

# WEST HEIDELBERG COMMUNITY LEGAL SERVICE

21 Alamein St West Heidelberg 3081  
Phone 9450 2002 Fax 9458 1067  
ABN 48 964 511 645 (Reg No A0013686G)

## Background Paper

### Capsicum Spray and the Appropriate Use of Police Violence

by Simon Bogli,

La Trobe Law Student on Clinical Legal Education Placement at the West Heidelberg Legal Community Legal Service under the supervision of Dr Liz Curran, Lecturer in Law, La Trobe Law/ West Heidelberg Community Legal Service

#### Purpose and Research Methodology of the Background Paper

The purpose of the background paper is to examine the use of capsicum (or Oleoresin Capsicum -- OC) spray in Victoria and identify areas of law reform. Specifically, the paper will focus on these issues:

- What are the current guidelines to Police on the use of OC? Are these guidelines appropriate given the changing use of OC?
- Is OC now used as a "first resort" weapon for police as opposed to an "alternative to lethal force"?
- What are the concerns with the appreciable rise of OC use in the last ten years?
- What role will the Human Rights Charter play in changing police conduct and guidelines in the use of OC?

The research consists of:

- An examination of the police guidelines for the Use of Force, specifically the use of OC.
- A de-identified case study
- A review of the recent media reporting regarding the use of OC
- A review of the academic literature in regards to the role of OC and its use by police
- An examination of Australian independent inquiries into the use and effects of OC spray by police
- Interviews with Gary Sullivan, Principal Solicitor, West Heidelberg Community Legal Service and Tamar Hopkins, Solicitor.

#### What is "Capsicum Spray"?

Pepper spray, or oleoresin capsicum (**OC**) **spray**, is the extract of pepper plants and chills. It is the principle active ingredient in OC spray.<sup>1</sup>

OC spray is an inflammatory agent, which the spray causes the mucous membranes of the eyes, nose and throat to swell, leading to gasping and gagging. The eyes will sting and are involuntarily forced shut. There may be a discharge from the nose, coughing and slight shortness of breath. There will also be a burning sensation on the skin of your face.<sup>2</sup>

The effects of the use of Capsicum spray are disputed. Reports commissioned by most police forces, including Victoria, Queensland, and the FBI<sup>3</sup> conclude the spray is safe and that there are no long-term

<sup>1</sup> Parliament of Australia Parliamentary Library, Research Note, "Capsicum Spray- The Record to Date" Ireland, Law and Bills Digest Group, 12 February 2002

<sup>2</sup> "Sprayed Man had a heart condition", 7 February 2008, Dominion Post, (NZ)

<sup>3</sup> *ibid*, page 2

consequences of being sprayed. However, conflicting research commissioned by the American Civil Liberties Union and others, have reported up to 60 deaths in the US alone in the use of capsicum spray.<sup>4</sup>

#### Case Study: Z<sup>5</sup>

Z is a young male who was attending a public party when a violent brawl broke out between two men. The police were called and approached Z and his companion, asking for identification. Z presented his identification; however, the police took umbrage at Z's 'attitude' towards them because he was asking questions. Police then sprayed Z with OC. He was arrested for assaulting police and resisting arrest. There is no evidence that police suspected Z of inciting the brawl or presenting as a violent threat.

In the American context, a "large proportion of cases, the alleged victims of police assaults were themselves charged with offences such as resisting arrest or assaulting a police officer, charges which were usually dismissed later for lack of evidence"<sup>6</sup> and it is "common practice"<sup>7</sup> for officers to charge victims to "justify" the use of force<sup>8</sup>.

This case study identifies two of the major issues involved in the use of capsicum spray:

- The changing use of OC. When OC was first introduced on Victorian streets, it was promoted as an alternative to "lethal force" as the public outcry from police shootings prompted the Government to introduce "alternatives" which would reduce the incidence of fatalities<sup>9,10</sup>. It is increasingly being used as a weapon of first choice for police<sup>11</sup>.
- The attitude amongst police that "younger people", specifically Gen Yers, have no respect towards police<sup>12</sup> and that younger persons are taking a more aggressive and violent attitude towards police<sup>13</sup>. It is argued by police that the use of capsicum spray is a very safe<sup>14</sup>, complaint-free<sup>15</sup> method of quelling aggressive conduct. However, young people report that in 78% of cases police "never" or "rarely treat them with respect"<sup>16</sup>. The main issue with weaponising police is that, rather than using verbal communication and "old-fashioned police intuition"<sup>17</sup>, police, "more and more, are policing at a distance. In the past they would use batons and police dogs -- now it's pepper spray and Tasers."<sup>18</sup> This is confirmed by Tamar Hopkins who states, "Recourse to force is made easier by weapons that minimise contact between police and members of the public. This means that adherence to Use of Force guidelines is less likely."<sup>19</sup>

#### What are the guiding principles in the "use of force" by Victorian Police?

<sup>4</sup> American Civil Liberties Union, "No Magic Bullet" published 1997

<sup>5</sup> Z has been de-identified in order to protect his privacy.

<sup>6</sup> Amnesty International, Police brutality and excessive force in the New York City Police Department, June 1996

<sup>7</sup> Ibid

<sup>8</sup> Ibid

<sup>9</sup> Office of Police Integrity, "Review of Fatal Shootings by Police" published November 2005, page 25.

<sup>10</sup> NSW Parliamentary Debates, Questions without notice, "Capsicum Spray Use by Police" 20/11/1997

<sup>11</sup> "Copping a spray - The growing fear that police are too quick to use a last resort, capsicum, on the public", quoting Cameron Murphy, President, NSWCCCL, 10 February 2008, Sunday Times (NSW)

<sup>12</sup> "Courts call it assaulting a police officer. To Gen Y . . . IT'S A BADGE OF HONOUR" Courier Mail (QLD), quoting Trisha Fox, criminologist, 28 January 2008

<sup>13</sup> Ibid

<sup>14</sup> Crime and Misconduct Commission, (QLD), "Oloresin Capsicum spray use by Queensland Police" October 2005, page 12

<sup>15</sup> Ibid, page 12

<sup>16</sup> "Legal Groups Call for Ban on Capsicum Spray" NSWCCCL media release, 17 Sep 2004.

<sup>17</sup> Interview with Gary Sullivan, Principal Solicitor, West Heidelberg Community Legal Service 20 May 2008.

<sup>18</sup> Quote from Police Association president Greg O'Connor in the report: "Sprayed Man had a heart condition", 7 February 2008, Dominion Post, (NZ)

<sup>19</sup> Tamar Hopkins, Solicitor, Written Response to Interview Questions, May 2008

The main approaches to the use of force by Victorian Police are embedded within the Victoria Police Manual, Operational Procedures at Section 101-1<sup>20</sup>:

1. **Safety first** – the safety of police, the public and offenders or suspects is paramount.
2. **Risk assessment** – is to be applied to all incidents and operations.
3. **Take charge** – exercise effective command and control.
4. **Planned response** – take every opportunity to convert an unplanned response into a planned operation.
5. **Cordon and containment** – unless impractical, adopt a 'cordon and containment' approach.
6. **Avoid confrontation** – a violent confrontation is to be avoided.
7. **Avoid force** – the use of force is to be avoided.

The criteria for the use of OC spray foam is listed in the Victorian Police Manual, Operational safety and other equipment at 101-3<sup>21</sup>:

**Only use OC spray/foam:**

1. in situations of violent and serious physical confrontation
2. where a person is involved in violent or other physical conduct likely to seriously injure themselves or result in suicide
3. where it is appropriate to deter attacking animals

**Do not use OC spray/foam when a person is passively resisting, e.g., hanging limp or refusing to comply with instructions.**

Application of the Principles

However, as indicated in a number of recent media reports, there are concerns that police are too quick to use a last resort, in the form of capsicum spray, on the public in contravention of the police guidelines<sup>22</sup>. Police are instructed in the guidelines to de-escalate the use of force and to avoid physical confrontation rather than using capsicum spray or batons to control violent situations and persons.

However, police are now using capsicum spray indiscriminately towards large groups, rather than using a planned "contain and cordon" approach, which identifies "risks", for example, which persons are breaching the peace and causing a situation of "violent and serious physical confrontation". A recent example of this is was at the 2008 Australian Open where members of the general public, including children, were sprayed by the police who were attempting to subdue drunk and unruly spectators<sup>23</sup>. This by no means an isolated incident with OC spray being used as a threat and a weapon towards a large crowd at Highpoint Shopping Centre on 13 October 2007 and at on Racecourse Rd Flemington on 28 against a large crowd.<sup>24</sup>

The use of OC spray in this way is highly problematic because "in protecting the public" the use of this spray is actually inflicting harm on innocent members of the public. The potential for the inappropriate use of capsicum spray against innocent public protestors also remains. As indicated by Tamar Hopkins, "an innocent bystander watching police arrest a person has every right to be there, provided they don't actively hinder the police in the execution of their duty or threaten or engage in an assault (breach of the peace). They may watch, photograph, ask the police for their identification and make comments. Bystanders however frequently report being threatened or actually sprayed when they don't move on. There are no general move on powers."<sup>25</sup>

<sup>20</sup> The Victoria Police Manual, Operational Procedures at Section 101-1

<sup>21</sup> The Victoria Police Manual, Operational safety and other equipment at 101-3

<sup>22</sup> "Copping a spray - The growing fear that police are too quick to use a last resort, capsicum, on the public" op cit

<sup>23</sup> Greek fans threaten legal action over spray 17 January 2008 The Age

<sup>24</sup> Tamar Hopkins, Solicitor, written responses to interview questions, May 2008

<sup>25</sup> ibid

This supports the conclusion that Z's incident with the police is not atypical, and may be systematic throughout the force.

#### Police Perspective's on the Use of Force

In the American context, the Baltimore County Police introduced the use of capsicum spray in 1994<sup>26</sup>. Some of the Officers' testimony in the use of OC spray is listed below:

- I think it's a great...alternative to initial use of force.
- Definitely better than using a nightstick.
- The word is out (on the street)...all people have to do is hear the Velcro (copyright) and they comply pretty quickly. [The officer who made this comment had actually pulled the OC from his holster at least 10 times, but had sprayed it only once.]<sup>27</sup>

This type of praise for OC as an initial force weapon by front-line officers would support the idea that the Victorian guidelines are inappropriate for the use of the weapon. It was never designed to be used as a lethal force weapon, so the use of force guidelines are being contravened because it is not being used as an alternative to lethal force, but rather in quelling violence at the first instance.

The increasing use of OC was highlighted in "The Age"<sup>28</sup>, with the incidence of capsicum spray use rising 1600% in the last ten years, with OC spray being used 2623 times in 2006-07, a sixteen fold increase from 1998<sup>29</sup>. However, according to the ABS<sup>30</sup> assaults against the person or "assault victimisation rates" decreased in Victoria to 4.1% in 2005 from 4.7% per head of population in 2002. Even with the recent upsurge of violence in Melbourne, with assaults rising 17% in the last year<sup>31</sup>, this use of force seems heavily disproportionate to the level of violent crime.

According to Deputy Commissioner Kieran Walshe "... it is clear that young people from 16 to 25 seem to have a diminished respect for authority, not just police. We try to talk to calm them down, but if there is a risk of a violent confrontation it is entirely appropriate for our people to use the spray to avoid injuries."<sup>32</sup>

The attitude of the police towards youth suspects encourages the idea that the police's argument that the weapon is designed as an alternative to "lethal force" is fallacious and the police will use the capsicum spray when it is appropriate to pre-empt or close down a violent situation.

The Crime and Misconduct Report indicates that in Queensland in 2004, only 9% of 340 reported cases is OC spray used in a situation where there is an "armed person"<sup>33</sup>. The majority of times OC spray is used in domestic violence (18%), disturbances (12%), Fight/assault/threat of assault (25%), and disorderly conduct (12%)<sup>34</sup>. In this situation, it may be more appropriate for police to use non-violent, verbal techniques to defuse situations. For Western Australian police in the 1990's, a training program known as "verbal judo" was found to be "very effective in dealing with the kinds of confrontation where you would use this kind of weapon."<sup>35</sup>

#### Charter of Human Rights and Human Rights Framework

The recently enacted Charter of Human Rights, section 10<sup>36</sup> affords the right of Victorians the protection from torture and cruel, inhuman or degrading treatment. It explicitly states

A person must not be—

<sup>26</sup> National Institute of Justice, "Evaluation of Pepper Spray," Edwards, Granfield, and Onnen 1997

<sup>27</sup> *ibid*, "Officers' Testimony"

<sup>28</sup> Police use of capsicum spray soars, *The Age*, 3 March 2008

<sup>29</sup> Police use of capsicum spray soars, *The Age*, 3 March 2008

<sup>30</sup> Australian Bureau of Statistics Release: 4509.0 - Crime and Safety, Australia, Apr 2005

<sup>31</sup> Police use of capsicum spray soars, *The Age*, 3 March 2008

<sup>32</sup> Police use of capsicum spray soars, *The Age*, 3 March 2008

<sup>33</sup> Crime and Misconduct Commission, (QLD), "Oloresin Capsicum spray use by Queensland Police" October 2005, page 26

<sup>34</sup> *Ibid*, page 26

<sup>35</sup> Sunday TV Program, Channel 9, cover story: "Chemical Weapons on Australian Streets", aired April 5, 1999, Reporter Paul Ransley: quoting Asst Commissioner Kucera, WA Police.

<sup>36</sup> Charter of Human Rights and Responsibilities Act (Vic) 2006

- (a) subjected to torture; or
- (b) treated or punished in a cruel, inhuman or degrading way; or
- (c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.

The Charter right is based on the *United Nations Covenant on Civil and Political Rights* to which Australia is a signatory.

Similar provisions are also contained in the US Bill of Rights<sup>37</sup>. In the UN Code of Conduct for Law Enforcement Officials, article 4, it states:

"Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result"<sup>38</sup>

On the evidence presented, it seems clear that the Victorian Police are not following their human rights obligations because rather than resorting to any form of force as a last option; they are using OC spray as a first option if there is a "risk of a violent confrontation". However, the capacity for citizens to enforce and protect their civil rights is limited by a number of obstacles. These have been highlighted in the American experience, where there is an explicit constitutional guarantee<sup>39</sup>:

- Criminal prosecution for the violation of Federal law, the Bill of Rights, are very rare due to the very high standard of proof needed: It must be proved that the accused had acted with specific intent to violate the victims' federal civil rights.<sup>40</sup>
- Criminal prosecution for the violation of State law, such as assault and battery are difficult to prove because it must be argued that the force used against the civilian was "outside the course of duty" and this is difficult to prove because there are many situation where police officer may legitimately who may legitimately use physical force.<sup>41</sup> In the case of *Tennessee v Garner*<sup>42</sup> "it was stated that the use of any weapon is justified when an officer reasonably believes that such force is necessary to stop an individual's aggressive or resistant behaviour, and that lesser levels of control would be unsafe or ineffective."<sup>43</sup>
- The most effective way of addressing police brutality claims is civil action. In the period 1992-1995, over 3000 lawsuits were brought against the New York Police. In 1582 of these cases, \$82 million was paid out to the victims in out-of-court settlements<sup>44</sup>. However, the access to legal representation may be limited, and as many of these cases are not heard in open court, there is little public exposure to systematic police abuse, and the cases are heard on a case-by-case basis.

For Victorians, civil action would be hard to sustain without an enforceable civil right. Although, section 10 of the Charter may be used to supplement a civil battery case against a police officer, section 39 (3) which states: A person is not entitled to be awarded any damages because of a breach of this Charter. This means that a civilian may not have any legal remedy for the breach of their rights. They would have to prove that the officer acted "outside of his scope of employment", which would be difficult to sustain as force is routinely used by police.

<sup>37</sup> The 8<sup>th</sup> Amendment to the Bill of Rights (US)

<sup>38</sup> UN Code of Conduct for Law Enforcement Officials, article 4

<sup>39</sup> Amnesty International, Police brutality and excessive force in the New York City Police Department, June 1996

<sup>40</sup> Amnesty International, Police brutality and excessive force in the New York City Police Department, June 1996

<sup>41</sup> Ibid.

<sup>42</sup> *Tennessee v Garner*<sup>42</sup> 105 S.Ct. 1694 (1985)

<sup>43</sup> Use of Aerosol Weapons by Law Enforcement Steven D. Ashley,

<sup>44</sup> Amnesty International, Police brutality and excessive force in the New York City Police Department, June 1996

Moreover, even though the police "use of force" guidelines are not legally enforceable and merely 'persuasive', the Court may consider these when deciding if and when a police officer is acting within their duties. However, because the police "use of force" guidelines are so broad, especially when it comes to the use of OC spray, a Court may consider an individual police officer was acting within his duty. Also, the research indicates that the effects of capsicum spray, on most people, may last only a few hours<sup>45</sup>, so unlike a baton which would leave a large bruise or other physical effects, the assault may not be readily identified.

What needs to be done?

- The removal of OC spray as a method of force; on the evidence, it is not used as an alternative to lethal force, and it is misused by police as a weapon of first instance. It would be more appropriate that the police use non-violent methods of dispute resolution to deal with situations such as domestic violence or disorderly or drunken conduct in public places.
- More training of police in non-violent dispute resolution methods. If police no longer have OC spray to deal with potentially violent situations, it is imperative that the police have training, so that the police don't resort to the use of batons as a substitute to capsicum spray. This would be a retrograde step.
- If OC spray is retained as a weapon of use by police, stricter guidelines for the use of OC must be introduced that reflects the actual use of capsicum spray by police. In the Queensland Operational Police Manual, there is a prohibition of the use of OC spray "against juveniles, except in extreme circumstances where there is no other reasonable option to avoid the imminent risk of injury"<sup>46</sup> which would reduce the level of spraying against youth and only where all other reasonable alternatives have been exhausted.
- Additionally, a more substantive civil rights and complaints procedure should be in place to facilitate independent review of complaints made against police members who have been excessive in their use of force. Victims of police assaults should have the procedural right, through VOCAT, to seek compensation for any injuries that have suffered, or for the breach of their rights under the Charter.

These measures will have an effective role in regulating police conduct in the use of capsicum spray and ensure that the police are held accountable for their actions.

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