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# Understanding discretion in modern policing

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*Discretion is a ubiquitous and legitimate aspect of modern policing, though its scope and limits are poorly understood. In this article, the authors seek to refine our understanding of discretion in modern policing by examining the historical evolution of the concept, and the modern challenges facing individual officers and police organisations in reconciling, on the one hand, the duty to enforce the law fairly and impartially, and on the other hand, the need to temper strict law enforcement for sound policy and operational reasons. The article reviews recent case law in Canada exploring these tensions within policing and the proper limits of police discretion.*

A lot of people think this is just a job that you go to take a lunch hour, job's over, something like that. But it's a twenty-four hour deal, no two ways about it. And what most people don't see, just how hard it is to do the right thing. People think if I make a judgment call that that's a judgment on them. But that's not what I do, and that's not what should be done. I have to take everything and play it as it lays. Sometimes people need a little help. Sometimes people need to be forgiven. And sometimes they need to go to jail. Now, it's a very tricky thing on my part, making that call. The law is the law, and heck if I'm gonna break it. You can forgive someone. Well, that's the tough part. What can we forgive? Tough part of the job. Tough part of walking down the street.

Officer Jim, *Magnolia* (Film, 1999)

"*Fiat justitia, ruat caelum*" [Let justice be done though the heavens fall] may be apt for a Judge: but it can lead a policeman into tactics disruptive of the very fabric of society.

Lord Scarman in his report on the Brixton Riots in 1981.<sup>1</sup>

## INTRODUCTION

Officer Jim's fictional lament (if that is not too strong a word) aptly captures both the centrality of discretion to the police officers' job, and the difficulty that frontline officers experience in deciding how best to exercise discretion in particular circumstances. And Lord Scarman's cautionary note emphasises the importance of the wise exercise of discretion to the policing role, and the possibly negative consequences of its misuse particularly in relation to the over-policing of ethnic minorities.<sup>2</sup> It has recently been seen in England again how an exercise of police discretion with respect to decisions to use force can be the trigger for an unexpected and unprecedented disintegration of normal community order.<sup>3</sup>

In this article, the authors review the topic of police discretion focusing on the following issues:

- the meaning and scope of police discretion;
- the inherent tensions within and paradoxes of discretion;
- how the law both enables and constrains discretion; and

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<sup>1</sup> The Rt Hon Lord Scarman, *The Scarman Report: The Brixton Disorders, 10-12 April 1981* (Penguin Books, 1981) p 103.

<sup>2</sup> Lord Scarman was referring to the police's stop and search practices which were the catalyst which sparked the Brixton riots in London in 1981.

<sup>3</sup> Dodd V and Davies C, "London Riots Escalate as Police Battle for Control", *The Guardian* (9 August 2011), <http://www.guardian.co.uk/uk/2011/aug/08/london-riots-escalate-police-battle> viewed 29 October 2011. The trigger for the London riots, which spread to a number of other cities, was the shooting of Mark Duggan by armed police in the course of an attempted arrest. In mentioning this, it is not implied that the decisions of the police who stopped Duggan were necessarily inappropriate or unwise. That is yet to be determined by the Independent Police Complaints Commission.

- the challenge faced by police to exercise discretion so as to uphold high standards of legitimacy and accountability expected by the community.

## WHAT IS POLICE DISCRETION?

The discovery of discretion as a topic worthy of scholarly attention came relatively late. A mere 30 years ago, Superintendent G Fryer, in charge of the New South Wales Police Department's Prosecuting Branch, opined in his foreword to the published proceedings of a seminar on "Police Discretion in the Criminal Process" held at the Institute of Criminology, University of Sydney, that the seminar "provided the forum for [police discretion] to be fully ventilated in New South Wales for the first time".<sup>4</sup>

Scholars of policing have pointed out, however, that police work by its very nature is discretionary in the sense that it involves the exercise of choice or judgement. As a leading historian of policing, Mark Finnane has noted, "Every level of police work, especially at the micro level, involves choice on part of the police officer".<sup>5</sup> Another leading scholar of public law observed in a similar vein, police have an extensive range of decisions, "whether to investigate, to question, to search, to arrest, to caution, to charge, to prosecute; what charge to bring, whether to negotiate over pleas and other matters, and which judge or bench of magistrates to put the case before".<sup>6</sup> But of course discretion is not unique to the police. As Stenning noted, discretion pervades common law systems of criminal justice at every stage (through arrest, prosecution, trial and sentencing), and may be contrasted with the "principle of legality" that ostensibly seeks to limit discretionary justice, more or less, in many continental European civil law systems.<sup>7</sup>

As in other organisations, officers in a police service, from the Commissioner to the officer on patrol, are all called upon to exercise discretion. The focus in this article, however, is exclusively on the generally "lower level" exercise of discretion with respect to law enforcement (investigation, search, arrest, prosecution, etc) and public order policing, in particular circumstances,<sup>8</sup> rather than "higher-level" discretionary decisions such as whether to give priority to the policing of particular kinds of offences, or whether to establish some specialist policing squad. Indeed, it is the "lower level" exercises of discretion which have particularly occupied the attentions of most scholars who have written about police discretion, many of whom have pointed out the significance of the fact that officers "on the beat" very frequently have to make relatively unsupervised discretionary decisions.<sup>9</sup> This, of course, poses particular challenges for achieving effective accountability for their exercises of discretion.

Discretion became an object of serious study by police researchers in the United States in the 1960s. Goldstein, who exposed the myth of "full enforcement" of the criminal law, described police discretion as applying to the following areas: (1) choosing objectives; (2) choosing methods of

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<sup>4</sup> Institute of Criminology, *Police Discretion in the Criminal Process: Proceedings of a Seminar on Police Discretion in the Criminal Process* (University of Sydney, 1980) p 9. The seminar was chaired by Sir Laurence Street, then Chief Justice of the Supreme Court of New South Wales.

<sup>5</sup> Finnane M, "Police and Politics in Australia – the Case for Historical Revision" (1990) 23 *Australian and New Zealand Journal of Criminology* 218 at 218.

<sup>6</sup> Galligan D, "Regulating Pre-trial Decisions" in Lacey N (ed), *A Reader on Criminal Justice* (OUP, 1994) p 151.

<sup>7</sup> Stenning P, "Discretion" in Wakefield A and Fleming J (eds), *The SAGE Dictionary of Policing* (Sage Publications Ltd, 2009) p 85.

<sup>8</sup> Although in "high profile" cases, such decisions are often made at a very high level of the organisation: Stenning, n 7. Lowe has recently argued that operational officers in Britain in practice "have little or no opportunity to apply discretion" when investigating "high policing" cases, such as in counter-terrorism investigations: Lowe D "The Lack of Discretion in High Policing" (2011) 21 *Policing and Society* 233 at 233.

<sup>9</sup> See, for example, Wilson J, *Varieties of Police Behavior* (Harvard University Press, 1968) p 7.

intervention; (3) choosing how to dispose of cases; (4) choosing investigative measures; (5) choosing field procedures; and (6) issuing permits and licenses.<sup>10</sup>

Probably one of the most cited definitions of “discretion” is that offered by Kenneth Culp Davis:

A public officer has discretion whenever the effective limits on his power leave him [or her] free to make a choice among possible courses of action or inaction.<sup>11</sup>

This, of course, is a very broad – some would say overly broad – definition of discretion which does not distinguish between acceptable and unacceptable bases for discretion. Accordingly, Davis went on to point out that the discretion allowed to officials is typically structured or “fettered” by policies or guidelines designed to ensure the acceptable exercises of discretion by distinguishing between criteria and principles for its exercise which are acceptable from those which are not (for instance, it may sometimes be acceptable to take a person’s age or gender into account, but not their race or ethnicity). This is accurately captured in the *Concise Oxford English Dictionary’s* definition of discretion as the “liberty of deciding as one thinks fit, absolutely or within limits”. Such limits are typically designed to ensure that decisions are principled rather than arbitrary, and that they respect human and civil rights.

It is worth drawing here a distinction between discretion and what one might term “interpretive judgment”. The former almost always involves some of the latter (an officer must interpret a situation before he or she can exercise appropriate discretion with respect to it), but interpretive judgment does not itself constitute discretion. Thus, for instance, in investigating a road crash, a police officer will have to make a judgment as to whether it was a genuine “accident” or whether the circumstances leading to it fulfil the requirements of the offence of dangerous or careless driving by any of the drivers involved. The officer thus makes an interpretative judgment of the available evidence, but this is not an exercise of discretion. Discretion only comes into play once the judgment is that an offence *prima facie* has been committed, at which point the officer must make a discretionary decision as to whether to take certain enforcement actions (arrest, breathalyser test, search and seizure of the vehicle, etc) against the driver. In exercising such discretion the officer will typically be expected to be guided by police service policies or guidelines on such matters.

Policies with respect to the exercise of discretion by police are understandably often controversial, and may change over time in response to changing public attitudes. Probably the most well-known example of such change has to do with the policing of domestic violence and child abuse. There was a time when, even though both of these matters likely involved criminal offences, the police took the view that they were “private” matters and thus did not warrant police intervention. The increasing influence of feminist and child protection arguments led the police in time to change their attitudes and policies towards such situations, to the point that in many jurisdictions the routine non-intervention by police was replaced by mandatory intervention and charging policies.<sup>12</sup>

The exercise of discretion, finally, inevitably involves discrimination. A difficulty here is that the term “discrimination” has two quite different (positive and negative) connotations: on the one hand, the term may be applied positively to a particularly refined person as a person with “discriminating taste”; on the other hand, the term “discriminatory” may be negatively applied to improper or prejudiced race-based decision-making. In setting out acceptable and unacceptable bases for the exercise of discretion, policies and guidelines attempt to identify (and discriminate between) acceptable and unacceptable forms of discrimination in decision-making. Not surprisingly, in some circumstances this can be quite confusing for frontline police officers who are typically not well versed in philosophy or linguistics. It is frequently emphasised to police officers, for instance, that they must not discriminate on the basis of the race of the suspect in making law enforcement decisions, while at the same time, they are urged to be sensitive to ethnic, religious or cultural traditions and

<sup>10</sup> Goldstein H, “Categorizing and Structuring Discretion” in Goldstein H (ed), *Policing a Free Society* (Ballinger Publishing Company, 1977) pp 95-100.

<sup>11</sup> Davis KC, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State UP, 1971) p 4.

<sup>12</sup> Sherman L, Schmidt J and Rogan D, *Policing Domestic Violence: Experiments and Dilemmas* (The Free Press, 1992).

differences in dealing with members of the public.<sup>13</sup> The line between acceptable and unacceptable discrimination when faced with a situation involving a member of an ethnic minority may not be readily identifiable or easy to discern for a police officer who has not received good training on such matters.<sup>14</sup>

### **The concept of “police independence”: Protecting police discretion from “improper” political influence**

A major concern ever since the creation of the “new police” in the 19th century has been to ensure that in exercising their discretion, the police are insulated from unwanted partisan political and other powerful corporate or personal influence and pressures. Or, to put it another way, to ensure that police discretion is exercised in the broader “public interest” rather than in pursuit of narrow partisan “private” interests. The idea is easily stated, but often not quite so easily applied in multi-party democracies where it is not always a simple matter to distinguishing between “the public interest” and partisan or private interests. Occasionally, what is good for General Motors may also be thought, by reasonable Democrats, to be good for America!

The idea that police need to have some degree of insulation from political influence over how they discharge their powers and duties has been reinforced by a series of judicial decisions establishing the doctrine of “constabulary independence”. Courts have held that police decision-making is amenable to judicial review and that the common law writs and remedies (orders of mandamus, prohibition and certiorari, habeas corpus, etc) are available to review the legality of police action. That said, the courts are reluctant to interfere in police decisions, as particularly exemplified by the English case of *R v Metropolitan Police Commissioner; Ex parte Blackburn*.<sup>15</sup> A moral crusader and former Labour politician, Mr Blackburn sought an order of mandamus to compel the police to take action against illegal gaming casinos that were springing up in London in the 1960s. Lord Denning, in the English Court of Appeal, while accepting that the police are answerable to the law, reiterated the cardinal principle of police independence:

No minister of the Crown can tell [the Commissioner] that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.<sup>16</sup>

The conclusion was that the Commissioner exercised discretion as to “operational matters” and so long as he stayed within the broad parameters of that discretion, the court would not interfere. It is also a clear expression not only of the discretion possessed by the Chief Constable but also of “every constable in the land”.<sup>17</sup> In another attempt, Mr Blackburn sought an order to compel the Metropolitan Police to enforce the Obscene Publication Acts in Soho, London’s notorious red-light area. Again the court decided that it would not normally interfere in the exercise of a chief officer’s discretion.<sup>18</sup>

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<sup>13</sup> For a recent media account of police discretion exercised in a case involving ritual “payback” in an Australian Aboriginal community see Taylor P, “Ritual Aboriginal Payback Suspected in Outback Death”, *The Australian* (16 September 2011), <http://www.theaustralian.com.au/news/nation/ritual-aboriginal-payback-suspected-in-outback-death/story-e6frg6nf-1226138327645> viewed 29 October 2011.

<sup>14</sup> Stenning P, “Policing the Cultural Kaleidoscope: Recent Canadian Experience” (2003) 7 *Police and Society* 21.

<sup>15</sup> *R v Metropolitan Police Commissioner; Ex parte Blackburn* [1968] 1 All ER 763.

<sup>16</sup> *R v Metropolitan Police Commissioner; Ex parte Blackburn* [1968] 1 All ER 763 at 769. The assertion that in such matters the police are answerable “to the law alone”, however, does not seem to be easily reconcilable with liberal democratic principles, and has been criticised by a number of police scholars: see Marshall G, “Police Accountability Revisited” in Butler D and Halsey A (eds), *Policy and Politics: Essays in Honour of Norman Chester* (Macmillan, 1978); Lustgarten L, *The Governance of Police* (Sweet and Maxwell, 1986) p 64; Stenning P, “The Idea of Political “Independence” of the Police: International Interpretations and Experiences” in Beare M and Murray T (eds), *Police and Government Relations: Who’s Calling the Shots?* (University of Toronto Press, 2007); and, most recently, Walsh D and Conway V, “Police Governance and Accountability: Overview of Current Issues” (2011) 55(2-3) *Crime, Law and Social Change* 61.

<sup>17</sup> *R v Metropolitan Police Commissioner; Ex parte Blackburn* [1968] 1 All ER 763 at 769.

<sup>18</sup> *R v Metropolitan Police Commissioner; Ex parte Blackburn (No 3)* [1973] QB 241.

## FIRST PRINCIPLES: DISCRETION AS A FOUNDATION FOR HUMANE ADMINISTRATION AND COMMUNITY SUPPORT

There are mythological aspects to the purported centrality of discretion to police work. The mandate of the modern police is typically traced to the architect of modern British policing, Sir Robert Peel (who established a police force in 1829 for the Metropolis of London) and his *Nine Principles of Policing*.<sup>19</sup> The ideas and values underlying these principles were hugely influential in guiding the development of the “new police”. At the time they were promulgated, the principles served a broader political purpose, namely to promote the legitimacy, and garner public acceptance, of the new police. They are set out in full in Appendix A to this article.

These principles do not address the issue of discretion directly, but the idea of discretion underscores several of them. For instance, the idea is implicit in the caution to use force to apprehend crime or restore order only where the use of persuasion, advice and warnings have failed. Furthermore, the Commissioner’s “Instructions” issued to the Metropolitan Police in 1829, included advice that they were not to “be understood as containing rules of conduct applicable to every variety of circumstances that may occur in the performance of their duty; something must be left to the intelligence and discretion of individuals”. On this view, police constables legitimately possess discretion in how they exercise their legal powers and duties to prevent crime, keep the peace and enforce the law. The legality of this discretion has been recognised by superior courts in common law jurisdictions.<sup>20</sup>

As the Queensland Crime and Misconduct Commission (CMC) recently observed, the centrality of discretion is also recognised in contemporary codes of police ethics:

Consistent and wise use of discretion, based on professional policing competence, will do much to preserve good relationships and retain the confidence of the public. There can be difficulty in choosing between conflicting courses of action. It is important to remember that a timely word of advice rather than arrest – which may be correct in appropriate circumstances – can be a more effective means of achieving a desired end.<sup>21</sup>

## TEMPERING LEGALITY WITH JUSTICE, FAIRNESS AND “COMMON SENSE”

Peel’s Nine Principles entreat police officers to be absolutely impartial in their service to the law. However, this must be reconciled with the equally prominent principle that cautions against excessively strict enforcement of the law and promotes the use of discretion to temper the strictures of legality. As scholars have pointed out, there are four main reasons why discretion is both a necessary and legitimate aspect of police work, some pragmatic, others more normative:

1. no legislature has succeeded in formulating laws which encompass all conduct intended to be made criminal and which clearly exclude all other conduct;
2. failure to eliminate poorly drafted and obsolete legislation renders the continued existence of discretion necessary for fairness;

<sup>19</sup> Recent historical research suggests that the Nine Principles are more properly understood as the creation of 20th century police scholars (in particular Charles Reith (Reith C, *A New Study of Police History* (Oliver and Boyd, 1956)) than of Sir Robert Peel himself: Lentz S and Chaires R, “The Invention of Peel’s Principles: A Study of Policing ‘Textbook’ History” (2007) 35 *Journal of Criminal Justice* 69. Notwithstanding doubts about provenance, the principles remain nevertheless a foundational document for modern policing in Britain and other Commonwealth countries.

<sup>20</sup> In the Canadian Supreme Court case of *R v Beare* [1988] 2 SCR 387 at 410, for instance, La Forest J commented: “Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on. The *Criminal Code* provides no guidelines for the exercise of discretion in any of these areas. The day to day operation of law enforcement and the criminal justice system nonetheless depends upon the exercise of that discretion.”

<sup>21</sup> CMC (Queensland), “Police Move-on Powers: A CMC Review of their Use” (2010), <http://www.cmc.qld.gov.au/asp/index.asp> viewed 7 November 2011, p 11, quoting International Association of Chiefs of Police, *Law Enforcement Code of Ethics* (1989).



3. discretion is necessary because limited resources make it impossible to enforce all laws against all offenders; and
4. the strict enforcement of the law would have harsh and intolerable results.<sup>22</sup>

So the issue is not whether police discretion does or should exist, but rather when *should* the duty of strict enforcement give way to other considerations. Ideas about this have evolved significantly over the years.

In the 19th century and 20th century, there was a clear mandate on the police to distinguish between the “respectable” and the “rough” classes. This affected which types of crime were prioritised as proper police business. Taking action against intoxicated persons, pimps, prostitutes, Aboriginals, vagrants and other “disorderly” subjects has formed the focus of uniformed policing from its very inception in Australia. As Finnane pointed out, police “have played their part in reproducing inequalities, or even in enhancing them”.<sup>23</sup> The pre-eminence attached to public order within policing – its so-called “moral street-sweeping” function – has significantly shaped the content of police culture.<sup>24</sup> The mandate to discriminate between different classes, however, is not simply an expression of police culture. It has also been expressly grounded in police regulations. Until 2000, police regulations in New South Wales required police officers to enforce the law with strict impartiality though with the following caveat:

Police officers must be strictly impartial in the discharge of their duties towards all persons. While required to zealously carry out their duties, officers must exercise forbearance and discretion in dealings with minor offences committed inadvertently or in ignorance, or without evil intent, by respectable and law abiding citizens. A caution or warning is all that is necessary on many occasions.<sup>25</sup>

This pragmatic counsel resonates with Peel’s Principles. However, it should be apparent that there is an obvious inherent contradiction in this directive. The regulation emphasises the importance of equality before the law (the duty of “strict impartiality”), while simultaneously institutionalising departures from this standard through promoting diversionary justice (through cautions or warnings) for otherwise “respectable” rule-breakers.

Discriminatory policies of law enforcement based on socio-economic or racial grounds cannot easily be reconciled with the principle of equality before the law. They are also difficult to reconcile with the modern corporate vision of policing as a form of community-focus service, rather than the protection of the interests of the propertied classes or ruling elites.<sup>26</sup> Not surprisingly, the directive in cl 7 was excised from the revised *Police Regulation 2000* (NSW). The *Operational Procedures Manual* for the Queensland Police Service goes even further, and contains the following order:

Where officers are making a decision to prosecute they are to ensure that their decision is *not* influenced by matters such as:

- (i) race, religion, sex, national origin or political views;
- (ii) personal feelings of the prosecutor concerning the offender or the victim;
- (iii) possible political advantage or disadvantage to the government or any political group or party; or
- (iv) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution.

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<sup>22</sup> La Fave W, “The Need for Discretion” in Sykes G and Drabek T (eds), *Law and the Lawless: A Reader in Criminology* (Random House, 1969) pp 299-303.

<sup>23</sup> Finnane M, *Police and Government: Histories of Policing in Australia* (Oxford University Press, 1994) p 103.

<sup>24</sup> The term “moral street-sweeping” was coined in Reiner R, “Policing and the Police” in Maguire M, Morgan R and Reiner R (eds), *The Oxford Handbook of Criminology* (Oxford University Press, 1994) p 742; see also Loftus B, *Police Culture in a Changing World* (Oxford University Press, 2009).

<sup>25</sup> *Police Service Regulation 1990* (NSW), cl 7 (repealed).

<sup>26</sup> Indeed, the modern corporate vision of policing identifies community safety and security as paramount, with a particular focus on the need to partner with, and responsive to the needs, of “vulnerable and minority groups”: *Directions in Australia New Zealand Policing 2008-2011 – A Policing Strategy by the Ministerial Council for Police and Emergency Management* (ANZPAA, 2008), Direction 1, Communities 1.5.3, [http://www.anzpaa.org.au/Upload/pubs/Directions\\_2008-11.pdf](http://www.anzpaa.org.au/Upload/pubs/Directions_2008-11.pdf) viewed 3 November 2011.

## POLICING DISCRETION AND THE ROLE OF GUIDELINES

While police discretion is seen as inevitable and essential, there remains an underlying fear that its exercise may lead to arbitrary, corrupt or unethical behaviour. The modern view is that these risks of misuse of discretion can be addressed not by eliminating discretion entirely, but rather by structuring its exercise through administrative guidelines:

Assuming they are public, guidelines can be a yardstick for testing decisions, and in that way reduce the scope for reliance on irrelevant, improper, or arbitrary factors. Secondly, the need to formulate guidelines may be an incentive to officials to think more carefully and critically about the objects to be attained and the policies to be followed.<sup>27</sup>

These have been particularly influential in relation to guiding the decision to prosecute. Guidelines for prosecutors have been issued in most common law jurisdictions; in some, of course, the police officers themselves assume the responsibility for prosecutions of summary matters.

Nowadays, however, there is a strong organisational pressure to identify police authority in the perceived safety of statute rather than the vagaries of the common law, which from a police perspective is difficult to identify and subject to constant revision by the courts. Queensland's *Police Powers and Responsibilities Act 2000* (Qld) (PPRA) provides a good example of this approach. It is important to keep in mind, however, that Acts like the PPRA do not abolish the common law – they are not codes in the strict legal sense of the term, but rather a consolidation of relevant police powers.<sup>28</sup> That said, the PPRA can fetter the common law discretion expressly. An example here is the reform to police discretion in the field of domestic violence, where there is now a statutory duty to investigate where the police officer believes or suspects that domestic violence has been, is being or is likely to be, committed.<sup>29</sup>

But in general terms, the only statutory acknowledgement of police discretion relates to the decision to prosecute. This discretion to institute proceedings focuses on satisfying two considerations: sufficiency of evidence and “the public interest”. The first threshold is relatively unproblematic, relating the probative force and likely admissibility of the evidence. Public interest is more complex, involving consideration (alone or in conjunction) of a wide range of factors. These factors heavily draw on those guiding prosecution decisions issued by the Office of the Director of Public Prosecutions. For example, the Operational Policing Manual (OPM) of the Queensland Police Service includes a list of considerations relevant to whether or not the public interest requires a prosecution in a given case, including matters such as the seriousness of the offence, the vulnerability of the victim, aggravating and mitigating circumstances, etc. These factors are reproduced in full in Appendix B to this article.

As well as giving consideration to these 18 public interest factors, the OPM also contains general guidance about the relative weight of these factors:

While many public interest factors mitigate against a decision to proceed with a prosecution, there are public interest factors which operate in favour of proceeding with a prosecution (for example, the seriousness of the offence and the need for deterrence). In this regard, generally, the more serious the offence the more likely it will be that the matter of public interest will require a prosecution to be pursued.

There is clearly scope for this process to go awry; the public interest as determined by frontline police officers may well differ from the public interest as determined by public prosecutors evaluating briefs of evidence. Furthermore, broad “public interest” considerations may be invoked as a “cover” for

<sup>27</sup> Galligan, n 6, pp 58-159.

<sup>28</sup> Section 9 of the PPRA provides: “Unless this Act otherwise provides, this Act does not affect – (a) the powers, obligations and liabilities a constable has at common law; or (b) the powers a police officer may lawfully exercise as an individual, including for example, powers for protecting property.”

<sup>29</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 27; *Domestic and Family Violence Protection Act 1989* (Qld), s 67; *Restraining Orders Act 1997* (WA), s 62A.

more suspect motivations. As the following Canadian case illustrates, police would benefit from more tailored and contextual guidance on how to weigh these factors, and courts need to be canny in detecting police abuses.

### **DUTY TO INVESTIGATE VERSUS DISCRETION NOT TO: RECONCILING OPPOSING LEGAL CONSIDERATIONS**

The police duty to investigate crime thoroughly and professionally is reflected in police service charters, in the objects clauses of police Acts, and in the statements of police ethics and values. Failures in criminal investigation undoubtedly contribute to miscarriages of justice, whether resulting in the wrongful conviction of innocent people or failures in bringing true offenders to justice. Investigative failures also dent public confidence in policing. But should police officers be exposed to civil liability for negligent failures to discharge their duties? And how do these duties on police to investigate competently, whether conceived as an ethical and/or legal requirement, relate to the individual police officer's discretion not to investigate?

The issue of investigative negligence is rarely litigated, and in most common law jurisdictions there has been a judicial reluctance, on public policy grounds, to impose on police a duty of care through the tort of negligence. A recent exception is the Supreme Court of Canada in the 2007 case of *Hill v Hamilton-Wentworth Regional Police Services Board*,<sup>30</sup> in which the court held, by a 6:3 majority, that the police investigating a robbery owed a duty of care to suspects under investigation, and thus could be held liable in negligence for the breach of the standards of care that ought to be expected of a reasonable police investigator. In this case, the plaintiff alleged investigative negligence, specifically that the police had failed (a) to properly conduct photo line-up for identification purposes; (b) to conduct separate interviews of key witnesses; (c) to follow up information that two Hispanic males, one of whom looked like the suspect, were the robbers; and (d) to note that similar robberies had occurred while the suspect was in custody.

The majority of the Supreme Court of Canada held that police investigators, like many professionals, owed prima facie a duty of care to suspects under investigation. In determining whether a duty of care existed, there needs to be established sufficient proximity between the police investigators and the suspect. The majority concluded that this threshold was met as "[t]he relationship between the police and a suspect identified for investigation is personal, and is close and direct".<sup>31</sup> Moreover, there were no compelling reasons on public policy grounds to deny imposing the duty of care in this case. Indeed, recognition of such a duty is consistent with the values in the *Charter of Rights and Freedoms* and the public interest in responding to failures of the justice system.

By contrast, the three dissenting judges rejected the extension of the law of negligence to police investigators, pointing out that recognising that a police officer owed a private duty of care would necessarily conflict with the officer's overarching public duty to investigate crime and apprehend offenders – this alone, in their view, was sufficient to negate that proximity argument. Moreover, on public policy grounds, the dissenting judges found that recognising such a duty may interfere with other statutory and legal responsibilities, as well as foster defensive legal practice among police. Imposing a duty on police not to harm suspects through negligent investigation would inevitably pull officers back from targeting an individual as a suspect and may lead to an overly cautious approach to the discharge of their duties. As the dissenting judges noted, the inherent opposition of the duties owed by police to the public on the one hand, and the duties owed to private citizens affected by the investigation on the other, has been regarded as sufficient reason for denying liability on policy grounds.

The decision also addressed the issue of how the new tort would relate to the exercise of police discretion. The majority recognised that under the common law police officers had discretion whether or not to investigate or charge suspected offenders. In relation to the tort of negligent investigation, a

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<sup>30</sup> *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129.

<sup>31</sup> *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129 at [33].



valid and lawful exercise of that discretion not to investigate a matter would preclude an action of negligence – in other words, a legitimate exercise of discretion would be tantamount to a defence for a claim of negligence.

This landmark decision of the Supreme Court of Canada has created a new tort of “negligent investigation”. This new tort supplements existing civil law remedies of unlawful/false arrest, false imprisonment and malicious prosecution, which the majority concluded could not provide remedies for merely negligent acts. While clarifying the scope of professional negligence for police in Canada, the decision creates uncertainties about the extent to which this new tort of negligent investigation extends beyond targeted suspects to others who suffer losses. The classes of plaintiff to which this new tort may potentially extend include “persons of interest”, victims, and, more broadly, members of the general public. As the majority noted, the decision only dealt with the duties owed by the police to suspects under investigation, and that other potential classes of plaintiff affected by negligent investigation would need to be determined on a case-by-case basis.<sup>32</sup>

No other common law jurisdiction has taken this bold step. Indeed, there is an opposite trend in other jurisdictions in relation to the tortious liabilities of police. In Australia, for example, the High Court has held that police officers were not liable in negligence for failing to exercise their statutory powers under mental health legislation in relation to person who presented as a suicide risk.<sup>33</sup>

Later that year, the Supreme Court of Canada returned to the issue of police discretion in *Beaudry v The Queen*.<sup>34</sup> This case involved the criminal liability of a police officer (B) for obstructing justice under s 139(2) of the *Criminal Code*, arising from the exercise of his discretion not to investigate a number of serious driving offences committed by another (off-duty) police officer. At trial, B defended the charge of obstruction on the basis that his decision not to investigate the matter was a proper exercise of police discretion. B had not, at any time, concealed the fact that he had exercised discretion, candidly reporting to superiors the facts of the case (that the other officer had been stopped while driving in an acutely intoxicated state). However, B sought to justify his decision not to administer the breathalyser test or conduct further investigations on the grounds that the fellow police officer was experiencing emotional and relationship difficulties and was “more in need of a helping hand rather than a blow to the head”.<sup>35</sup> B’s superior officer disagreed with this assessment, and directed him to prepare an impaired driving report immediately.<sup>36</sup> B had refused to do this, and sought advice from the police union on whether he had to comply with such an order.<sup>37</sup> He was convicted of obstruction of justice. His appeal provided the Supreme Court with the opportunity to consider the relationship between police discretion and the offence of obstructing justice.

In a split decision (5:4), the majority of the Supreme Court upheld the conviction, but recognised that the facts of the particular case could support a verdict either way – the differences between the majority and minority approach to the appeal were not related to the law governing discretion or the scope of the offence of obstructing justice, but rather turned on differing views about the role and

<sup>32</sup> *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129 at [27].

<sup>33</sup> A recent illustration is the Australian decision in *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, where the High Court of Australia unanimously declined to impose on police officers a duty of care to prevent suicide. In that case, two police officers came across a man who presented as a suicide risk, though he refused to go with them and reassured them that he would not “do anything stupid”. The police did not place him under a treatment order though they had the power to do so if they believed he was mentally ill and a danger to himself. The court unanimously held there was no legal duty of care on the grounds that the relevant statutory power (s 10 of the *Mental Health Act 1986* (Vic)) had not been triggered in the circumstances. This was because the police officers had not formed the view that the person was suffering from a mental illness and therefore there was no statutory power to which a common law duty of care could attach. The several judgments underscored that the common law did not impose a duty upon a person to take affirmative action to protect another from harm, and reiterated the importance that individuals should take responsibility for their own actions.

<sup>34</sup> *Beaudry v The Queen* [2007] 1 SCR 190.

<sup>35</sup> *Beaudry v The Queen* [2007] 1 SCR 190 at [12].

<sup>36</sup> The courts in which this case was heard were not called upon to consider the authority of the superior officer to overrule the inferior officer’s exercise of discretion in this way and under these circumstances.

<sup>37</sup> The union subsequently acted as an intervener on the appeal to the Supreme Court.

powers of the appeal court to interfere with verdicts that were “unreasonable”. There was considerable convergence between the majority and minority decisions on the scope of police discretion and its relationship with the offence of obstructing justice. The points of convergence may be summarised as follows:

1. Police officers exercise an essential discretion in relation to the discharge of their duties to enforce the law and investigate crime.<sup>38</sup>
2. Police discretion is not absolute or unfettered. An exercise of police discretion must be justified rationally. This justification has both subjective and objective elements. The subjective aspect relates to whether discretion has been exercised “honestly, transparently and on the basis of valid and reasonable grounds”.<sup>39</sup> The objective factors supporting the justification focus on “the material circumstances” in which the officer’s discretion was exercised. Justifications offered must be proportionate to the seriousness of the conduct and it must be clear that the discretion was exercised in the public interest.<sup>40</sup>
3. Police discretion is inherent in the office of constable, and in common with prosecutors, must be exercised independently of the executive. Police discretion is neither constrained by administrative directives nor by the roles and functions of the prosecutors.<sup>41</sup>
4. Potential liability for the offence of obstruction of justice arising from an exercise of police discretion had to be approached in two stages. The first step was to determine whether the exercise of police discretion was valid. If it was, then the matter could not proceed. If the prosecution established that the discretion was exercised for an improper motive (such as seeking preferential treatment for a fellow officer), the next stage required proof of the elements of the offence beyond any reasonable doubt. Obstruction required proof, in relation to *actus reus*, that the conduct of the accused had tended to defeat or obstruct the course of justice; and in relation to *mens rea*, a specific intent in relation to the same, namely the prosecution must prove an intention to act in a way tending to obstruct, pervert or defeat the course of justice. According to the majority, improper exercises of discretion are not *ipso facto* criminal: “A simple error of judgment will not be enough. An accused who acted in good faith, but whose conduct cannot be characterized as a legitimate exercise of the discretion, has not committed the criminal offence of obstructing justice.”<sup>42</sup>

Ultimately, the Supreme Court of Canada in this case reaffirmed the central importance of the common law doctrines of police discretion and constabulary independence. That said, discretion was not unfettered, and the common law as well as statute placed limits on when that discretion not to investigate may be exercised. A duty to investigate may clearly be modified by statute, as has occurred in Australia (as noted above) in relation to the duties to investigate domestic violence.

The basic legal principles guiding discretion identified by the Supreme Court are derived from administrative law – grounded in notions of reasonableness, proportionality and transparency etc. These principles are relatively easy to operationalise through police training and policy. Indeed, some of these principles resonate and overlap with the following six principles developed by the Association of Chief Police Officers (ACPO) in the United Kingdom used to promote police compliance with human rights:

**LEGALITY** – is there a legal basis for police actions? Is that legal basis in; statute, regulations, case law and is it available to a member of the public.

**PROPORTIONALITY** – can the police demonstrate that actions taken were “proportionate” to the threat or problem it sought to prevent.

**RELEVANCE/NECESSITY** – was the police action strictly relevant to the particular threat/problem.

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<sup>38</sup> *Beaudry v The Queen* [2007] 1 SCR 190 at [35].

<sup>39</sup> *Beaudry v The Queen* [2007] 1 SCR 190 at [38].

<sup>40</sup> *Beaudry v The Queen* [2007] 1 SCR 190 at [40].

<sup>41</sup> *Beaudry v The Queen* [2007] 1 SCR 190 at [44]-[48].

<sup>42</sup> *Beaudry v The Queen* [2007] 1 SCR 190 at [52].

SUBSIDIARITY – was the police action the least “force/intrusive” available.

EQUALITY OF ARMS – in any trial process did the defendant have the same information and access to information as the police/prosecution.

REMEDY – is there an independent public remedy available to the citizen.<sup>43</sup>

Nothing in the Supreme Court of Canada’s decision, however, limits the power of Parliament to legislate on police discretion; indeed, it may be necessary to do so in some fields, such as family violence, where police have historically and routinely declined to investigate violence against women or children for improper reasons, and Parliament has intervened to place a mandatory duty on police to investigate such alleged incidents.

In sum, the two decisions of the Supreme Court of Canada in 2007 are landmarks in policing law. Both decisions affirm the centrality and legitimacy of police discretion, and impose new duties, and potential civil and criminal liabilities, on police officers. The decisions shed light on how crucial decisions not to investigate or invoke legal processes must be framed to avoid both civil as well as criminal liability. The decisions reveal the complex legal framework in which modern policing operates, and how individual police officers, in balancing competing operational and legal demands, may often feel themselves to be between the proverbial “rock and a hard place”.

## CONCLUSION

In a recent CMC report in Queensland reviewing the use of “move on” powers, the Chairperson underscored the vital role that discretion plays in public order policing:

Although the discretionary nature of the move-on powers is one of their advantages, misuse of that discretion has the potential to seriously undermine the objectives of the legislation and to damage public confidence in policing. It is therefore important that the exercise of discretion be properly managed in terms of being reasonable, bona fide, principled and consistent. That management will only come about with adequate training, clear guidelines and cultural awareness.

... One of the main concerns of community groups upon the introduction and later geographical expansion of the move-on powers was their possible adverse impact on a number of disadvantaged groups such as young people, homeless persons and Indigenous people. Our review has found some support for those concerns. In particular, young people and Indigenous people are significantly more likely to experience being moved on than any other group. We also see some evidence to support a call to re-emphasise the need to use informal processes to divert people from the justice system, particularly in the context of policing juveniles. Although we consider that police should retain move-on powers, we are concerned by some of these findings and the lack of proper guidance provided to operational police for the use of the move-on powers, in particular the exercise of discretion. We have recommended a number of legislative and operational changes that we hope will address some of these concerns.<sup>44</sup>

The concern raised by the CMC about discretion is not specific to “move on” powers. There is certainly a need to promulgate more guidelines (*not* prescriptions) on how police should exercise discretion, affirming the legitimate space for discretion, in a range of areas. This will facilitate the consistent or equal treatment of citizens and so enhance a sense of fairness, and perceived legitimacy of the police.

But to promote fair outcomes, the exercise of powers must also be based on just principles. As Galligan has pointed out, if the substantive laws and principles on which guidelines are based are unfair, then the guidelines will merely serve to perpetuate that unfairness.<sup>45</sup> While judicial review has the potential to render police decision-making transparent and accountable, it is important to recognise its limitations. Courts exercising judicial review are remote from the “action on the streets”, with

<sup>43</sup> The ACPO Statement of Principles appears in the online publication, *Policing Our Community*, produced by the Warwickshire Police that aims to enhance staff awareness of human rights standards in policing: Warwickshire Police, *Policing our Community*, <http://www.warwickshire.police.uk> viewed 3 November 2011.

<sup>44</sup> CMC, n 21. It is noted here that similar concerns were expressed in relation to disadvantaged groups in the 1987 report of the Ontario (Canada) Task Force: Anand R, *Report of the Task Force on the Law Concerning Trespass to Publicly-used Private Property as it Affects Youth and Minorities* (Ontario Ministry of the Attorney-General, 1987).

<sup>45</sup> Galligan, n 6, pp 159-161.

many judges understandably reluctant to exercise close supervision over police or “second-guess” decisions of an operational nature. As one leading commentator put it, the central problem is that police work falls between the two points of accountability – Parliament on the one hand, and the courts on the other:

If the lines of accountability to Parliament are disrupted and the courts maintain an attitude of abstinence, then the autonomy and independence of officials and agencies is strengthened.<sup>46</sup>

The remedy, as Galligan suggests, is to invest authorities other than courts, such as an Ombudsman or an Administrative Appeals Tribunal, with powers of oversight and review. This proposal, combined with further emphasis on guiding rather than eliminating discretion entirely, would be a positive and paradigm-shifting development.

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<sup>46</sup> Galligan, n 6, p 157.

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## **APPENDIX A: PEEL'S "NINE PRINCIPLES OF POLICING"**

Authors' Note: The following iteration of "Peel's principles" (and there are many) is extracted from the Crime and Misconduct Commission (CMC), *Police Move-on Powers: A CMC Review of their Use* (2010), <http://www.cmc.qld.gov.au/asp/index.asp>, viewed 7 November 2011, Appendix 3.

1. To prevent crime and disorder, as an alternative to their repression by military force and severity of legal punishment.
2. To recognise always that the power of the police to fulfil their functions and duties is dependent on public approval of their existence, actions and behaviour and on their ability to secure and maintain public respect.
3. To recognise always that to secure and maintain the respect and approval of the public means also the securing of the willing co-operation of the public in the task of securing observance of laws.
4. To recognise always that the extent to which the co-operation of the public can be secured diminishes proportionately the necessity of the use of physical force and compulsion for achieving police objectives.
5. To seek and preserve public favour, not by pandering to public opinion; but by constantly demonstrating absolutely impartial service to law, in complete independence of policy, and without regard to the justice or injustice of the substance of individual laws, by ready offering of individual service and friendship to all members of the public without regard to their wealth or social standing, by ready exercise of courtesy and friendly good humour; and by ready offering of individual sacrifice in protecting and preserving life.
6. To use physical force only when the exercise of persuasion, advice and warning is found to be insufficient to obtain public co-operation to an extent necessary to secure observance of law or to restore order, and to use only the minimum degree of physical force which is necessary on any particular occasion for achieving a police objective.
7. To maintain at all times a relationship with the public that gives reality to the historic tradition that the police are the public and that the public are the police, the police being only members of the public who are paid to give full time attention to duties which are incumbent on every citizen in the interests of community welfare and existence.
8. To recognise always the need for strict adherence to police-executive functions, and to refrain from even seeming to usurp the powers of the judiciary of avenging individuals or the State, and of authoritatively judging guilt and punishing the guilty.
9. To recognise always that the test of police efficiency is the absence of crime and disorder, and not the visible evidence of police action in dealing with them.



**APPENDIX B: EXTRACT FROM THE OPERATIONAL PROCEDURES MANUAL  
(QUEENSLAND POLICE SERVICE, 2002-)**

Authors' Note: These factors are adapted from the Prosecution Guidelines issued by the Queensland Office of the Director of Public Prosecutions, *Director's Guidelines*, "Public Interest Criteria", pp 3-4, <http://www.justice.qld.gov.au/justice-services/justice-agencies/office-of-the-director-of-public-prosecutions>, viewed 15 November 2011.

**Factors to be considered in determining whether a prosecution is required in  
"the public interest"**

- (i) the seriousness or, conversely, the triviality of the alleged offence or that it is of a "technical" nature only;
- (ii) any mitigating or aggravating circumstances;
- (iii) the youth, advanced age, intelligence, physical health, mental health or special infirmity of the alleged offender, a witness or a victim;
- (iv) the alleged offender's antecedents and background, including culture and ability to understand the English language;
- (v) the degree of culpability of the alleged offender in connection with the offence;
- (vi) whether the prosecution would be perceived as counter-productive to the interests of justice;
- (vii) the availability and efficacy of any alternatives to prosecution;
- (viii) the prevalence of the alleged offence and the need for deterrence either personal or general;
- (ix) whether or not the alleged offence is of minimal public concern;
- (x) any entitlement or liability of the victim or other person or body to criminal compensation, reparation or forfeiture, if prosecution action is taken;
- (xi) the attitude of the victim of the alleged offence to a prosecution with regard to the seriousness of the alleged offence and whether the complainant's change of attitude has been activated by fear or intimidation;
- (xii) the cost of the prosecution relative to the seriousness of the alleged offence;
- (xiii) whether the alleged offender is willing to cooperate in the investigation or prosecution of others, or the extent to which the alleged offender has done so, subject to guidelines issued by the Director of Public Prosecutions (State), particularly Guideline 33: "Immunities" of the Director of Public Prosecutions (State) Guidelines contained in Appendix 3.1 of this chapter;
- (xiv) the necessity to maintain public confidence in such institutions as the Parliament and the courts;
- (xv) pending the outcome of any other prosecution from the same circumstances (including in a civil jurisdiction);
- (xvi) whether the prosecution for that class or type of offence has been discouraged by the courts in the course of judicial comment;
- (xvii) whether the prosecution will result in hardship to any witness, particularly children; and
- (xviii) vexatious, oppressive or malicious complaints.