The use of lethal force against terrorists

Presentation to PC18
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Introduction

1. As a result of public controversy over whether the tactical officers who responded to the Lindt Café siege should have sought to incapacitate the hostage taker sooner than they did, the inquest into the deaths that ensued examined various aspects of the use of force in such situations.

2. Some of the self-appointed experts felt they knew enough from the television coverage of events to make public statements the morning the siege ended about what the tactical police could and should have done. In the view of some of those "experts", the Tactical Operations Unit officers should have shot the hostage taker, Man Monis, through the glass doors or windows of the stronghold soon after he identified himself as a terrorist and made clear he was not going to release the hostages.

3. Those views were apparently based on the commentators' opinions about three things:

- The snipers had sufficiently clear sightings of Monis to enable them to be confident they could hit the target and instantly incapacitate him without risking the lives of the hostages;
- The snipers were armed with weapons and ammunition that would have enabled them to accurately pierce the two sets of windows separating the snipers and the target with the desired result; and
- The use of deadly force by the snipers was in the circumstances lawful.

4. The inquest relied upon detailed interviews and walk-throughs with the officers involved; extensive scene analysis and superb digital recreation of aspects of the incident scene from all relevant positions/perspectives; extensive ballistics and other forensic science test results; and the evidence of independent tactical experts. That material led to the conclusions that the snipers secreted in the buildings surrounding the café had neither the technical capacity nor a reasonable opportunity for a firing solution.

5. That being the case, the third question of whether the snipers had lawful authority to attempt to end the siege by killing Monis before he had injured any of the hostages was hypothetical. However, because inquests are concerned with preventing deaths occurring in similar circumstances in future, it was an issue that warranted consideration.

6. It is also the issue we are focusing on today: in what circumstances are police officers entitled to use force likely to cause death or serious injury and can or should they be entitled to rely on a direction or order from a superior officer that will modify their criminal responsibility for harm that ensues?

The facts of the siege

7. There were conflicting views among the parties who participated in the inquest as to whether the law would have authorised the use of deadly force against Monis at various points throughout the siege.

8. For the benefit of those not so familiar with the events, I will summarise them very briefly in so far as they are relevant to the issue under consideration.

9. At about 9.40 am on 15 December 2014, Monis produced a shortened shotgun and told the 18 people in the Lindt Café that he would shoot them and/or detonate the bomb he claimed to have in the backpack he was wearing unless they complied with his directions. He made hostages relay a series of demands but refused to speak with police negotiators.

10. He maintained possession of the gun and backpack for the rest of the incident and continued to threaten the hostages with death if they tried to leave or if others escaped.

11. During the day, two groups of hostages escaped. Shortly after 2:00 am the following morning, a third group of hostages escaped. As the last of them was running through a set of French doors, Monis fired in their direction showering them with glass from the fanlight.

12. Soon after, he made Tori Johnson kneel with his hands behind his head. Monis then fired another shot into the ceiling of the café.

13. Ten minutes after the first shot was fired, Tori was executed and an emergency action was then initiated, during which Monis was killed and Katrina Dawson received fatal injuries from fragmenting police bullets.

14. The most contentious issue for the inquest was whether a forced entry should have been effected sooner than it was. That is not relevant to the issue we are focussing on today because there is no debate that police were entitled to enter the café at any stage after the siege commenced and to challenge Monis and demand he surrender. If he failed to do so and instead threatened police, they would be entitled to render him incapable of further aggression. There was considerable debate about when entry should have been forced but no doubt about the lawful authority of police to do so.

15. However, what we are focusing on today is whether the officers were entitled to incapacitate him without first calling on him to surrender, by for example, shooting him through a window or door of the cafe.

The law before Lindt

16. The common law provides that any person may use reasonable force to defend themselves or others against attack. The force used must be proportionate to the threat and the person using the force must believe that it is necessary to preserve the safety of themselves or another from an imminent or on-going attack.[1]

17. The common law is codified in the *Crimes Act 1900* (NSW) which in s 418 additionally excuses a person from criminal responsibility for the use of force he or she believes is reasonably necessary to "*terminate the unlawful deprivation of...the liberty of another person"* provided the conduct is *"a reasonable response in the circumstances*" as the actor perceives them to be.

18. This has been interpreted to mean that the prosecution needs to show that there was no reasonable possibility that the accused believed his or her conduct was necessary, and there was no reasonable possibility that what the accuse did was a reasonable response to the perceived circumstances.[2]

19. In all Australian states the common law position is augmented by statutory provisions that until recently were largely similar in effect. Those provisions state the position

[1] *Zecevic v DPP* [1987] HCA 26
[2] *R v Katarzynki* [2002] NSWSC 613 at [20]

more positively by providing that in the circumstances encompassed in the legislation, a use of force is lawful.

20. These traditional police statutory powers are exemplified by the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA) which in s 230 authorises an officer to use such force as is *"reasonably necessary*" to exercise his or her functions under the Act. Those functions include the "*protection of persons from injury or death."* These powers have been interpreted to require the officer to honestly believe that the degree of force used was necessary – a subjective test - and for the force used to be objectively proportionate to the threat posed.[3]

21. At the time of the siege, there was no authority which excused an officer from criminal responsibility if their use of force was in compliance with a direction or order from of a superior.

22. The officer who uses the force has to be of the requisite belief as to the risks posed by the target and what is necessary to negate them. He or she is individually responsible for the outcome of their use of force, irrespective of what a more senior officer might consider to be the most appropriate response to the threat.

23. Of course, the belief held by the officer who used the force – in term of the scope of the threat and how best to respond - could be influenced by what a superior officer told them, but the so called 'defence of superior orders' is not part of Australian common law[4] or any statutory regimen in existence in NSW at the time of the siege.[5]

24. The autonomy of the constable deriving his or her executive power directly from the Crown has been recognised in this country since at least the beginning of the 20th century.[6] The corollary is that the officer is personally responsible for the exercise of his or her powers if a crime is allegedly committed.

Applying that law to the siege

25. The families of Tori Johnson and Katrina Dawson submitted that from the time Monis announced himself as an Islamic State operative and threatened the hostages with death via the shotgun he was brandishing or the bomb he claimed to have in his backpack, Monis was posing such an imminent threat to the safety of the hostages that police would have been lawfully entitled to shoot him. Had an officer shot and killed Monis, the officer would not have committed a crime and would not even have needed to rely on the self-defence provisions of the Crimes Act - as their LEPRA powers would have meant the use of even deadly force was lawful.

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[3] *R v Turner* [1962]VR 30 at 36

[4] *A v Hayden* [1984] HCA 67

[5] The *Criminal Code 1899* (Qld) s31 and the same section of the WA Criminal Code excuse a person from criminal liability for actions taken in obedience to the order of a competent authority which he or she is bound to obey. There is scant authority on the effect of the provisions. However, in view of the authorities precluding reliance on a defence of "superior orders" it is likely the provisions would not be applied to the situations here under consideration.

[6] *Enever v The Queen* (1906) 3 CLR 969

26. The submissions of the NSWPF did not explicitly accept or reject this submission. Rather than dealing with the question of the power to use deadly force prior to the tactical officers storming the building, the submissions made on behalf of the Commissioner restated the concepts of individual officer responsibility including the need to foresee imminent serious injury or death and the proportionality of the response before an officer could rely on self-defence.

27. The submissions focussed not on whether the use of deadly force without confronting and calling on Monis to surrender would have been lawful - but on whether it was desirable or appropriate having regard to other options available to those managing the incident. These other options were primarily negotiation while a decision was made as to whether and when a forced entry to the strong hold should occur. When that occurred, the hostage taker would be called on to surrender and if he failed to do so and threatened police, the need and justification for resorting to the use of lethal force would have been beyond doubt.

28. The Commissioner's submissions also, quite properly, referred to the need for policing organisations to maintain public trust and confidence. It recognised that the use of lethal force can quickly undermine positive public perceptions of police.

29. If earlier intervention in critical incidents and greater emphasis on what might be called a pre-emptive use of force were to become more usual, a re-conceptualisation of self-defence might be necessary and public debate about these issues would be required. This is discussed further below.

30. The inquest concluded that from an early stage in the siege, police would have been lawfully justified in using lethal force to incapacitate Monis. The relevant factors were:

    - police had actively tried and failed to engage with the hostage-taker for some hours;
    - he had refused to negotiate, release any hostages or make any concessions;
    - he made explicit threats to kill hostages if others escaped;
    - he repeatedly articulated support for a terrorist organisation known to incite execution of hostages;
    - one of his demands was to be provided with paraphernalia that operatives of the same organisation had regularly used in ritualised executions (a black shahada flag); and
    - he claimed to have a bomb.

31. I concluded that a police officer knowing of those factors could reasonably have concluded that the hostages were in imminent risk of death or serious injury. The corollary is that only by incapacitating Monis without him having an opportunity to shoot a hostage or detonate a bomb could the risk he posed be negated. In my view that would have justified an officer shooting Monis dead without calling upon him to surrender – a sniper initiated firing solution or a clandestine entry and engagement.

32. With the benefit of hindsight, all would agree that would have been a preferable outcome to what transpired.

33. As indicated earlier, the evidence revealed that the snipers had neither a reasonable opportunity, nor the technical capacity to effect such an outcome. In any event, of more relevance to the issues here under consideration, is whether the law was sufficiently clear. That is: if similar circumstances arose in future, would a sniper who was in position to take an effective shot be deterred because of concerns about the legal ramifications?

34. The high level of uncertainty among officers of various ranks who gave evidence - and the written submissions made on behalf of the Commissioner - indicated that officer training has instilled in them a high degree of caution about resorting to the use of lethal force. Without doubt, in almost all circumstances that approach is entirely appropriate. However, a mechanism to overcome that hesitancy is necessary when police are responding to a terrorist incident.

35. This is because protection from prosecution requires prosecuting authorities to accept that the officer genuinely believed the force used was necessary and that objectively, the force was not disproportionate to the threat posed by the deceased. That places an officer contemplating using deadly force in a precarious position where the legality of his or her actions depends upon the assessment of others. It is foreseeable that such an officer might not be solely focussed on achieving the best public safety outcome in a terrorist incident.

36. It was to address such uncertainty that the inquest recommended the law be amended to empower the Commissioner to authorise the use of deadly force by officers responding to a terrorist incident.

37. It is recognised that implementing that recommendation would involve weakening well established legal principles and that there are public policy considerations both for and against such a reform. They are discussed below.

Any need for change – the policy considerations

Police independence

38. The autonomous and individually responsible officer model is supported by significant constitutional and public policy considerations. The High Court in *Enever v The Queen* observed that even though an officer might be appointed under a statute, the officer exercises original not delegated power that accrues to him or her as a result of the office held. That power is exercised at his or her own discretion and solely at their own responsibility:

If he arrests on suspicion of felony, the suspicion must be his suspicion, and must be reasonable to him. If he arrests in a case in which the arrest may be made on view, the view must be his view, not that of someone else.[7]

39. The independence enjoyed by the individual constable extends all the way to the Commissioner who can't be directed by the government that appoints him or her as to who should be charged with what.

40. However, the extent of this independence and its source is unclear. It can't be based on the traditional separation of powers doctrine that posits that each of the three branches of government – the executive, the legislature and the judiciary – must act independently of the other two because the police force and its employees are part of executive government like every other public service department. It's well recognised that the responsible Minister can give directions to public servants in departments within the Minister's portfolio.

41. The source of police independence has been the subject of considerable academic scrutiny.[8] It is accepted that police and other public office holders exercising regulatory or law enforcement related functions should not be subject to the same type of political direction that is quite proper in the case of other public servants. However, there is a divergence of views around what should be considered operational policing and beyond the scope of ministerial direction and what is police policy that can be subject to political control.[9]

42. If it is accepted that a police minister should be able to direct a police commissioner as to what activities should be actively policed and what tactics should be used to that end, it might be thought a small step to extend that to who should be targeted and by what means.

43. Similarly, if police commissioners are to be given power to direct subordinate officers to utilise particular tactics, questions arise as to who should be responsible for the outcome and what other aspects of an officer's autonomy might be modified.

Seniority of decision makers

44. Policing is unlike many other vocations in that some of the most challenging decisions are required to be made by the most junior officers. In other business and professional organisations, the harder decisions are channelled up to the more experienced operators who are expected to accept responsibility for them on account of their seniority in the hierarchy. In policing, first responders - predominantly very junior officers - often have to deal with whatever they confront immediately.

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[7] Ibid per Griffith CJ at 977

[8] See Stenning P.C., *Governance of the police: independence, accountability and interference*, (2011) 13 FLJ 241 for a summary of some of the literature.

[9] *Ibid*. p250 *et seq*

45. However, when a protracted incident unfolds police forces have procedures to bring to bear more expertise via elaborate incident command structures. Those arrangements concentrate authority to make operational decisions about various aspects of the incident response in the hands of key officers whose seniority, training and experience are presumed to better equip them to make the best decisions.

46. In recognition that terrorist incidents pose special challenges that officers rarely need confront, in NZ and all Australian states and territories a specialist cadre of officers has been created who can access special powers with the consent of executive level officers. It is arguably anomalous to exclude those senior specialist officers from having direct in-put to a decision to use deadly force. All the more so when actions taken in response to the orders those officers give may precipitate the need to resort to that degree of force by the more junior officers who are bound by law to follow those orders.

47. For example, a Forward Commander can direct that an Emergency Action be initiated requiring members of the tactical team to storm a stronghold where an armed hostage taker has already demonstrated a preparedness to shoot to kill, yet that commander exposes him or herself to no criminal responsibility if a tactical officer shoots and kills the offender during the entry - at law the shooter is solely responsible.

Moral burden

48. A decision to take action that can be readily foreseen as likely to cause the death of another person is a grave responsibility, even if that other person is engaged in serious crime. The autonomous officer model not only means that the individual who causes the death is solely responsible in the terms of the criminal law but also sheets home to him or her the moral burden of having taken another life. Peer and organisational support after the incident is crucial but that will not negate the officer's primary personal responsibility for the death even if he or she is found to have been legally justified in causing it. It can be persuasively argued that the emotional burden of having taken such drastic action should not be carried for evermore by a single officer.

49. For example, to negate the risk posed by a hostage taker with a "dead man's switch" activated improvised explosive device would require a precise shot causing flaccid paralysis. That is likely only to be achieved if the target is shot without warning. Such a strategy is only likely to be settled upon in consultation with the Forward Commander and the Tactical Commander, so it is anomalous for the shooter to bear sole ethical responsibility for the death if that plan is put into operation.

A broader perspective

50. The NSWPF and its officers are required by the Police Act which constitutes the organisation to "*work with the community to reduce violence, crime and fear*" and to

provide services including the "*protection of persons from injury or death"*.[10] All other state and territory police forces have a similar mandate.[11]

51. By definition, the aim of terrorist action is to advance the political goals of the offender(s) by instilling fear in the community by threatening and, in many cases, causing death, injury or damage.

52. A tactical officer manning the inner cordon around a stronghold is not well equipped to gauge the harm being done to those outside the immediate vicinity by the terrorist action. That officer therefore cannot take those impacts into account when assessing proportionality of any response designed to resolve the incident.

53. For example, information being broadcast from a stronghold could be causing mass panic in other parts of the city compromising the operation of transport and emergency services and putting the lives of numerous other people at risk. It would be appropriate for an officer *au fait* with the impacts of the event to be able to contribute to a decision to use lethal force to resolve the incident.

Helping the terrorists win?

54. Another strategy of terrorists is to damage the social fabric of the target society by provoking government responses that are inconsistent with that society's values or traditions. Lowering the threshold for the use of lethal force by police risks doing this. If governments dilute safeguards long recognised as essential features of liberal western democracies have the terrorists to some extent achieved their goals?

55. This is not to suggest that changes may not be warranted, but rather that the community needs to be aware of what they are giving up so the benefits and costs can be weighed.

Greater controls now exist

56. As the judgments in *Enever v The Queen* make clear, a significant reason for the ruling that a constable could not be characterised as an agent of the Crown was the fact that no one was able to exercise the degree of control over the officer's actions such as would support the application of the maxim *respondeat superior* (let the master answer). Barton J expressed it this way:

> *As I have pointed out, the person must be not only the servant of the superior, but must be under the control of the superior before the latter can be held liable.*[12]

57. Policing has changed a lot since the early days of the twentieth century when police constables in rural Tasmania (where the facts litigated in *Enever* occurred) were

[10] Police Act 1990 (NSW), s6(3)(b).
[11] Insert details of corresponding legn
[12] *Enever v The Queen supra* at 983

frequently many days' ride from the supervision of their superior officers. With advances in technology and training, police officers are now quite capable of being closely supervised in many circumstances - such as a contained terrorist incident.

58. In those changed circumstances, there is less reason to insist on each constable being treated as an independent and autonomous actor rather than a member of a closely supervised team capable of taking direction about all aspects of the response to the job at hand.

Sharing responsibility

59. A number of Australian jurisdictions are considering changing the powers of police when responding to a terrorist incident. The Western Australian Parliament has a Bill before the lower house that grants immunity from prosecution to officers who act in accordance with orders given by superiors in a terrorist incident,[13] and in June 2017 the Victorian Government established an expert panel to advise on terrorism prevention and responses. Its first report recommended changes to the *Crimes Act 1958* (Vic) to clarify the powers of police to respond to terrorist incidents by using pre-emptive lethal force.[14] The new Liberal Government in South Australia, when in opposition undertook to introduce new "*shoot to kill"* powers to authorise police to pre-emptively "*take out terrorists before they make an immediate threat to innocent life."*[15]

60. However, to date only NSW has enacted legislative changes. They are set out below. When introducing these amendments less than a month after the Lindt inquest findings were published, the Premier spoke of the need to provide certainty as to the legal position of officers responding to terrorist incidents.

The new NSW legislation

61. The amendments to the *Terrorism (Police Powers) Act 2002* (NSW) introduced in June 2017 were the first statutory provisions in NSW that sought to vary the criminal responsibility for a deliberate use of force that results in a foreseeable death. It does so by involving a senior officer in the decision making process.

62. The amendments, contained in part 2AAA of the Act, provide in s24A that if the Police Commissioner is satisfied that an incident to which police are responding is likely to be a terrorist act, and that a planned and coordinated police action is required, the Commissioner may activate the new provisions by declaration. If the Commissioner is not available a Deputy Commissioner may make the declaration.

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[13] *Terrorism (Extraordinary Powers) Amendments Bill* 2018 (WA)

[14] Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, Report 1, Chapter 2 Use of Force, p17, 2017, www.vic.gov.au/countering-terrorism-in-victoria.html

[15] The Advertiser, www. adelaidenow.com.au, August 28, 2017, accessed 20 April 2018

63. Once such a declaration is made and communicated to the officer in charge of the police responding to the incident, certain "*police action*" is authorised by s24B. That action includes "*authorising, directing or using force (including lethal force)*" provided it is "*reasonably necessary, in the circumstances as the police officer perceives them to be to defend any person threatened by the terrorist act or to prevent or terminate their unlawful deprivation of liberty*."

64. Provided the officer acts in good faith, he or she does not incur any criminal liability for taking "*any such police action for the purposes of a police action plan"*.

65. As can be seen, these provisions replicate many of requirements of the defence of self-defence in the *Crimes Act*, but provide wider protection so long as certain other requirements are met.

66. First the similarities. The force used or authorised or directed to be used must be objectively reasonable in the circumstances as the officer concerned perceives them to be. This is largely equivalent to the reasonable and proportionate response requirements of the self-defence provisions.

67. However, an officer is explicitly empowered to authorise or use deadly force to protect a person who is merely threatened by a terrorist - there is no need for the officer to conclude the victim is in imminent risk of death or serious injury.

68. Presumably the requirement that the officer act in good faith is intended to ensure an officer does not authorise or resort to deadly force when that would be clearly disproportionate to the threat posed by the hostage taker or terrorist.

69. Under the *Crimes Act* and common law self-defence, the state of mind that is the focus of examination is that of the actor who causes the death or injury. Under the new *Terrorism (Police Powers) Act* provisions, a shooter is entitled to immunity from prosecution if he or she is authorised or directed to use lethal force as part of a "*police action plan of the police officer in charge"* of responding to the terrorist incident.

70. This would seem to mean that a sniper can be directed to effect a firing solution by a more senior officer as part of a direct action or an emergency action plan. That direction can be followed without the sniper independently forming a view as to the danger the target poses to others or the potential for less lethal means to negate it, provided he "*acts in good faith*". That would seem to indicate that if he accepts that his superiors have made all necessary assessments and nothing known to him makes it clear that resort to deadly force is not necessary, he will be exculpated if he complies with the order or direction to shoot the target.

71. The "*police action*" that is protected after the Commissioner has made a declaration under these new provisions includes the authorising or directing of force that is reasonably necessary and part of a police action plan, provided it is authorised or directed to be used in good faith.

72. These provisions extend protection to the forward commander and tactical officers in charge of initiating the action plan in which a target is shot and killed.

73. Absent this protection, it is arguable the commanders could be held liable as a party to the offence of unlawful killing, even though the principal offender, the shooter, has immunity.

74. As with the shooter, the commanders are only protected if the force they authorise or direct is reasonably necessary, in the circumstances as they perceive them to be, and they act in good faith.

Conclusions - what do the provisions deliver?

75. The new arrangements were enacted to give officers involved in responding to terrorist incidents confidence that they could discharge their responsibilities to keep the community safe and rescue hostages without undue or unnecessary caution as a result of fear they could be prosecuted for killing a terrorist hostage taker.

76. This seems to have been achieved by removing the requirement that before using deadly force an officer needs to believe that others are at imminent risk of serious injury or death. Now, resort to such force need only be necessary to defend a person threatened by a terrorist or to secure their release.

77. Further, the provisions envisage a commander giving an order to a tactical officer to implement a planned intervention that involves the use of lethal force. The tactical officer complying with an order is immune from prosecution, as is the officer giving the order, if the terms of the new provisions are met.

78. The only additional requirement is that the commander and the tactical officer act in good faith. That term is not defined, and is more redolent of a commercial law setting, but in this context it is likely to be breached if the officers know facts indicating the use of deadly force is unnecessary. For example, if during the operation it became apparent that the gun wielded by the hostage taker was not functional and his claim to have a bomb was false.

79. The effect of the new arrangements is to both lower the threshold for the use of deadly force in responding to terrorist incidents and to share the responsibility for the decision to use such force. For the first time a tactical officer will be able to claim justification for causing serious injury or death by relying on his compliance with a commander's order.

80. The wisdom of these changes will be judged by how they are applied. If it is to intervene earlier in situations similar to the Lindt Café siege, it is likely they will receive public support. If they are used to justify the use of lethal force against a mentally ill person shouting political slogans while threatening people, it is likely those who claim these new provisions are a dangerous dilution of civil liberties will be proven right.