Henry (1852–1925)* (2006) Australian Dictionary of Biography <<http://adb.anu.edu.au/biography/willshire-william-henry-9128>>, originally published in John Ritchie (ed) *Australian Dictionary of Biography* (Melbourne University Press, 1990) vol 12.

121 Nettelbeck and Foster, above n 118, 114–15.

122 The Prosecutor said that their evidence ‘must be weighed very carefully’ due to their ‘[s]implicity of character, a not too retentive memory, and a tendency to adopt a course which they considered would be most agreeable to the person questioning ... [making] their evidence subject to suspicion’: ibid 115.

123 Ibid 120.

124 Western Australia, Report of Royal Commission of Inquiry into Alleged Killing and Burning of Bodies of Aborigines in East Kimberley, and into Police Methods when Effecting Arrests (1927).

125 Ibid vi. The Commission went on to note that ‘it cannot be overlooked that the evidence of those witnesses was the evidence of interested parties. They had everything to gain by denial and everything to lose by admission’: at vi.

the police.<sup>126</sup> The Chief Protector, Mr Neville, seemed more concerned with the possible effect on the reputation of Western Australia than with the fate of the Aboriginal people, of whom he was prepared to say only that they 'appear to have lost their lives in some untimely way'.<sup>127</sup> The Commission found that 11 people had been killed, but due to the lack of evidence was unable to say who might have been responsible.<sup>128</sup>

More recently, police have occasionally been subjected to criminal trial for their actions against Aboriginal people. In 1984, four police officers and a police aide were committed for trial before the Western Australian Supreme Court in Karratha for the manslaughter of John Pat. All were acquitted and reinstated to duty. The Coroner had written to the Attorney-General outlining what he perceived to be inadequacies in the police investigation into Pat's death. The views of the Commissioner of Police were sought on this matter, and the Commissioner responded that he believed there was no substance in the comments.<sup>129</sup> This case became 'for Aboriginal people nation wide a symbol of injustice and oppression',<sup>130</sup> and was a major impetus behind the eventual establishment of the Royal Commission into Aboriginal Deaths in Custody, which reported into Pat's death.

Another death investigated by the Royal Commission was that of Jabanardi, who died at Ti-Tree in 1980, after a vehicle in which he was a passenger was forced to a stop by police. One of the police officers, Constable Clifford, shot Jabanardi during the course of a fight between the police and the Aboriginal occupants of the car, with Clifford alleging that Jabanardi was approaching him with a large nulla-nulla, or fighting stick. There were many deficiencies in the police investigation of the killing.<sup>131</sup> Clifford was put on trial for Jabanardi's murder in Alice Springs in October 1981. He was acquitted by the jury. The

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126 The Commission stated that

all attempts to get the individuals in question to stand to their statements were fruitless. In fact, what amounted to a conspiracy of silence existed throughout the locality ... I was impressed with the evident ill-feeling entertained towards what may be termed the bush blacks, as distinguished from the domesticated blacks, on account of the killing of cattle.

Ibid.

127 The Chief Protector, Mr Neville, stated that:

Anyone following the matter carefully can only come to one conclusion, and that is that natives have lost their lives in some untimely way – how, Sir, it is for you to say, and not for us. I only hope, for the sake of the fair name of Western Australia in respect of its treatment of the natives, that the truth will come out. The inquiry should at least encourage the belief that improved methods of handling native matters in certain directions may be instituted, and I hope that my repeated representations in these respects may now bear fruit.

Ibid 92.

128 An Aboriginal man, Lumbia, was however arrested and committed for trial for the killing of the European Hay: *ibid* 6.

129 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of John Peter Pat* (1991) 12.

130 *Ibid* 2.

131 For failures noted by the Coroner, see Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Report of the Inquiry into the Death of Jabanardi (at Ti Tree)* (1991) 24–5.

Aboriginal occupants of the vehicle were, however, convicted of various assaults.<sup>132</sup>

Perhaps the best known of all these cases is the investigation and ultimate trial of Senior Sergeant Chris Hurley for the killing of Mulrunji (Cameron Doomadgee) at Palm Island in 2004. Mulrunji died after sustaining severe liver injury while in police custody. Whether Hurley had deliberately or accidentally fallen on him, or had perhaps punched him, possibly in retaliation for an earlier dispute in which Mulrunji had punched Hurley, was the subject of enormous controversy. A coronial inquest in 2006 found that Mulrunji died as a result of Hurley's actions, and referred the case to prosecuting authorities.<sup>133</sup> Hurley was put on trial, but acquitted; and a further coronial inquiry in 2010 returned an open finding.<sup>134</sup>

Given this history, it is clear that any discussion of the potential legal immunity of police from criminal prosecution must take account of the historical relations between police and Indigenous people. That history contributes to an understandable perception among many Indigenous people that many police act with impunity where Indigenous people are concerned. That perception, and poor police-Indigenous relations in general, can only be fuelled by the use of provisions that render the police legally immune.

### C Further Arguments: Inconsistency and Uncertainty

A notable feature of several of the immunity provisions discussed in this article is that their existence on the statute book seems only to have been noticed when raised, sometimes at a late stage, during a trial. This was certainly the case with the provision at issue in the *Whittington* case, section 162 of the *Police Administration Act 1978* (NT). Prior to the case, this provision was understood to apply only to civil actions against the police.<sup>135</sup> In March 2005, almost immediately after the time limit issue was raised by Mildren J in the Supreme Court, section 162 was amended to introduce a new scheme dealing with the Territory's vicarious liability for torts committed by police officers. The two-month time limit on criminal prosecution was abolished, without a word being uttered on the matter in the Police Minister's Second Reading Speech.<sup>136</sup>

Similarly, the immunity provision for youth detention centre guards in section 215 of the *Youth Justice Act 2005* (NT) was not raised in the Tasker case, either at Magistrates' Court or Supreme Court levels. Nor was the general, but partial, immunity provision found in section 208E of the *NT Criminal Code*, which would appear to be equally applicable to a juvenile detention centre guard. Despite the fact that this provision was only introduced into the *NT Criminal Code* in 2005, and that there was presumably a policy reason for its introduction, it seems to have escaped the notice of the defence. An alternative explanation is that prosecutors and defence were aware of it, but elected not to raise it because

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132 Ibid 5–6.

133 *Inquest into the Death of Mulrunji* (27 September 2006).

134 *Inquest into the Death of Mulrunji* (14 May 2010).

135 See, eg, *Police v Miller* [2001] NTMC 53 (Loadman SM).

136 See Gray, 'Case and Comment', above n 13.

of the public sensitivity of the case, and the desire to avoid the perception that detention centre guards were assaulting inmates and escaping all legal consequence.

If this is the case, it furnishes a further reason for the abolition of these provisions. Inconsistency and uncertainty undermines public faith in the administration of justice. This is particularly so where those likely to suffer from the application of the provisions, in this case NT Aboriginal people, have a history of mistreatment at the hands of the law and those who enforce it.

### D Human Rights Perspectives

Perhaps the strongest argument for the abolition of immunity provisions comes from the perspective of human rights. As is clear from the foregoing discussion, Australia's treatment of vulnerable people in closed environments is highly susceptible to criticism from a human rights perspective. The use of force in the Don Dale Detention Centre could be argued to amount to torture, contrary to the article 7 prohibition against torture in the *International Covenant on Civil and Political Rights* ('ICCPR'),<sup>137</sup> and to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment* ('CAT')<sup>138</sup> itself.<sup>139</sup> The NT Royal Commission Final Report found that the verbal abuse and 'physical control' to which detainees were subject was inconsistent with basic human rights contained in the *United Nations Convention on the Rights of the Child*,<sup>140</sup> particularly the right to be treated with humanity and respect.<sup>141</sup> The Report also found that the treatment including the use of restraints was in breach of relevant provisions of the *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*,<sup>142</sup> as well as article 10 of the ICCPR.<sup>143</sup>

It is true that rights under international conventions such as the ICCPR are of limited practical use to detainees unless they are effectively implemented under Australian law. International law does oblige States Parties to take necessary steps to give effect to rights existing under that law, including ensuring the

137 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

138 Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

139 For an allegation to this effect, see Calla Wahlquist, 'Treatment of Children at Don Dale Prison Could Amount to Torture, Says UN', *The Guardian* (online), 28 July 2016 <<https://www.theguardian.com/australia-news/2016/jul/28/treatment-of-children-at-don-dale-prison-could-amount-to-torture-says-un>>. See Bronwyn Naylor, Julie Debeljak and Anita MacKay, 'A Strategic Framework for Implementing Human Rights in Closed Environments' (2015) 41 *Monash University Law Review* 218, 225–6; see also Bronwyn Naylor, 'Protecting Human Rights in Detention: Rights, Monitoring and OPCAT' (2016) 41 *Alternative Law Journal* 151, 153.

140 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

141 *NT Royal Commission Final Report*, above n 1, vol 2A, 159, 164–5; see also Commonwealth, *Findings and Recommendations*, above n 48, 3.

142 GA Res 45/113, 68<sup>th</sup> plen mtg, UN Doc A/RES/45/113 (14 December 1990). NT Royal Commission Final Report, above n 1, vol 2A, 169, 239; see also Commonwealth, *Findings and Recommendations*, above n 52, 5.

143 *NT Royal Commission Final Report*, above n 1, vol 2A, 331; see also Commonwealth, *Findings and Recommendations*, above n 52, 9.

availability of effective remedies to victims.<sup>144</sup> States are required to submit periodic reports to the treaty-monitoring body about their progress in implementing their treaty obligations; and individuals can communicate alleged violations of their human rights to the treaty-monitoring body, which pronounces its views on the merits of the communication.<sup>145</sup> However, Australia has a history of ignoring or rejecting the findings of such bodies.<sup>146</sup> Under Australian domestic law, a treaty is not legally binding unless it is incorporated into domestic law by the Commonwealth Parliament under section 51(xxix) of the *Constitution*.<sup>147</sup>

Nevertheless, international law has an increasing influence on Australian law. This is particularly so in those jurisdictions which have adopted human rights charters, notably Victoria and the ACT,<sup>148</sup> where ‘human rights considerations are now part of the decision-making matrix of all core and hybrid public authorities’.<sup>149</sup> Even outside these jurisdictions, international treaties such as the *ICCPR* and the *CAT* are a significant influence on the legal policy process, as is evident in the official response to the *NT Royal Commission Final Report* itself.<sup>150</sup>

In December 2017, Australia ratified the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (‘*OPCAT*’).<sup>151</sup> In so doing, it committed to creating an independent National Preventive Mechanism (‘*NPM*’), or a regime of independent inspections

144 Art 2 of the *ICCPR* requires states ‘to take the necessary steps ... to adopt such laws or other measures ... to give effect to the rights’ in the *ICCPR*, as well as ensuring effective remedies: see discussion in Naylor, Debeljak and MacKay, above n 139, 225.

145 For example, individual communications can be made under the First Optional Protocol to the *ICCPR*: see *Optional Protocol to the International Covenant on Civil and Political Rights*, open for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); and see also *CAT* art 22; see generally discussion in Naylor, Debeljak and MacKay, above n 139, 228–9.

146 Julie Debeljak, ‘Does Australia Need a Bill of Rights?’ in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook, 2012) 37, 53–6. For an example, see Human Rights Committee, *Views: Communication No 1184/2003*, 86<sup>th</sup> sess, UN Doc CCPR/C/86/1184/2003 (27 April 2006) (‘*Brough v Australia*’), concerning the treatment of a 16-year-old Aboriginal boy with a mild intellectual disability in prison: see discussion in Naylor, Debeljak and MacKay, above n 139, 230.

147 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 193–5 (Gibbs CJ), 211–12 (Stephen J), 237–40 (Murphy J).

148 In Victoria, note the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic); and in the ACT, see the *Human Rights Act 2004* (ACT). See discussion in Naylor, Debeljak and MacKay, above n 139, 232–41. The Victorian Charter adopts a ‘dialogue model’ intended to respect parliamentary sovereignty. This means that ‘judges cannot invalidate legislation that unjustifiably limits rights’: at 232.

149 Naylor, Debeljak and MacKay, above n 139, 246.

150 For example, the Commonwealth Government supported the recommendation of the NT Royal Commission that a Commission for Children and Young People be established, and provided with functions that are compatible with the requirements of a National Preventive Mechanism as set out in *Optional Protocol to the Convention against Torture*: see Commonwealth, ‘Detailed Commonwealth Response to the Royal Commission into the Protection of Children and Detention of Children in the Northern Territory’ (2017) <<https://www.dss.gov.au/sites/default/files/files/our-responsibility/families-and-children/Government-response-Attachment-A--Integrating-Comments.pdf>>.

151 *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006). See Australian Human Rights Commission, ‘Australia Ratifies Major Anti-Torture Treaty OPCAT’ (Media Release, 15 December 2017).

for all places of detention, as well as facilitating periodic monitoring visits by the United Nations Subcommittee on the Prevention of Torture ('SPT'). In order for a monitoring scheme to be *OPCAT*-compliant, a monitoring body needs to be independent and adequately resourced, supported by adequate functions and powers, and able to work cooperatively with detaining authorities as well as report publicly on its work.<sup>152</sup> A possible model for such a scheme is the United Kingdom Inspectorate of Prisons ('UK Inspectorate'),<sup>153</sup> although it is likely that the monitoring role in Australia will be allocated to existing monitoring bodies.<sup>154</sup>

The major point of a monitoring regime, according to Fletcher, is to 'ensure transparency and accountability in a sphere in which the government has complete power over individuals, but to do so in a non-confrontational way'.<sup>155</sup> As part of 'transparency and accountability', Naylor, Debeljak and MacKay argue that it is necessary to change 'the culture of closed environments to be human rights oriented and compliant'.<sup>156</sup> This requires the establishment of an 'organisational culture' which is 'respectful of the human rights of people both within and outside the organisation' and which complies 'with the organisation's negative and positive obligations to promote human rights'.<sup>157</sup> Elements of such a culture might include harmony and respect, professionalism and fairness of procedure, security, family contact and regime decency, and wellbeing and development.<sup>158</sup> These may sound utopian or unrealistic, but are in fact highly valued by prisoners, who, for example, 'know the difference between "feeling humiliated" and "retaining an identity"'.<sup>159</sup>

The culture of abuse prevailing at Don Dale was the product of an emphasis on security and discipline rather than on the human rights of vulnerable detainees. The legal framework of juvenile detention in the NT was the foundation and justification for this culture. A significant part of this framework was the criminal immunity from prosecution of detention centre guards. As Australia has now implemented the *OPCAT*, it has now committed itself to establishing monitoring mechanisms to ensure transparency and accountability, as well as a 'human rights culture'. Part of that should involve accepting that a

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152 Catherine Branson, 'Potential for Oversight – The Role and Effectiveness of Monitoring Bodies in Overseeing Human Rights in Closed Environments: A Commonwealth Perspective' in Bronwyn Naylor et al (eds), *Monitoring and Oversight of Human Rights in Closed Environments: Proceedings of a Roundtable* (Monash University Law Faculty, 2012) 37, 39.

153 See discussion of the UK Inspectorate in Naylor, Debeljak and MacKay, above n 139, 256.

154 In New Zealand, which ratified the *OPCAT* in 2007, the role is allocated to five existing monitoring bodies, with the New Zealand Human Rights Commission as the Central NPM: see discussion in Naylor, Debeljak and MacKay, above n 139, 258.

155 Adam Fletcher, 'Australia and the *OPCAT*' (2012) 37 *Alternative Law Journal* 233, 234, quoted in Naylor, Debeljak and MacKay, above n 139, 259.

156 Naylor, Debeljak and MacKay, above n 139, 260.

157 Ibid 261.

158 See discussion of these factors in ibid 262.

159 Alison Liebling, 'Moral Performance, Inhuman and Degrading Treatment and Prison Pain' (2011) 13 *Punishment and Society* 530, 533, cited in Naylor, Debeljak and MacKay, above n 139, 263.

component of equality before the law for vulnerable detainees is equal access for detainees, as victim or complainant, to the criminal courts.<sup>160</sup>

## V CONCLUSION

This article has argued for the abolition of provisions found in various Australian statutes giving police and law enforcement officers full or partial immunity from criminal prosecution for actions carried out in the course of their duties. It has considered the justifications for such provisions, including that they are necessary to protect officers or the general public from danger. The strongest justification for their existence, it has been argued, stems from the argument that officers might become defensive or reluctant to carry out their duties if they knew they might subsequently be subject to criminal prosecution. Underlying this, it has been suggested, is the view that there is an ‘overriding public interest’ in police and law enforcement officers, like judges and barristers, being able to do their jobs unhindered. This view depends ultimately on the respect, even awe, in which police and law enforcement officers, as instruments or embodiments of the law, have traditionally been held.

In this context, it is arguably no accident that such provisions remain most common in the NT, the last ‘frontier’ once known as the ‘wastelands of the Crown’.<sup>161</sup> It is in the Territory that the view is most likely to persist that certain people, by their actions or perhaps their situation in life, have effectively placed themselves outside the protection of the law: ‘outlaws’ in a sense, who might, as under the old English law of outlawry, legitimately be killed.<sup>162</sup> Just as ‘Stand Your Ground’ laws reflect the moral attitudes of the US gun culture, immunity provisions in the NT may be argued to reflect the cultural and moral attitudes of the frontier. That such provisions are most likely to be enacted against people viewed as outside the protection of the law is illustrated by their appearance in immigration detention centre legislation, to be used potentially as a weapon against asylum seekers arriving by boat. Such people are also viewed by Australian law as outsiders, as aliens undeserving of the protection of human rights.<sup>163</sup>

Criminal immunity provisions are flawed from a human rights perspective. In addition, the practical consequences of immunity provisions are deeply undesirable. Successive reports and inquiries have over decades emphasised the importance of training as a way to avoid fatal police shootings and other acts of

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160 See further discussion of the notion of human rights culture in Naylor, Debeljak and MacKay, above n 139, 261.

161 Note the use of the phrase ‘wastelands of the Crown’ to refer to the NT in the legislation annexing the Territory to South Australia, the *Northern Territory Act 1863* (SA).

162 For a case considering the application of the old English common law of outlawry to an Aboriginal man accused of murdering a European, see *R v Jimmy Governor* (1900) 21 LR (NSW) 278.

163 On this issue see discussion of the absence of a broader human rights culture in Australia, as well as lack of public sympathy towards vulnerable groups such as asylum seekers, in Naylor, Debeljak and MacKay, above n 139, 263.

violence committed in a law enforcement context.<sup>164</sup> Training needs not only to enable police to respond better in situations of high stress; it also needs to encourage the development of a culture in which the human rights of arrested persons and other vulnerable individuals are respected, and in which force is used as a matter of last resort.<sup>165</sup> If such a culture is to be developed and strengthened, transparency and accountability requires that police and law enforcement officers have no greater immunity from prosecution for their actions than other members of the community.

Simon Bronitt has argued that 'the key problem is not the incidence or prevalence of police use of force, but the lack of clarity surrounding decision-making and the legal powers of police to use force'.<sup>166</sup> While this is undoubtedly true in some contexts, the key problem in environments such as juvenile and immigration detention is the potential for human rights infringement and abuse. One way to help prevent such abuse is to remove from the law provisions which give police and law enforcement officers total or partial immunity for their actions.

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164 See, eg, Goldsworthy, above n 107. Goldsworthy notes that

in Queensland, operational police undergo Operational Skills and Tactics (OST) training once a year. This is hardly the repetitive training that allows you develop instinctive reactions, nor does it verse you well in knowing all of the options available to hand and which one to go to. The Queensland Police Union has called for firearms training 12 times per year.

165 The police operational safety principles ('OSP') incorporate the avoidance of confrontation and the minimum use of force: see discussion in Bronitt, above n 107.

166 *Ibid* 74.