Civil Litigation Against Police in Australia: Exploring Its Extent, Nature and Implications for Accountability

Janet Ransley, Jessica Anderson and Tim Prenzler
Griffith University, Australia

Much recent policing reform has been concerned with strengthening organisational and individual accountability through complaints, discipline systems and external oversight. Civil litigation against police has largely been ignored as an accountability measure. This research aimed to broaden the understanding of police litigation in Australia, and determine the implications for its use as an accountability mechanism. While the findings are not definitive, they generally conform with previous research outcomes that most cases initiated by civilians involve allegations of police abuse of power or process corruption. A new finding is that police sue their own organisations at about the same rate as they are sued by members of the public, although primarily for unfair dismissal. The results show a need for more detailed research, but highlight that civil litigation can form part of a regulatory web for identifying, controlling and preventing police misconduct.

Much recent Australian policing literature has been concerned with police misconduct, complaints processes and improving integrity (see e.g. Prenzler, 2002; Prenzler & Ransley, 2002; Goldsmith & Lewis, 2000; Dixon, 1999; Lewis & Prenzler, 1999). This is not surprising, given the enormous impact of large-scale inquiries into police corruption in three states (see Queensland's Fitzgerald Report, 1989; Wood Report, 1997, from New South Wales; Kennedy Report, 2004, from Western Australia), and recent high-profile misconduct in Victoria — which has seen six police officers jailed and led to continued calls for a royal commission (Taylor, 2006). The prescriptions for reform from these upheavals are similar, focusing on institutional changes to improve external oversight of police (e.g., corruption commissions, or strengthening existing institutions such as the Ombudsman), and organisational and administrative changes within police services (e.g., improved supervision, reporting, recruitment, training and complaints processes).

An often overlooked factor is the extent to which civil litigation against police services can both highlight problematic practices, and provide a proactive, legal accountability tool that is largely independent of police organisations. While the

Address for correspondence: Dr Janet Ransley, School of Criminology and Criminal Justice, Mt Gravatt campus, Griffith University, Nathan QLD 4111, Australia. E-mail: J.Ransley@griffith.edu.au

main purpose of civil litigation is to enable individuals to seek redress for wrongs committed against them, trends in the numbers and types of cases being brought can indicate organisational failures in procedures, training, and supervision, and also provide a way for individuals to seek accountability for police misconduct. Research both internationally (Kappeler et al., 1993; Smith, 2003) and in Australia (McCulloch & Palmer, 2005; McCulloch, 2002) shows general trends in absolute terms to increased numbers of cases for damages against police, and greatly increased awards in successful cases, but there is a dearth of both quantitative and qualitative data on the numbers, types and extent of civil claims, and of the nature of trends on a per officer basis, especially at a national level. There is also little research that assesses the extent to which these claims inform police practice — both at managerial and operational levels — as well as the relationship between litigation and complaints processes, and the contribution, if any, that civil litigation makes to police accountability.

In this article, we discuss these issues before reporting on preliminary research into the extent and nature of civil litigation against police in Australia since 1990. We point out some of the difficulties in collecting data on this subject, and discuss implications arising from our findings. In particular, our data tend to support previous research on the types of police activities that lead to litigation. Importantly, our data also highlight an apparent frequent failure in human resource management processes within police services, leading to a large number of actions taken by police against their own employers. Further research, and better data collection, is required to authoritatively establish the extent and types of litigation against police in the Australian jurisdictions, and to monitor the reactive and proactive responses of police management. Such data will enable further analysis of the extent to which civil litigation holds police organisations, and individual police, accountable for their conduct.

Police Accountability

Internationally, police accountability has been seen as a difficult and enduring problem (Walker, 2005). The legitimacy of the policing function in contemporary western societies is underpinned by the rule of law notion that police are accountable for their acts and wrongdoing, just like other citizens (McLaughlin, 2005; Herbert, 2006). Public confidence in such accountability is essential (Keenan & Walker, 2005), not least because this is the basis on which police are then granted intrusive and coercive functions and powers. That is, police are given the right to question, use force against, and detain members of the public, but are required to be accountable for how this is done. The problem arises in achieving this accountability without unduly hindering police effectiveness, but much of the literature of the last 40 years suggests that the accountability project has had limited success in many countries (see, e.g., Sheptycki, 2002; Walker, 2005; Smith, 2001; Fijnaut, 2002). Studies of public perceptions suggest that confidence in police legitimacy is adversely affected by any perceived lack of accountability for misconduct such as corruption or excessive force (Chermak et al., 2005).

Police accountability is defined in various ways, with classic definitions centring either on public control over police, or on requiring police conduct to be explained

(Chan, 1999). On these models, the objective is either to achieve political control over police decision-making, or to have police provide reasons for their decisions. As Chan (1999) notes, both models are problematic, the first because of police resistance to control and the disadvantages of political interventions in police operations, and the second because of the lack of real outcomes from simple explanations or accounts.

Alternatively, accountability can be pictured as occurring along two dimensions. One dimension requires individual officers to account for their interactions with citizens (in terms of civil liberties, fairness and respect), and another requires police organisations to account for the quality of services (crime control, order maintenance) provided to the public (McLaughlin, 2005). This dual mandate of the police to be both fair and effective (Keenan and Walker, 2005), sees fairness owed primarily to individuals and effectiveness to the public at large. Despite this distinction, there is a fluidity between these mandates, so that effective delivery of policing services often depends on how individual officers conduct themselves, while officers' conduct in turn is affected by organisational culture, standards and training. So organisations need to be accountable both for the effectiveness of their services, and for how they maintain professional conduct by their individual officers.

Just as there are two interlinked dimensions in the *target* of accountability (fairness or effectiveness), there are also different dimensions regarding to *whom* police are meant to be accountable. Broadly speaking, accountability is to the people, but can be through government, with its democratic mandate to provide and fund public services; parliaments, which create frameworks of legal powers and duties; and the courts, with their capacity to judge police behaviour (Walker, 2005). This accountability occurs *internally*, via corporate governance (policies, codes of conduct, complaints systems, reporting, performance and disciplinary systems) and *externally* through legal mechanisms, the constitutional structure (responsible ministers and parliament), and civil society, including civilian oversight (McLaughlin, 2005).

How these various dimensions of accountability are to be achieved differs to some extent across jurisdictions. In the United States, a great deal of attention has been focused on achieving the fairness mandate through legal and constitutional means. Recent developments have centred on 1994 laws enabling federal agencies to bring civil suits against local and state police departments where there is a pattern of practice of the abuse of citizens' rights (Walker, 2005). This has been coupled with the 1970s creation of a new constitutional tort involving the abuse of human rights by state agents (see discussion of *Bivens v Six Unknown Fed. Narcotics Agents 1971* in Harlow, 2004). In the United Kingdom too, there has been a recent shift to focus on constitutional developments as attempts have been made to use the *Human Rights Act 1998* (Br) to force changes to accountability systems (see Harlow, 2004). A further strand in the UK literature deals with the uneasy relationship between internal accountability systems and centralist managerialism, as the Blair government has tried to assert stronger political control over police (McLaughlin, 2005). Similarly, the Canadian Charter of Rights has been the basis of a successful claim against police for ineffectiveness in protecting women from a serial rapist, while New Zealand's Bill of Rights was argued to provide accountability for an alleged police assault (see Harlow, 2004).

This drive to constitutional redress can be seen as an admission of failure of the old, rules-based accountability, but is largely unavailable in Australia, with its lack of entrenched rights protection. Instead, Chan (1999) sees the new Australian accountability in terms of combined self-regulation (quality assurance systems, early intervention with high-risk individuals) and external oversight. She outlines a model where accountability is maximised through clear standards that are taken seriously, and for which officers take responsibility (Chan, 1999: 263). This may be achieved by laws, regulations and legal sanctions (old accountability), or best practice, performance reviews and training (new accountability).

Australian inquiries into police corruption and misconduct have generally agreed on the need for strengthened accountability, focusing largely on 'new' means, such as independent oversight agencies, surveillance and integrity testing, improved supervision, complaints profiling, disciplinary systems, ethics training and risk analysis (Prenzler, 2002). As well as these essentially managerialist prescriptions, there has been a particular focus on to whom police are accountable, with independent agencies and civilian oversight strongly favoured (Goldsmith & Lewis, 2000; Prenzler, 2000). The general Australian trend then has been towards accountability through strengthened oversight agencies and corporate governance measures, rather than legal and constitutional accountability via the courts.

This trend is partly explained by the lack of constitutional redress in Australia, but also by other difficulties in exacting legal accountability. Accountability can occur criminally, when individual police officers are prosecuted by the state for their crimes; or civilly, when citizens argue police misconduct gives rise to a private remedy (e.g., damages, an injunction, or mandatory action). In addition, police disciplinary actions (e.g., in misconduct tribunals) can be seen as a quasi-legal accountability procedure.

There are potential problems with each type of legal accountability. Criminal prosecutions send powerful messages about police misconduct, but they are relatively rare (Hughes, 2001), despite the recent successful prosecutions of police in Victoria (Taylor, 2006). Reasons for this include difficulties in collecting evidence, the criminal standard of proof necessary for conviction, and a reluctance by other police and prosecutors to take action (especially in jurisdictions which lack independent oversight agencies). Disciplinary actions are sometimes seen as internal to police, and an instrument of police management rather than a true form of accountability (Smith 2001, 2003). In some jurisdictions they are seen as lacking independence and not leading to satisfactory outcomes, particularly where there is no or limited external oversight (Smith, 2003).

Consequently, Smith (2001) suggests that 'police unlawfulness is much more widespread than the criminal statistics suggest' (2001: 379) and that a person suffering from police misconduct has a far greater chance of achieving a remedy in the civil courts than through criminal prosecution or by invoking the complaints process. This suggests a need for a more detailed study of civil legal accountability for police.

Civil Litigation Against Police

Civil legal action against police can be taken in three main ways: via judicial review of organisational decision-making; negligence actions for the conduct of police investigations; and actions against police officers and their employers for torts

against civilians such as assault, false imprisonment, trespass, negligence and malicious prosecution (Dixon & Smith, 1998; McCulloch, 2002), and for breaches of other legal schemes such as anti-discrimination and administrative law.

Civil litigation against the state generally has become a growth area in recent decades (Atiyah, 1997). The main purpose of such actions is to provide corrective justice, in the form of redress to individuals who have suffered harm caused by others. Various forms of civil liability can be incurred, including under contract and administrative law, but often the liability will be for tort. While the traditional role of tort has been to provide compensation for financial loss, modern legal theorists increasingly see a role for tort law as a deterrent to wrongdoing (Harlow, 2004). That is, the threat of tort liability and therefore economic costs being incurred may have a desirable impact on conduct. Civil litigation generally, and especially tort, can therefore call public officials to account and challenge their conduct. In terms of police accountability, both individual officers and organisations may change their behaviour if there is otherwise a risk of adverse financial consequences (Freckelton, 1996).

In the past, there has been a reluctance by courts to impose tort liability on police, because to do so could make police unduly defensive and risk-averse in their decision-making (Hoyano, 1999). In addition, policy decisions about the allocation of resources along with day-to-day operational decisions have been considered nonjusticiable, or beyond the scope of courts (Malkin, 1995). Increasingly though, these perceptions have been challenged, as tort law has been used to drive attempts at legal redress where other means are not available, or have failed, to the extent that aspects of the literature now refer to tort law as a type of ombudsman, with a role to establish community standards for government agencies (Harlow, 2004; Malkin, 1999). Tort is increasingly being used as a proxy for a human rights claim (McMurray & Rice, 2005), a role of special importance in Australia with its otherwise lack of rights protection.

Historically, while individual police have always been liable for any wrongs they commit (ALRC, 1975), the extent to which civil legal actions can be taken against police organisations has been limited. This has been because at common law police have not been regarded as employees, but as having independent authority under the notion of the office of constable. Hence, police services were not vicariously liable for officers' conduct, or for any wrongs incurred, even after other areas of Crown liability had been reformed (Hogg & Monahan, 2000). This confined civil actions to individual police, who generally have limited resources to pay damages awards.

In recent years this concept has weakened, particularly as police have sought protection as employees under industrial laws, and as increasingly complex managerial and command structures have shown their independence to be greatly curtailed (Carabetta, 2003). But the civil liability issue was put beyond doubt by laws specifically extending liability for the conduct of individual officers to the Crown; see, for example, sections 6 and 8, *Law Reform* (*Vicarious Liability*) *Act 1983* (NSW); sections 10.5 and 10.6 *Police Service and Administration Act 1990* (Qld). So now, generally citizens may sue police agencies as well as individual officers — although in New South Wales the right to join individual officers in actions against the police service has recently been curtailed by s9B *Law Reform* (*Vicarious Liability*) *Act*. When claims succeed, agencies can avoid liability only by showing the behaviour was outside the scope of the employees' duties, and could not reasonably have been prevented or

controlled by the agency. The onus, therefore, is on police services to show they have taken all reasonable steps to prevent misconduct.

The growing body of literature on civil litigation against police is concentrated in actions for tort, particularly in attempting to map trends in the numbers and types of actions taken, and in damages awarded — in Australia (Boni, 2002; McCulloch & Palmer, 2005; McCulloch, 2002), the United States (Worrall, 1998; Hughes, 2001; Novak et al., 2003) and the United Kingdom (Dixon & Smith, 1998; Smith, 2003). There is general agreement that the trend in each jurisdiction is to a sharp increase in both numbers of actions and damages awarded. McCulloch and Palmer (2005) report that the contingent or potential liability for this type of action for the Victorian and New South Wales police alone is $10 million and $90 million respectively. In the United States, the cost of excessive use of force actions against the Los Angeles police has been estimated at more than US$200 million and contingent liabilities in 215 other municipalities have been estimated at US$4.3 billion (Hughes, 2001). In Britain, incomplete data from 1998/99 reported on over 5000 claims and £4.61 million paid in damages in resolved actions (see Smith, 2003).

In the United States, where most research on this issue has been conducted, the two most common types of civil claims brought are for failure to train and supervise field officers correctly (Ross, 2000). These claims reflect a concern by complainants with police service institutional and administrative processes, rather than just the actions of individual officers. The main circumstances identified as leading to litigation include wrongful death, police pursuits, excessive use of force, failing to arrest drunk drivers, abandonment of high crime areas, police sexual violence, and retaliation against civilian complainants and critics (Hall et al., 2003). Australian research indicates similar circumstances leading to litigation, with McCulloch's (2002) review of 14 finalised cases in Victoria involving 'forced entry raids, fatal shootings, assaults — punching, kicking, stomping and strikes using baton and a hockey stick — strip searches, pressure point holds, fabrication of evidence, and the policing of demonstrations' (p. 175).

US research (Ross, 2000) also indicates that about 40% of civil cases involve serious police misconduct, as opposed to technical errors or minor rights violations. McCulloch and Palmer's (2005) review of 16 judgments in finalised cases and 6 settled cases, all from Victoria and New South Wales, support this finding. Of their sample of 16 litigated cases, 8 involved proved incidences of deliberate misconduct, including 7 assaults, 1 case of the planting of drugs, and 4 of malicious prosecution (p. 42).

These findings do not fit the common view of police officers: that they risk being sued simply for doing their job (Novak et al., 2003; Ross, 2000). Instead, the findings suggest that a substantial proportion of litigation is a reaction to abuses of police power and position, either physically or through process corruption. The findings also raise concerns that existing police accountability mechanisms are not sufficient to deal with these failures. McCulloch and Palmer (2005: 90–94) report that many litigants and their lawyers lack confidence in complaints systems. This lack of confidence was partly borne out by the study's finding that in at least 6 out of 22 cases (from Victoria and New South Wales), civil actions succeeded despite formal complaints about the same incident not being sustained or not being acted on by police. In the United Kingdom, Smith (2003) examined why aggrieved persons sued police rather than using complaints processes, and found the motivating factors were

'less for "revenge" than for an explanation, apology or recognition of their point of view' (p. 415). Additionally, while they distrusted formal complaints processes, civil litigation gave complainants a sense of empowerment, in that they felt in control of what was happening (pp. 417–418). That research also found that the motive to sue was particularly strong where complainants felt that they were wrongly criminalised as a result of police misconduct — that is, they were wrongly charged, or had false charges added to legitimate ones. The general infrequency with which police are criminally prosecuted for misconduct (Freckelton, 1996) may reinforce the motive to proceed civilly.

The perception that there is insufficient internal response to misconduct spurs litigation, and also helps justify increased civil damages awards. Thus in a recent decision the High Court dismissed an appeal by the NSW government against damages awarded for its vicarious liability for police misconduct, in *NSW v Ibbett [2006] HCA 57*. The decision appealed against awarded the respondent aggravated and exemplary damages for assault and trespass by two police officers. A significant factor in both the original judgement and the appeal was that neither police officer involved had received appropriate reprimands or training about their misconduct. This helped justify the special damages awarded against the police service, which the court justified as condemning both the original misconduct and the police service's trivial and dismissive response to the initial complaint.

The existing research then is focused on three areas. First, it establishes upward trends in the number and quantum of claims. Second, it examines the types of circumstances that lead to claims (e.g., large-scale public order events, shootings, strip searches and forced-entry raids). Third, it shows that police misconduct coupled with distrust of formal complaints systems are major precursors to civil litigation. McCulloch and Palmer (2005) also examined police attitudes to civil litigation, finding a generally adversarial, defend-at-all-costs approach, and consequently a resistance to settling even strong claims. However, the authors point out that insufficient data exist on the nature and extent of litigation against police to support definitive statements, and clearly regard their own research as exploratory (McCulloch & Palmer, 2005: 2–3). Their study drew on limited data sets, being confined to Victorian and NSW cases, from Supreme or intermediate court records of tort actions, largely obtained by using contacts to identify suitable cases (see McCulloch & Palmer, 2005: 6–7). Additionally, they specifically excluded cases where police officers sued their own organisations. The limitations of this approach include that:

- Victoria and New South Wales are not necessarily representative of the other Australian jurisdictions
- the small sample makes it difficult for accurate conclusions to be drawn about the nature of cases being brought
- the limitation to tort actions excludes other types of matters for which police are being sued
- the inclusion of police initiated cases may be a valuable source of information about accountability for management decisions within police services.

Method

The present study aimed to provide further data to overcome some of the limitations listed above, and to strengthen the research base from which conclusions can be drawn about civil litigation against police in Australia. In particular, the study aimed to obtain data from all Australian jurisdictions, from publicly accessible databases, which involved any form of civil litigation against police (i.e., whether in tort, contract, administrative or industrial law). The difficulties with obtaining systematic, accurate data, both in Australia and overseas, have been well documented (see McCulloch & Palmer, 2005). These difficulties include the fact that there is no centralised collection, with data being maintained by each separate police service. In addition, most Australian police services do not publish these data, or even general trend information, although they may refer in their annual reports to collective contingent liabilities.

Furthermore, many cases are settled prior to judgment, and the outcome may not be published, and commonly may include secrecy provisions to prevent disclosure. Many cases that do proceed do so in intermediate or lower courts, where judgments are not commonly reported or made available on unreported judgment databases. Even with reported higher court cases, there are difficulties in identifying every case in which police are sued civilly, because such cases could involve numerous different causes of action, and do not always identify in the case name the fact that police are involved (because often the first defendant or defendants will be individual police sued in their own names).

These issues are well recognised in the literature — Miller and Wright (2004: 757) refer to 'the mysterious case of the missing tort claims', and to the 'blissful ignorance' of the numbers, types and outcomes of claims that hinders discussions about the capacity of tort to regulate police misbehaviour. Their study measured published civil judgments against police against a review of newspaper reports of civil settlements. Their findings suggest the vast majority of claims were settled prior to trial or even to lodgment of a formal claim, and include secrecy clauses preventing public disclosure of the outcome. They suggest two desirable policy outcomes: first, that legislatures should prevent police agencies from requiring secrecy for any settlement; and second, that agencies should have to annually report detailed statistics on the numbers, types and outcomes of claims against them, whether or not they proceed to formal judgment.

Such requirements would have greatly aided this research. In their absence, we recognise the study's significant methodological limitations. Our data is not presented as definitive or even indicative, but simply as a snapshot of what is currently ascertainable about the problem in Australia. One of our main purposes is to highlight the need for better reporting, so that future research can reach more reliable findings. However, given the international literature, and the data we have managed to obtain, we can make some intelligent assumptions about whether the data generally conforms with what other studies have found, and to highlight the need for further research.

For this study, the primary source of data was case reports obtained by searching the Australian Legal Information Institute (AustLII) database, the most comprehensive source of primary legal materials for all Australian jurisdictions. AustLII contains full-text searchable databases of legislation and reported cases for state and federal superior

and intermediate courts and tribunals. For the purposes of this study, coverage of the decisions of the courts and tribunals set out in Table 1 was achieved. Some cases are *not* retrieved by searching AustLII, including decisions of magistrates and local courts, many unreported decisions of intermediate courts, settled cases and old cases (databases generally commence around the early 1990s). But despite these limitations, AustLII provides the most comprehensive, Australia-wide, source of accessible case information.

All AustLII case databases were searched using key terms derived from the literature (e.g., police and negligence, duty of care, strip searches, use of force, and so on), and where possible, case names of known incidents of litigation against police. Where case reports yielded other case names (e.g., often cited as precedents), these too were searched for. The search was limited to exclude cases heard before 1990, so as to achieve a manageable search process and data set, and because pre-1990 data are not recorded for most courts and tribunals on the databases.

To supplement this primary source of data, a second search process was conducted of media reports, using the Factiva search engine, with similar criteria and keywords as for the AustLII searches. This process accessed reports in over 9000 sources, including all Australian mainstream media, along with a range of specialist and professional journals. The purposes of this search were, first, to try to supplement the data by finding details of cases from lower courts, unreported cases and settled cases; and, second, to provide richer sources of information to supplement that contained in case reports (particularly about the background and consequences to some of the more notorious cases). Media reports were only used if they provided a sufficient range of information, including the nature of the incident leading to the claim, the legal cause of action on which the claim was based, and the fact that the claim had been finalised in some way.

Overall, 57 cases fitting the criteria were retrieved from AustLII, and 30 from Factiva, yielding a total of 87 cases. The cases fell into two broad groups — those involving citizens suing police, predominantly as tort actions (42 cases), and police suing police, predominantly seeking review of management decisions (45 cases). The cases were also analysed to identify their jurisdiction, the relevant court or tribunal, year in which judgment was given, cause of action, trigger events, outcome, and quantum of damages or other remedies ordered. Not all data were available for each case, particularly those sourced from Factiva.

TABLE 1

AustLII Case Databases Searched

Appellate courts	Trial courts	Tribunals
High Court of Australia	State and Territory Supreme Courts	Antidiscrimination tribunals
State and Territory Courts of Appeal	State and Territory intermediate (District and County) courts	Industrial relations and workers' compensation commissions
		Administrative appeal tribunals, privacy commissions, information commissions

General Characteristics

As explained above, our data reveal only a snapshot rather than any definitive statements about numbers of, or trends in, civil claims against police. Even so, the findings tend to conform with what studies have found in both the United States (Worrall, 1998) and the United Kingdom (Smith, 2003); namely, a generally upward movement in the number of claims made against police. As shown in Table 2, over 50% of our cases were finalised between 2001 and 2004 inclusive. No relevant cases were found for 1990, 1991 and 1994.

The data were analysed for jurisdiction, court or tribunal of determination, and whether they involved citizens suing police or police suing police, as shown in Table 3. In relation to jurisdiction, New South Wales is clearly overrepresented in our sample, accounting for nearly 60% of all cases found in the study, despite only accounting for 30.6% of the numbers of police nationwide in 2003 (AIC, 2004). Table 3 also shows a relatively even spread of proceedings among the various courts and tribunals, apart from further overrepresentation in New South Wales of police against police cases in the Industrial Relations Commission (see discussion below). In most of the Factiva cases, the court in which the action was brought was not specified, leading to the cases for which the court or tribunal is shown as not known.

When Citizens Sue Police

When the 42 cases where citizens sued police were analysed, the most common causes of action related to excess use of force (assault, battery, trespass to person), with 18 cases, or about 43%, involving this claim, as shown in Table 4. The next most common claim was for negligence — generally a failure of the police duty of care to ensure no harm comes to a person in their custody or care. There were 11 claims, or about 31%, involving this cause of action. There were nine claims involving some form of process abuse (e.g., false imprisonment, wrongful arrest, malicious prosecution or trespass to property through a failure to obtain a warrant).

A trigger event for cases brought by citizens against police was the occurrence of a strip search, with four cases, or 10%, following on from this event. While one case, the notorious Tasty Nightclub raid (see McCulloch, 2002) involved 463 patrons of both sexes being illegally searched, the others all involved female complainants detained in relation to unpaid traffic tickets. Each of these three cases resulted in substantial damages being awarded to the claimant ($193,600, $138,000 and $150,000 respectively), because of the inclusion of an amount for exemplary damages awarded by courts to condemn the defendant's behaviour and deter its repetition. In several such cases where police clearly made an error, the failure to admit to the error and to apologise were catalysts for the litigation.

TABLE 2

Cases Against Police By Year of Settlement 1992–2004

1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
1	1	0	1	3	1	10	11	10	13	9	19	8

TABLE 3

Numbers and Types of Case Per Court/Tribunal and Jurisdiction

State/territory	Type of court/tribunal	Numbers of civilian suing police cases	Numbers of police suing police cases
NSW	Court of Appeal	4	3
	Supreme Court	4	0
	District Court	0	0
	Industrial Relations Commission	0	16
	Administrative Appeals	0	1
	Anti-discrimination Tribunal	4	3
	High Court	3	1
	Human Rights and Equal Opportunity Commission	1	0
	Compensation Court	0	1
	Not known	7	1
Victoria	Supreme Court	1	1
	Anti-discrimination Tribunal	1	0
	Administrative Appeals	1	0
	Not known	10	1
	Total	*13*	*2*
Qld	Court of Appeal	1	2
	Supreme Court	1	2
	Anti-discrimination Tribunal	0	2
	Not known	2	1
	Total	4	*7*
SA	District Court	0	2
	Workers Compensation Tribunal	0	2
	Total	*0*	*4*
Tasmania	Supreme Court	0	1
	Not known	0	1
	Total	*0*	*2*
ACT	Supreme Court	1	0
WA	Industrial Relations Court of Australia	0	2
	Not known	0	2
	Total	*0*	*4*
NT	Federal Court	1	0
Total		42	45

The cases in Table 4 overwhelmingly relate to the alleged or proved misconduct of one or more individual police officers, for which vicarious liability may then arise in the police service generally. Only one case relates to the decision not to investigate a complaint. In the Northern Territory the family of an Aboriginal man who died in custody unsuccessfully sought judicial review of the police decision not to investigate the circumstances of his death. In a Victorian case, the applicant was successful in overturning a police service decision not to release under freedom of information

TABLE 4

Types and Numbers of Citizen vs. Police Cases*

Type of action	No. cases per jurisdiction	Outcome for applicant
Assault and/or battery, trespass to person	NSW 7 Vic 7 Qld 1	17 successful, not known in 1
Total no. cases 18	Not known 3	
False imprisonment, wrongful arrest, malicious prosecution	NSW 3 Vic 1 Qld 2	successful in 6, unsuccessful in 1
Total no. cases 7	Not known 1	
Trespass to property	NSW 1	successful in 2
Total no. cases 2	Vic 1	
Negligence	NSW 7 Vic 3	successful in 4, unsuccessful in 6,
Total no. cases 11	ACT 1	undisclosed in 1
Return of seized goods (action under statute)	Qld 1	1 successful
Judicial review of decision not to investigate death	NT 1	1 unsuccessful
Discrimination	NSW 4	1 successful,
Total no. cases 6	Vic 2	5 unsuccessful
FOI application	Vic 1	1 successful
Defamation	NSW 1	1 successful

Note: *Some cases counted more than once, due to multiple causes of action

law certain documents related to the activities of environmental activists. A Queensland case involved a decision over whether seized goods could lawfully be retained by police after the death of their owner, who was suspected of having stolen them. Apart from these three instances which each involved a form of administrative dispute, all of the cases involved civilians alleging some form of wrongful conduct on the part of police.

The clearest finding to emerge from Table 4 is that in cases involving the alleged abuse of power by police — such as assault, trespass, wrongful arrest or malicious prosecution — claimants had very high success rates (25 from 27 cases). In cases involving alleged negligence or the breach of anti-discrimination or administrative law, the success rate was much lower (8 from 21 cases). This would suggest that claimants only bring the first type of claim where there is strong evidence to support them. It might also indicate a readiness by courts to accept that evidence as substantiating active misconduct more readily than is the case for negligence claims. Further research into court decision-making is required to confirm this.

When Police Sue Police

The 45 cases where police sued police were also examined, as shown in Table 5. The majority of these cases (24, or 53%) involved appeals against human resource

management decisions (to dismiss, withhold pay or allowances, or on recruitment). Six cases, or about 13%, were claims in negligence, mostly to do with workplace stress; and seven cases, or about 16%, alleged discrimination in employment-related decisions.

The cases shown in Table 5 are distorted by the large number of unfair dismissal cases from New South Wales. Most of these cases were appeals against the Commissioner's decision to dismiss a police officer. As discussed further below, this is most likely caused by particular events related to the fall-out from corruption inquiries, and the use of legal challenges to the Commissioner's discretionary power to dismiss unsatisfactory officers. The extent to which these decisions are legally challenged is in itself interesting, given that the discretionary measure was introduced as a reform measure to help counter corrupt officers. Apart from this, common trigger events leading to police suing the police included allegations of sex or disability discrimination, and workplace safety issues. The success rate for these cases was around 70% overall.

Discussion

As explained above, our data do not support definitive statements about the overall numbers, types or outcomes of civil suits against police. Despite this, the data provide a useful understanding of aspects of higher level contested civil cases against police over the past 10 years, and points to issues requiring further research.

First, while we cannot definitively confirm a trend to increased numbers and quantum of claims, nothing we found was contrary to the findings of all other Australian and overseas research that such a trend is occurring. Possible reasons for the apparent trend include changes to the legal system that may have encouraged overall litigiousness, such as no win–no fee litigation (McCulloch, 2002); but note the findings of a recent review suggesting that in fact litigation rates in Australia have been relatively stable over the past 10 years (see Wright, 2006). Other suggestions from the

TABLE 5

Types and Numbers of Police vs. Police Cases

Type of action	Cases	Outcome for applicant
Sex discrimination	Vic 1	3 successful
	Qld 2	1 unsuccessful
Total no. cases 4	Tas 1	
Disability discrimination	NSW 3	2 successful
Total no. cases 3		1 unsuccessful
Tort — negligence	NSW 7	8 successful
	Qld 4	4 unsuccessful
Total no. cases 12	SA 1	
Unfair dismissal, deferment/	NSW 17	17 successful
nonpayment of salary increments/	WA 3	8 unsuccessful
allowances, appeals on	Tas 1	
recruitment decisions	SA 2	
	Qld 1	
Total no. cases 25	Vic 1	

literature are that changes in policing style have encouraged litigation, both the increased use of paramilitary techniques (McCulloch, 2002) and the larger number of interactions brought about by community policing (Worrall & Marenin, 1998). Another possible explanation derives from complaints systems: either they are inadequate (McCulloch, 2002), outcomes fail to really satisfy complainants (Smith, 2001, 2003), or the greater publicity focused on complaints encourages more litigation. Finally, it may be that the new tendency to use tort law as a form of ombudsman for government action, or a proxy human rights claim (see above), might help explain any trend to increased complaints. There is a need for further research, not just in Australia but also internationally, to discover which, if any, of these reasons best explains the apparent trend to more civil litigation against police.

The second issue arising from our research is that a large proportion of cases against police in Australia were brought in New South Wales. Table 3 showed 60% of cases to be from that state, compared to the 30.6% of Australian police that its service employs (AIC, 2004). However, as also discussed above, that figure is somewhat distorted by the large number of unfair dismissal cases brought in the period following the Wood Inquiry. If these cases are excluded, then New South Wales had about 34% of all Australian cases. This is a relatively small overrepresentation, considering that New South Wales has the biggest police service, and faces more diverse policing problems than some other states and territories, particularly in dealing with crime problems in the large urban area of Sydney. These types of policing interactions have been found in the literature to be likely to lead to litigation (see Kappeler et al., 1993). However, the NSW cases should not be completely overlooked. The great majority of them relate to reviews of the Commissioner's discretion to dismiss unsuitable or corrupt officers, and the fact that the civil legal system is apparently being used to undermine this reform measure is worthy of further investigation.

The third issue from our data also supports previous research, in that the circumstances prompting civilians to sue police tended to include large-scale public order events, strip searches and the like. Importantly, most of the cases in this category were triggered by misconduct, ranging from excessive force and trespass to process corruption such as malicious prosecution. This finding agrees with Smith's observation (2003) that it is police engagement in unauthorised and improper conduct that drives citizens to civil litigation, rather than noncompliance with minor rules. This tends to negate comments such as those of the then NSW Police Minister that legislative reforms were necessary to protect police officers against 'vindictive [civil] claims … by criminals they apprehended' (NSW Parliamentary Debates, 2003). The gross nature of much police misconduct might also help explain why litigation is preferred over complaints systems — the extent of moral outrage felt by citizens in these circumstances might call for a more public and formal expression of condemnation.

The fourth issue concerns a new indication from this research — that police suing police is about as common as civilians suing police, and consequently also problematic for police services. Of course, as already discussed, this finding is somewhat distorted by the NSW data. But even without those cases, police officers were the complainants in about one third of the cases where police agencies are sued. Studies of complaints systems elsewhere, for example, Goldsmith (2000) on Colombia, also show a tendency among police officers to use complaints systems

against their superior officers where permitted. This suggests a broader phenomenon of police as sophisticated manipulators of various avenues of redress and review. This phenomenon may be exacerbated in Australia by the very high rate of union membership by police officers, with 99% of police being members of a union, the formidable industrial and political strength of those unions (Burgess et al., 2006, 293), and the aid they give to members involved in legal actions. It may also highlight potential managerial problems; for example, US research has indicated a rising number of sexual harassment claims being filed by female police officers that indicate a failure of management to address internal sexism (Collins, 2004). The resort by police officers to civil litigation against their own agencies or superiors is potentially problematic, both because of the resources expended in processing and paying damages in these claims and because it indicates major deficiencies in police management practices, especially in human resources decision-making. Police services need to collect data on these cases and systematically examine how their internal processes can be improved to avoid their own officers having to seek redress through the civil courts.

The final issue arising from the research concerns what it shows about the use of civil litigation as an accountability measure, and its broader implications for the accountability of police services more generally. The threat of being sued is often perceived as a negative, adverse outcome for police. Research has shown it to be a major source of stress felt by individual officers (Jellett et al., 1994), and there is a tendency for agencies to fear not only the financial implications of suits, but also the adverse publicity (Chermak et al., 2005). However, we have suggested that there may be a general legal trend for tort in particular to be reconstituted as a way of forcing governments and their agencies to explain their actions. In light of this, it might be time for civil litigation against police to be viewed in a new way. Accountability should no longer be confined to single dimensions, such as being subject to external or internal controls or being required to explain to governments. Instead, in the current environment, accountability is being reconfigured along multiple dimensions at once — governmental, internal, constitutional, and through private legal action. In such a system, civil suits become another tool for management, assisting to identify problem procedures, behaviours and staff, and providing incentives for improved systems and conduct. These complementary and often overlapping accountability mechanisms can be seen as examples of the regulatory webs that Braithwaite and Drahos (2000) have noted to be effective means of controlling behaviour and achieving compliance.

Conclusion

This study examined 87 cases where police were sued in all Australian jurisdictions, and analysed them according to when they occurred, in which jurisdiction, the type of claimant, and the type of claim. The findings support those of earlier research, particularly McCulloch's (2002) assertion that most litigious circumstances arise from day-to-day policing events in which police are found to have abused their power either physically or through process corruption. When proved, these types of claims seem more successful in establishing an action for redress than negligence or administrative law actions, indicating a readiness by courts to punish police misconduct. Given

that most jurisdictions have formal, internal or external, complaints processes to deal with such misconduct, improving the operation of, and public confidence in those processes, might deter recourse to civil actions. However, civil litigation can form part of a regulatory web for controlling police misconduct and misbehaviour, and should be seen as a positive tool for police management to identify problem situations and behaviours and developed improved training and prevention systems.

The study also found that about half of all litigation against police originates with officers seeking review of management decisions. This, too, represents a burden on police service resources that might be diverted by better decision-making, and better internal review processes. This study suggests that many of the disputes leading to civil litigation against police, whether initiated by civilians or police officers, could be better and more efficiently dealt with in other ways. However, developing policies and practices to achieve this goal will continue to be difficult while data in the area is so fragmented and difficult to collect. The first step to improved practice will be for police services to collect and publish standardised data in this area, and then to maintain a research and policy focus on developing improved forms of practice for dealing with internal and external disputes.

References

Atiyah, P. (1997). *The damages lottery*. Oxford: Hart Publishing.

Boni, N. (2002). *Issues in civil litigation against the police* (Current Commentary No. 5). Marden, Australia; Australasian Centre for Policing Research.

Australian Institute of Criminology. (2004). Composition of police services by jurisdiction, 30 June 2003. In *Australian crime: Facts and figures 2004*. Canberra, Australia: Author. Retrieved January 10, 2006, from http://aic.gov.au/publications/facts/2004/tab07.html

Australian Law Reform Commission. (1975). *Complaints against police*. Canberra, Australia: Author.

Dixon, D. (1997). *Law in policing*. Oxford: Clarendon Press.

Braithwaite, J., & Drahos, P. (2000). *Global business regulation*. Cambridge: Cambridge University Press.

Burgess, M., Fleming, J., & Marks, M. (2006). Thinking critically about police unions in Australia: Internal democracy and external responsiveness. *Police Practice and Research*, *7*(5), 391–409.

Carabetta, C. (2003). Employment status of the police in Australia. *Melbourne University Law Review*, *27*, 1–32.

Chan, J. (1999). Governing police practice: Limits of the new accountability. *British Journal of Sociology*, *50*(2), 251–270.

Chermak, S., McGarrell, E., & Gruenewald, J. (2005) Media coverage of police misconduct and attitudes toward police. *Policing: An International Journal of Police Strategies and Management*, *29*(2), 261–281.

Collins, S.C. (2004). Sexual harassment and police discipline: Who's policing the police? *Policing: An International Journal of Police Strategies and Management*, *27*(4), 512–538.

Dixon, D. (1999). *A culture of corruption: Changing an Australian police service*. Sydney, Australia: Hawkins Press.

Dixon, B., & Smith, G. (1998). Laying down the law: The police, the courts and legal accountability. *International Journal of the Sociology of Law*, 26, 419–435.

Fijnaut, C. (2002). Introduction to the special issue on police accountability in Europe. *Policing and Society*, *12*(4), 243–248.

Fitzgerald, A. (1989). *Report of an inquiry into possible illegal activities and associated police misconduct*. Brisbane, Australia: Government Printer.

Freckelton, I. (1996). Suing the police: The moral of the disappointing morsel. *Alternative Law Journal*, *21*(4), 173–190.

Goldsmith, A. (2000). Police accountability reform in Colombia: The civilian oversight experiment. In A.J. Goldsmith & C. Lewis (Eds.), *Civilian oversight of policing: Governance, democracy and human rights*. Oxford: Hart Publishing.

Goldsmith, A., & Lewis, C. (Eds.). (2000). *Civilian oversight of policing: Governance, democracy and human rights*. Oxford: Hart Publishing.

Hall, D., Ventura, L. & Yung H.Lee. (2003). Suing cops and corrections officers. *Policing: An International Journal of Police Strategies and Management*, *26*(4), 529–547.

Harlow, C. (2004). Damages and Human Rights. *New Zealand Law Review,* 420–450.

Herbert, S. (2006) Tangled up in blue: Conflicting paths to police legitimacy. *Theoretical Criminology*, *10*(4), 481–504.

Hogg, P.W., & Monahan, P.J. (2000). *Liability of the Crown*. Toronto, Canada: Carswell.

Hoyano, L. (1999). Policing flawed police investigations: Unravelling the blanket, *Modern Law Review*, *62*, 912–936.

Hughes, T. (2001). Police officers and civil liability: The ties that bind? *Policing: An International Journal of Police Strategies and Management*, *24*(2), 240–262.

Jellett, S., Pope, N., & Voges, K. (1994). The stress of litigation: Fear of litigation as a stressor in Queensland police officers, *Australian Police Journal*, *48*(4), 163–167.

Kappeler, V., Kappeler, S., & del Carmen, R. (1993). A content analysis of police civil liability cases: Decisions of the federal district courts, 1978–1990. *Journal of Criminal Justice*, 21, 325–337.

Keenan, K., & Walker, S. (2005). An impediment to police accountability? An analysis of statutory law enforcement officers' bills of rights. *Public Interest Law Journal, 14*, 185–204.

Kennedy, G. (2004). *Royal Commission into whether there has been corrupt or criminal conduct by any West Australian Police Officer* (Final report). Perth, Australia: Government Printer.

Lewis, C., & Prenzler, T. (1999). *Civilian oversight of police in Australia* (Trends and Issues Report No. 141). Canberra, Australia: Australian Institute of Criminology.

McCulloch, J., & Palmer, D. (2005). *Report: Civil litigation by citizens against Australian police between 1994 and 2002*, Canberra, Australia: Criminology Research Council.

McCulloch, J. (2002). Civil litigation. In T. Prenzler & J. Ransley (Eds.), *Police reform: Building integrity*. Sydney, Australia: Hawkins Press.

McLaughlin, E. (2005). Forcing the issue: New Labour, new localism and the democratic renewal of police accountability. *Howard Journal*, *44*(5), 473–489.

McMurray, S., & Rice, S. (2005). Lifting the veil: Human rights violations and tort law in Australia. *Precedent, 70*, 27–31.

Malkin, I. (1995). Tort law's role in preventing prisoners' exposure to HIV infection while in Her Majesty's custody. *Melbourne University Law Review*, *20*, 423–480.

Miller, M. & Wright, R. (2004). Secret police and the mysterious case of the missing tort claims, *Buffalo Law Review*, *52*, 757–791.

New South Wales Legislative Assembly. (2003). *Parliamentary debates* (pp. 4971–4972). Sydney, Australia: New South Wales Government.

Novak, K., Smith, B., & Frank J. (2003). Strange bedfellows: Civil liability and aggressive policing. *Policing: An International Journal of Police Strategies and Management*, *26*(2), 352–368.

Prenzler, T. (2000). Civilian oversight of police. *British Journal of Criminology*, *40*, 659–674.

Prenzler, T. (2002). Corruption and reform: Global trends and theoretical perspectives. In T. Prenzler & J. Ransley (Eds.), *Police reform: Building integrity*. Sydney, Australia: Hawkins Press.

Prenzler, T., & Ransley, J. (Eds.). (2002). *Police reform: Building integrity*. Sydney, Australia: Hawkins Press.

Ross, D. (2000). Emerging trends in police failure to train liability. *Policing: An International Journal of Police Strategies and Management*, *23*(2), 169–193.

Sheptycki, J. (2002). Accountability across the policing field: Towards a general cartography of accountability for postmodern policing. *Policing and Society*, *12*(4), 323–338.

Smith, G. (2001). Police complaints and criminal prosecutions, *Modern Law Review*, 64, 372–392.

Smith, G. (2003). Actions for damages against the police and the attitudes of claimants. *Policing and Society*, *13*(4), 413–422.

Taylor, J. (2006, October 23). Vic Police accused of not tackling corruption, *The 7.30 Report* [Television broadcast, Australian Broadcasting Corporation transcripts]. Sydney, Australia: Australian Broadcasting Corporation.

Walker, S. (2005). *The new world of police accountability*. Thousand Oak, CA: Sage.

Wood, Justice J. (1997). *Final report: Royal Commission into the New South Wales Police Service*. Sydney, Australia: New South Wales Government.

Worrall, J., & Marenin, O. (1998). Emerging liability issues in the implementation and adoption of community orientated policing. *Policing: An International Journal of Police Strategies and Management*, *21*(1), 121–136.

Worrall, J. (1998). Administrative determinants of civil liability lawsuits against municipal police departments. *Crime and Delinquency*, *44*(2), 295–314.

Wright, E. (2006). *National trends in personal injury litigation: Before and after IPP*. Canberra, Australia: Law Council of Australia.