Less Than Legal Force? An Examination of the Legal Control of the Police Use of Force in New Zealand

LISA WANSBROUGH*

I INTRODUCTION

The power to use force is both one of the most important and one of the most problematic aspects of the police's role. While few would question the necessity of such a power in contemporary policing, the police use of force is often the subject of controversy and intense scrutiny by human rights groups, the media, and the public at large. This is hardly surprising given the extraordinary nature of this power and the "numerous ethical, procedural and legal dilemmas"[1] that it creates. One of the greatest dilemmas posed by the power to use force is the problem of how to ensure effective legal control and accountability over its use. It is a fundamental principle of our legal system that the actions of agents of the government should be carefully prescribed by law.[2] This is particularly important when these agents have the capacity to affect important rights and freedoms of individual citizens, as the police do to a great extent.[3] This is because the police are granted powers that tend to limit the liberty of the individual; for example, through the laws of search and seizure, or via the power to use force. Such powers are granted to the police, despite their capacity to infringe on individual rights, because they are important tools that enable the police to maintain public order.[4] Nonetheless, it is important that these powers are prescribed by law, in order to ensure that the encroachment on individual rights is not excessive.[5]

However, when it comes to the police power to use force, the legal controls governing its use are often described as "vague"[6] or "irrelevant",[7] and legal accountability is said to "barely [exist] at a practical level in any

* BA/LLB (Hons). The author would like to thank Associate Professor Scott Optican of The University of Auckland Faculty of Law for his helpful suggestions and support.

1 Warren and Jones, "The Police Use of Force: Contexts and Constraints" in Coady et al (eds), *Violence and Police Culture* (2000) 61.

2 Arnold, "Legal Accountability and the Police: The Role of the Courts" in Cameron and Young (eds), *Policing at the Crossroads* (1986) 68.

3 Marion and Oliver, *The Public Policy of Crime and Criminal Justice* (2006) 332–333.

4 Ibid.

5 Ibid.

6 Fyfe, "Police Use of Deadly Force: Research and Reform" (1988) 5 JQ 165, 172.

7 Cameron, "Developments and Issues in Policing New Zealand" in Cameron and Young (eds), *Policing at the Crossroads* (1986) 22.

significant sense".[8] While these criticisms are levelled at the legal control over the police use of force in general, such concerns are particularly pertinent to one aspect of the police use of force. That aspect is the use of weapons. Although the law has carefully prescribed the circumstances in which police are entitled to use force, the means by which that force can be exercised has largely been left to the discretion of the police. The reason for this is the difficulty in providing effective legal control. At present, control over the use of force is governed by the dual principles of legal accountability and due process. Underlying the concept of legal accountability is the notion that agents of the government must not be allowed to act above or outside the law.[9] This is particularly important when it comes to the police's power to use force, given that this power can be used to cause harm or even death to members of the public.[10] In order to properly control this extraordinary power, it is important not only to ensure that police may be held legally accountable for their actions after the fact, but also that the law is clear and precise so that they are able to know the scope and limitations of their authority to use force in advance.[11]

If the law is too vague or ambiguous, it will be of little practical relevance.[12] The need for clarity in legal control extends to setting clear parameters for the use of force.[13] If it is not obvious what constitutes a reasonable use of force, it will be difficult to determine whether an officer's actions are appropriate or not.[14]

When it comes to setting legal parameters for the means by which police exercise force, the principle of proportionality is key. In this context, proportionality requires that "[f]orce used to achieve legitimate police ends ought not to be disproportionate to the seriousness of the offence that is alleged or threatened".[15] Another important principle closely related to proportionality is the principle of minimal force. This principle dictates that "[p]olice ought to use those means that are least intrusive, least constraining, and least harmful, compatible with the securing of their ends".[16]

The difficulty of regulating the means by which police exercise force is that it is not always easy to predict the type of force that will be a proportionate response to any given situation. As such, a dilemma arises in trying to set clear parameters for the use of force, while also ensuring that

---

8 Arnold, supra note 2, 67.

9 Ibid 69.

10 McGowan, "Rule-making and the Police" (1971–1972) 70 Mich L Rev 659, 684.

11 Ibid.

12 Alpert and Smith, "How Reasonable is the Reasonable Man? Police and Excessive Force" (1994) 85 J Crim L & Criminology 481, 489.

13 Reiner, *The Politics of the Police* (3 ed, 2000) 182–183.

14 Smith and Alpert, "Pepper Spray: A Safe and Reasonable Response to Suspect Verbal Resistance" (2000) 23 Policing 233, 239.

15 Kleinig, *The Ethics of Policing* (1996) 101.

16 Ibid.

the laws governing the police use of force are flexible.[17] A police officer's decision to use force will depend on the unique facts of the situation that he or she faces. It is inevitable that the police officer must exercise a level of discretion in deciding the appropriate response in the circumstances.[18] It would be inadvisable to attempt to cover every possible contingency that may arise. Not only would this be impossible, but also the end result would be a legal framework that would be too complex and detailed to provide practical guidance to police officers, who must react quickly to defuse any threat that may arise.

Given the many competing goals that need to be met by legal controls over the police use of force, it is no wonder that such laws are often criticized for falling short of the mark. Rules governing the means by which police exercise force are often drafted in very general terms, providing that force must be "necessary" and "reasonable", but providing little guidance as to what this actually means. While the justification for the vagueness of these rules may be to avoid limiting the operational effectiveness of the police, the reality is that this also limits the ability of the law to provide proper control and guidance when it comes to the proportionality of the police use of force.

Arming the Police — The Controversy Surrounding the Police Use of Weapons

In recent years, politicians,[19] members of the legal profession,[20] the wider public, and the media[21] have, on multiple occasions, raised the question of the adequacy of New Zealand's legal controls over the police use of force. At its core, public debate over the means by which police exercise force focuses on two issues. The first is the types of weapons that the police should have at their disposal, and the second is the circumstances in which police should be allowed to use these weapons.

Controversial incidents of the police using force often revolve around criticism that the weapon used by the police in the particular circumstance was not a proportionate response to the threat posed. This leads to calls for the police to have a wider array of "less lethal" weapons at their disposal to prevent unnecessary serious injuries or deaths. In New Zealand, pepper spray

17 Miller and Blackler, *Ethical Issues in Policing* (2005) 31.

18 Reiner, supra note 13, 169.

19 (3 April 2007) 683 NZPD 8541 (Keith Locke).

20 Harrison, "Shocking Guns Have No Place in Society", *The New Zealand Herald*, 6 June 2007 <http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10385076> (at 28 July 2008); "Less Lethal? The Trial of Tasers as Part of Policing in New Zealand" Auckland District Law Society Public Issues Committee (2006) <http://www.adls.org.nz/aboutadls/committees/public-issues-committee/public-issue-papers> (at 28 July 2008) ["Less Lethal"].

21 See "Opponents Fear Abuse of Stun Gun", *The New Zealand Herald*, 7 June 2006 <http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10385354> (at 28 July 2008); Houlahan, "Police Accused of Breaching Taser Limits", *The New Zealand Herald*, 24 October 2006 <http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10407263> (at 28 July 2008).

was introduced to the police following concerns that the risk of serious injury from police batons was too high.[22] In most countries, debate about whether to introduce the Taser was sparked by controversial police shootings.[23]

In New Zealand, the fatal shooting of Steven Wallace in 2000 provided a catalyst for debate about the means by which police exercise force. Wallace, who was in a violent and distressed state, was fatally shot by a police officer as he advanced towards the officer wielding a golf club.[24] While a police investigation and a criminal trial cleared the officer of wrongdoing,[25] the incident remains one of the most controversial police shootings in New Zealand's history. At the heart of the controversy lay the concern that the use of a lethal weapon by the police was a disproportionate response to the threat posed by Wallace.[26]

In the aftermath of the Wallace shooting, the police undertook an investigation — Project Lincoln — which examined the viability of introducing a wider array of "less lethal" weapons to the police.[27] The resulting report reaffirmed the use of pepper spray by the police.[28] Pepper spray is a chemical irritant that incapacitates a subject through inducing several medical symptoms:[29]

> [I]nvoluntary eye closure, nasal and sinus drainage, gagging, coughing and a shortness of breath along with a burning sensation on the skin. Additional symptoms may include nausea, loss of coordination and upper body motor skills, disorientation and fear.

Pepper spray was introduced in New Zealand as a "less lethal defensive weapon for front line officers" in January 1998.[30] It was seen as a less

---

22 For example, Kleinig points out that batons have the potential to cause serious injury, such as broken or fractured bones. See Kleinig, supra note 15, 104.

23 See Baker, "Tasers Getting More Prominent Role in Crime Fighting in City", *The New York Times*, 15 June 2008 <http://www.nytimes.com/2008/06/15/nyregion/15taser.html> (at 28 July 2008).

24 *Wallace v Abbott* (2002) 19 CRNZ 585 (HC). The incident took place in the town of Waitara in the early hours of the morning of 30 April 2000. According to witnesses, Wallace began smashing the windows of an unoccupied community police station, yelling to the police to come out. When he received no response, he proceeded to the main street of Waitara where he smashed windows and threatened passing motorists with a baseball bat. When a police patrol car approached, Wallace smashed its windows with a golf club. On confrontation by police officers he was purportedly in an "irrational and violent" state, and armed with a baseball bat and a golf club. The officers identified themselves and warned him that they were armed. Wallace ignored police requests to throw down his weapons and advanced towards the officers. He threw his golf club at Constable Abbot but retained the baseball bat. After further warnings, as Wallace continued to advance, Constable Abbott shot Wallace several times, fatally wounding him.

25 Ibid; Pearce, "Steven James Wallace: Fatally Wounded at Waitara Sunday 30 April 2000" New Zealand Police (2000) <http://www.police.govt.nz/resources/2000/waitara-shooting/waitara-shooting.pdf> (at 29 July 2008).

26 See generally "Police Report is No Defense for Tasers", *Scoop Independent News*, 4 August 2006 <http://www.scoop.co.nz/stories/PO0608/S00039.htm> (at 29 July 2008) ["No Defense"]; Wall, "Shots Still Echo in Waitara", *The New Zealand Herald*, 7 December 2002 <http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=3008192> (at 29 July 2008).

27 New Zealand Police Operations Group *Project Lincoln: A Review of Less Lethal Weapons and Related Issues* (April 2004) ["*Project Lincoln*"].

28 Ibid 63.

29 Ibid 44.

30 Ibid 45.

harmful option than batons because, in most cases, the effects of the spraying lasted only a matter of minutes.[31]

Project Lincoln also recommended the introduction of the Taser to the New Zealand police.[32] The Taser is a device that incapacitates a subject by sending currents of electricity through their body. It operates by firing metal barbs attached to a wire into the target, and then sending an electrical current down the wire and into the subject.[33] The weapon can also be used in "stun mode" whereby the gun directly applies electricity to the subject's body rather than via the firing of probes.[34] Project Lincoln concluded that the Taser offers "considerable advantages to the front line officer as a personal less lethal weapon option".[35] In particular, it was believed that the Taser would have greater effectiveness in incapacitating subjects than pepper spray or batons because, unlike these weapons, it does not rely on pain compliance. Instead, the electrical shock to the subject causes their muscles to contract, forcing them to fall to the ground.[36] Further, the Taser has a firing range of up to 6.4 metres, which allows the police officer to deploy the weapon in situations where it may be dangerous to get too close to the subject.[37]

While these options are "less lethal" than firearms, they are still dangerous weapons capable of causing death or serious injury. The police themselves concede that such weapons carry a risk of serious injury or death, and that they are given the title of "less lethal" weapons simply because that risk is lower than the risk associated with firearms.[38] For example, given that pepper spray affects the respiratory system, it has increased risk for those who suffer from respiratory illnesses such as asthma. Inhalation of pepper spray can also lead to hypertension, increasing the risk that the recipient will suffer from a heart attack or stroke.[39] Further, the spray can potentially be fatal for those suffering psychiatric distress or affected by drugs or alcohol.[40] The potential dangers of pepper spray are evidenced by

31 Ibid 44.
32 Ibid 92.
33 Ibid 64.
34 Ibid 67.
35 Ibid 92.
36 Ibid 70.
37 Ibid 91.
38 Ibid 8.
39 Smith and Stopford, "Health Hazards of Pepper Spray" (1999) 60 N C Med J 268.
40 "Answers Needed on Pepper Spray", *Waikato Times*, 18 July 2001 (The Knowledge Basket Database, University of Auckland Library) (at 18 September 2006).

the fact that four fatalities following the use of pepper spray have occurred in New Zealand.[41]

Similarly, while research into the link between Tasers and deaths occurring after their use has proved inconclusive,[42] over 150 deaths have occurred following the use of Tasers by police in the United States.[43] Due to the electrical current sent through the target's body, there is a risk that the shock from a Taser can cause an uncontrollable spasm of the heart muscles, resulting in cardiac arrest.[44] This risk is heightened if the subject is already in a state of distress or stimulation, either from a psychiatric condition or because they are under the influence of drugs or alcohol.[45] Further, when fired, the barbs from a Taser can cause serious injury if they penetrate the subject's body. The darts require surgical removal and can cause major injury if they penetrate the subject's eyeball.[46] The use of a Taser also regularly causes injuries associated with falling while unconscious.[47] Amnesty International has expressed concern that despite these risks, very little rigorous or independent research has been conducted on the effects of Taser use.[48]

Nonetheless, the risk of death or serious harm is much less than with a firearm. Indeed, the scepticism surrounding the introduction and use of "less lethal" weapons derives from the concern that because the risk is lower these weapons will not be subjected to the same rigorous regulation and scrutiny that firearms are.[49] New Zealand police are generally unarmed, and police shootings are relatively rare. When such incidents do occur, particularly when fatalities result, the actions of the police are subjected to intense scrutiny and investigation. By contrast, while precise statistics are hard to come by, it appears that pepper spray is used by police

41 In each case, while coroners did not find pepper spray as the direct cause of death, the subjects all fell into categories of people with increased vulnerability to pepper spray. The fact that they all lost consciousness or died almost immediately after being sprayed suggests that the two incidents were not merely coincidental. See McGehan, "Police Hold Line on Pepper Spray", *Waikato Times*, Hamilton, New Zealand, 24 July 2001, 7; Binning, "Pepper Spray 'Unlikely' to have Caused Death", *The New Zealand Herald*, 1 May 2003 <http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=3452011> (at 29 July 2008); O'Rourke, "Family Speaks on Court Attack Death", *The New Zealand Herald*, 29 November 2006 <http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10412980> (at 29 July 2008); Binning, "Politicians Back Pepper Spray Review", *The New Zealand Herald*, 7 February 2008 <http://www.nzherald.co.nz/section/1/story .cfm?c_id=1&objectid=10491025> (at 29 July 2008).

42 "USA: Amnesty International's Continuing Concerns about Taser Use" Amnesty International (2006) <http://www.amnesty.org/en/library/asset/AMR51/151/2007/en/dom-AMR511512007 en.html> (at 1 October 2008).

43 Ibid. In a recent landmark decision, a Californian jury found Taser International Inc liable in a wrongful death lawsuit, following the death of a man who had been hit multiple times by police officers with Taser stun guns. This is the first time that Taser has lost a wrongful death lawsuit. See Johnson, "Taser's Stock Hurt By 1st Lawsuit Loss", *The Arizona Republic*, 10 June 2008 <http://www.azcentral.com/business/articles/2008/06/10/20080610biz-taser0610.html> (at 29 July 2008).

44 Amnesty International, supra note 42.

45 Ibid.

46 Harrison, supra note 20.

47 See e.g. Amnesty International, supra note 42.

48 Ibid.

49 "No Defense", supra note 26.

approximately 2000 times each year.[50] During the time that the Taser was introduced on a trial basis in Auckland and Wellington, it was deployed 85 times and discharged on 13 of those occasions.[51]

It is clear that these less lethal weapons are far more likely to be used than lethal weapons. However, because these weapons are considered to be less harmful, the concern is that their use may not be regulated as carefully, despite the serious risks that they still pose. Given the current controversy that surrounds the police use of less lethal weapons such as the Taser and pepper spray, these weapons provide a focal point for an examination of the adequacy of current legal controls over the means by which the police exercise force.

II THE CURRENT STATE OF THE LAW IN NEW ZEALAND

In New Zealand, the legal authority for the police use of force primarily derives from the Crimes Act 1961.[52] The Crimes Act addresses two aspects of police use of force. First, it sets out the circumstances in which it is justifiable for an officer to use force, and, secondly, it limits the level and means by which police can use force by requirements of necessity and reasonableness. Given that the Crimes Act merely provides justification for what would otherwise be unlawful force, a police officer may face criminal charges if their use of force falls outside of the standards of reasonableness and necessity. Section 62 of the Crimes Act provides that "[e]very one authorised by law to use force is criminally responsible for any excess, according to the nature and quality of the act that constitutes the excess." As such, an officer who uses excessive force could face charges for assault, or homicide if death results.[53] Further, in the case of an unreasonable or

50 According to statistics presented in Parliament, pepper spray was used 1670 times in 2003, 2100 times in 2004, and 2000 times in 2005. See (22 February 2006) NZPD Questions for Written Answer (Knowledge Basket, University of Auckland Library) Question 854 (Keith Locke) (at 1 August 2008).

51 Houlahan, "Taser Firings: The Full List", *The New Zealand Herald*, 17 April 2007 <http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10434637> (at 29 July 2008). "Deployment" of the Taser includes the laser-painting of a subject and removing the weapon from its holster but not using it.

52 Note that the Crimes Act provisions do not apply exclusively to police officers — in certain circumstances they could also apply to civilians. However ss 39 and 40 state that where the force used is intended or likely to cause death or grievous bodily harm, the provisions apply only with respect to police officers or those called to assist the police.

53 See e.g. *Greenwood v Attorney-General* [2006] DCR 586, in which the actions of a police officer amounted to trespass to the person when he arrested the plaintiff without cause and in the process the plaintiff sustained a blow to the head and broken ribs. See also *Toro v Attorney-General* [2003] DCR 261, in which an officer was found to have committed battery by setting a police dog onto the plaintiff who was surrendering to the police. Although the Injury Prevention, Rehabilitation, and Compensation Act 2001 bars civil proceedings for compensation where injury has occurred, it does not prevent plaintiffs from bringing an action claiming exemplary damages.

unnecessary use of a weapon, the officer could also be charged with an offence under the Arms Act 1983.[54]

A police officer who has used excessive force may also be liable for a breach of the New Zealand Bill of Rights Act 1990 ("NZBORA"). For the most part, the use of force by the police will be considered a justifiable limitation on the rights contained within the NZBORA provided that they exercise that force within their legal authority. However, there are several provisions of the NZBORA that may come into play if a police officer has exceeded or misused their authority to use force. These include the right not to be deprived of life,[55] the right not to be subjected to "torture or to cruel, degrading, or disproportionately severe treatment or punishment",[56] and the right that "[e]veryone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person."[57]

Circumstances in Which Police are Authorized to Use Force

The first threshold for determining whether a police officer is authorized to use force is that the circumstance must fall within one of the categories contained in sections 39, 40, 41, and 48 of the Crimes Act. The circumstances in which police are authorized to use force under the Crimes Act are very broad, and are designed to encompass most aspects of police duties in which officers may be faced with resistance or potentially violent individuals. As such, police are given the authority to use force while making a lawful arrest,[58] preventing an escape,[59] executing a warrant or other process,[60] preventing a crime,[61] protecting persons or property,[62] or in self-defence.[63]

Means by Which Police are Authorized to Use Force

Although the police use of force may be justified in a wide array of circumstances, the force will only be justified if the means used are also legitimate. The "means" by which police exercise force refer largely to the tools that are employed to achieve the purpose of the force, whether

54 For example, the Arms Act 1983, s 53, provides that it is a criminal offence to carelessly discharge a firearm, airgun, or other restricted weapon. The applicability of this provision to police use of force is illustrated in the recent criminal proceeding brought against a police officer in the Auckland District Court for careless use of a firearm when trying to apprehend a suspect. Binning, "Officer in Court after Firing at Suspect", *The New Zealand Herald*, Auckland, New Zealand, 12 December 2006, A1, A3.

55 New Zealand Bill of Rights Act 1990, s 8.

56 Ibid s 9.

57 Ibid s 23(5); see e.g. *Harris v Attorney-General* (23 July 1999) unreported, High Court, Masterton Registry, CP7/96, Durie J.

58 Crimes Act 1961, s 39.

59 Ibid s 40.

60 Ibid s 39.

61 Ibid s 41.

62 Ibid.

63 Ibid s 48.

those tools are the police officer's own hands, police dogs, or weaponry. The Crimes Act provisions dealing with the use of force make no specific mention of the different tools police may use. As such, there is no reference to the type of circumstances in which it may be justifiable for police to use particular weapons. However, the Crimes Act does authorize police officers to use high levels of force capable of causing death or grievous bodily harm if the situation requires it.[64] This implies that the police are entitled to carry and use weapons capable of such levels of force. Indeed, while there is no mention of police weapons in the Crimes Act, the Arms Act 1983 provides that police are entitled to carry restricted weapons in the course of their duty.[65] It appears that this provision is sufficient to authorize police to carry restricted weapons such as firearms and pepper spray,[66] without the need for specific statutory authority for police to possess particular weapons. As such, this provision is also likely to entitle police to carry Tasers.[67] Nonetheless, while the police may have the authority to possess such tools, their power to use them is not unchecked. The Crimes Act requires that the means used to exercise force are both necessary and reasonable in the particular circumstances.

There are no hard and fast legal rules about what constitutes reasonable force — the Crimes Act provides no definition of "reasonableness" or "necessity" and, in general, the courts have been reluctant to discuss this aspect of the use of force in any great detail. This is because the reasonableness of force is generally regarded as a question of fact, to be decided having regard to the particular circumstances of a case, rather than a formulaic legal test.[68] Despite the lack of detail, some core elements of the requirements of reasonable necessity can be sketched out. In *Jackson v Police*,[69] Wild J made the following comments:[70]

> [I]t is common ground that whether use of force was necessary ... was a subjective test. But the reasonableness of the force used ... is

64 Ibid ss 39–40. See also s 48. The circumstances in which grievous bodily harm or death could be justified in relation to s 41 are less clear, but it is likely that it would not be considered reasonable with respect to the prevention of suicide.

65 Arms Act 1983, s 3(2)(a)(ii).

66 Pepper spray is classed as a restricted weapon under the Arms (Restricted Weapons and Dangerous Airguns) Order 1984, para 8.

67 At present it is unclear whether a Taser would be classed as a restricted or unrestricted weapon under the Arms Act 1983. In a recent report on Tasers, the Auckland District Law Society ("ADLS") contended that Tasers may be classified as airguns under the Arms Act 1983, s 2, because of their use of compressed gas rather than an explosive charge. If this were the case, Tasers would be an unrestricted weapon unless deemed restricted by the Governor-General by an Order in Council under the Arms Act, s 4. See Auckland District Law Society Public Issues Committee, Less Lethal, supra note 20, 5. Contrast *Police v Nichols* [1989] DCR 206, in which an electric stun gun was held prima facie to come within the words of the Arms (Restricted Weapons and Dangerous Airguns) Order 1984, para 8. It is likely that a similar interpretation will be given to Tasers — this is the view taken by the New Zealand police. See New Zealand Police, *Electro Muscular Incapacitation Devices: Standard Operating Procedures* (17 July 2006) 3 ["*Electro Muscular Incapacitation Devices*"].

68 Simester and Brookbanks, *Principles of Criminal Law* (2 ed, 2002) 478.

69 *Jackson v Police* (21 December 2006) unreported, High Court, Wellington Registry, CRI 2006-485-128 per Wild J.

70 Ibid [13].

> to be assessed on an objective not subjective standard. The degree of force was what was necessary in the circumstances but no more.

In other words, it is irrelevant whether or not the person believed they were employing reasonable force. The test is whether or not such force was objectively reasonable.[71] Simester and Brookbanks suggest that in order to be reasonably necessary, the force used must be indispensable and unavoidable,[72] an assertion that is in keeping with the principle that the particular level or type of force must be proportionate to the threat posed.[73]

Despite this general principle, it is important to note that force that is disproportionate could potentially be reasonable if, in the circumstances, there are no lesser means available to confront a threat. The Court of Appeal made a statement to this effect in *R v Howard*:[74]

> '[S]uch force as ... it is reasonable to use' may include force which is not in reasonable balance with the believed threat, if for instance the accused has no real choice of means, other than a means which might be seen in the normal course as way out of balance with the threat.

However, compared to ordinary members of the public, the police normally have several different means of exercising force at their disposal. They would therefore — at least in theory — be expected to have the ability to more effectively tailor their response to the particular threat level.[75]

Unfortunately, there are very few explicit rules dealing with the reasonableness of the police's use of weapons in particular circumstances, and so it is difficult to gain anything but a sparse picture of the types of circumstances in which it may be reasonable to use particular weapons. Given that Tasers were only introduced on a trial basis, the courts have not yet had an opportunity to examine the issue of reasonableness of use with respect to this particular weapon. On the other hand, there is some case law regarding the reasonable use of firearms and pepper spray from which it is possible to draw certain conclusions.

With respect to firearms, the courts have said that it is reasonable for police to draw and point firearms at people where there are reasonable grounds to believe the person may be armed.[76] In terms of the actual use of a firearm, it will normally be reasonable for police officers to use firearms in response to individuals who are armed with a firearm and are either

---

71 *R v Murray* (22 October 1987) unreported, High Court, Wellington Registry, T26/87.

72 Simester and Brookbanks, supra note 68, 481.

73 *Stanley v Police* (11 September 1990) unreported, High Court, Christchurch Registry, AP145/90, 4.

74 (2003) 20 CRNZ 319, 325.

75 Klockars, "A Theory of Excessive Force and its Control" in Gellar and Toch (eds), *Police Violence* (1996) 11.

76 Ibid 145–146. See generally *Fyfe v Attorney-General* [2004] NZAR 731 (CA); *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA); *Warmington v Attorney-General* (17 February 1998) unreported, High Court, Auckland Registry, CP455/96.

actually using the weapon or threatening to do so.[77] It also appears that if the police are confronted by an individual who is in possession of another type of weapon capable of causing death or grievous bodily harm, it may also be deemed reasonable for the police to use a firearm.

Given that the police use of firearms is relatively rare, there are few cases dealing with the issue. The best known case is that of *Wallace v Abbott*, in which — after the High Court decided that the officer had a case to answer — a jury found that the defendant was justified in using a firearm against Wallace, who was rushing towards him with a golf club.[78]

With respect to pepper spray, it is widely accepted that it is reasonable for a police officer to use pepper spray against an individual who is violently resisting the police. For example, in *R v Kissling*,[79] the use of pepper spray was considered an appropriate restraint after Kissling bit an officer's finger during a struggle in which the officer was attempting to remove an object from Kissling's mouth. In *Waata v Police*,[80] the High Court considered that the use of pepper spray against Waata was reasonable after he shoved an officer in the chest and subsequently attempted to evade arrest.[81] In *Harris v Attorney-General*,[82] the use of pepper spray against Harris, who pushed an officer and then became involved in a violent struggle with the police, was also considered reasonable. Williams J held that the use of pepper spray was reasonable because Harris had "violently resisted" the officers' attempts to arrest him.[83]

The position of the courts with respect to the use of pepper spray against non-violent subjects is less clear. In *Slater v Attorney-General*,[84] Keane J held that it was not reasonable for police to use pepper spray as a pre-emptive tool to induce the compliance of individuals who were not resisting the police.[85] Police officers had discovered Slater and another person intoxicated and asleep in a damaged rental car. In an attempt to repossess the car on behalf of the owners, police attempted to awaken the

77 See e.g. *R v Mako* [2000] 2 NZLR 170 (CA); *R v Laws*, noted in [1999] BCL 511.

78 See *Wallace v Abbott*, supra note 24.

79 (4 May 2005) unreported, Court of Appeal, Wellington Registry, CA403/04.

80 (27 June 2002) unreported, High Court, Nelson Registry, AP10/02, Doogue J.

81 Ibid. In this case, police were looking for a possible perpetrator of an earlier burglary. When they encountered Waata on the cathedral grounds, they asked him if they could look inside his backpack. Waata responded by pushing one of the officers in the chest, and ran away. Police officers yelled after him that he was under arrest and called on him to stop. They then pursued and pepper sprayed him.

82 (5 July 2006) unreported, High Court, Auckland Registry, CIV 2004-404-005787. Police had entered Harris's property looking for one of his tenants. They entered the tenant's room under Harris's implied license, but when they attempted to enter the rest of the house, Harris became agitated and told the police to "fuck off". Immediately after this, he pushed one of the officers and the police tried to arrest Harris for assault. A struggle ensued, and police used pepper spray on Harris.

83 Ibid [158]. In a previous criminal prosecution of Harris, Judge Morris dismissed the charges, holding that because the police had no lawful right to be on the property, their subsequent actions were tainted by this illegality and, as such, the evidence of Harris resisting the police should be excluded. As the Judge decided that the police had not met the first threshold of the circumstances fitting within one of the categories in which force is justified, the question of whether the use of pepper spray was a reasonable response by police officers was not addressed. See ibid [85]–[86].

84 [2006] NZAR 664 (HC).

85 Ibid 671.

occupants by shaking them. They could not be awakened so the officers pepper sprayed them. Following the spraying, Slater reacted violently and was restrained by the police. Keane J held that the use of pepper spray was unreasonable, because at the time of the spraying, the occupants of the car posed no immediate threat to the officers.[86]

In another highly publicized case, a District Court Judge held that the police use of pepper spray against a passively resisting environmental protester was unreasonable.[87] The protester, Simon Oosterman, was pepper sprayed by police after coming to the aid of a fellow protester who had been arrested. The police officer argued that the use of pepper spray was warranted because Oosterman had struggled with the police. However, Judge Weir said that Oosterman had been passively resisting the police and that the use of pepper spray in such circumstances was unacceptable.[88] At the time that Judge Weir declared Oosterman to be passively resisting, he was "holding his arms out, turning and twisting".[89] This suggests that a person's actions could constitute passive resistance even if they are struggling against the police, provided that the struggle is not violent.

While the lower courts have declared that it is unreasonable for a police officer to pepper spray a person offering only passive resistance, or as a pre-emptive measure where the individuals pose no immediate threat to the police, the Court of Appeal recently sanctioned the use of pepper spray as a compliance tool in a situation where the individual was not physically aggressive. In *R v Ropiha*,[90] the subject — who was in police custody — refused to comply with officers conducting a strip search pursuant to section 57A of the Police Act 1958. The officers threatened that if he did not voluntarily submit to the search, pepper spray would be used. When he still refused to comply, police sprayed him, causing him to yell and struggle with the officers present. Pepper spray was then used a second time and the officers restrained Ropiha on the floor. The Court held that although Ropiha did not become physically aggressive until after he was pepper sprayed, the force used by police officers was not excessive or unreasonable, but rather, "[g]iven the appellant's confrontational behaviour and his consistent refusal to submit to a full search, the police were justified, after repeated warnings, in using force to carry out the search".[91] However, the Court then stated that while they believed that the use of pepper spray was reasonable in the circumstances, they had reservations about the use of pepper spray being used as a pre-emptive tool to induce compliance,[92] and

86 Ibid 672.

87 Boyes, "Judge Slams Use of Pepper Spray", *The New Zealand Herald*, 15 September 2005 <http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10345618> (at 29 July 2008).

88 Ibid.

89 Ibid.

90 (7 August 2006) unreported, Court of Appeal, Wellington Registry, CA36/06.

91 Ibid [17].

92 Ibid [18].

that they "are not ... to be taken to be expressing the view that the use of pepper spray in circumstances such as this is generally acceptable".[93]

This ruling creates confusion as to whether or not it is reasonable for police to use pepper spray against individuals offering passive resistance. As a decision of the Court of Appeal, *Ropiha* would seem to overrule lower court findings that the use of pepper spray as a compliance tool is unreasonable. On the other hand, the judgment expressly stated that it was not to be taken as precedent that the use of pepper spray is reasonable in such circumstances. As such, it appears that this ruling modifies the approach taken by the lower courts, providing the possibility that in some circumstances, such as when the police are executing a lawful process, pepper spray may be used against individuals who are unco-operative but not actively resisting the police.

In another recent case, the High Court also sanctioned the use of pepper spray in a situation where the individual was not being physically aggressive. In *Jackson v Police*,[94] Wild J held that the officer was justified in using pepper spray in a situation where the individual had been arrested and then attempted to step around the officer. Although other police officers present expressed doubts about the reasonableness of using pepper spray in the circumstances, particularly considering the presence of several other officers who could have assisted in restraining the man, Wild J pointed to a number of factors that he felt were relevant in finding that the police officer's actions were not unreasonable. These factors included the following:[95]

- the man was suspected of committing a violent crime (strangling a woman at a party);
- he had previously ignored the officer when the officer had called out to him;
- he was inebriated;
- he was in a "state of some undress" because he was not wearing a shirt;
- he was "patently very upset and emotional";
- he repeatedly said that he wanted to go back to the party and see his girlfriend, and the officer was entitled to assume that this was the woman who had been strangled;
- the officer had both gestured to the man to stop and had arrested him; and
- notwithstanding this, the man had attempted to step around the officer and leave the premises.

93 Ibid.

94 *Jackson v Police*, supra note 69.

95 Ibid [41].

Police General Instructions

In addition to the statutory rules and common law governing police use of force, further guidance can be attained from the police General Instructions ("GIs"). The GIs are internal police rules created by the Commissioner of Police under the authority of section 30 of the Police Act 1958. Although these instructions resemble statements of policy more than legally binding rules, the Police Act states that all members of the police "shall obey and be guided by those instructions".[96] The GIs are of interest when considering the legal framework governing the police use of force because they indicate how the police have interpreted the legal requirement of reasonableness with respect to particular weapons. The GIs also have legal relevance because the courts have deemed them a relevant source in assessing the reasonableness of a police officer's actions. In *Wallace v Abbott*,[97] Elias CJ stated that while it is of primary importance that the police use of force fits within one of the legal justifications, the GIs are "part of the background against which the reasonableness of police conduct falls to be assessed".[98] Her Honour observed that "[c]ompliance with police procedures may well be a matter properly to be weighed by the body charged with deciding whether the constable used force that was unreasonable."[99] This was the case in *Slater v Attorney-General (No 1)*.[100] In that case Keane J — in deciding that the police use of force was unreasonable — emphasized that the actions of the police constituted a direct breach of the GIs relating to the use of pepper spray.

In contrast to the legal rules, the GIs specify the types of circumstances in which it would be appropriate for police officers to use particular weapons. The GIs addressing the use of force are largely based on statutory rules. These rules are used to inform the police's Tactical Options Framework ("the Framework"), which is designed to guide the police to "escalate and de-escalate the choice of equipment or tactics in accord with the direction the incident is taking".[101] According to the Framework, the police officer must make a "Perceived Cumulative Assessment" of a situation and the subject's behaviour and tailor the level of force used accordingly.[102] For example, if the subject is actively resisting the police, they can use pepper spray as well as pain compliance tactics such as wristlocks and "distraction techniques".[103] Where a subject is only offering passive resistance, the

96 Police Act 1958, s 30(1).

97 *Wallace v Abbott*, supra note 24.

98 Ibid [49].

99 Ibid [21].

100 *Slater v Attorney-General*, supra note 84, 672.

101 Marshall and Shuey *A Strategic Evaluation of the New Zealand Police Position Concerning the Use of Force When Responding to Potentially Violent Situations: A Review of Best Practice, Policy and Training* (New Zealand Police Report, 2001) 17.

102 "TASER – As a Tactical Option for Police" New Zealand Police (2006) <http://www.police.govt.nz/resources/2006/taser-trial/taser-tactical-options-card.pdf> (at 30 July 2008).

103 Ibid.

officer can use "empty hand tactics", which include the use of handcuffs and a "physical escort".[104] The Taser is considered a weapon at the higher end of the "intermediate options" available to the police, and is only to be used against a subject exhibiting assaultive behaviour.[105] If the officer assesses the situation as one in which death or grievous bodily harm may result, they are entitled to use deadly force, which includes the use of carotid holds, firearms, and other tactics and techniques with "serious implications".[106]

The Framework appears to place pepper spray, Tasers, and firearms on a weapons continuum, with pepper spray being warranted against subjects displaying a low level of violent behaviour, Tasers requiring a higher level of violence, and firearms only to be used in the most dangerous situations.[107] As such, the Framework provides that it is only reasonable to use pepper spray in situations where the subject is actively resisting the police. The threshold for Taser use seems to be higher, requiring behaviour that is "within or beyond" the assaultive range.[108] This suggests that Tasers could also be used in situations where there is a risk of death or grievous bodily harm, a category where the use of firearms is also warranted. Further guidance regarding the appropriate uses of these weapons can be attained from the GIs.

1 Pepper Spray

The GIs describe pepper spray as a "tactical tool for frontline officers for the resolution of violent incidents with minimum risk of harm to the police, the public and the person involved".[109] If this were to be read in the light of the Tactical Options Framework, it would suggest that "active resistance" constitutes violent behaviour in which the likelihood of serious injury resulting is low.[110] The GIs further state that pepper spray should not be used against people offering passive resistance, and should not normally be used in crowd situations.[111]

2 Tasers

At present, there are no official GIs relating to the use of Tasers by New Zealand police. This is because the Taser has to date only been introduced on a trial basis. The Taser's standard operating procedures are virtually

104 Ibid.

105 Ibid. Other tactical options in this category include empty hand techniques, batons, weapons of opportunity, and police dogs.

106 Ibid.

107 Ibid. However, as will be discussed in the next part, the tactical options model creates some ambiguity by the fact that "Active Resistance" and "Assaultive" behaviour are not defined or distinguished from one another.

108 Ibid.

109 Police General Instructions, A268(1).

110 See generally Police General Instructions, A270(1).

111 Police General Instructions, A270(2).

identical to those relating to pepper spray in terms of the circumstances in which the weapon may be used,[112] but additionally state that the Taser can be used by the police when dealing with:[113]

- unarmed (or lightly armed) but highly aggressive people;
- individuals displaying irrational or bizarre behaviour; and
- people under the influence of mind-altering substances, solvents or alcohol.

This suggests that where the subject is in a highly aggressive and agitated state, they will be considered to be displaying "assaultive" behaviour and police may therefore consider it reasonable to use a Taser. The reference to a high level of aggression suggests that the Taser should only be used in situations where the subject poses a risk of serious injury to the officer or someone else. The guidelines also suggest that the threat posed by the subject must be credible, requiring the officer to "have an honest belief that the subject, by age, size, apparent physical ability, threats made, or a combination of these, is capable of carrying out the threat posed".[114] The guidelines also state that "[u]nder no circumstances is the device to be discharged to induce compliance with an uncooperative but otherwise non-aggressive person."[115]

Further, there are a range of situations in which the use of a Taser is restricted. For example, the use of a Taser against someone offering passive resistance is prohibited, as is the use of a Taser in a situation where it could ignite a flammable substance.[116] In other situations, a greater level of care than normal is expected. For example, the use of a Taser in a crowd situation is strongly discouraged but not prohibited,[117] and "consideration and care" must be taken when using a Taser on subjects who are in an elevated position, or who are in or near a body of water.[118] The guidelines further state that Tasers should only be used against pregnant females as a "last resort".[119]

3 Firearms

The GIs relating to the use of firearms are much stricter than the Crimes Act provisions governing the use of force and are also far more restrictive than the GIs relating to the use of Tasers and pepper spray. They emphasize that

112 New Zealand Police, *Electro Muscular Incapacitation Devices*, supra note 67, 5.

113 "Taser X26 Operational Trial" New Zealand Police (2006) <http://www.police.govt.nz/resources/2006/taser-trial/> (at 30 July 2008).

114 Ibid.

115 New Zealand Police, *Electro Muscular Incapacitation Devices*, supra note 67, 4–5.

116 Ibid 4.

117 Ibid 6.

118 Ibid 5.

119 Ibid 6.

"[a]n overriding requirement in law is that minimum force must be applied to effect the purpose",[120] and that, where practical, the police should not use a firearm unless it can be done without endangering other persons. The guidelines state that firearms can only be used in circumstances where the offender poses a risk of death or grievous bodily harm and the situation cannot be dealt with in a less violent manner.[121] The police instructions further provide that in any of the above circumstances, an offender cannot be shot until: they have first been called upon to surrender (unless it is impracticable and unsafe to do so); it is clear that the offender cannot be disarmed without first being shot; and further delay in apprehending the offender would be dangerous or impracticable in the circumstances.[122]

III A CRITIQUE OF THE CURRENT LEGAL AND ADMINISTRATIVE FRAMEWORK GOVERNING THE POLICE USE OF FORCE

The major problem with the existing legal rules governing the police use of force is that they are simply too vague to provide any real guidance about when it is or is not acceptable to use different levels of force. Although the statutory provisions set out the circumstances in which force can be used, the question of the appropriate means by which such force can be exercised is essentially left to the discretion of the police, with the only real statutory guidance being that the force must be "reasonable" and "necessary".[123] It was no mistake that these powers were drafted in such broad terms. Rather, it reflects an intention on the part of the legislature to provide the police with an authority to use force that is permissive rather than prescriptive.[124] The legislative provisions governing police use of force are designed to "enable the police to address a very wide range of problematic behaviour in a variety of ways".[125] They are intended to cater to the inherent unpredictability of police work and the accompanying need to have flexibility in the rules that govern their response to any given situation. If the law were overly prescriptive, it could hamper the ability of the police to respond quickly and effectively to what may be a unique or unforeseeable situation.

However, in the quest for flexibility, the current statutory rules have sacrificed clarity, and in the process, have weakened the ability of the law to control the police use of force. While requirements of necessity and

120 Police General Instructions, F061(1).

121 See Police General Instructions, F061(2).

122 Police General Instructions, F061(3).

123 See Crimes Act 1961, ss 39–41.

124 Cameron, supra note 7, 25.

125 Ibid 26.

reasonableness are essential limitations on the police power to use force, without further definition and explanation, these terms have little value in guiding police actions. This is because they mean very little in a practical sense. When a police officer is faced with a situation in which he or she may need to exercise force, the test of reasonableness and necessity will provide little practical guidance in what may be a split-second decision about what level of force to use. Officers require more concrete guidance about what actually is reasonable and necessary in a particular circumstance. The inability of the present legal rules to provide this guidance means that they are "almost wholly unsuited to the task of controlling and limiting police behaviour".[126]

Of course, it is quite often the case that the law will be drafted in broad language. It is a fundamental principle that the law must be fixed, certain, and knowable, and therefore cannot change constantly to deal with unforeseen circumstances. As such, Parliament often confers powers or provides rules that are quite broad, and then leaves it to the courts to fill in the gaps. Unfortunately, when it comes to the police use of force, the courts have been very slow to fill in these gaps. One of the reasons for this is that the issue of police force rarely comes before the courts.[127]

This is hardly surprising given the numerous barriers that stand in the way of criminal or civil proceedings against the police. Criminal actions against the police are notoriously difficult to prosecute, with "juries being generally prepared to give the benefit of doubt to the police defence that they were or perceived themselves to have been acting in the course of their duty or in self-defence or under provocation when the alleged impropriety occurred".[128] The credibility of the complainant is often tainted by a criminal record or because they were intoxicated, on drugs, or engaging in activity of questionable legality at the time of the incident.[129] This lack of credibility is usually enough to raise reasonable doubt that the police were justified in their actions, particularly given that difficulties often arise in producing independent witnesses.[130]

Even when the issue of police use of force has come before the courts, they have rarely provided an in-depth analysis of the reasonableness of the means by which the police have exercised force. The courts are far more willing to address the first threshold question of whether the circumstances fall within one of the categories in which force is justified. If the police use of force falls outside one of these categories, the courts are quick to

126 Ibid.

127 Ibid 27.

128 Freckleton, "Legal Regulation of the Police Culture of Violence: Rhetoric, Remedies and Redress" in Coady et al (eds), *Violence and Police Culture* (2000) 148–149.

129 Ibid 149.

130 Ibid.

declare that the use of force was excessive and unreasonable.[131] However, in situations where police actions reach the first threshold, the courts rarely go further and analyse whether the particular type of force used by the police was proportionate to the threat posed by the subject. In such circumstances, the courts usually accept that the force was both necessary and reasonable, without going into any real detail about what these terms mean.[132] This lack of analysis can be illustrated by the recent cases that have come before the courts dealing with the reasonableness of police use of pepper spray.

In *R v Ropiha*,[133] the Court of Appeal held that it was reasonable for the police to use pepper spray pre-emptively against an individual who was offering only passive resistance. It appears that the reason for this decision was that the police used the force to complete a search they were legally entitled to conduct.[134] This circumstance would therefore fit within the section 39 category authorizing the use of force to execute a lawful process. However, the court did not go on to analyse whether or not pepper spray was a proportionate response to the threat posed by the subject. This is an important question when assessing the reasonableness of police actions given that the Crimes Act provides that the force will not be justified if the purpose can be achieved by reasonable means in a less forceful manner. Instead, while the Court expressed reservations about the use of pepper spray as a pre-emptive weapon to induce compliance,[135] they did not look further into the issue.

Similarly, in *Jackson v Police*, Wild J held that it was reasonable for the police officer to pepper spray the subject because he had attempted to step around the officer following his arrest.[136] This action was enough to invoke section 40 of the Crimes Act 1961, which authorizes the use of force to prevent an escape. In a discussion of the issue of reasonableness and necessity of police use of force, Wild J went so far as to list a range of factors to support the reasonableness of the police officer using force in the circumstance.[137] However, his Honour did not analyse whether the particular type of force used by the officer was proportionate to the threat posed. Without this further piece of analysis, these judgments do little to fill in the gaps created by the vague statutory test.

In order to create a greater degree of clarity with respect to the reasonableness test, the courts must do more than simply state whether the police use of force is reasonable or unreasonable. They must explain why the

131 See e.g. *Greenwood v Attorney-General*, supra note 53, in which a police officer's actions were deemed unreasonable because the use of force followed an unlawful arrest and therefore fell outside the circumstances for which force is justified under the Crimes Act, s 39.

132 Cameron, supra note 7, 27.

133 *R v Ropiha*, supra note 90.

134 Ibid [17].

135 Ibid [18].

136 *Jackson v Police*, supra note 69, [42].

137 Ibid [41].

particular level of force used by police was reasonable in the circumstances, bearing in mind the requirement of proportionality. It is unsurprising that the courts have been unable to fill in the gaps of the statutory test. Given that the reasonableness of an officer's actions is largely a question of fact rather than a question of law, the ability of the courts to provide any real guidance is limited. Given this difficulty, it may not be wise simply to rely on the courts to shed light on vague statutory rules. It suggests that there may be a need for the statutory rules themselves to have a greater degree of specificity in setting the legal parameters around the police use of force.

Police Use of Force and the Accountability Deficit

Where the legal parameters of the use of force are unclear — as is the case in New Zealand at present — the law will be ill-suited to the task of guiding or controlling police actions before the fact.[138] Even if the law does not fulfil this function, the aim is that it can be used as a way of holding police officers accountable for their actions after the fact.[139] This accountability is an essential part of ensuring that police conduct is governed by and judged according to the law.[140] Indeed, the fact that the Crimes Act expressly provides for the criminal liability of police officers who misuse or exceed their authority to use force demonstrates an intention to hold police officers who act outside the scope of their authority legally accountable. However, as Arnold points out, "legal accountability in respect of the police barely exists at a practical level in any significant sense".[141] This may be due in part to the institutional barriers inhibiting criminal or civil actions against the police.

Another factor inhibiting the courts' ability to hold police officers legally accountable is the lack of clarity of the current legal rules. If the scope of the legal authority to use force is unclear, it will also be unclear when an officer is acting outside the boundaries of that authority. In this situation, it is difficult to hold the officer to account for an unacceptable use of force. If this is the case, there will be a large murky area in which actions may be unnecessary or unacceptable, but may nevertheless pass by unscrutinized because of the difficulty in defining what is or is not unreasonable. This is a serious deficit when we consider the extraordinary nature of the police's power to use force. Given that this power is conferred to police by the law, it is important that the police are also answerable to the law for their use of this power and held to account if they abuse it.[142] The courts are the primary mechanism for holding the police legally accountable for their actions, but without defining and distinguishing reasonable force from unreasonable force, their ability to provide this accountability is limited.[143]

138 Manning, "Violence and the Police Role" (1980) 452 Annals Am Acad Pol & Soc Sci 135, 139.

139 Ibid.

140 Arnold, supra note 2, 69.

141 Ibid 67.

142 Ibid 69.

143 Uildriks and Mastrigt, *Policing Police Violence* (1991) 35.

While the courts are the primary mechanism for holding the police legally accountable, they are not the only way to hold an officer to account for their actions. The police themselves have internal disciplinary procedures in place to investigate and hold officers to account. In theory, internal oversight of police actions can be an effective way of preventing excessive uses of force and holding officers responsible for abuses. In practice, however, internal disciplinary procedures are often highly problematic. It is perhaps inevitable that in internal investigations and disciplinary matters, the police will more often than not heavily favour the officer over the complainant.[144] Even if this is not always the case, the wider public often view internal disciplinary proceedings with scepticism.[145] Such proceedings are usually held in private — meaning there is very little transparency — and the lack of independence of internal investigations gives rise to a not entirely misplaced perception that the police would rather look after their own than punish their excesses.[146] In New Zealand, the problems that arise with internal disciplinary actions have recently been highlighted by a Commission of Inquiry report examining how the police dealt with complaints of police sexual misconduct. The report observed that the police response to complaints about their colleagues could be described as a "wall of silence",[147] and also expressed concern about a lack of transparency and independence in internal investigations.[148] The problems that exist in internal police investigations and disciplinary procedures mean that this mechanism cannot make up for the failings in legal accountability mechanisms such as the courts.

Another way in which police can be held accountable is via the Independent Police Conduct Authority ("IPCA"). The IPCA is a body that is independent from the police and is tasked with investigating allegations of misconduct or neglect of duty against the police.[149] It often investigates incidents of police use of force, including high profile police shootings like the Steven Wallace case. However, a number of institutional obstacles stand in the way of the IPCA. Although in-depth discussion of the IPCA is outside the scope of this article, its ability to operate as a mechanism for accountability has been questioned on a number of grounds. These include its heavy reliance on material from police investigations when considering a complaint,[150] its secrecy provisions that mean that its findings are often not publicly released, and the fact that the IPCA has only a recommendatory function — it does not have the power to compel the police to bring disciplinary or criminal proceedings against their officers.

144 Ibid.

145 Ibid.

146 Ibid.

147 Bazley (Commission of Inquiry into Police Conduct) *Report of the Commission of Inquiry into Police Conduct* (March 2007) 295.

148 Ibid 105.

149 Independent Police Conduct Authority Act 1988, s 12.

150 McGonigle, "Police Complaints, Privacy, and Officers' Rights" [1998] NZLJ 153, 153.

Indeed, because the enquiries of the IPCA are privileged, if a complainant wants to subsequently bring a legal proceeding against the police, they cannot access the material and findings held by the IPCA.[151] This means that the IPCA cannot even be used as a stepping-stone to holding an officer accountable in another forum. Again, these problems mean that the IPCA cannot serve as an effective substitute for legal accountability through the courts.

An Operational Decision? The Lack of External Control over the Means by Which Police Exercise Force

Another troubling aspect of the current legal regulation of the police use of force is the lack of legal control over the weapons that police can use when exercising force. Although the Arms Act 1983 confers the police with the power to carry restricted weapons, this power is not constrained by a requirement that the introduction of such weapons receive parliamentary scrutiny or permission. This is because decisions regarding the weapons that police can carry have been deemed to be an "operational matter for the police".[152]

The police have traditionally been given a great deal of independence from the government when it comes to law enforcement or operational matters.[153] One of the reasons for this independence is the notion that there should be a separation of powers between elected representatives and the police. Such a separation is considered important in any liberal democracy to ensure that "[p]olice decisions that impact directly on individual citizens are not the result of political decisions".[154] While the police must, of course, implement the law, they are accorded a great deal of discretion in such matters and are on the whole not subjected to political scrutiny.[155]

The notion of police independence affects not only the extent to which government ministers can intervene in police affairs, but also the ability of Parliament to scrutinize or debate certain aspects of policing. Neil Cameron's statement sets out the issue:[156]

---

151 Ibid.

152 Annette King (Minister for Police) quoted in Collins, "A Momentous Decision", *The Dominion Post*, Wellington, New Zealand, 31 August 2006, 4.

153 Chen and Palmer, "Constitutional Issues Involving the Police: An Analysis for the Independent External Review of the Police Administrative and Management Levels and Structures" (1998) <http://www.police.govt.nz/resources/1998/review-of-police-admin--commissioners-submission/> (at 1 October 2008). See also *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53, 56 (HL), for a discussion of the House of Lords on the principle of operational independence.

154 Chen and Palmer, supra note 153.

155 This was recently illustrated when Prime Minister Helen Clark was criticized for commenting on the operational decision of the Police not to reopen the investigation into the deaths of the Kahui twins following the acquittal of their father, Christopher Kahui, for their murders. See Trevett and Binning, "PM Criticised for Kahui Case Comments", *The New Zealand Herald*, 27 May 2008 <http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10512678> (at 30 July 2008).

156 Cameron, supra note 7, 19.

> The absence of a clear Ministerial power to direct, and the general acceptance of a wide notion of police independence, naturally affects the second major area of political influence – parliamentary comment and questioning. In the first place, the very vagueness of the legal and constitutional position means that it is unclear what types of questions can be properly asked of the Minister and what types of policing topics can be properly debated.

The effect of this is that detailed issues of policing, such as the types of weapons police employ in exercising their law enforcement duties, are seldom debated in the House.[157]

The problem with this approach is that it is not always clear what constitutes an operational matter that should be left to the discretion of the police, and what is a matter of administration and policy that should be subject to government scrutiny and oversight.[158] Arguably, the decisions regarding the type of weapons that can be used by police in carrying out their duties should not be considered to be a purely operational matter. The problems that could arise from political involvement in policing decisions regarding individual cases of law enforcement or prosecution may not necessarily arise in relation to greater external control over the weapons available to the police.

It is possible that if the police do not have adequate tools to assist them in fulfilling their duties, their core functions could be compromised. Therefore, the police should undoubtedly play a key role in assessing whether there is a need for a particular weapon. However, it is important to recognize that the police are not the only stakeholders in a decision to introduce new weapons. The issues arising from the use of weapons such as pepper spray and Tasers go beyond mere operational considerations. Given that these weapons will be used against members of the public, and can have serious health risks or potentially infringe on important rights, it is important that the decision to introduce weapons is not left solely to the police. At present it appears that there are few external controls. The Auckland District Law Society ("ADLS") has expressed concern about the lack of public consultation regarding the introduction of Tasers.[159] They contend that there is an urgent need for such consultation and, in particular, an engagement with other key stakeholders such as the legal and medical professions.[160] The involvement of such independent experts could ensure that Bill of Rights issues and health risks are more fully explored. If these issues are not subjected to independent scrutiny and control, it makes it difficult to exert control over the use of these weapons following their introduction.

---

157 Ibid.

158 Chen and Palmer, supra note 153.

159 Auckland District Law Society Public Issues Committee, Less Lethal, supra note 20, 6–7.

160 Ibid 7.

Police General Instructions — A Less than Legal Application of Use of Force Provisions?

As we have seen, the current legal framework governing the police use of force does not provide the level of guidance that police officers need. Without legal guidance, it is left to the police themselves to connect the dots. As outlined in Part II, it is the Police GIs that fulfil this role, setting out the circumstances in which it is appropriate for police to use the various weapons at their disposal. These instructions play a crucial role in informing police about the rules relating to the use of force and the use of particular weapons when exercising force. Further, while these rules must be informed by and limited by the legal requirements of police use of force, they can also be more restrictive than the legal test, prohibiting behaviour that may not necessarily be illegal, but that is nonetheless inappropriate. As such, although the GIs constitute policy rather than legally enforceable rules, they can be very useful at filling in the gaps that the statutory rules have left open.

A number of problems arise with the present GIs and the way in which they are implemented. Certain ambiguities arise when it comes to determining the circumstances in which the police are actually authorized to use particular weapons. For example, police guidelines state that Tasers can be employed when a suspect is exhibiting "assaultive" behaviour. The broad range of human conduct that can constitute an assault arguably hampers the level of practical guidance that such a term provides. Simester and Brookbanks give the following illustration:[161]

> At one end of the scale [assault] may include an unconsented-to kiss on the cheek, while at the other end it may include a grievous physical attack, falling short of murder or manslaughter but nonetheless resulting in severe injury to the victim.

Assault can also consist of a threat to inflict unlawful force, provided that the threat is accompanied by a relevant "act" or "gesture" to indicate an intention to follow through with the threat.[162]

The wide range of behaviour that could potentially be considered "assaultive", gives rise to some serious questions about the types of circumstances in which police are authorizing the use of Tasers. It may be understandable for a police officer to use a Taser against an individual exhibiting the type of assaultive behaviour displayed by Steven Wallace, who was clearly aggressive and advancing towards police armed with a golf club. By contrast, at the other end of the scale this category could also theoretically allow the use of the weapon against someone who is threatening or resisting the police but does not pose a risk of serious injury.

---

161 Simester and Brookbanks, supra note 68, 573.

162 Ibid.

In the latter situation, it is debatable whether the use of a Taser would be proportionate.

In the United States, the use of a Taser has been deemed reasonable in situations where the subject is struggling with the police, but does not present a risk of serious injury or death.[163] This has even been the case in situations where the struggling individual was handcuffed.[164] United States courts have also deemed it reasonable to use a Taser against subjects who are distressed and verbally abusive, but non-violent.[165] In several cases, it has even been held reasonable to use a Taser on a subject who is handcuffed but non-compliant.[166] By contrast, the use of a Taser has been deemed excessive in cases where the subject is allegedly being co-operative or is in no way resisting the police.[167]

In New Zealand, however, it is unlikely that the use of a Taser could be considered reasonable against people who are struggling but pose only a low risk of harm, or who are resisting the police but are non-violent. New Zealand Taser guidelines clearly prohibit the use of Tasers against individuals offering passive resistance,[168] and the New Zealand threshold for Taser use appears to be higher than the standard for that of pepper spray — that being "active resistance". Indeed, the lower standards imposed in the United States have been heavily criticized for allowing Tasers to be used in situations where their use is disproportionate to the threat posed. Many have argued that Tasers should be restricted to situations where there is a risk of death or serious injury.[169] This is the standard for Taser use in the United Kingdom, where Tasers are only authorized in situations where the use of firearms would also be allowed.[170]

Given that the New Zealand police have described the Taser as a less lethal alternative to a firearm, a similar standard should arguably be imposed here. However, with the ambiguity of the term "assaultive" used to guide New Zealand police in their use of the Taser, it is currently unclear what circumstances the police are authorized to use this weapon in. The inconsistent statements by police regarding the position of Tasers within the weapons continuum compounds this lack of clarity. At times, police statements seem to suggest that Tasers will be placed just below firearms in the hierarchy of tactical options, and that they "will only be used in

163 See *Hinton v City of Elwood* 997 F 2d 774 (10th Cir, 1993); *Calusinski v Kruger* 24 F 3d 931 (7th Cir, 1994).

164 See *Moore v Novak* 146 F 3d 531 (8th Cir, 1998); *Carroll v County of Trumbull*, 2006 US Dist LEXIS *2309; *Willkomm v Mayer*, 2006 US Dist LEXIS *11489.

165 See *Draper v Reynolds* 369 F 3d 1270 (11th Cir, 2004).

166 See *Willkomm v Mayer*, supra note 164; *Devoe v Rebant*, 2006 US Dist LEXIS *5326.

167 See *Schmittling v City of Belleville*, 2006 US Dist LEXIS *28594; *Autin v City of Baytown*, 2005 US App LEXIS *29098 (5th Cir).

168 New Zealand Police, *Electro Muscular Incapacitation Devices*, supra note 67, 6.

169 See Manning, supra note 138; Lewer and Davison, infra note 170; "Use of Tasers by Law Enforcement Agencies: Guidelines and Recommendations" Stanford Criminal Justice Center (2006) <http://www.law.stanford.edu/program/centers/scjc/library/tasers.pdf> (at 31 July 2008).

170 Lewer and Davison, "Electrical Stun Weapons: Alternative to Lethal Force or a Compliance Tool?" Bradford Non-Lethal Weapons Research Project (2006) <http://www.brad.ac.uk/acad/nlw/research_reports/docs/BNLWRP_electricalweapons_Opinion_Jan06.pdf> (at 31 July 2008).

circumstances of absolute last resort, where other tactical options such as the baton or pepper spray have either been tried, unsuccessful[ly] or may be irrelevant".[171] On other occasions, police have implied that Tasers will be employed more as an alternative to pepper spray.[172] Considering the huge difference between the circumstances in which it would be warranted to use a firearm as opposed to pepper spray, the lack of consistency in police statements further increases the ambiguity over Taser usage. If police intend that Tasers be employed in similar situations to pepper spray, this raises issues about whether police have provided an effective gradient between the situations in which these weapons should be used. Given that the risks associated with Tasers appear to be higher than with pepper spray, the situations in which they can be used should arguably be more restrictive. The police's Tactical Options Framework differentiates between the situations in which pepper spray and Tasers can be used by stating that pepper spray can be used when the subject is offering active resistance, whereas Tasers can only be used when the behaviour is assaultive. By contrast, the GIs outlining when each weapon may be used are identical. The differentiation between active resistance and assaultive behaviour is fairly meaningless considering active resistance could fall within the definition of assault. Without further differentiation, there is nothing in the police guidelines to prevent Tasers being used as an alternative to pepper spray, which could lead to an escalation rather than the intended de-escalation of police force.

The actual wording of the GIs relating to Tasers and pepper spray raise other potential inconsistencies with the legal test, and indeed with their own tactical framework. Whereas the Tactical Options Framework suggests that pepper spray or Tasers cannot be employed unless the subject is using some level of force — whether that be actively resisting or exhibiting assaultive behaviour — the GIs state that these weapons can be used if the officer believes on reasonable grounds that the subject poses a *threat* of physical injury. This raises issues about the level of threat that needs to be posed, and how imminent that threat is. These instructions have the potential to allow for the pre-emptive use of force in situations where the statutory test seems to require actual force. For example, section 39 of the Crimes Act authorizes the use of force to *overcome any force* used in resisting arrest, suggesting that a threat of force not accompanied by some level of active resistance will not be sufficient to activate this provision. The requirement in the GIs that the belief must be based on reasonable grounds could be taken to mean that the threat must be accompanied by some gesture before it can be seen as credible, but the fact that the tests are all subtly different tends to create confusion where there should be

171 John Campbell, Interview with Police Superintendent John Rivers, "The Taser Debate" (TV3 Campbell Live, Auckland, 6 June 2006).

172 See "Taser Operational Trial to Begin" Ten One Community Edition (2006) <http://www.police.govt.nz/news/tenone/20060428-284/feature_taser.htm> (at 19 August 2008).

clarity. Further ambiguity arises from the fact that the GIs allow the use of Tasers or pepper spray to resolve situations where a person is acting in a manner likely to physically injure themselves. This seems weaker than the statutory requirement in section 41 of the Crimes Act that force may only be used in such a situation if there is a likelihood of "immediate and serious injury".

Such inconsistencies suggest that in some aspects the police standards for the use of pepper spray and Tasers are potentially more relaxed than the legal rules. This is of concern because, if anything, police GIs should be far stricter than the legal rules. The legal rules are the source of the police's authority to use force and, as such, if the internal rules of the police are weaker than legal requirements, they could, in effect, be sanctioning the use of force in situations where there is no legal authority to do so in the first place. This would give rise to a situation where the police rules guiding the reasonableness of the police use of force could clash with the legal standard, opening police officers up to criminal or civil liability for their actions. Even if the GIs suggested that it was reasonable to use force in the circumstances at hand, this would not be relevant in terms answering any criminal charges against an officer.[173] To reduce the chances of police officers incurring legal liability, the GIs should be much stricter than the legal standards.[174]

In many respects, the GIs do provide greater detail than the legal rules. A good example of this is the rule that police should not use pepper spray against individuals offering passive resistance.[175] This rule is arguably in keeping with the principle of proportionality. It recognizes that in situations where the subject is not resisting the police in a violent or aggressive manner, the costs in terms of pain, suffering, and potential injury to the subject may outweigh the positive benefits of using pepper spray for incapacitation purposes. This is because in many cases the use of pepper spray actually enrages the subject, causing them to act more aggressively than they were before.[176] As such, it makes sense to use other tactics — such as verbal negotiation or restraint holds — against subjects who are not actively resisting the police.

Contrary to police GIs, it appears that in many cases the police do use pepper spray against subjects who are not actively resisting the police and do not pose an immediate physical threat.[177] Also of concern are reports that police have used pepper spray against subjects who have already

173 *Wallace v Abbott*, supra note 24, [21].

174 Klockars, supra note 75, 11.

175 Police General Instructions, A270(2).

176 See e.g. *Slater v Attorney-General*, supra note 84; *R v Ropiha*, supra note 90. In these cases the subjects were not violent though they offered passive resistance to the police prior to being pepper sprayed. Following the use of pepper spray, they reacted violently, causing police to engage in a physical struggle with the subjects.

177 Ibid. A further example is the pepper spraying of environmental protestor Simon Oosterman, who was recently awarded $5000 in damages from the police for this incident. See "$5000 for Protester Sprayed by Police", *The New Zealand Herald*, 3 July 2008 <http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10519656> (at 31 July 2008).

been restrained by police and clearly no longer pose a risk of physical injury.[178] Such incidents suggest that even in situations where the GIs are relatively clear in outlining how pepper spray should or should not be used, they are not entirely effective in controlling the use of pepper spray by police. Although there will always be situations in which police officers act outside of the rules, critics argue that the police misuse of pepper spray is far more widespread than isolated incidents of individual rogue police officers not following the rules.[179] This suggests that, even in situations where the GIs are relatively clear in setting the boundaries of the use of particular weapons, they are not an effective substitute for clear, legally enforceable rules.

Even in relation to the trial introduction of Tasers, there have been concerns that the police GIs are problematic and do not adequately provide guidance for police use of these weapons.[180] One issue that has arisen is the use of "laser-painting" by police.[181] There is no reference to laser-painting in police guidelines, although the Project Lincoln report recommending the introduction of Tasers noted that "the use of the laser sights and the visual effect of the Taser may induce some persons to comply",[182] without having to actually fire the weapon. However, as laser-painting is merely one step removed from actually discharging the Taser, in principle this tactic should only be employed in situations where firing the weapon would be warranted. The ADLS has expressed concern over the possible consequences of police threatening the use of the Taser by laser-painting individuals in situations where actually discharging it would contravene their own rules:[183]

> [T]here remains the risk of the "last resort" status of the Taser being eroded, and police drawing the weapons less conscientiously than was intended or indeed would be expected. This could in turn lead to the weapons being fired more frequently and in the face of less serious incidents.

On the whole, police have employed laser-painting in circumstances where the subject has been behaving aggressively and has been armed with a weapon[184] — a situation in which Taser use would generally be justified under the police guidelines. Moreover, in the majority of cases, the

178 See e.g. Hutton, "Court Action Taken After Cops Pepper-Spray Man at Marae", *Waikato Times*, 1 October 2003 (The Knowledge Basket Database, University of Auckland Library) (at 18 September 2006); New Zealand Police, "Police Investigate Pepper Spray Incident" (9 May 2006) <http://police.govt.nz/district/countiesmanukau/release/2438.html> (at 31 July 2008).

179 See e.g. "Minister Ducks Her Taser Critics" Green Party of Aotearoa New Zealand (6 July 2006) <http://www.greens.org.nz/node/14439> (at 31 July 2008).

180 See generally Auckland District Law Society Public Issues Committee, Less Lethal, supra note 20, 9.

181 "Laser-painting" is the threatened use of a Taser by drawing the weapon and aiming the targeting laser at the subject.

182 New Zealand Police Operations Group, *Project Lincoln*, supra note 27, 70.

183 Auckland District Law Society Public Issues Committee, Less Lethal, supra note 20, 8.

184 For a list of these incidents see Houlahan, supra note 51.

police tactic of laser-painting has been successful in inducing the subject to comply with police demands.[185] In a number of instances, however, it appears that police have used laser-painting in situations that do not seem to warrant the use of a Taser.[186]

Instances where Tasers have actually been discharged have also provoked concern, particularly where police have discharged it multiple times against the same person.[187] While the police guidelines do not specifically state that police should not use the Taser against a person more than once, research suggests that the risks associated with Tasers are heightened with multiple uses.[188] This suggests that officers should be cautious in deploying the weapon against the same person more than once. If the risks in discharging the Taser are heightened in such situations, in order for the response to still be proportionate, the individual must arguably pose the same level of risk that warranted the use of the Taser in the first place. If the person has been incapacitated but is still struggling with police, some level of force may still be warranted, but the principle of minimum force mandates that the least forceful means should be employed. Where the threat posed by the individual has diminished, the use of a Taser may very well constitute an excessive use of force.[189]

Such concerns have been raised in relation to a recent incident in which police tasered an unarmed woman twice in a wet bathroom.[190] Police claimed that they tasered the woman because she was acting in a bizarre and irrational manner, and, although she was unarmed, she had locked herself in a bathroom where she had access to glass, chemical sprays, and razors. As such, they decided that due to the possibility of injury to the woman and the officers, using the Taser was the safest option.[191] With three officers in attendance, and the woman unarmed at the time, it must be asked whether police could have used less forceful means to apprehend the woman, particularly considering it appears that the police used the Taser as a first resort. This is particularly worrying because the Taser was deployed despite police guidelines stating that extra consideration and care must be taken when using a Taser against subjects who are in or near water.[192] Also of concern is that once the woman had been tasered and was on the ground, it appears that she was tasered again almost immediately after the officers failed to properly handcuff her.[193] On these facts, the use of the Taser does

185 Ibid.

186 Ibid.

187 Ibid.

188 Taser International Inc warns that "extensive repeated, prolonged, or continuous applications" can "contribute to ... medical risks". See Auckland District Law Society Public Issues Committee, Less Lethal, supra note 20, 9.

189 Ibid.

190 Cook, "Unarmed Woman Tasered Twice in Wet Bathroom", *The New Zealand Herald*, 25 March 2007 <http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10430737> (at 31 July 2008).

191 "Taser Trial Update #6" New Zealand Police (2007) <http://www.police.govt.nz/news/ release/2991.html> (at 31 July 2008).

192 New Zealand Police, *Electro Muscular Incapacitation Devices*, supra note 67, 6.

193 Cook, supra note 190.

not seem to comply with the statutory rule that a use of force will not be justified if the same purpose can be achieved by reasonable means in a less violent manner.

Given the potential risks that arise from the use of Tasers, it is important that police officers exercise a great deal of care when considering whether or not its use is appropriate in a particular circumstance. In the majority of situations in which police have discharged Tasers, the subjects have been in highly aggressive or distressed states and have often been armed with dangerous weapons. In these situations the use or threatened use of the Taser served to de-escalate the seriousness of the situation and induce the subject to comply with the police.[194] However, the number of cases in which police have laser-painted suspects where the actual use of a Taser would not have been warranted, or have used a Taser multiple times on the same person, highlight that issues have already arisen over the police implementation of Tasers. These concerns suggest that there is at least a need for greater clarification of the rules governing Taser use to ensure that these weapons are used proportionately.

IV SUGGESTIONS FOR GREATER CONTROL AND ACCOUNTABILITY OVER THE POLICE USE OF FORCE

In order to ensure that the police use of force is properly governed by the principles of due process and legal accountability, it is essential that clear legal parameters exist. The current legal framework does not provide adequate control and guidance over the means by which police exercise force. This, in conjunction with the problems apparent in delegating such matters solely to the police, suggests a need for stronger and clearer legal controls over police weaponry. Such controls should take two principle forms. First, decisions regarding the introduction and possession of weapons by the police should be subjected to an independent investigative and decision-making process. Secondly, there should be clearer legal rules outlining the circumstances in which it is reasonable for police to use particular types of weapons.

Legal Control over the Introduction and Possession of Police Weapons

The first step towards creating stricter controls over the means by which the police exercise force is to take decisions regarding the introduction of new weapons out of the sole hands of the police. The government has traditionally left decisions regarding the weapons that police have at their

194 Houlahan, supra note 51.

disposal to the police themselves, and it certainly makes sense for the police to play a key role in such decisions. It is the police who are best placed to identify the gaps in their present tactical options, and the utility of potential weapons. At the same time, however, the use of weapons by the police raises wider issues than mere operational efficacy. Given the medical and legal implications of police weapons, there is a case for independent experts in these fields to have input into decisions regarding the introduction of new weapons. As any weapons introduced would ultimately be used against members of the public, it makes sense that they too should be entitled to make submissions on any potential new introductions.

The benefits of having external input into important weapons decisions can also be seen with regard to other police weapons. For example, at present, the decision about the extent to which police may carry firearms is left entirely to the police. While the police have decided that in general officers should not be armed,[195] the Police Commissioner has suggested that if the Taser trial were unsuccessful, there would be pressure from "strong forces" wanting police to carry guns.[196] Realistically, it is unlikely that police could substantially alter their firearms policy without at least an informal assent by Parliament or Cabinet, and given the public outrage that would likely result, such assent would probably not be forthcoming.[197] However, even if there is some informal control over police weaponry, without formal legal controls there is no guarantee that important decisions regarding the introduction and use of police weapons will be subjected to rigorous independent investigation.

If all interested parties are to receive a fair hearing, the body making the final decision should be impartial. As a party with an interest in the outcome of the decision, the police could not be considered impartial. One way in which external oversight could occur is by leaving the final decisions regarding the introduction of new weapons to an independent agency. For example, the ADLS suggest in their report on the Taser trial that the final decision regarding the implementation of Tasers should be made by an independent body such as a Commission of Inquiry into Police Conduct.[198] Another approach could be to amend the Arms Act 1983 to require that legislative approval must be given before new weapons can be introduced to the police. The issue of whether the weapon should be introduced could then go through a select committee process in which interested parties could make submissions about the benefits or dangers of the police having the weapon at their disposal.

Either approach has the benefit of allowing independent input into the process, and could be a useful forum to thresh out ambiguities and

195 Police General Instructions, F061.

196 "Police Commissioner Backs Away from Taser Comments", *The New Zealand Herald*, 26 October 2006 <http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10407682> (at 31 July 2008).

197 Auckland District Law Society Public Issues Committee, Less Lethal, supra note 20, 1.

198 Ibid 14.

problems that may arise with the use of the weapon. For example, in relation to Tasers, issues regarding the use of laser-painting or multiple discharges could be investigated, and recommendations or controls could be formulated to prevent unnecessary or excessive usage of the weapon. A Commission of Inquiry could potentially avoid some of the concerns that may arise from making the decision to introduce weapons a purely political decision to be made by the current government. On the other hand, leaving the decision to Parliament would enhance democratic control over the police use of weapons, and could serve as a good starting point for future legislation concerning the circumstances in which police may use particular weapons. While either approach would be lengthy — leading to concerns that the operational effectiveness of the police could be compromised — considering the important interests at stake, it is arguably important that such decisions not be rushed.

Fixing Tighter Legal Parameters over the Police Use of Force

As has been argued, the current legal regulation over the means by which police exercise force falls short of ideal standards. Far from providing clarity and certainty, the vagueness of the current legal framework has meant that the law has been largely ineffective in providing control and guidance over the circumstances in which police can use different weapons. As a result, the broad legal tests of reasonableness and necessity have very little practical relevance to the police use of force. If the law does not have practical relevance to the actual use of force by police officers, the notion that the actions of the police should be subject to the law exists solely in the realm of principle.

The obvious solution to this situation is to strengthen legal rules in order to set clearer boundaries around the police use of weapons. However, tightening the legal rules governing police actions is no easy task. Although it is important that such rules are clear and specific enough to provide proper guidance, it is also essential that they provide enough flexibility to allow the police to effectively perform their job. In saying this, the present legal rules seem to go too far in catering to the requirement for flexibility, and in the process have become too vague to provide any real legal guidance. Such guidance is crucial to ensure that the police use of force is governed by the principles of due process and legal accountability.

It is important for the rules governing police use of force to derive ultimately from the law and not simply from internal policies such as police GIs. This is because statutory standards ensure that there is a level of democratic control over administrative actions.[199] Rules derived solely from policy also generally tend to be less transparent and more easily changed. Further, if these policies are not supported by the law, those who breach

199 McGowan, supra note 10, 686.

internal policies cannot be held legally accountable. In other words, it is important to have clear legal parameters as a safeguard against arbitrary actions on behalf of the state. This is particularly important when it comes to the police, as they possess the greatest potential to infringe the rights and freedoms of citizens, and doubly important when it comes to the use of force, because of the potential for injury or even death to result. Therefore, while it may not be practical for the legal framework to be too prescriptive, it should at the very least provide the bottom lines — clear and understandable boundaries specifying not simply the circumstances in which force may be employed, but also providing clear guidance about the level and means by which force can be employed in such circumstances. Such firm guidance cannot be attained from the law if the only guidance that is given is via terms that have very little practical value for police officers.

One way in which legal control over the police use of force could be strengthened without becoming overly complicated is by codifying some of the rules that are currently contained within the police GIs. This would, of course, render these rules legally enforceable. While legal rules based on police instructions would not and could not be as detailed or restrictive as the latter, they could serve the purpose of setting stronger legal parameters by plainly stating uses that are clearly unacceptable for each particular weapon. For example, it may be appropriate for the law to clearly state that Tasers should not be used against individuals who are merely being unco-operative with police, but it would be too restrictive to say that Tasers could only be used against highly aggressive individuals who are armed with a weapon. This is because there may be circumstances in which use of a Taser could theoretically be justified that fall outside of the latter category. For example, if a single police officer is confronted by a person who has committed a violent crime, is highly aggressive, and could clearly overpower the officer, the use of a Taser may be warranted even if the person does not appear to be in possession of a weapon. In contrast, it will always be inappropriate for police to use a Taser against an unarmed non-aggressive individual who is merely being unco-operative, because the use of a Taser in that situation would be disproportionate to the threat posed. As such, this would be a good legal bottom line for the use of a Taser.

Other rules — such as those detailing behaviour that will be generally unacceptable but in some situations may still be appropriate — will still be better dealt with by internal instructions. Good examples are the rules relating to the use of Tasers against pregnant women, people in elevated positions, or those in or near water. In most situations it will be inappropriate for police to use Tasers in such circumstances, given the heightened risk of harm that arises.[200] However, a situation may arise where a person to which these rules apply poses a credible threat of serious

200 See generally Stanford Criminal Justice Center, supra note 169, 4–8.

harm and that threat cannot be defused by lesser means. As such, it may be more appropriate to have a rule in the GIs generally advising against the use of a Taser in these circumstances, rather than making such use illegal altogether. This would provide a balance between the need for flexibility and the need for clear guidance.

If it is made clear in the GIs that the use of a Taser in such a circumstance will not generally be considered reasonable, its use in those situations would warrant greater scrutiny. The fact that such conduct is generally considered unacceptable under police GIs could then be a factor to consider when assessing whether the police officer's actions were legal. In order for the police GIs to fill in the gaps in this manner, it would be necessary for there to be greater consistency between the legal rules and police GIs.

There must be an assurance that the police standard of reasonableness is the same as the legal standard of reasonableness if the GIs are to be considered a credible source of guidance for what is or is not reasonable. At present, there is no external input into the creation of police GIs. There would arguably be greater certainty and consistency between the legal rules governing police use of force and police GIs if, in drafting GIs, the Police Commissioner were required to consult with legal experts to ensure these rules are consistent with the legal test. At present, an extensive review is being undertaken to determine what changes should be made to the Police Act 1958, the Act from which the Commissioner of Police derives his power to create GIs.[201] One issue raised in the review was whether specific legislative provisions should be enacted prescribing the decision-making process of the Police Commissioner when it comes to the way in which police may use weapons.[202] The majority of those who made submissions on this issue supported greater statutory control, with one submitter arguing that there should be legislation specifying "ministerial responsibility in relation to the admissibility and use of equipment use[d] in exercising force", with the aim of providing "more accountability for use of force".[203] This would allow for more visible external control over the rules governing police use of weapons, but in itself would not necessarily ensure greater consistency with the legal rules. To this end, the author would suggest that the Police Commissioner must consult with the Law Commission to ensure that police GIs governing the police use of weapons are consistent with the legal rules.

Even in the event that there is greater consistency between the GIs and statutory rules, there is arguably still a need for the promulgation of statutory rules outlining the bottom lines for when these weapons can

201 Police Act 1958, s 30.

202 "Issues Paper 5: Powers and Protections" Police Act Review (2006) <http://www.policeact.govt.nz/pdf/issues-paper-5-powers.pdf> (at 31 July 2008).

203 "Perspectives on Policing: An analysis of responses received on the Police Act Review" Police Act Review (2007) <http://www.policeact.govt.nz/pdf/perspectives-on-policing.pdf> (at 31 July 2008).

and cannot be used. Although in the interests of consistency it would be necessary for legal rules to set the parameters of each and every weapon that the police have at their disposal, this article will use Tasers and pepper spray as examples of the form that such statutory provisions could take.

With respect to pepper spray, the police GIs provide a useful starting point for setting the legal parameters of its use. The GIs prohibit the use of pepper spray against individuals offering passive resistance and state that pepper spray should only be used against those who are actively resisting the police. This is a good place to set the legal bottom line. Given the health risks that can arise from pepper spray, as well as the pain and suffering that results,[204] it is not a proportionate response to pepper spray someone who is not displaying some level of force or violence towards the police. If the subject is merely passively resisting or behaving uncooperatively, the situation should be dealt with by lesser means, such as physical restraint or verbal communication. By contrast, pepper spray could be an effective tool against someone who is using force against the police. For instance, the police have said that pepper spray is useful in resolving violent confrontations in situations where the police are able to get close enough to use the spray, such as where the subject is unarmed.[205]

In the interests of providing clear legal parameters, the statutory rules would require some variations from the GIs. For example, the GIs do not define what active resistance is. This could create problems in differentiating between active and passive resistance, especially considering that the case of Simon Oosterman demonstrated that passive resistance could involve some level of physical struggle. The legal test would therefore have to define what active and passive resistance is. A useful definition of these terms is provided by the Wisconsin Department of Justice.[206] In their recommendations regarding the use of pepper spray and Tasers, they define passive resistance as occurring when the subject "refuses to comply with a directive from a law enforcement officer but does not attempt to engage in physical action likely to cause bodily harm to the officer or to another person".[207] This suggests that if a subject is struggling, but not to the extent that they are likely to cause physical harm, this can still be passive resistance. This was the case with Oosterman, who was restrained by police but was twisting around with his arms held out.[208] By contrast, the Wisconsin Department of Justice defines "active resistance" as occurring "when an officer encounters behavior which physically counteracts his or her attempt to control and which creates risk of bodily

204 Kaminski et al, "Assessing the Incapacitative Effects of Pepper Spray during Resistive Encounters with the Police" (1999) 22 Policing 7.

205 New Zealand Police Operations Group, *Project Lincoln*, supra note 27, 63.

206 "Electronic Control Device (Taser) Update" Wisconsin Department of Justice (2005) <https://wilenet.org/html/taser/index.htm> (at 31 July 2008).

207 Ibid.

208 Boyes, supra note 87.

harm to the officer, subject, and/or other person".[209] It then goes on to define "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition."[210] Providing definitions such as these in the New Zealand legislation would help to clarify the difference between active and passive resistance.

Another aspect of the use of pepper spray that could use clarification is the level of threat required before pepper spray can be deployed. The GIs dealing with the use of pepper spray state that officers can use pepper spray where there is a threat of physical injury. Given that the present legal rules suggest that, at the least, the threat should be an imminent one, it may be useful to emphasize this point in a legislative provision specifically dealing with the use of pepper spray. The author suggests that such a provision could take the following form:

Pepper Spray

(1) In addition to the rules governing the use of force by Police in sections 39, 40, 41, and 48 of this Act, Police may not use pepper spray in the execution of their duties unless:
   a) The subject is actively resisting the Police in the execution of a lawful arrest, warrant or other process; or
   b) The subject poses a credible and imminent threat of physical injury; and
   c) The purpose cannot reasonably be effected by a less violent means.

(2) Police must not use pepper spray against a person who is merely being unco-operative or offering passive resistance.

(3) For the purposes of this provision,
   a) "Passive resistance" occurs when a subject refuses to comply with a directive from a police officer but does not attempt to engage in physical action likely to cause bodily harm to the officer or to another person.
   b) "Active resistance" occurs when a police officer encounters behaviour which physically counteracts his or her attempt to control, and which creates risk of bodily harm to the officer, subject, or other person.
   c) "Bodily harm" means physical pain or injury, or any impairment of physical condition.

In developing legal bottom lines for the use of Tasers, it is important that the standard for their use is set higher than that of pepper spray. The police standard that Tasers can only be used against those exhibiting "assaultive"

209 Wisconsin Department of Justice, supra note 206.
210 Ibid.

behaviour is too vague to provide the level of clarity required of a legal bottom line. Such a standard could theoretically allow police to use a Taser against someone who merely shoves an officer.

Given the risk of harm or even death posed by the use of a Taser — as well as the pain caused to the subject[211] — in order for its use to be proportionate, the threat posed by the subject should be more than just a threat of physical force. Indeed, given that Tasers have been cited by police as a less lethal alternative to firearms, the standards for their use should bear more resemblance to the rules relating to the use of firearms than to the use of pepper spray. The police GIs provide that police cannot use firearms unless they fear death or grievous bodily harm, and the threat cannot reasonably be defused in a less violent manner.[212] Although the risks associated with Tasers are lower than with firearms, the number of Taser-related deaths in overseas jurisdictions highlights that the use of Tasers still carries a high risk.[213] Given these dangers, it is suggested that Tasers should only be used against subjects who pose a credible and imminent threat of grievous bodily harm. This standard would allow the use of Tasers against individuals who pose a risk of "really serious" bodily injury;[214] for example, people who are behaving in a violent and aggressive manner, or who are in possession of some type of weapon and pose a credible risk of causing serious injury. It would not allow the use of a Taser in a situation where a person is struggling with the police, but does not pose a risk of serious physical injury to officers. Further, it would not necessarily allow the use of a Taser in a situation where the subject is armed with an object that may be used as a weapon, if in the circumstances the subject is not behaving in a manner that suggests they will use it to harm the police.[215] The author suggests that a statutory provision setting the legal parameters for Taser use could take the following form:

Tasers

(1) In addition to the rules governing the use of force by Police in sections 39, 40, 41, and 48 of this Act, Police may not discharge a Taser against a person in the execution of their duties unless:
   a) The subject poses a credible and imminent threat of grievous bodily harm to the officer or others; and
   b) The threat cannot be resolved by less violent means.

(2) In determining the credibility of such a threat, the officer should consider the following factors:

211 Stanford Criminal Justice Center, supra note 169, 4–8.

212 Police General Instructions, F061(2).

213 See Amnesty International, supra note 42.

214 *DPP v Smith* [1961] AC 290, 334 (HL).

215 See Auckland District Law Society Public Issues Committee, Less Lethal, supra note 20, 8.

a) Whether the subject is behaving in an aggressive and violent manner; and
b) Because of the age, size, and apparent physical ability of the subject, or because the subject is in possession of a weapon, there are reasonable grounds to believe that the subject is capable of causing grievous bodily harm to the officer or others.

(3) Under no circumstances may police use a Taser to induce compliance against an unco-operative but otherwise non-aggressive person, or against a person who is offering passive resistance.

Increasing Accountability for Misuse of Force

If there are clearer legal controls over the means by which police exercise force, the hope is that there will be greater legal accountability for police actions. With more specific legal parameters, it may be easier to draw the line between the reasonable exercise of police force and excessive use of force. While strengthening legal rules over the use of force may not necessarily address some of the systemic obstacles to holding police accountable before the courts, research suggests that the courts are more likely to take a harder line on police conduct if stricter and clearer statutory rules are implemented to guide police conduct.[216]

Even if the enactment of stricter rules does lead to greater accountability over police actions in the courts, there may still be a need for other mechanisms to hold police officers accountable for a breach of their rules. For example, the courts are unable to deal with situations in which the officer may have behaved inappropriately and in breach of police instructions, but has not actually contravened the law. Other prohibitive factors mentioned above in Part III also mean that the courts may not always be the best forum to hold police officers to account if they have misused their power to exercise force. As such, administrative forums such as the IPCA are still an important way in which accountability over the police use of force can be enhanced.

It is submitted that accountability would be enhanced by giving the IPCA more teeth. At present, the IPCA only has the power to recommend internal disciplinary action if an officer is found to be at fault. It does not have the power to require that an officer be disciplined or sanctioned. This has been justified on the basis that the function of the IPCA is to determine whether or not police misconduct has occurred, and that it is for others — such as the police or the government — to determine the consequences

216 Reiner uses the enactment of the Police and Criminal Evidence Act 1984 (UK) as an example of this. This Act created stricter and more comprehensive rules governing police search and seizure practices and interrogation of suspects. Reiner notes that following the enactment of these rules, the courts were more willing to look into alleged breaches by the police, and hold them to account. See Reiner, supra note 13, 179.

that should result from this finding. However, the inability of the IPCA to deliver binding recommendations or impose sanctions arguably undermines its effectiveness in holding police officers accountable. While the IPCA should not be a substitute for the courts in holding police legally accountable, it may increase public confidence in the accountability of the police if the IPCA could make binding recommendations for internal discipline.

Further, while the IPCA may not have the capacity to look deeply into legal issues and determine whether an officer is guilty or innocent of a criminal charge, they may at the very least be able to assess whether an officer could have a case to answer. As such, there is a case for the IPCA to have the power to recommend criminal prosecution if they believe the situation warrants it. It would then be up to the courts to determine whether the officer did in fact act illegally. It is important that the IPCA possess these powers, even though doing so would require a reformulation of the IPCA's role. Such powers would both ensure that the public can have confidence in the police force and ensure that the police are held to the legal standards that have been set for them.

Another way to ensure greater public confidence in the accountability of the police is to improve the reporting requirements of the police following the use of weapons. At present, whenever pepper spray is used, police GIs require police officers to submit a report outlining the incident.[217] However, these reports are not publicly available except through a Privacy Act or Official Information Act request. Even where such reports are available, they are often criticized for being too vague and lacking in specifics.[218] Further, the police do not keep data on the number of instances of police misuse of pepper spray,[219] which hampers efforts to ensure that police are complying with the rules regarding its use.

During the Taser trial, police officers were required to file a report every time a Taser was deployed. This included not only situations where the Taser was actually discharged, but also incidents where the Taser was presented, arced, or used to laser-paint a subject.[220] Although there is no requirement that the police make these reports available to the public, they have released a brief description of each incident of Taser use. The accuracy and specificity of these reports have been criticized.[221] A possible solution to this problem is provision for independent oversight and auditing of police reports regarding weapons usage.[222] Although it is not suggested that the police are intentionally misleading the public with regard to their

217 Police General Instructions, A277.

218 Answers Needed on Pepper Spray, supra note 40; "Court Advises Police to Better Monitor Use of Pepper Spray", *Radio New Zealand Newswire*, 30 September 2003 (The Knowledge Basket Database, University of Auckland Library) (at 18 September 2006).

219 New Zealand Police Operations Group, *Project Lincoln*, supra note 27, 61.

220 New Zealand Police, *Electro Muscular Incapacitation Devices*, supra note 67, 13.

221 Auckland District Law Society Public Issues Committee, Less Lethal, supra note 20, 12–13.

222 Ibid.

weapons usage, the fact remains that they have a vested interest in ensuring that the public does not form negative impressions of the police use of these weapons. This applies in particular to the Taser, which was only introduced to the New Zealand police on a trial basis.[223] Without independent oversight over police reporting of weapons use, public confidence in both police reports and in the actual use of these weapons could suffer.[224]

As such, the author suggests that accountability over police weapons would be enhanced by having independent oversight and auditing of reports into the police use of weapons. Such oversight could ensure that these reports are accurate and detailed, including specific information about the circumstances leading up to the use of the weapon, and the reasons why in the circumstances it was seen as necessary to deploy the weapon, bearing in mind the statutory rules and police GIs. Such reports should also detail the number of times the weapon was deployed, the way in which it was deployed and against whom, and the aftermath of the weapons use; for example, the response of the subject, the way in which the subject was subsequently restrained, and what treatment, if any, was administered to the subject.

V CONCLUSION

Ensuring legal control and accountability over the police use of force is by no means an easy task. The task is all the more difficult when it comes to the means by which police exercise force. This is because control over police weapons has traditionally been left solely to the police, and the legal rules have been so broadly worded that they have been largely ineffective in providing any real guidance or control. However, the principle of legal accountability mandates that the police must not be above the law — the law must govern their conduct and their actions must be judged in accordance with the law. This principle is all the more important when it comes to the police use of force, because this power allows the police to act in a manner that may cause injury or death to people whom the police are normally tasked with protecting. Further, the police use of force carries the potential to compromise rights that the police are otherwise tasked with upholding. As weapons are a key way in which the police exercise force, and have potentially serious consequences, it is imperative that strong and clear legal standards are put in place to govern their use.

In most situations, the police will undoubtedly exercise caution and care in their exercise of force. It is likely that they will generally comply with both the law and their own internal rules. Despite this, when it comes to an important power like the ability to exercise force, it is not

223 Ibid.
224 Ibid.

enough to simply trust the police to exercise this power with care, or to allow them to regulate themselves. It is imperative that the law sets the parameters of this power, guides the police in their exercise of force, and holds them to account for excesses or misuse of this power. At present, the law is not fulfilling this role. There is no specific legal control over either the introduction of weapons to the police, or the use of these weapons following their introduction. Although the Crimes Act mandates that the police must use "reasonable" means when exercising force, this by itself is not enough.

While a reasonableness test gives police flexibility in deciding the appropriate response to a particular situation, it is too vague to provide practical guidance to the police about the legal parameters of the power to use force. Without such practical guidance, the law cannot effectively limit and control the police use of force. While the police GIs provide greater specificity and guidance regarding the usage of particular weapons, they are not by themselves sufficient. In certain respects, the GIs governing the use of pepper spray and Tasers appear to be inconsistent with legal standards, particularly with regard to the threat level required before the use of force is warranted. The GIs also use vague and ambiguous terms without defining their meaning, such as "assaultive" behaviour and "active resistance". Without further definition and explanation, these rules could theoretically allow the use of pepper spray and Tasers in situations where their use is not proportionate to the threat posed. Further evidence that the GIs are by themselves inadequate to control the police use of weapons is provided by the fact that on many occasions, police have not followed their own rules. This has particularly been evident in relation to the use of pepper spray against subjects who are only offering passive resistance. These factors demonstrate that there is a need for legally enforceable rules to guide and control the circumstances and means by which the police exercise force.

The police use of force and the use of weapons in particular is an aspect of policing that commonly stirs debate and creates controversy. In New Zealand, a society where police have traditionally been unarmed, the relatively recent introduction of less lethal weapons such as pepper spray and Tasers has been a focal point for such attention. One of the central concerns regarding these weapons is that, because they are less lethal than firearms, the police and the legal system will be less vigilant in ensuring that their use is carefully regulated and controlled. The lack of independent control over the introduction of these weapons, and the absence of specific legal rules limiting their use, has fed such concerns. This article has attempted to provide some useful suggestions to ensure that, in the future, the police use of weapons will be subject to rigorous legal control and accountability. If the police use of force is to be truly subject to the law, such changes are vital, and the current debate over the Taser provides a perfect opportunity for these issues to be aired and changes to be made.