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Law, Policing and Public Order: The  
Aftermath of Cronulla

Chris Cunneen\*

\*University of New South Wales

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# Law, Policing and Public Order: The Aftermath of Cronulla

Chris Cunneen

## **Abstract**

Following the riots at Cronulla and other Sydney beaches, the NSW Government introduced a raft of legislative amendments with the expressed aim of preventing and controlling large-scale public disorder incidents through the Law Enforcement Legislation Amendment (Public Safety) Act 2005. In addition to the new laws there has also been discussion and trials relating to various enhancements in police hardware to respond to public disorder. This chapter will discuss the new approaches to policing and the legal framework within which they have occurred post-Cronulla.

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## **Law, Policing and Public Order: The Aftermath of Cronulla**

### **Chris Cunneen**

The December 2005 riots at Sydney's southern beaches disturbed a view of Australia as a prosperous, racially tolerant and successful multicultural society. Thousands of young white Australians were shown draped in flags reclaiming 'their beach' from other Australians of different cultural backgrounds. Mostly those targeted were of 'Middle Eastern descent' and in particular, Lebanese Muslim Australians. The images of young people engaged in this racist demonstration and subsequent violence were powerful expressions of a contemporary Australian nationalism concerned with who is included within the boundaries of nation and with the excluded, who can be publicly vilified and violently assaulted because of their ethnicity or religion.

Following the riots at Cronulla and other Sydney beaches, the NSW Government introduced a raft of legislative amendments with the expressed aim of preventing and controlling large-scale public disorder incidents through the *Law Enforcement Legislation Amendment (Public Safety) Act 2005*. In addition to the new laws there has also been discussion and trials relating to various enhancements in police hardware to respond to public disorder. This chapter will discuss the new approaches to policing and the legal framework within which they have occurred post-Cronulla.

To begin with, it is worth noting the legal system tends by its very nature to depoliticise and dehistoricise our understanding of the background and motivations involved in large scale public disorder and riots. The positivist nature of the law does not distinguish between the motivations of the law breakers, in the sense that a drunken brawl, a political protest or a racially motivated attack might all constitute 'affray' or 'riot' providing the elements of the offence are proven. For example it has been previously noted in relation to hate crime that 'while "hate" may well be the most important factor for both the victim and the perpetrator, it has historically been a matter of principled indifference for the official actors in the formal criminal justice system' (Cunneen et al 1997:1). As Owen (2006:9) has noted in relation to the Macquarie Fields riots in 2005, the characterisation of protestors and riots as criminal disavows questions relating to motives and belief. The term 'criminality' tends to preclude the

need for any further explanation (see also Cunneen et al 1989) and policing, criminal law and penal sanctions become blunt instruments of public policy. Law and order rhetoric replaces the need for more considered understandings of the motivations and dynamics involved in public disorder.

### **Lockup and Lockdown**

The new measures introduced in the *Law Enforcement Legislation Amendment (Public Safety) Act 2005* introduced new police powers, new offences and increased penalties for some existing offences. A new offence of ‘assault during public disorder’ was created, which carries a higher penalty than that for general assault: the maximum is seven years imprisonment where the assault causes actual bodily harm, compared to a maximum of five years for a similar common assault. There are also substantially increased maximum penalties for affray (up from five years to ten years imprisonment) and riot (up from ten years to 15 years imprisonment). The changes express the sentiment that the government is tough on law and order and are in line with a dominant governmental view that increasing penal sanctions has the effect of reassuring community fears. Little thought appears to be given to whether the new penalties have any deterrent effect, or whether the escalating scale of punishment holds any real proportionality to the seriousness of the offence.

Other changes introduced by the Act centred on creating special powers in relation to targeted areas; these provide substantial enhancements to police powers over citizens, irrespective of whether or not they are involved in public disorder. Police have the power to impose an emergency closure of licensed premises and liquor outlets, and to establish emergency alcohol-free zones. The legislation removes the presumption in favour of bail for certain public order offences.

However, it is the ‘lockdown’ powers which are most extreme and demonstrate the greatest potential to override the rights of people to go about their daily business. The Commissioner of Police can establish special ‘lockdown’ zones, the potential size of which is ill-defined. A few streets? A residential or commercial block? A neighbourhood? A suburb or locality? A region? They are all possible ‘zones’ for a lockdown. After the lockdown has been declared, police can establish roadblocks where police may stop and search persons and vehicles and require persons to disclose their identity. The legislation allows police to confiscate and search mobile phones and other communication devices for text messages, and to confiscate vehicles in cases where the driver has been, or is likely to be, involved in public disturbances.

Furthermore, police can prevent entry into or exit from the authorised zone. The lockdown can last for up to 48 hours on the authority of the Police Commissioner, or can be extended by the Supreme Court. This power to control movement of individuals in large designated areas has fundamental implications for freedom of movement. It creates a relationship between police and citizen whereby police are more like a military-style force controlling an occupied population.

Specific offences under the new legislation include failing to comply with police directions relating to the emergency liquor restriction, drinking or possessing alcohol in an emergency zone, or failing or refusing to disclose your identity. However, it is not so much these offences created under the legislation that are the concern, it is more the substantial extension of police powers to interfere with the freedoms of citizens. The potential abuse of this legislation in terms of racial profiling and/or the targeting of young people is significant.

These lockdowns were put in place in various Sydney beach suburbs in the days following the Cronulla riot. It is telling however, that within a week of the new laws being enacted, the first use of a 'lockdown' outside of Sydney was in a public housing area, the Gordon estate in Dubbo, with predominately Aboriginal residents. As a result of a disturbance, local residents spent the first day of 2006 being unable either to enter or leave the estate in which they resided. This was an ominous beginning for the potential use of the new laws; far from being used to prevent racist attacks, the laws were being applied to Aboriginal people living on public housing estates.

The introduction of new laws and the ramping-up of existing penalties as a response to collective disorder is not a new political response. Many of the changes from the older common law public order offences to statutory offences of violent disorder, affray and riot were introduced during the latter part of the 1980s in New South Wales as a result of riots and collective disorder, much of it involving Indigenous anti-police protests in places like Brewarrina, Bourke and Redfern (Cunneen et al 1989: 185-186).

The changes in the legislation *post*-Cronulla also draw attention away from the problems with police responses to large-scale collective disorder. The report by former assistant police commissioner Norm Hazzard into the disturbances painted a picture of a police force with poor command structures in place and confusion over various responsibilities (*Sydney Morning Herald* 21/10/06, p.3).

## **Water Cannon and Tasers**

In late March 2006 the NSW government announced it was requesting tenders for the supply of water cannon to the NSW police riot and public order squad. The reason presented to the public for the need for the equipment stemmed from the racially-motivated disturbances at Cronulla. The government also claimed that previous riots at Redfern and Macquarie Fields were instances where water cannon may have been used, if available (Clennell 2006). The previous month it had been announced that police would be trialling the use of taser guns which deliver electric shocks of 55,000 volts. Perhaps the NSW government was unaware that the US-based corporation Jaycor has developed an electrocuting water cannon where, according to the company, 'debilitating but not lethal shocks' travel through the water jet (Smith 2003). For a state government looking to save money this might have been seen as a 'two for the price of one' bargain in the public order armoury! It should also be noted that the current proposals for Taser guns and water cannon are in addition to the arming of many Australian police services in recent years with capsicum spray.

One might question whether public disorder has reached a point in Australia where governments could justify the use of water cannon against its citizens. While water cannon are presented as a 'non-lethal weapon', they can and do cause serious injury both through the blunt impact trauma from the highly pressurised water, as well as injuries sustained from flying debris and collisions with cars, poles and other fixed objects. The use of taser guns has also been the subject of considerable controversy in Canada and the United States. A recent Amnesty International report (2005) estimated that there had been 103 taser-related deaths in North America between June 2001 and March 2005. There were also many examples of the inappropriate use of taser guns against people already restrained or in custody, and against children and people with physical disabilities. Amnesty International called for a suspension on the use of taser guns pending an independent, rigorous and impartial inquiry. More recent data by Amnesty showed that the death toll had passed 150 by early 2006 (Amnesty International 2006). After a Victorian proposal to trial taser guns, the Law Institute of Victoria (2004) gained access under freedom of information to a Ministerial Advisory Committee report which found that there was a clear lack of scientific evaluation regarding the safety of these weapons.

That there is serious consideration of the use of water cannon and taser guns belies a shift in attitude towards public disorder and appropriate policing. Certainly water cannon will not work in relatively closed spaces like football stadiums, nor does it discriminate well in public places where only a small number of people in a crowd may be involved in violent activity.

As the Americans found in the civil rights and Vietnam War protest days, water cannon also poses a public relations nightmare for government. One might question for example the long-term effect on the public if water cannon had been used in Melbourne during the World Economic Forum demonstrations in September 2000.

Perhaps more importantly, these solutions to public disorder shift attention away from the causes. It is easy to forget that recent riots in Palm Island, Macquarie Fields and Redfern all occurred immediately after there had been deaths in police custody or involving police pursuit. All three communities are among the poorest urban and rural places in Australia, and with histories of volatile police relations; water cannon and tasers are unlikely to resolve the long-running problems in these communities and will, in all likelihood, make the work of day-to-day policing far more difficult.

Are we becoming a society where public disorder is more prominent? A cursory look at the last three decades suggests that incidences of public disorder have remained relatively infrequent, and perhaps less frequent now than in the past. Most large scale public disorder has either been associated with political protests, with sporting and leisure events, or as a reaction against heavy-handed policing; very few have been associated with racist motivations such as in Cronulla. There have been riots associated with music venues such as the Frankston Hotel in Melbourne, the Star Hotel in Newcastle and the Stage Door Tavern in Sydney which have reached almost iconic status through later popularisation in rock music. There have been disturbances over the years at soccer and rugby league matches – and these continue to cause some level of concern. The longest running public conflict around leisure events was the riots at the Bathurst Motorcycle Races during the early to mid 1980s (Cunneen et al 1989).

Police responses to these disturbances have varied from underestimating conflict, to ad hoc violent over-reaction<sup>1</sup>, to relying on specialised police riot squads. Perhaps one lesson, which should be kept in mind in today's climate, is the danger of institutionalising conflict between particular groups and the police. Certainly the lesson from the Bathurst motorcycle races' riots was that the use of the Tactical Response Group (TRG) had limited effect on controlling the violence and instead institutionalised a pattern of anti-police behaviour. As has been argued elsewhere, in that instance the presence and use of tactical police polarised and exacerbated the situation (Cunneen et al 1989).

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<sup>1</sup> See for example, the 1994 report by the Victorian Ombudsman on police reaction to the Richmond Secondary School blockade.

## **The Limits of Policing and Criminal Law in Riot Control**

The heyday of TRG-type police groups was the late 1980s, so it is disturbing to see the re-emergence of the idea that heavily equipped riot police will stop public disorder. Ironically, the last time the purchase of water cannon was seriously discussed was during this period of the early 1980s and specifically in relation to the riots at the Bathurst motorcycle races. By the late 1980s the TRG in NSW and Western Australia were also routinely used in Aboriginal communities when there were disturbances. By the early 1990s, there were a number of official inquiries - particularly over the use of excessive force in Redfern (Cunneen 1990) and as a result of a number of shootings such as that of Darren Brennan in Glebe. As a result the NSW TRG was disbanded, but today essentially the same idea has re-appeared as the Riot and Public Order Squad.

It is worth briefly outlining the main arguments against institutionalised police riot squads such as the TRG to demonstrate the limits of this style of policing public order situations. The TRG was formed in 1982 allegedly as a response to riots at the Bathurst motorcycle races (see Cunneen et al 1989). However their role as a specialist riot control group quickly became institutionalised within the State's policing apparatus. The group had its own executive, administrative, operational and training components and most importantly it grew in size and increased its operational duties during the 1980s.

The TRG, like the more recent Riot and Public Order Squad, was established as a fast response police tactical unit capable of being deployed anywhere in the State at short notice. It was noted after their establishment that such groups, although originally established to deal with a specific 'threat', soon develop at an operational level to incorporate many of the more usual functions of general duties policing (Cunneen et al 1989:120). In addition the structure of groups like the TRG and the new Riot and Public Order Squad are designed to ensure that a sense of independence and elitism develops. There is a clear risk of alienation from the concerns of mainstream general duties policing.

One of the most important factors in the establishment of specialist riot squads is the implied admission that relations between the normal civil policing agencies and sections of the public have deteriorated to such an extent that a paramilitary response is necessary (Cunneen et al 1989:121). The very nature of centralised specialist police responses means that there is no requirement to develop local relationships or networks; specialist squads respond to situations which have already been defined in advance as problematic and likely to require higher levels of force. The possibility of negotiation between community and police over acceptable

behaviour and the limits of protest is removed, and the likelihood of violence substantially increases in the stand-off between riot squad and the crowd. Peaceful resolution of conflict is less likely when the training, equipment and focus is clearly on the use of force.

Negotiation and consent are important components in developing community respect for police and these are undermined when a reliance on tactical police develops. Without respect, consensual policing becomes impossible, and the likelihood of the necessity to rely on force is accentuated. As Findlay has noted, 'Respect and its maintenance, along with the generation of community consent, is an essential feature of most policing structures. The maintenance of respect becomes a primary function for policing...' (Findlay 2004:45). The alternative is the police acting in a role more like an occupying army, relying on the availability of greater force to ensure order.

If paramilitary responses to public disorder provide for a distorted view of the relationship between police and public, then the criminal law also can become significantly deformed when it is applied to collective disorder. As has been previously noted,

The application of individual criminal responsibility to collective behaviour, rests on individual identification of offenders who, while being proved to possess personal guilt, are punished to a great degree as representative of the collective disorder...

While the crowd cannot stand in the dock, its spectre compounds the determination of individual criminal responsibility and the level of punishment it is deemed to deserve (Cunneen et al 1989:123-124).

We see some indication of this with the introduction of a new offence of 'assault during public disorder', and the higher penalty it attracts compared to other forms assault. It begs the question of proportionality and social harm: should a male involved in an assault in a public disturbance receive greater punishment than a similar person who assaults his spouse and children in the privacy of his home?

However the clearest distortions of the law are evident in the new 'lockdown' powers of police. It has been well demonstrated that police discretion has a key influence on the way manifestations of public disorder and protest are contained or escalate into riot and violence (Cunneen et al 1989). The new stop, search and confiscation powers substantially enhance police discretion; further, the new laws shift the balance of potential criminality onto whole communities or social groups.

## Policing Racist Violence

This chapter has dealt primarily with issues relating to public disorder and criminal justice responses; it is also worth considering how the law might respond to matters of racist violence. It was just over a decade ago that the Australian Human Rights and Equal Opportunity Commission (HREOC) released its report after a national inquiry into racist violence. The Commission found that although comparatively speaking Australia was a non-violent, socially cohesive nation, racist violence was a major issue which must be confronted before it becomes a significant threat (NIRV 1991). The Commission found that racist violence particularly impacted on Australians of Asian and Arab backgrounds and that institutional racism was an endemic problem for Aboriginal people in Australia. The inquiry had arisen because of an upsurge in racist attacks against minority groups and concern over the impact of institutional racism in the criminal justice system on Aboriginal Australians.

It is worth recalling that HREOC had, as a result of its inquiry, recommended that a federal criminal offence of racist violence and incitement to racist violence be introduced. While the offences were introduced federally in the *Racial Hatred Act* (1995), they lacked criminal penalties; however in New South Wales the *Anti-Discrimination (Racial Vilification) Amendment Act* (1989) introduced a criminal offence under section 20D of serious racial vilification with a maximum penalty of six months imprisonment. Racial vilification falls into the category of serious racial vilification 'if it is aggravated by threats of, or incitement to, more serious physical harms (personal violence or damage to property)' (McNamara 2002:133). It remains a mystery to many as to why no-one was charged under section 20D as a result of the Cronulla riots.

It is also clear that sections of the media played an instrumental role in aggravating the violence at Cronulla. The Hazzard report specifically criticised talkback radio commentators for fuelling racism, and in particular for reinforcing the view that men of Middle Eastern backgrounds were a threat (*Sydney Morning Herald* 21/10/06, p.3).

HREOC also recommended that where racist motivation was an element of an offence it should constitute an aggravating factor in sentencing. The only Australian state to introduce racist motivation as an aggravating factor in sentencing was New South Wales; this was introduced recently, not as result of HREOC's 1991 recommendations, but as a result of the gang rapes committed by young Muslim men against (mostly) non-Muslim women. One of the perpetrators was given a total sentence of 55 years imprisonment. A further recommendation of HREOC which has been ignored is that Australian police forces monitor

the frequency and nature of hate crime, however unlike many European and American jurisdictions, it is not possible in Australia to determine whether official reports of racially-motivated offences have been increasing.

## **Conclusion**

There has been a move to a much tougher stance on public disorder and part of this has been through legislative changes that have increased police powers in the public realm and increased penal sanctions for public order offences. There have also been calls for 'technical' solutions to public disorder such as the use of water cannon and taser guns. Law and order rhetoric has apparently displaced the need for a more careful and specific consideration of how policing and the law might respond to particular types of collective disorder. Certainly in relation to racist violence, the specific recommendations of the National Inquiry into Racist Violence still have relevance today.

Of concern is that the use of criminal law is a blunt instrument in dealing with these types of disturbances. There are dangers that conflict will become institutionalised through the use of tactical riot squads and that restraint in the use of force will disappear if specialist squads are provided with hardware such as water cannon. These radical responses to public disorder seriously distort the relationship between police and communities and the role of the criminal law in prosecuting and punishing individual offenders. Given the relative infrequency of public disturbances in Australia we need to question seriously whether the 'ramping up' of the criminal justice system is in any way proportionate to the level of threat. The spectre of a police water cannon dispersing citizens in a Sydney suburb is one that would substantially and perhaps irrevocably change the dynamics of civil policing in this country.

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