# TASER! TASER! TASER!

# A CASE STUDY ON LAW AND PROCEDURE PERTAINING TO POLICE TASERS

*Q. If he remained on his knees for two, three, four, 5 minutes without doing anything aggressive towards police you were going to Taser him?*
*A. In this situation yes.*[1]

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[1] Cross-examination of SC Charman in *Police v Phillip Bugmy* (unreported, NSWLC, judgments on 17 and 21 February 2012 at Broken Hill, Magistrate Dunlevy). Transcript 18.8.11 at 33.3-33.5.

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## INTRODUCTION

1. This paper will explore the law and procedure pertaining to police Tasers focusing on the case study of the Wilcannia matter *Police v Phillip Bugmy* (unreported, NSWLC, judgments on 17 and 21 February 2012 at Broken Hill, Magistrate Dunlevy) ("***Phillip Bugmy***").

2. A number of complex and interesting issues arose during the proceedings. This paper examines the following:

   - **TASER, TASER, TASER!**
     A survey of the Taser device, the General Duties Police Standard Operating Procedures and some Australian case law which comments on Taser related issues.

   - **REASONABLE FORCE AND *LEPRA***
     The yardstick against which the lawfulness of the use of force by police is judged.

   - **s138(1) *EVIDENCE ACT 1995* AND "OBTAINED" REASONING**
     Developments over the last decade.

   - **THE ROLE OF THE MEDIA AND OPEN JUSTICE**
     Applications by media outlets in criminal proceedings.

   - **SUBPOENAED MATERIAL AND THE "IMPLIED UNDERTAKING"**
     Constraints on the use of subpoenaed documents and your obligations.

## SUMMARY AND OUTCOMES OF THE CASE

3. Phillip Bugmy was charged with four offences:

    - Assault occasioning actual bodily harm – in relation to his mother (s59(1) *Crimes Act*)
    - Resisting SC Paul Charman in the execution of his duty (s58 *Crimes Act*)
    - Using an offensive weapon with intent to prevent the lawful apprehension of himself (s33B(1)(a) *Crimes Act*)
    - Intimidating SC Charman, SC Hurst and Con Gowans in the execution of their duty (s60(1) *Crimes Act*)

4. At about 3.30pm on 20 February 2011 three police officers, SC Paul Charman, SC Belinda Hurst and Con Monique Gowans attended the home of Phillip Bugmy's grandmother in 'the Mallee', Wilcannia to arrest him for an offence of assault occasioning actual bodily harm arising out of an incident the night before. Mr Bugmy's mother was the alleged victim.

5. When they arrived, police saw Mr Bugmy inside the home. They told Mr Bugmy he was under arrest for assaulting his mother and they asked him to come outside. Mr Bugmy said "No, fuck off." The police tried to open the door but it was locked. Mr Bugmy effectively ignored police. He was cooking a meal. The police saw him pick up a plate, knife and fork and walk out of sight. He said something like "Fuck off, I'm having a feed." After a few minutes, he returned to the kitchen, picked up a steak knife from the dish rack, dried it and again walked away into another room of the house.

6. The police officers walked a short way from the house and discussed what to do. They heard a "click" on the door and returned to find the door unlocked. The three police officers entered the house.

7. SC Paul Charman announced their presence in the lounge room and Mr Bugmy then came into the room.

8. The evidence revealed that within a few seconds of the police entry to the house, the Taser Cam began recording. The Taser Cam footage clearly depicted the situation in the two minutes or so before Senior Constable Charman fired the Taser at Mr Bugmy.[1]

9. Mr Bugmy had a knife in his right hand when he entered the loungeroom. SC Charman repeatedly told Mr Bugmy to put the knife down. Mr Bugmy said "What the fuck did you break into my grandmother's house for? What the fuck did I do?" Magistrate Dunlevy found that the knife in Phillip's right hand looked like a steak knife. He also found that there was another object in Phillip's left hand which he believed to be a fork. The use of the knife was the subject of the offensive weapon charge.

[1] The footage can be viewed at: http://www.abc.net.au/local/videos/2011/09/02/3308952.htm.

10. In relation to the actions with the knife, Magistrate Dunlevy found that Mr Bugmy had his right arm to his side, flicking his wrist or elbow; that the knife pointed in the approximate direction of SC Charman and Con Gowans; that the action was very fleeting in nature over 6 to perhaps 8 seconds, wholly consistent with gesticulation. Mr Bugmy then gave or allowed the knife to be taken by his partner Annette Johnson. The evidence indicated that SC Hurst then took and secured the knife from Ms Johnson.

11. Mr Bugmy was directed to get on the ground by police. He slowly kneeled on the ground in front of the police and put his hands behind his head.

12. In the lead up to the use of the Taser, Mr Bugmy was in that kneeling position for "what in the context of this was a considerable period of time, in excess of one and a half minutes." He had his head slightly bowed.

13. Magistrate Dunlevy also found that he was saying things which were defiant of the authority of the police but he was not uttering threats. When he was directed to put his chest on the ground, he refused and said he was not going to do so. Mr Bugmy also repeatedly said "I've done nothing wrong." Mr Bugmy took his hat and shirt off when he was kneeling on the ground. Contrary to the accounts of police, he did not throw them on the ground or at police and did not take them off from a standing position. He took them off whilst kneeling and placed them on the bed beside him. The prosecution placed emphasis on this so-called aggressive act by Mr Bugmy in taking off his hat and shirt and thus demonstrating his readiness to fight. Magistrate Dunlevy accepted that that action could be construed as threatening behaviour and potentially a signal that Mr Bugmy was prepared to fight. The police relied on Mr Bugmy's defiance in the face of police direction to get on the ground and his refusal to obey police directions as constituting the resist police charge.

14. Mr Bugmy remained on his knees and still had his hands behind his head and his head bowed forward when SC Paul Charman fired the Taser at him. He was restrained and taken into custody at Wilcannia police station.

15. Whilst in custody at Wilcannia police station, Mr Bugmy said "Come on, suck my dick, you cunts, I'll rape you cunts, come on suck my dick." And "I'm not going anywhere you cunts, you cunts have shot me, I'm not going anywhere." And finally "You shot me you cunts; this is my town, I'm going to get bail tomorrow and I'm going to come back here and shoot you cunts; you wait, you're dead." This was the conduct relied upon by the police for the intimidate police charge.

16. The next day, he was bail refused by the Magistrate. By the end of the proceedings, Mr Bugmy had spent a total of about 7 months in custody bail refused.

17. The ultimate outcome of the criminal proceedings was as follows:

    - AOABH – no evidence offered, dismissed.
    - Resisting SC Paul Charman – dismissed, no prima facie case as there was no evidence of any opposition by force.
    - Using an offensive weapon with intent – actions wholly consistent with gesticulating; not satisfied BRD that knife used in order to prevent lawful apprehension, dismissed.
    - Intimidating SC Charman et al – s138 objection upheld, all evidence of intimidation excluded, dismissed.

18. A complaint was made to the Commissioner of Police on behalf of Mr Bugmy, however it was declined and closed because an investigation into the matter was already underway by the Professional Standards Command ("the PSC"). The PSC investigated issues of assault upon Mr Bugmy (with Taser); excessive use of force and collusion of police witnesses. The outcome for all matters investigated by the PSC was "Not sustained". The matter is being reviewed by the NSW Ombudsman.

19. The matter was also referred to the Officer of the Director of Public Prosecutions, however, that Office considered that there was no reasonable prospect of an assault conviction against SC Charman and no criminal charges against him were warranted.

20. A civil action against the NSW Police Force was recently settled in favour of Mr Bugmy.

## TASER, TASER, TASER!

### The Players

- Officer(s) who fired the Taser
- Other officer(s) who were present at the scene
- Vetting officer (sometimes referred to as the duty officer) in relation to the SITREP (situation report) – eg. a local Inspector
- Professional Standards Duty Officer for the Local Area Command ("LAC") – usually reviews Taser use within about 24 hours
- Regional Taser Review Panel ("TRP")
- Local Area Commander – head of the local chain of command, through whom correspondence with the TRP often passes
- Region Commander – personal review of all probes discharged and drive stun incidents within 72 hours, usually also a member of the Regional TRP
- Taser Executive Committee
- Local Complaints Management Team
- Regional Complaints Management Team

### Some Terminology

21. When originally introduced in NSW in 2002, the use of Tasers was confined to specialist police officers. They were only rolled out across the State to general duty/operational police in late 2009.

22. The **Taser** is a **less lethal force** conducted electrical weapon ("CEW") designed to incapacitate human beings or animals while minimising fatalities and permanent injury through the delivery of short duration electrical impulses that overpower the normal electrical nerve signals within the nerve fibres.[2]

23. A Taser can be drawn and used to "cover" a subject; fired so that two probes discharge into the subject's body; or used by direct contact to "drive stun" the subject.

24. In the Northern Territory ***Inquest into the death of Gottlieb Rubuntja*** **[2010] NTMC 48** ("***Rubuntja Inquest***"), Coroner Cavanagh summarised evidence in relation to the weapon as follows:

> I received evidence that at the time of departing from the station, Constable Frost was armed with an electro-muscular control device or what is colloquially known as a Taser (I also note that the Taser is a reference to the brand name). I received evidence that the Taser is a device whereby 2 barbs (or probes) are fired by compressed air at an offender. Attached to the barbs are very light wires which conduct electricity at a very high voltage, but low current, thereby administering a severe and instantly disabling shock to the subject. In order to be effective the barbs must connect with the target in order for the energy to be transferred between the two barbs, completing the

[2] "Use of Conducted Electrical Weapons (Taser)", NSW Police Force, July 2013, Version 2.0 ("SOPs, v 2.0) at 9.

> electrical circuit and delivering pulses to temporarily incapacitate the target. For energy to be transferred from the Taser via the barb, contact must be made with the target by both barbs to complete the circuit. If either barb does not make good contact with the target then the Taser's energy will arc in front of the device with no energy being transferred and the target will not likely receive any of the Taser energy and therefore not be incapacitated.[3]

25. The question of whether a Taser contributed to or caused a subject's death would obviously be a matter for expert opinion, but the term "less lethal force" is a clear acknowledgement that the weapon has the potential to kill. As Magistrate Heilpern said in ***R v Ali Alkan*** **[2010] NSWLC 1** ("***Ali Alkan***"):

> The word 'lethal' means "deadly". Whilst the wording is clumsy, the only reasonable interpretation is that the Procedures consider the Taser to be a lethal tactic, although less lethal than, say, a firearm. In other words the use of the Taser is acknowledged by the police themselves to be a tactic that may cause death.[4]

26. A further acknowledgment of the increased risk of serious injury or death is made in relation to the weapon's multiple use.[5]

27. The TASER International Inc product warnings and information acknowledge in many respects the potential for causing death or serious injury, including for example causing "startle, panic, fear, anger, rage, temporary discomfort, pain, or stress which may be injurious or fatal to some people."[6]

28. The current SOPs state that the "Taser is not a replacement for a conventional firearm. It is a less lethal option which should be deployed and managed alongside conventional firearms and other tactical options".[7]

29. The evidence from the download of the Taser in the ***Inquest into the death of Antonia Carmelo Galeano*** (Office of the State Coroner, Queensland, 14 November 2012, Findings of Ms Christine Clements, Deputy State Coroner) ("***Galeano Inquest***") showed that there had been 28 activations of the X26 Taser weapon over a seven minute period. However, this evidence did not establish when the Taser was deployed or for how long an effective circuit was maintained.[8] Witnesses gave evidence of between six and ten activations of the Taser. Coroner Clements referred to the capability of the device to deliver a charge

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[3] At [38].
[4] *R v Ali Alkan* [2010] NSWLC 1 at [67]. His Honour was referring to the terms of the Public Order and Riot Squad SOPs for the use of a Taser which refer to "less lethal tactics".
[5] SOPs, v 2.0 at 23 and 24. See also internal NSW Police document, "Standard Operating Procedures for use of Electronic Control (TASER) Devices" (version 1.17 as at 4 December 2010) ("SOPs, v 1.17") at [5.11].
[6] TASER International Inc "Warnings, Instructions and Information: Law Enforcement" at Annexure H in SOPs at 51.
[7] SOPs, v 2.0 at 15, [4.3].
[8] *Galeano Inquest* at 59.

continuously and for longer than five seconds. Her Honour stated the following:

> All that is required for this to happen is for the person firing the device to hold sufficient finger pressure on the trigger for longer than five seconds. Although called a 'trigger', it was explained the device is activated by a solenoid, more in the nature of a switch. The degree of pressure required was very little, equivalent to a 'hair' trigger degree of sensitivity in a firearm.
>
> If, unwittingly or otherwise, the switch is held on past the elapse of the pre-set five second interval, the taser continues to cycle. It is akin to an automatic weapon in that sense. The slightest pressure will re-activate the device to cycle for another five seconds unless the trigger remains depressed, in which case, the taser continues to cycle for the duration of the trigger depression.

30. The Coroner recommended that the Queensland Police Service consider using the X2 model Taser or other device which is engineered to prevent the trigger/switch being held 'on' for longer than five seconds without a specific conscious re-activation of the switch/trigger.[9]

31. The **Taser Cam Footage** is audio-visual footage recorded by the Taser device itself. As soon as a police officer "arms" a Taser by flicking the safety switch up, the camera at the front of the Taser handle starts recording. The camera stops recording when the safety switch is flicked back into the "safe position".

32. **Taser Usage SITREP** is a situation report completed in two parts: (1) by the officer who used the Taser including a brief outline of the incident; and (2) by a duty officer including an assessment of whether the use of the Taser amounted to hazardous practice. The form is then sent to the Region Commander, Duty Operations Inspector, Operations Response Unit and the Media Unit.[10]

33. The **Regional Taser Review Panel (TRP)** reviews all Taser use in their region and reports to the Taser Executive Committee. The Panel usually includes Inspectors (Operations Manager and Professional Standards Manager) and an Assistant Commissioner. If of the view that the use of the Taser was not justified, they will recommend a full internal investigation. The TRP reviews the full range of matters from draw and cover, probes discharged, drive stun to hazardous practice and unintentional discharge.

34. The **Taser Executive Committee** monitors all Taser deployments, identifies issues and establishes procedures that ensure appropriate corporate governance is in place.

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[9] *Galeano Inquest* at 100.
[10] See an example of a blank Taser Sitrep at Annexure F in SOPs, v 2.0 at 46-47.

## Documents to Obtain

35. Documents worth seeking under prosecution disclosure obligations or if necessary, subpoena, in cases where the use of a Taser is in issue include:

- The Taser Cam footage
- Relevant internal Taser Standard Operation Procedures – general operational police or specialist police SOPs
- Taser Familiarisation Presentation and the Taser User Training Package – internal training documents
- Tactical Options Model
- Any other Taser related material located on the Taser Intranet page
- Taser Use in Mental Health Facilities – policy document on use of Tasers in mental health facilities
- Taser Register forms
- Internal memorandum to and from the Taser Review Panel and Taser Executive Committee
- TRP minutes and other reports or documents created as part of the review process
- TRP procedures
- Taser Executive Committee Terms of Reference
- Email/other written responses by officer(s) involved sent to the TRP
- Officer's certificate of competency compliance (training, certification and re-certification for Taser use)
- Any other situation report (Sitrep) relating to the incident
- COPS events, police notebook entries
- Custody Management Record
- Where applicable, documents to/from Local and/or Regional Complaints Management Team
- Police Handbook, Chapter A (Arms & Appointments)

## Standard Operating Procedures

36. The NSW Police Force has developed Standard Operating Procedures for use of Tasers ("SOPs"). These SOPs govern the use of Tasers by general duties police officers. There are also separate Taser SOPs for the Public Order and Riot Squad and the Tactical Operations Unit.[11]

37. There is a publicly available unrestricted version of the operational police Taser SOPs called "Use of Conducted Electrical Weapons (Taser)". It is referred to as the "TASER User Public Information" document in the Policies, Procedure & Legislation section of the NSW Police Force website. As at version 1.17, it was almost identical in terms to the internal restricted NSW Police Force SOPs used by operational police.[12]

[11] SOPs, v 2.0 at 17.

[12] The internal NSW Police document, "Standard Operating Procedures for use of Electronic Control (TASER) Devices" (version 1.17 as at 4 December 2010) ("SOPs, v 1.17") was obtained under subpoena and tendered in evidence in the *Phillip Bugmy* proceedings. As is

38. The direct link is:
http://www.police.nsw.gov.au/__data/assets/pdf_file/0006/188322/TASER_Use_Public_Information.pdf

**A Revised Document**

39. The SOPs have been revised seven times since originally promulgated in September 2008 and recently on a substantive basis following the report of the NSW Ombudsman "How are Taser weapons used by the NSW Police Force? A Special Report to Parliament under s. 31 of the *Ombudsman Act 1974*" and the recommendations made by the NSW State Coroner in the *Inquest into the death of Roberto Laudisio Curti* on 14 November 2012.

40. Given the subtle differences between the publicly available version of the SOPs and their regular amendment, it is important to obtain the relevant version for the point in time in issue and the internal restricted version on which police officers are trained and which has binding effect.

**Minimum Standards**

41. The SOPs are a yardstick against which the Court might measure whether a police officer was using reasonable force; acting in execution of his/her duty more generally; or acting improperly or even unlawfully. Standard Operating Procedures implemented by the NSW Police Force can be considered 'minimum standards' of acceptable police conduct against which officers ought to be judged for the purpose of s138(1) *Evidence Act 1995* in the same way that police and executive guidelines have been.[13]

42. The SOPs themselves recognise that "[a]ny action or inaction demonstrated by a Taser User that falls outside of the procedures or their intent, will be viewed as a breach of the procedures and may be subject of remedial or management action or dealt with as a complaint."[14]

**Officer certification and carrying a Taser into the field**

43. A police officer must be trained and certified to carry and use a Taser by a qualified Taser Instructor.[15] All operational police will be trained in the use of Tasers.[16] The training consists of 8 hours of initial instruction that includes the firing of 3 cartridges, passing a written test with a minimum score of 80% and annual recertification thereafter.[17] A failure to re-certify annually will result in loss of Taser accreditation.[18]

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discussed later in the paper, I was released from the implied undertaking by the Local Court in relation to this document for educational purposes.

[13] See for example *Ridgeway* (1995) 184 CLR 19, *DPP v Carr* (2002) 127 A Crim R 151, *DPP v AM* 161 A Crim R 219 at [42], *Robinson v Woolworths Ltd* (2005) 158 A Crim R 546 per Basten JA.

[14] SOPs, v 2.0 at 13.

[15] SOPs, v 2.0 at 17-18.

[16] SOPs, v 2.0 at 15, [4.5].

[17] SOPs, v 2.0 at 10.

[18] SOPs, v 2.0 at 18.

44. Only one police officer should carry a Taser to a minimum two uniformed officer team undertaking operational response duties.[19] However, an Inspector or acting Inspector working as a Duty Officer and a Sergeant or acting Sergeant working as a Supervisor have authority to carry and use a Taser when working as a single unit.[20]

## Tactical Options and the Importance of Communication

> *For to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill.*[21]

45. The principles of the Tactical Options Model need to be applied in all circumstances.[22] A police officer must consider all use of force tactical options available to them when considering resorting to the Taser.[23]

46. The SOPs emphasise the importance of communication. They set the use of a Taser in the context of a broad range of options available to police officers in the carrying out of their duties, including options which do not involve any use of force.

47. Along with the Tactical Options Model itself, the following is a very useful section of the SOPs:

> Officers should familiarise themselves with the Tactical Options Model as outlined in *Annexure A*. This model will form the framework for use of force decision making by officers.
>
> In particular, **'communication'**; is the hub of the wheel and therefore should be used as a component of all other tactical options. Force should only be used where de-escalation or negotiation have not been successful, or where circumstances do not allow any reasonable opportunity to attempt those techniques.[24]

48. The emphasis in this text has not been added. The earlier edition also had the word communication capitalised. This extract is ripe for cross-examination and ultimately submissions in cases in which one is arguing that the police resorted to force too readily, failed to communicate effectively or when other options involving less force were available.
49. The Tactical Options Model also notes that an officer's "[a]bility to disengage, de-escalate the situation or respond to escalation is imperative."[25]

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[19] SOPs, v 2.0 at 15, [4.8] and 17.
[20] SOPs, v 2.0 at 17.
[21] Sun Tzu, 500 BC, cited in the National minimum guidelines for incident management, conflict resolution and use of force by the Australasian Centre for Policing Research, Report No. 132.1 at 1.
[22] SOPs, v 2.0 at 17.
[23] SOPs, v 2.0 at 19 and 20.
[24] SOPs, v 2.0 at 29; see a similar statement at SOPs v 1.17 at [3.12].
[25] Tactical Options Model in Annexure A to SOPs, v 2.0 at 38.

50. SC Charman acknowledged the limits of his communication:

> HEARN: Q. What communication did you make?
> A. Clearly telling him he needed to get on the ground, clearly telling him on numerous times to get on his chest to put his hands behind his back.
> Q. Did you ask him why he wasn't getting on his chest?
> A. No.
> Q. Did you perhaps say "Phillip if we try and arrest you in this position are you going to give us any trouble?"?
> A. No.
> Q. Did you try and engage him in a dialogue at all?
> A. No.
> Q. No you didn't, you kept making directions at him without trying to engage him at all didn't you?
> A. No I was engaging him with conversation.
> Q. You were engaging him?
> A. Yes.
> Q. In conversation?
> A. Well he was talking to me I was talking to him is that conversation.[26]

## A Hierarchy of Options?

51. In ***Ali Alkan*** Magistrate Heilpern referred to a hierarchy of options for arresting police:

> There are several types of force open to police who seek to arrest, grading from informing the person being arrested, to placing a hand on the shoulder, to the use of unarmed force, to the use of batons, OC Spray and firearms. In my view, the use of Tasers is very high on that scale.[27]

52. Whilst a hierarchical analysis may be important in some contexts, for example, whether a particular use of force was excessive, it is important to note that the Tactical Options Model does not establish such a hierarchy, or flowchart effect causing police officers to go from one option to the next in order.

## A Situational Model rather than a Linear or Continuum Approach

53. The policy clearly reflects an approach that is designed to shift according to the circumstances, including over the course of any given situation, and not in any particular direction around the wheel. It is a situational, rather than incremental or linear, tactical options model. A situational model places the officer in the middle of a circular arrangement of options, from which they choose the most appropriate measure, based on the characteristics of the situation at hand.[28] The model also requires police to

[26] Transcript 18.8.11 at 32.6-28.
[27] *Ali Alkan* at [63].
[28] NSW Ombudsman "How are Taser weapons used by the NSW Police Force? A Special Report to Parliament under s. 31 of the *Ombudsman Act 1974*" at 57.

continually assess and reassess the situation (and corresponding appropriate tactical option(s)).

54. A Tactical Options Model also forms part of the Operational Safety Training and Procedures Manual in the Northern Territory Police Force. There was evidence in the ***Rubuntja Inquest*** that the model was adopted in 1997 following recommendations by the Australasian Centre for Police in Research (ACPR). Before that time, the NT Police had a "use of force continuum":

> … whereby police took incremental steps increasing their level of force when faced with a particular situation, ie. if communication failed then empty-handed tactics would be considered, if that failed then the officers would gradually continue through the options increasing the level of serious incrementally.
>
> [I]t was recognised by ACPR that the difficulty with the use of force continuum is that it meant that police came under the misapprehension that they needed to continue increasing the level of force used in any given situation and had to escalate their response, rather than being able to de-escalate in any given situation… the training methodology used by NT Police now requires officers to think about al options as existing on the same plain, or field, and determine whether to escalate or de-escalate depending on the circumstances they were facing at the time.[29]

55. The current approach in NSW appears to mirror that in the NT.

56. This Tactical Options Model diagram can be very useful in terms of preparing submissions and cross-examination on what a police officer could or should reasonably have otherwise done in a particular situation.

**Options without using physical force**

57. There are a number of options available to police which involve no use of force at all.

- **Communication** This is essential in any task. It is a key element of gaining control of a situation and should be used alongside all other tactical options. Talking a person into compliance avoids the inherent dangers of a physical confrontation in which an officer or other persons may be injured. Ineffective communication, however, could result in an escalation in the threat associated with the situation and increase the danger posed by the situation to police and others.

- **Officer presence** The mere presence of a police officer at a scene may be enough to control the situation. Verbal communication may not even be needed to gain control. In the majority of situations,

[29] *Inquest into the death of Gottlieb Rubuntja* [2010] NTMC 48 at [109] to [110].

two police officers attend incidents together, which is likely to increase the chance of a person conforming to police directions.

- **Contain and negotiate** In siege, hostage or bomb threat scenarios, police immediately set up inner and outer perimeters and usually the Tactical Response Unit is engaged. It may, however, be an appropriate tactical response in less severe situations, for example, where a subject can be contained in a room of a house or building and allowed to calm down before proceeding further.

- **Tactical disengagement** This involves the police retreating from a situation. Upon arrival, police should assess the area and identify an escape route if the need arises.

**Options involving use of force**

58. In relation to use of force, the Model includes:

- **Weaponless control (or 'empty hand tactics')** This involves the use of one or more of the weaponless control techniques, such as wrist locks, defensive kicks, knee strikes and restraints. These techniques rely on pain compliance and mechanical control. Pain compliance involves the manipulation of a joint and compliance results from the subject wanting to relieve the discomfort. Mechanical control relies on the striking of major nerve points, which results in temporary immobilization, and discomfort of the subject to gain control.

- **OC spray** This device uses an airborne delivery system to convey an inflammatory agent to a subject's location to restrain or limit the subject's actions. According to the Police Handbook on "Arms and Appointments", use of defensive sprays is only for the protection of human life; or as a less than lethal option for controlling people where violent resistance or confrontation occurs or is likely to occur; and for protection against animals. When police spray someone with OC spray, they must seek medical assistance from an ambulance or hospital casualty staff as a matter of course.

- **Baton** A baton is an impact weapon. It is an intermediate level. According to the Police Handbook on "Arms and Appointments", police may use their baton if they are in danger of being overpowered or to protect yourself or others from injury.

- **Conducted electrical weapon (Taser)** Taser is a less lethal force designed to temporarily incapacitate humans or animals while minimizing fatalities and permanent injury.

- **Firearm** According to the Police Handbook on "Arms and Appointments", police are only justified in discharging a firearm when there is an immediate risk to the police officer's life or the life

> of someone else, or there is an immediate risk of serious injury to the police officer or someone else, and there is no other way of preventing the risk. Police are not to draw a firearm, point or aim it, unless they consider that they are likely to be justified in using it. The discharge of a firearm is to be regarded only as a last resort. Police are not to fire warning shots. And whenever possible, they must announce their office and call on the offender to surrender. Police should only discharge their firearm when there is no other reasonable course of action. In discharging a firearm, police must always consider that innocent people might be injured.

59. It is also worth considering whether police officers could have appropriately called for back-up or used locals (eg. family) or an ACLO to assist in the situation.

**Control Theory**

60. The emphasis on communication and negotiation, there is also a clear message that police officers should conduct their duties so as to de-escalate a situation, rather than escalate it.

> Force should only be used where de-escalation or negotiation techniques have not succeeded, or where circumstances do not allow any reasonable opportunity to attempt those techniques.[30]

61. De-escalation of a situation allows for police to gain better control of the situation. The police philosophy behind the use of force is based on "control theory": the ultimate goal is control of the situation and you need advantage for control. This requires an evaluation of the propensity for control as against causing injury. The theory is that when police have control of a situation, there is necessarily less risk of injury to police or others.

62. In ***Phillip Bugmy***, Magistrate Dunlevy found that a reasonable police officer would have allowed a calmer head to prevail, sought to negotiate further and communicate further, sought to calm everybody down including himself and his police officer colleagues and would have insisted for a longer period of time that Mr Bugmy subdue himself.

[30] SOPs, v 1.17 at 14, [3.12].

**Criterion to Draw and Cover**

63. A police officer should not even **draw, point or aim** a Taser unless they consider they are likely to be justified in actually using it according to the criteria to discharge a Taser.[31]

64. Police officers should continue to assess the environment and the situation unfolding before them and where the reason or justification for drawing the Taser ceases to exist, the Taser **should be** deactivated and re-holstered.[32]

65. Both of the above points are emphasised in the SOPs by bold text in shaded text boxes.

66. A police officer must consider whether the Taser is the best option in the situation having regard to the criteria to discharge a Taser and their training **before** even removing the Taser from its holster.[33]

67. A Taser drawn from the holster and pointed at a subject is considered a 'use of force' and should be justifiable and in accordance with the criterion to draw and cover.[34]

68. Pointing a Taser at a subject without justification, even without firing the Taser at the subject, may be considered a breach of procedure.[35]

69. Where circumstances dictate the drawing of a Taser from the holster so as to cover a subject, the Taser **must** be immediately armed by moving the safety switch to the 'F' (fire) position.[36] This is important in terms of the accountability mechanism because arming the Taser also triggers the recording of the Taser Cam footage.[37]

70. Once armed, the red laser dot is visible on the subject at the projected point of contact of the top probe.[38]

**Criteria to Discharge a Taser**

71. The SOPs set out prescriptive categories for the valid use of a Taser. Assuming one or more of those categories applies, however, the discharge of the Taser is a discretionary decision to be made by the Taser User after proper assessment of the situation and the environment.[39]

[31] SOPs, v 2.0 at 19.
[32] SOPs, v 2.0 at 19.
[33] SOPs, v 2.0 at 20.
[34] SOPs, v 2.0 at 21.
[35] SOPs, v 2.0 at 21.
[36] SOPs, v 2.0 at 19.
[37] SOPs, v 2.0 at 9.
[38] SOPs, v 2.0 at 19.
[39] SOPs, v 2.0 at 20.

There are essentially six situations in which a police officer may be justified in discharging a Taser:

- To protect human life;
- To protect themself or others where violent confrontation is occurring or imminent;
- To protect themself or others where violent resistance is occurring or imminent;
- To protect officer(s) in danger of being overpowered;
- To protect themself or another person from the risk of actual bodily harm; or
- Protection from animals.

72. Note that two key amendments have been made to the criteria in the SOPs since the December 2010 version:

    - Adding the word "violent" before the word "resistance" in the third criteria set out above.
    - Amending the criteria in relation to injury, which formerly applied to protection of police or another person **from injury** to a broader category of protection from the **risk** of actual bodily harm.

73. The SOPs emphasise the individual choice and responsibility for use of a Taser:

> Police are expected to use a Taser in accordance with these procedures and be mindful that the decision to deploy a Taser rests with them after consideration of the environment, the situation and the tactical options available to them at the time.[40]

74. The criteria to discharge a Taser provides a broad scope for use of Tasers in NSW, particularly the category in relation to risk of actual bodily harm. According to the NSW Ombudsman, "[t]he Taser SOPs are not sufficiently clear or precise, and some terms can and are being interpreted too widely."[41]

75. By comparison, the United Nations Human Rights Committee considers that Tasers should only be used in situations "where greater or lethal force would otherwise have been justified".[42] The UN Committee Against Torture has stated that a Taser should only be used as a "substitute for lethal weapons" and never used to restrain those in custody.[43]

[40] SOPs, v 2.0 at 20.
[41] NSW Ombudsman "How are Taser weapons used by the NSW Police Force? A Special Report to Parliament under s. 31 of the *Ombudsman Act 1974*" at 11.
[42] United Nations Human Rights Committee Reort on the USA (15 September 2006) at [30].
[43] United Nations Committee Against Torture Report on the USA (25 July 2006) at [35]; United Nations Committee Against Torture Report on Switzerland (2005) at [4(b)] and [5(b)].

## Judicial Opinion on Criteria for Use

76. There are varying operating procedures in other jurisdictions around Australia. The broad scope for use of Tasers has surprised some courts. The Northern Territory Coroner in the ***Rubuntja Inquest*** commented that: 'I had certainly apprehended that Tasers, upon their introduction, were to be limited in their utilisation to life threatening situations… where a weapon, threats to kill or attempts to kill had arisen and/or that a high level of aggression had been utilised before the Taser was to be used. My sense is that is the popularly held view.'

77. It was recommended in the ***Rubuntja Inquest*** Northern Territory that the standard operating procedures be amended to require a 'serious harm' pre-condition as opposed to mere 'injury' or 'risk of actual bodily' as it now stands in NSW. Whilst the Queensland guidelines required there to be a risk of serious injury to a person before an officer can deploy a Taser, it was recommended in the ***Galeano Inquest*** that the words "imminent risk" of serious harm to a person be added to the threshold test for application of a Taser. Coroner Clements commented that this would help to emphasise and guide police officers not to resort to Taser deployment unless the situation demands that course.[44]

## Relevant Criteria in the *Phillip Bugmy* Case

78. In the ***Phillip Bugmy*** case, the police relied on a violent confrontation or resistance being imminent, however the meaning of that seemed not to be adequately appreciated by SC Charman. In cross-examination there was this:

> HEARN: Q. If he remained on his knees for two, three, four, 5 minutes without doing anything aggressive towards police you were going to Taser him?
> A. In this situation yes.[45]

79. The prosecution relied on the taking off of Mr Bugmy's shirt as an act of aggression justifying the use of the Taser. Contrary to the evidence of officers Charman and Gowans, the video footage clearly depicted Mr Bugmy on his knees at the time he took off his shirt and hat.

> GRAHAM: Q. Officer is it known locally that males kneel down on the ground and put their hands behind their head and bow their head before a physical fight is about to occur?
>
> PROSECUTOR: Objection. How can the constable answer that question, "is it known locally", how would she know?
>
> GRAHAM: I refer my friend to paragraph 18 the last sentence of her statement.

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[44] *Galeano Inquest* at 99.
[45] Transcript 18.8.11 at 33.3-33.5.

> HIS HONOUR: Yes there is a reference to it being known locally that when people remove their shirts its in preparation to fight.
>
> PROSECUTOR: Yes but my friend is asking her about kneeling on the ground with their hands behind their head is it known locally, she's going down that path.
>
> HIS HONOUR: Well the witness has indicated that she does have sufficient knowledge as to what can be a precursor to a fight so in the circumstances I will allow the question.
>
> GRAHAM: Q. And so I'll ask you the question again. Is it known locally that males kneel down on the ground and put their hands behind their head and bow their head before a physical fight is about to occur?
> A. No.
> Q. Did you ask Mr Bugmy why he took his shirt off?
> A. No.
> Q. Did either of the other officers to your knowledge ask Mr Bugmy why he took his shirt off?
> A. Not to my knowledge.[46]

## Mission or Usage Creep

80. Consider also the issue of 'usage creep' or 'mission creep' – the term used to describe when the use of a device extends beyond the boundaries for use set up by policies and procedures or the original mission or intended use.[47] The NSW Ombudsman raised this as a matter of concern in its 2012 report:

> Mission creep and use of a Taser as a compliance device are significant concerns. Although these concerns are not reflected through systemic changes in data trends over time on Taser use, we did find several such incidents during our examination of individual Taser use. These findings are of concern not only because they are misuses, but also because Taser use in this way has the potential to diminish police officers' skills in communication, negotiation and weaponless control.[48]

81. There was evidence before the Coroner in the ***Curti Inquest*** from an expert in police tactics and weapons, Dr Geoffrey Alpert, a Professor of Criminology and Criminal Justice at the University of South Carolina, USA. The Coroner referred to aspects of his evidence as "highly useful" and evidence of "particular importance" including that:

> Given that height, weight and gender requirements are now waived for entry to the NSW Police Force, theoretically Tasers can neutralise any differences between an officer and a subject, but it can also cause 'lazy cop' syndrome, in which police turn to the use of Tasers too easily and too often. There is of

[46] Transcript 15.12.11 at 28.
[47] See Ryan E., 'Shocked and Stunned: A Consideration of the Implications of Tasers in Australia', 20 *Current Issues in Criminal Justice* (November 2008) at 2; and Federation of Community Legal Centres, Victoria, 'Taser Trap: is Victoria falling for it?' (October 2010).
[48] NSW Ombudsman "How are Taser weapons used by the NSW Police Force? A Special Report to Parliament under s. 31 of the *Ombudsman Act 1974*" at 11.

course a difference if an officer is alone, rather than, here, one of many against one.[49]

## Taser Misuse

82. In its 2012 report, the NSW Ombudsman identified 80 incidents – 14% of all Taser use incidents over a three-year period between 2008 and 2011 – where it was believed that the use of the Taser did not meet the Taser SOPs criteria for use. In 27 of these incidents a person had been subjected to a Taser in either probe or drive-stun mode when they should not have been.[50]

## Discharging the Taser

83. Before firing a Taser or using it in drive stun mode, the police officer should give a verbal warning to the subject where practicable.[51]

*Duration*

84. A single pull of the trigger discharges a 5-second cycle in either drive stun or probes discharged mode.[52] Holding the trigger continuously discharges a constant current until the trigger is released.[53] Any discharge of the Taser beyond this single cycle is considered to be multiple cycles or a prolonged cycle.[54]

85. According to the TASER International product warnings, most human testing of Tasers has not exceeded 15 seconds of application and none has exceeded 45 seconds.[55]

*"Probes discharged" mode*

86. When the Taser is fired, two probes are discharged. The second probe shoots out at an 8-degree angle below the top probe. This is called "probes discharged".[56]

87. Probes discharged is the ordinary method for the use of a Taser and results in "neuro-muscular incapacitation" or a direct involuntary contraction of the muscles that disrupts neuro-muscular control and affects the motor, sensory and nervous systems of the body. Neuro-muscual

[49] *Curti Inquest* at [52].
[50] NSW Ombudsman "How are Taser weapons used by the NSW Police Force? A Special Report to Parliament under s. 31 of the *Ombudsman Act 1974*" at 10.
[51] SOPs, v 2.0 at 21.
[52] SOPs, v 2.0 at 23.
[53] SOPs, v 1.17 at [5.9].
[54] SOPs, v 2.0 at 23.
[55] Annexure H in SOPs, v 2.0 at 51.
[56] SOPs, v 2.0 at 8.

control occurs if the probes attach properly to the subject and make an adequate circuit.[57]

88. A police officer should aim for the middle of someone's back, (avoiding the head) – the preferred target area. Or, in the alternative, a police officer should aim for the secondary target area – the lower torso at the front of someone's body (avoiding the face, groin or chest areas).[58] Maximum effect is achieved when discharging the Taser by aiming and placing one probe above and below the waistline of the subject.[59] Police officers are never to aim a Taser at the eyes or face of another person.[60]

*Police officers being Tasered*

89. In the past, police officers have been Tasered as part of their training. You may find that if there are a number of officers giving evidence, at least one of them (particularly those who have been in the force several years) will have been Tasered. This can be a convenient way of putting evidence before the Magistrate of the serious pain and discomfort that flows in terms of addressing s 138(3) considerations. However, the current SOPs now declare that "[u]nder **NO** circumstances will police undertake voluntary exposures from a Conducted Electrical Weapon".[61]

*"Drive stun" mode*

90. Alternatively, a police officer can "drive stun" a person by pushing the Taser gun into the person's body causing direct contact with the electrodes. Drive stun mode alone will not achieve neuro-muscular incapacitation, only pain.[62] This method – drive stun for pain compliance – is not recommended and should only be considered (and used) in exceptional circumstances.[63]

91. However, where probes discharged mode has failed and one or more probes had made contact with the subject, drive stun mode may be used to complete the circuit and achieve neuro-muscular incapacitation.

*More than one discharge*

92. The current SOPs emphasise that:

> Subjects should be allowed time to comply with police instructions *(as is reasonable in the circumstances)* before discharging a Taser on subsequent occasions. These instructions should be clear, concise and reasonable.

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[57] SOPs, v 2.0 at 24.
[58] SOPs, v 2.0 at 22. See earlier criteria at SOPs, v 1.17 at [5.7].
[59] SOPs, v 2.0 at 22.
[60] SOPs, v 2.0 at 27.
[61] SOPs, v 2.0 at 18, [6].
[62] SOPs, v 2.0 at 7;
[63] SOPs, v 2.0 at 24. See also SOPs, v 1.17 at [5.5.3] which required "exigent circumstances" for drive stun mode.

93. Where a Taser is used multiple times on a subject, each discharge or cycle must meet the criteria to discharge.[64]

94. A new feature of the SOPs is set out in relation to multiple police officers carrying Tasers: where more than one officer attending an incident is armed with a Taser, those officers should take steps to ensure that **no more than one** Taser is discharged on the subject at the one time.[65]

95. Under the earlier SOPs, continued use needed to be justified in all the circumstances following assessment of the subject and in accordance with the Tactical Options Model.[66] As set out below, the police must now satisfy the exceptional circumstances test before using multiple cycles on a person, and after reassessing the situation in accordance with the Tactical Options Model.[67]

*Discontinuing use*

96. The use of a Taser should be discontinued once the subject is effectively restrained and under control. Once a Taser has been used, officers should attempt to restrain the subject as quickly as possible.[68]

97. Officers should not employ any restraint technique that could impair the subject's respiration.[69] Police are now warned in the SOPs about the risks of positional asphyxia.[70]

**Restrictions on Taser Use**

98. Under the SOPs that operated from December 2010, there were two specific prohibitions on use:

- Unsurprisingly, a police officer was prohibited from using a Taser on compliant subjects exhibiting non-threatening behaviour.[71]
- But more importantly, a police officer was prohibited from using a Taser on a "passive non-compliant" subject.[72] In this regard, it seemed to be accepted by police that a Taser should not be used to achieve compliance or as a consequence for non-compliance of an otherwise passive subject.

99. The current SOPs expand significantly on the categories of restricted use.[73]

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[64] SOPs, v 2.0 at 23.
[65] SOPs, v 2.0 at 24.
[66] SOPs, v 1.17 at [5.10].
[67] SOPs, v 2.0 at 23.
[68] SOPs, v 2.0 at 20.
[69] SOPs, v 2.0 at 25.
[70] SOPs, v 2.0 at 25-26.
[71] SOPs, v 1.17 at [5.12].
[72] SOPs, v 1.17 at [5.13].
[73] SOPs, v 2.0 at 21.

A Taser **should not** be used in any mode:

> i. for any other investigative purpose. The video and audio capability of a Taser and Taser Cam should only be used as part of normal tactical deployment
> ii. near explosive materials, flammable liquids or gasses due to the possibility of ignition
> iii. on persons where there is a likelihood of significant secondary injuries
> (particularly concussive brain injury) for example: a fall from an elevated position
> iv. punitively for the purposes of coercion or as a prod to make a person move
> v. against passive non-compliant subjects who are exhibiting non-threatening
> behaviour which may include:
>
> a) refusing to move or offering little or no physical resistance
> b) refusing to comply with police instructions
> c) acting as a dead weight or requiring an officer to lift, pull, drag or push them in order to maintain control
>
> vi. to rouse an unconscious, impaired or intoxicated subject
> vii. to target known pre-existing injury areas of a subject
> viii. as a crowd control measure, such as for crowd dispersal at a demonstration or industrial dispute
> ix. when the subject is holding a firearm
> x. against a mental health patient solely to make them comply or submit to medication or treatment
> xi. unless it is in the performance of the officers duties or at an approved weapons training day

100. In addition, a Taser should not be used solely because it has projected light capability, for example, during a premises search.[74]

101. See also the detailed warnings and information in the TASER International Inc document "Warnings, Instructions and Information: Law Enforcement" at Annexure H to the current SOPs.[75]

## Passive non-compliance in the *Phillip Bugmy* case

102. The issue of passive non-compliance was key in the ***Bugmy*** case.

> HEARN: Q. Officer you say that he's not passive, would you agree that from the moment this incident started to the moment that you tasered him it was a fundamentally different situation?
> A. No.
> Q. When the situation started you have a man standing in close proximity to police with a knife, when you tasered him he's on his knees, and had been in that position for a minute and 14 seconds, he was unarmed, he had his hands behind his head and his was bowed towards the ground. Do you agree you were dealing with a different situation?

[74] SOPs, v 2.0 at 21.
[75] TASER International Inc "Warnings, Instructions and Information: Law Enforcement" at Annexure H in SOPs, v 2.0 at 50-57.

A. I believe the situations were different the volatility was the same.
Q. The volatility was the same?
A. (No verbal reply)
Q. The Taser upon pulling the trigger delivers an almost instant electric shock--
A. I'm aware of that.
Q. --incapacitating somebody?
A. I'm aware of that.
Q. If Mr Bugmy had launched himself at police instantly tasered?
A. I don't agree with that.
Q. What does instant mean to you?
A. Straight away.
Q. So you agree that having pulled the trigger on that Taser you were able to instantly incapacitate Mr Bugmy?
A. Yes.
Q. Now you say the volatility was the same but agree that the situation had evolved, is that your position?
A. Obviously with the knife previously he wasn't carrying a knife now.
Q. Would you agree that it's a different situation that he's no longer standing that he's on his knees--
A. Well--
Q. --do you agree that that changes the nature of the situation?
A. Well it changes the situation doesn't it not necessarily the nature.
Q. What about the fact that he clearly has nothing in his hands and his hands are behind his head, does that change the situation?
A. Well obviously like I said he had a knife before he hasn't got a knife now.
Q. And what did you do in relation to your obligations to assess and re-assess - what did you do to re-assess the situation?
A. You need to clarify that question.
Q. You agree the situation changed?
A. Yes.
Q. What did you do with regards to re-assessing what tactical option you wish to employ?
A. I don't understand the question.
Q. The Tactical Options Model requires you to assess and re-assess that is when at an incident or conducting an operation you are to constantly re-assess your situation to see whether perhaps it's appropriate to change your tactical response, do you understand that?
A. Yes.
Q. My question is, as this situation evolved what re-assessments did you make?
A. The assessment was I - there was no need for me to change my tactical option I don't believe the situation changed whether he had a knife or he didn't have a knife the volatility and the probability of a violent confrontation was always there, was still there I communicated clearly with him yet it didn't seem to be de-escalating the situation, the situation seemed to be escalating.[76]

103. The statements SC Charman made at the time tend to suggest this "cause and effect" state of mind vis-à-vis the accused's non-compliance:

[76] Transcript 18.8.11 at 30.31-32.1.

"You'll get Tasered"

…

"If you don't get on the ground, you'll be Tasered."[77]

104. The following responses in cross-examination further bear out that view.

HEARN: Q. --unless Mr Bugmy got face down on the ground it was a foregone conclusion that you were going to Taser him, you agree with that?
A. No I don't.

…

Q. Officer in your statement that you read onto the record today, you say this in relation to your communications with Mr Bugmy, this is paragraph 12, "Phillip you need to get on the ground now, if you fail to get on the ground I will Taser you" do you agree with that?
A. Yes.
Q. You were giving him a consequence for failing to get on the ground?
A. That's right.
Q. If he failed to get on the ground you were going to Taser him?
A. It's a warning.
Q. If he remained on his knees for two, three, four, 5 minutes without doing anything aggressive towards police you were going to Taser him?
A. In this situation yes.[78]

105. Con Gowans appears to have shared the same approach:

HEARN: Q… The fact that he was non-compliant meant that in this situation you weren't going to try any other tactic is that the case?
A. Correct until he became compliant.
Q. Even if he sat on his knees for five minutes non-compliant you weren't going to try and reason with him you weren't going to try and negotiate with him?
A. Not at that point.[79]

106. SC Charman's comment immediately following shooting the accused with the TASER suggests that the accused's non-compliance was the key factor in determining to use the TASER. "If you don't comply, you'll be Tasered again."[80]

## Exceptional Circumstances

107. The current SOPs also set out a number of situations in which the use of a Taser is only justified in exceptional circumstances.

The following are situations where a Taser **should not** be used unless **exceptional circumstances** exist. It should be understood that the exceptional circumstances should comply with the Criteria to Discharge a Taser and be dependent on the behaviour of the subject and the officer's

[77] Exhibit 1.
[78] Transcript 18.8.11 at 32.33-33.5.
[79] Transcript 17.8.11 at 36.37-44.
[80] Exhibit 1.

assessment of the situation, the environment and the tactical options available. This includes:

> xii. against a subject who is handcuffed
> xiii. against a female(s) suspected on reasonable grounds of being pregnant
> xiv. on an elderly or disabled subject(s)
> xv. on a child or subject(s) of particularly small body mass
> xvi. against the occupant(s) of a vehicle or the operator of machinery where there is a danger of the vehicle or machinery becoming out of control and posing a risk to the occupant(s) and/or bystander(s)
> xvii. against a subject who is fleeing. Fleeing should not be the sole justification for using a Taser against a subject. Officers should consider the subject's threat level to themselves or others and the risk of injury to the subject before deciding to use a Taser
> xviii. *Drive Stun* for pain compliance
> xix. using the Taser in a prolonged fashion by holding the trigger down for a period greater than five (5) seconds

Where a Taser has been used in *Probes Discharged* and/or *Drive Stun* as a result of exceptional circumstances, each cycle must meet the *Criteria to Discharge a Taser*. Reference is to be made in the COPS event and the Taser Sitrep outlining the exceptional circumstances.[81]

108. The TASER International Inc product warnings are annexed to the current SOPs.[82] They outline further categories of individuals who may be particularly susceptible to the effects of a Taser. They include:

- Those with heart conditions, asthma or other pulmonary conditions;
- People suffering from excited delirium, profound agitation, drug intoxication or chronic drug abuse and/or over exertion from physical struggle.[83]

109. Under the earlier SOPs, multiple use of a Taser was to be avoided where practicable and had to be justified in all the circumstances following assessment of the subject and in accordance with the Tactical Options Model.[84] Following the recent review, the SOPs now require exceptional circumstances before the use of multiple cycles should be considered and only after reassessment of the situation which caused the initial use of the Taser. In addition, after 3 cycles police **must** reconsider the effectiveness of the Taser as the most appropriate tactical option and **must** consider alternative tactical options.[85] One or more of the criteria to discharge **must** be present to justify further use of a Taser prior to each additional cycle.[86]

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[81] SOPs, v 2.0 at 22.
[82] TASER International Inc "Warnings, Instructions and Information: Law Enforcement" at Annexure H in SOPs, v 2.0 at 50-57.
[83] Annexure H in SOPs, v 2.0 at 51.
[84] SOPs, v 1.17 at [5.11].
[85] SOPs, v 2.0 at 15, [4.11] and 23. No emphasis added.
[86] SOPs, v 2.0 at 23.

> Officers are reminded that a subsequent use of the Taser or any prolonged use greater than five (5) seconds will be scrutinized and will need to be justified.[87]

110. Police are discouraged from handing over a loaded Taser to another police officer in the field. This is referred to as "hot handover". It may be considered a hazardous practice unless it is done in exceptional circumstances.[88]

111. The deployment of a Taser **should not** be used to resolve 'High Risk' situations unless there are exceptional circumstances.[89]

112. A definition of the word "exceptional" is provided in the current SOPs: being an exception, uncommon, unusual, extraordinary.[90] For the purpose of the SOPs, it refers to circumstances that would cause a reasonable person to believe that prompt and unusual action is necessary to prevent actual bodily harm to self or others.[91]

**Taser Cam**

113. The Taser Cam is an essential mechanism for improving the accountability of the NSW Police Force in the use of Tasers.

114. The SOPs recognise that covering the lens on the Taser Cam may constitute a "hazardous practice" and therefore a breach of the SOPs.[92]

115. Immediately upon return to the police station, police officers should also download the Taser data, including the Taser Cam footage.[93] There is restricted access to that footage.[94]

116. The police also have a protocol for producing Taser evidence for briefs, *GIPA* requests or under subpoena.[95]

117. Coroner Clements in the ***Galeano Inquest*** recommended that the Queensland Police Service consider an upgrade of their Taser device to incorporate a camera which is activated on deployment or alternatively consider other camera recording devices to be used by police officers. Her Honour stated that "[a] camera will not improve safety per se in the

[87] SOPs, v 2.0 at 23.
[88] SOPs, v 2.0 at 8 and 40. Under the SOPs, v 1.17, a hot handover was only permitted "in exigent circumstances where the TASER needs to be handed over to another TASER User": at [3.8].
[89] SOPs, v 2.0 at 29.
[90] SOPs, v 2.0 at 8.
[91] SOPs, v 2.0 at 8.
[92] SOPs, v 2.0 at 13.
[93] SOPs, v 2.0 at 33; SOPs, v 1.17 at [9.1].
[94] SOPs, v 2.0 at 34; SOPs, v 1.17 at [10.1] to [10.4].
[95] SOPs, v 2.0 at 34. See in particular the footnote on that page.

use of the taser but it will assist all, civilian and police alike, in the transparent use of CEW during police intervention in conflict situations."[96]

**After using a Taser**

118. Once under control, the police should remove the probes, unless they have penetrated the face, eye, neck, bone structure, groin area of any person or breast of a female; and the police should render immediate first aid to the subject.[97]

119. Officers should communicate with the subject after they have been incapacitated by the Taser, including verbal reassurance as to the temporary effects of the Taser and instructions to breathe normally.[98] Officers should continue to closely monitor the subject in custody, even after receiving medical care.[99]

120. In addition, the police must call an ambulance on every occasion that someone has been Tasered.[100]

121. The police also have to immediately contact their direct supervisor and inform them of the situation.[101] Back at the station, the police officer must report the use of the Taser in COPS and by way of a situation report for probes discharged or drive stun events.[102] Where a COPS entry is created for the event, the 'Use of Force' fields must be properly completed.[103]

122. Back at the police station, the arresting officer should notify the Custody Manager that the person was Tasered and where the probes made contact so that the information can be recorded in the Custody Management Record.[104]

**Australian case law in relation to the use of Tasers**

123. There is limited judicial commentary in Australia on the use and/or misuse of Tasers by police.

124. ***Phillip Bugmy*** and ***Ali Alkan*** are the only decisions in NSW criminal proceedings of which I am aware that are critical of police conduct in relation to the use of Tasers.

125. As noted by the NSW Ombudsman, these matters both involve a court determination that the use of force – the use of a Taser – was

[96] *Galeano Inquest* at 100-101.
[97] SOPs, v 2.0 at 25 and 30; SOPs, v 1.17 at [6.2] and [6.11].
[98] SOPs, v 2.0 at 25 and 30.
[99] SOPs, v 2.0 at 25 and 30.
[100] SOPs, v 2.0 at 25 and 30; SOPs, v 1.17 at [6.10].
[101] SOPs, v 2.0 at 25 and 30; SOPs, v 1.17 at [6.1].
[102] SOPs, v 2.0 at 30 and 32.
[103] SOPs, v 2.0 at 30.
[104] SOPs, v 2.0 at 30; SOPs, v 1.17 at [6.12].

unreasonable and not in accordance with *LEPRA*, where the NSW Police Force had previously determined that the use of the Taser *was* in accordance with the Taser SOPs.[105]

126. In ***Ali Alkan***, Sergeant McDevitt Tasered the accused twice as he was walking onto the footpath from the roadway on Oxford Street in the early hours of the morning. Following his arrest, he was searched and found in possession of prohibited drugs. The defence raised an objection under s138 in relation to the drugs obtained following the arrest. There was an issue as to the propriety of the arrest and the level of force used to execute it. Magistrate Heilpern found that on an objective view either in relation to the common law or s99 *LEPRA*, that the arrest was unnecessary.[106]

127. In relation to the Taser, Magistrate Heilpern was unimpressed by the reasons proffered by the police officer attempting to justify his use of force at [70] to [71]:

> 70 The reasons given by McDevitt for the use of such high level force are unconvincing. The various reasons given for using the Taser were; the lack of support from other police, to protect the life of the defendant, to protect members of the public from being killed or seriously injured, to protect his own safety and to stop the situation from escalating.
>
> 71 Within the ten seconds prior to firing [as was clear from the council CCTV], McDevitt was aware of three police being present in close proximity, from the Public Order and Riot Squad no less. The defendant was being compliant and mounting the footpath. No members of the public were at risk at that time. To suggest that at that point of time, out of concern for the safety of the defendant, it was reasonable to fire two darts into his back and electrocute him is fanciful. There were no attempts at talking to the defendant, or at placing a hand on his shoulder or other means listed above. To describe shooting someone with a Taser in these circumstances, as a non-escalation, is as literally true as it is patently excessive.

128. His Honour concluded that the use of force was well beyond what was reasonably necessary:

> 72 Clearly the way the defendant fell was prone to a high risk of injury after the first Tasering. He fell from the footpath onto the road, and that he did not suffer a significant head or other injury is most fortunate.
>
> 73 On any reasonable view the use of the Taser was excessive force, well beyond what was reasonably necessary in the circumstances. The reasons given for the second Tasering illustrate this further – there were four police from the Public Order and Riot Squad standing right next to the defendant. Each and collectively they had other non-lethal as opposed to less-lethal options. There had been no struggle. Even accepting [the officer's] subjective view, on an objective test it was unreasonable to Taser a second time. After the defendant rose to his feet, having been Tased once already, to suggest he

[105] NSW Ombudsman "How are Taser weapons used by the NSW Police Force? A Special Report to Parliament under s. 31 of the *Ombudsman Act 1974*" at 11.
[106] At [60].

was an immanent (sic) threat with four police from the Riot and Public Order Squad within arms length is not a reasonable conclusion.

74 It can be argued in many circumstances, including this one, that there is a greater risk to police in utilising the least force. That does not mean that it is reasonable to use excessive force where there are clearly other options available.

129. His Honour continued in assessing the use of force:

79 Applying the tests it is apparent from the CCTV that, on any objective assessment, there were other means available to [the officer] to apprehend the defendant, and there was no reasonable basis for the opinion that violent confrontation was imminent. The defendant's behaviour prior to the ten seconds leading up to the use of the Taser was reprehensible. His conduct in the last ten seconds was not. There was no reasonable basis for the view that there was a risk to human life neither at the time the Taser was used, nor in the approximately ten seconds beforehand. There was no reasonable risk to the officer being overpowered, and there were, to [the officer's] knowledge, three police present when the defendant was Tased. The defendant was, on any objective view, compliant and non-threatening. He was not armed, had not raised his fist, behaved aggressively or even verbally threatened any persons. There was, in the officer's mind, at least the possibility of drugs, and also the possibility of mental illness. The public perception, I should imagine, would be one of shock and horror at a person being Tased, thrashing about, rising to his feet, and being shocked again.

80 It was not reasonable to deploy the Taser when one considers a number of factors in clause six [of the PORS SOPs], including the overall tactical situation, the risk to the public, police and the defendant. Further there were many other options available. There were sufficient police personnel to take the defendant into custody or to search him without any need for Tasering. There was a police station only metres away.

130. As a result of finding both an illegality (unlawful use of force) and impropriety (breach of the SOPs), Magistrate Heilpern ultimately excluded the evidence pursuant to s 138 *Evidence Act.* His Honour took into account the following factors in s 138(3) in doing so:

84 As to (a) and (b), the evidence is highly probative and important. In the absence of the evidence obtained the charge must fail.

85 As to (c), the nature of the relevant offence, possession of prohibited drugs, is a summary offence at the low end of the criminal calendar. It is not an offence of violence or a property crime where there is an identifiable victim.

86 As to (d), the breaches of law and the impropriety were grave. This is not a case as in *Carr* where the police had a power to arrest, but exercised that power improperly. Unlawfulness comes in degrees. Thus for example, it is unlawful to arrest in breach of s99, in the sense that it prohibits ("must not") arrest unless criteria are met. However, a more serious example of unlawful is where a criminal offence has been committed. I have agreed with the submissions of Mr Terracini that McDevitt assaulted the defendant. It was

an unnecessary assault with a potentially lethal weapon without warning, in the back, where there was at least three other police within centimetres. It necessarily led to a wounding, then electrocution, then impact with the gutter and road, then muscular contraction (thrashing). It also led to a second episode of electrocution, impact with the road, muscular contraction and hospitalisation for the removal of a barb.

87 As to (e) I reject the contention of the prosecution that the illegality or impropriety was a split second decision. That is not the evidence of McDevitt, nor is that apparent from the CCTV. This was a deliberate, considered action of the police officer. It was wanton, in the true sense of that word. McDevitt did not waiver from his decision even when the defendant was compliant or even when he became aware that he had other police with him. He had ample time for rational decision making after the first Tasering, but elected to Taser a second time some ten seconds later.

88 As to (f) the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political Rights*. Article Nine was breached.

> **Article 9**
> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

89 As to (g) it is important to reiterate that the onus is on the prosecution on this portion of the test. Evidence is more likely to be admitted where the illegality or impropriety is being punished by other means. In this case the prosecution have sought to justify his actions with reference to inapplicable New Zealand law, police statements inconsistent with the CCTV, and the submission that the force used was reasonable. In *Ridgeway* (1995) 184 CLR 19 at 38 the High Court found that it was also relevant to consider whether the impropriety is "tolerated or encouraged by those in higher authority in the police force".

90 There is no evidence as to whether any other criminal or disciplinary proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention. Sergeant Green for the prosecution submits that there are other avenues, which may be utilized including disciplinary or complaint proceedings against police. That is correct, however there is no evidence that this has occurred or will occur in this case, particularly since the Tasering occurred nine months ago. Mr Terracini has foreshadowed civil proceedings, however it is unclear as to whether that will have any impact on McDevitt personally.

91 As to (h) the evidence would have been very simple and easy to obtain without breaching the law or behaving improperly. Part 4 of LEPRA gives the police specific power to stop and search those suspected of being in possession of prohibited drugs. Further, McDevitt could have issued the defendant with a move-on direction under Part 14 of LEPRA, or taken other steps to properly assess his level of intoxication or mental abnormality other

than electrocution. If there were ongoing risks to the defendant or the public he could have been detained as an intoxicated person under Part 16 of LEPRA.

92 Section 138(3) is not exclusionary. A further relevant factor is the seniority of the officer involved. In this case, McDevitt is a Sergeant of Police, not a junior young probationary constable. The breaches referred to above are thus all the more serious.

93 A further relevant factor is that the defendant has already suffered extreme punishment as a result of an allegation of a minor crime. This is not a case where the illegality or impropriety was a technical breach of the law, short-term detention or entry onto property. Here, the breach resulted in significant physical harm to the defendant.

131. In ***Phillip Bugmy*** Magistrate Dunlevy excluded evidence relating to the intimidation of police officers after being Tasered. His Honour made the following findings in relation to the use of the Taser:

> When I take into account all of these factors and I view the matter from the perspective of a reasonable police officer in the position of Senior Constable Charman, my finding effectively is that a reasonable police officer would have allowed a calmer head to prevail. A reasonable police officer in the position of Senior Constable Charman would have sought to negotiate further and communicate further with Mr Bugmy. A reasonable police officer would have sought to calm everybody down including himself and his colleagues and a reasonable police officer would have insisted for a longer period of time that Mr Bugmy subdue himself - and the example I would use is that he would have insisted more and continually that Mr Bugmy lay on his chest.
>
> In terms of how the situation panned out, my finding is that a reasonable police officer in the position of Senior Constable Charman would not have fired the Taser at the time that Senior Constable Charman fired the Taser.
>
> Consequently, whilst I am finding that it was lawful for the police to effect an arrest on Mr Bugmy given what had occurred in the lead up to this incident, the police did so in a way that used more force than was reasonably necessary and thus acted contrary to s 231 of the **Law Enforcement (Powers and Responsibilities) Act** 2002. Additionally, Senior Constable Charman in discharging the Taser and using it on Mr Bugmy did so in a way that was contrary to the comprehensive procedures and sensible procedures that have been laid down by the police for the handling of these types of situations and the use of a Taser.
>
> Therefore at the very least my finding is that there has been an act of impropriety which has led to the obtaining of this evidence.[107]

132. His Honour then turned to the balancing task required by s 138. His Honour referred to *Bunning v Cross* and *Robinson v Woolworths* and commented that "it seems that in these types of situations there does have

[107] Transcript 17.2.12 at 7.

to be at least some measure of curial disapproval in terms of how the evidence was obtained."[108]

133. His Honour characterised the event as one in which "Senior Constable Charman allowed a battle of wills to descend to violence and the end result was a debilitating and extremely painful experience for Mr Bugmy whereby he was Tasered" and which probably caused "fear to Mr Bugmy".[109] That characterisation and the need for curial disapproval were the chief factors which operated on his Honour's mind in determining to exclude the evidence.

134. His Honour also made further remarks including that the impropriety was "quite grave"; and that the police officer's actions were potentially inconsistent with the ICCPR "as the actions of the police do appear to have affected the inherent dignity of Mr Bugmy."[110]

135. In ***Police v Patrick Buckely*** **[2010] NSWLC 8** Lerve LCM (as his Honour then was) refused an application to exclude evidence in relation to one count of offensive language and two counts of resisting police. On the issue of the use of the Taser during the arrest, his Honour said:

> I am satisfied that on the evidence of Sgt. Owen, and the other officers that the accused was not under effective control at the time the taser was used. The accused was continually struggling and was refusing to comply with directions. In my opinion given the circumstances and conduct with which the police officers were met, no reasonable criticism could be directed to the officers for employing some method to bring the accused under effective control.[111]

136. A recent incident in Queensland in which a woman was apparently blinded in one eye after being Tasered by police may be another case to watch in the future.[112]

**Prosecution of Police**

137. A recent prosecution of two police officers for the unlawful use of a Taser in the Magistrate's Court in Western Australia resulted in convictions for assault and suspended sentences in January 2014. Aaron Strahan and Troy Tomlin Tasered Noongar/Yamatji man Kevin Spratt nine times in just over a minute. Mr Spratt had refused to be strip searched in the East Perth watch house in 2008. According to reporting of the case in the

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[108] Transcript 17.2.12 at 8.
[109] Transcript 17.2.12 at 8.
[110] Transcript 17.2.12 at 8.
[111] *Police v Patrick Buckely* [2010] NSWLC 8 at [40]. The use of force was not the sole issue in this case. Arguments were also raised in relation to propriety of the arrest, as opposed to commencing proceedings by way of a court attendance notice.
[112] "Woman blinded in one eye after being tasered by police officer", ABC News by Francis Tapim and Andree Withey (7 February 2014). Available at: http://www.abc.net.au/news/2014-02-07/queensland-police-taser-woman-in-eye/5244490.

media, the Magistrate said that imprisonment was the only appropriate sentence:

> "It was a gross error of judgment and a persistent and repetitive assault on a vulnerable victim in custody," he said. Tomlin was given an eight-month prison sentence, suspended for six months, as well as a $3800 fine.
>
> Strahan was also given an eight-month jail term, suspended for six months, and a $3250 fine.
>
> "No reasonable person could view that footage without being disturbed," Magistrate Bromfield said.
>
> He said claims from defence lawyer Karen Vernon that Mr Spratt could have been screaming in joy during the assault were "fanciful".
>
> "He was in custody. He could not flee from either of you. He was in an extremely vulnerable position," he said.
>
> Tomlin and Strahan were previously fined $1200 and $750, respectively, after an internal WA Police disciplinary hearing.[113]

138. As referred to below, a number of police officers are being prosecuted in NSW in relation to offences arising out of the ***Curti Inquest***.

**Coronial Inquests**

139. A number of coronial inquests have examined the use of Tasers by police.

140. The Alice Springs ***Rubuntja Inquest*** involved extensive consideration of the use of force by police when they attempted to take the deceased into custody under s32A *Mental Health and Related Services Act* (NT). Mr Rubuntja was a 39 year old Aboriginal man who died in Alice Springs following an attempt by two police officers to take him into custody so that he could be taken to hospital for a mental health assessment. The cause of death was found to be coronary atherosclerosis, a disease of the coronary arteries where fatty material builds up, hardens and then blocks the blood flow through the artery. He had no criminal record nor involvement with police in the past. He had some history of mental health problems although the information about that was limited. In the day or so before his death, he was observed by family and others in the community to be acting strangely. His mother sought the assistance of the police on a couple of occasions, and ultimately Cons Watson and Frost attended. A fairly chaotic scene confronted them. The deceased was in an agitated and aggressive state and talking incomprehensively. During his

[113] "Cops who tasered Kevin Spratt in WA lockup handed suspended jail terms", *The Australian Online* (22 January 2014).
Available at: http://www.theaustralian.com.au/news/nation/cops-who-tasered-kevin-spratt-in-wa-lockup-handed-suspended-jail-terms/story-e6frg6nf-1226807706190. I have been unable to obtain a copy of the Magistrate's reasons for decision or the remarks on sentence. See also *Spratt v Fowler* [2011] WASC 52.

apprehension, the Taser was discharged on 8 occasions over 2 minutes and 14 seconds. Only two discharges appear to have been successful because it appears that after that, one of the probes was not connected to the deceased and so the discharges had no effect. In addition to being Tasered twice; the deceased was also sprayed with OC spray; he engaged in a physical struggle with police; and was eventually handcuffed. Constable Frost, who fired the Taser, had been a police officer for six months at the time. Whilst the deceased was being detained on the ground, police noticed him wheezing, realised something was wrong and ultimately administered CPR. He later died at hospital.

141. Counsel Assisting in the Inquest identified a number of issues to be considered, including:

- Whether the use of the Taser and/or the OC Spray by police was reasonable and/or necessary in the circumstances.
- Whether when employing those techniques, specifically the Taser, OC Spray and restraints, Constables Watson and Frost were complying with the Northern Territory Police Force procedures and training.
- Whether the Northern Territory Police Force procedures and training should be modified in any way in light of the events flowing from this death.
- Whether the actions by the police in utilising the Taser, OC Spray or restraints caused or contributed to the death of the deceased.[114]

142. The evidence before the Coroner's Court was that the Electro-Muscular Control Device (ECD) – Good Practice Guide governed police use of Tasers, in addition to the overarching Operational Safety, Training and Procedures Manual which required that each situation where police are involved "must be carefully assessed so that only the minimum level of force will be applied to resolve each situation safely and effectively".[115]

143. In the 2008 ECD Guide, the justifications for use by an officer were:

1. Defend themselves, or others, if they fear physical injury to themselves or others, and they cannot reasonably protect themselves, or others, less forcefully; or
2. Arrest an offender if they believe on reasonable grounds that the offender poses a threat of physical injury and the arrest cannot be effected less forcefully; or
3. Resolve an incident where a person is acting in a manner likely to physically injure themselves and the incident cannot be resolved less forcefully; or
4. Deter attacking animals.

144. Coroner Cavanagh SM ultimately found that the use of the Taser was not justified in that case.

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[114] *Rubuntja Inquest* at [87].
[115] *Rubuntja Inquest* at [92] to [95].

> In hindsight, and in the circumstances where the deceased was not armed nor making any threats to kill or cause serious harm, in my view the use of the Taser was premature and inappropriate.[116]

145. Although His Honour immediately went on to state:

> However, given the speed and confusion of the event, and the agitation and non-compliance of the deceased, I do not wish to criticise the inexperienced and junior police officer himself (ie: Constable Frost). In my view, better training of officers such as Constable Frost in just when to use the Taser is necessary.[117]

146. There was evidence before the Coroner that the NT Police Force were reviewing their policy. A draft of the proposed amended 2010 ECD Guide, outlined that "the use of an ECD should be reserved to those situations where no other less forceful option would bring about a safe resolution" and "should be reserved for those situations where there is a real and imminent risk of serious harm either to a member of the public, a member of the police force (or in the case of self harm) the person on whom the ECD will be used" whereas the 2008 Guide covered situations "where there is a real and imminent risk of violence."[118] In addition, the amended version included an express prohibition on using a Taser as "a compliance measure."[119]

147. In relation to whether the NT Police procedures and training should be modified, Coroner Cavanagh remarked as follows:

> Sergeant Hansen gave evidence that police believe there needs to be an increase in the terms of the level of risk that must be reached prior to police discharging a Taser, and I agree. In my view, the community as a whole would expect that police would not utilise the Taser except in the most serious of circumstances and as a method of last resort, ie. prior to the utilisation of lethal force via a firearm. It is important that police understand this and that it is conveyed to each and every officer during the course of their training, and subsequent re-training.[120]

148. One of the factors that often seems to be at play is the overreaction by inexperienced and isolated police officers to the level of risk posed in a particular situation.

149. In the ***Rubuntja Inquest***, Constable Frost, who fired the Taser, had only been a police officer for six months at the time. Coroner Cavanagh declined to make any recommendation restricting junior police officers from carrying Tasers:

> I note that during the course of his evidence Counsel for the family asked Sergeant Hansen whether there should be a restriction on the issue of Tasers

[116] *Rubuntja Inquest* at [118].
[117] *Rubuntja Inquest* at [118].
[118] *Rubuntja Inquest* at [105].
[119] *Rubuntja Inquest* at [106].
[120] *Rubuntja Inquest* at [119].

> in relation to junior members of the force… Sergeant Hansen stated that he did not consider the logic of restricting the use of Tasers could be upheld, particularly in light of the circumstance that junior officers, immediately upon completion of their initial training and whilst still on probation, were given a firearm to use… I accept this evidence.[121]

150. Coroner Cavanagh again emphasised his view that Tasers should be reserved as an option of last resort and not to achieve compliance.

> I do however consider that it should be made clear to all police officers, and in no uncertain terms, that Tasers or ECD devices should only be deployed in cases where there is a real and imminent risk of serious harm and that all other less forceful methods have been considered and discounted. …
>
> I am encouraged by the fact that the Commissioner of Police, via the evidence of Sergeant Gregory Hansen, is continuously reviewing the use of Tasers to ensure that there is no abuse of this device. I recommend that police training in relation to the use of Tasers be such that police understand quite clearly that Tasers should not be used simply as a compliance tool and their use should only be considered in the most serious of circumstances.[122]

151. The ***Inquest into the death of Antonia Carmelo Galeano*** (Office of the State Coroner, Queensland, 14 November 2012, Findings of Ms Christine Clements, Deputy State Coroner) ("***Galeano Inquest***") examined the use of a Taser from outside a building, aimed at a man who was clearly injured, out of control and in an elevated position reaching forwards through broken glass and at risk of falling. Police had attended because the deceased's friend, Ms Wynne had called for their assistance. Over several hours, Mr Galeano's behaviour had deteriorated and he had become disturbed, incoherent, been physically violent to her and caused significant damage to property.[123] Coroner Clements found that in the circumstances the use of the Taser was "inappropriate and contrary to guidelines at the time."[124] Her Honour went on to say:

> Once Senior Constable Myles committed to use of the taser, the course was set and this created more difficulties in separating the two offices for a period. The multiple applications of the taser is a difficult area to consider. The guidelines indicate an officer was required to reassess the situation and consider other available options of the initial applications of the taser in either probe or drive stun modes are ineffective. It must be noted the guideline at the time did not stipulate a particular number of taser applications.
>
> The first issue to consider is the impact it had on Senior Constable Myles' capacity to become physically involved in attempting to restrain Mr Galeano. He was of course using his dominant hand (right) to fire and had to maintain control of the weapon and consider whether or not he should be activating the weapon again. While doing this he was of little assistance to Constable Cross, whom he knew was smaller and inexperienced.

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[121] *Rubuntja Inquest* at [121].
[122] *Rubuntja Inquest* at [122] and [132].
[123] *Galeano Inquest* at 3.
[124] *Galeano Inquest* at 58.

> If indeed Mr Galeano was attempting to equip himself with a piece of glass inside the bathroom, then Senior Constable Myles was entitled to take appropriate measures to guard against this threat and protect himself and Constable Cross. Use of the taser at that point might be considered justified, although by this time there must have been doubt it was influencing Mr Galeano's behavior even if it was seen to physically cause muscle clenching and falling to the ground. Alternatives were Senior Constable Myles' own physical size and strength aided with a baton. Had Mr Galeano gained a weapon and evidenced an intention to cause grievous bodily harm, then use of all options of force was open to the officers.
>
> It must be said that once both officers were together inside the flat, Constable Myles could and probably should have put aside the taser and entered the fray. His probationary and much smaller partner needed his help to bring Mr Galeano under physical restraint. That was evident at the outset. Senior Constable Myles had repeatedly observed the taser was not resulting in a degree of control sufficient to enable the much smaller Constable Cross to secure Mr Galeano with hand cuffs, and he could have put aside the taser and physically engaged at an earlier time.[125]

152. Coroner Clements did not consider there to be a proper basis for referral to the DPP or for disciplinary consideration in relation to the use of the Taser. Her Honour provided the following reasons:

> The findings of fact clearly establish the taser was activated 28 times but there is no clarity around the number of times the device was consciously deployed. I consider the initial decision to use the taser was against the guidelines due to the elevated position of Mr Galeano and therefore likely to contribute to a risk of injury. This initial decision caused further problems for Senior Constable Myles, particularly in restricting his physical involvement in assisting his probationary partner to physically restrain and handcuff Mr Galeano. However, I consider the circumstances in which this decision was made should be taken into account. Despite knowing Mr Galeano's past and recent history, the officers were totally unprepared for the severity of his psychotic furore induced by amphetamines. The decision making can be considered with the benefit of hindsight to be hasty but to a large extent was forced by the circumstances. The officers were faced with an extremely agitated and irrational man who was unresponsive to any communication from his friends or police officers…
>
> In this context it must be recognized it was imperative that police brought Mr Galeano under control before any other assistance could be sought. Senior Constable Myles had been recently trained to use the taser and he was instructed and expected the taser would achieve the goal when used against drug affected and highly motivated individuals. Senior Constable Myles made the decision he could not wait for further back up because of the risk to Mr Galeano, and to others should Mr Galeano escape the confines of the bathroom. Senior Constable Myles was accompanied by a slightly built probationary officer and it was quickly clear she needed help. Hindsight suggests he could have moved in physically himself at an earlier point but it was a very confined cluttered space with risks. Mr Galeano was continuing

[125] *Galeano Inquest* at 58-59.

his threats to the police officers and himself and there was a real risk he could access a possible weapon including broken porcelain and glass. In these circumstances the evidence justifies use of force alternatives to achieve the outcome of restraining Mr Galeano. It cannot be determined how many of the taser applications were deliberate and how many accidental. I have accepted the probability that some activations were unconsciously made. He then recognized he had to participate in a physical way to assist in handcuffing Mr Galeano.[126]

153. On the same day as the findings of the ***Galeano Inquest***, State Coroner Mary Jerram delivered her findings in the ***Inquest into the death of Roberto Laudisio Curti*** **[2012] NSWLC 11** (14 November 2012) ("***Curti Inquest***"). Her Honour made significant criticism of the police officers involved. Police fired Tasers at Mr Curti five times, applied two drive stun Tasers to him on seven occasions (whilst he was on the ground and handcuffed) and sprayed the contents of three OC cans at his face. A total of 11 police officers were ultimately involved in the attempts to restrain Mr Curti. Her Honour came to the following conclusions about the police actions:

> 56 Policing is a difficult and often dangerous job. The public rely on the police for protection and support which is, in the main, provided with professionalism and courage by the members of the NSW Police Force. They are entitled when necessary to use reasonable force, including weapons, to pursue suspects in vehicles at high speed, to arrest citizens and to place them in custody. As well as Tasers, they carry batons, firearms, OC spray and handcuffs. They are trained to use their bodies and appointments to control those who threaten others. These are not entitlements available to almost any other members of our society, and with them come huge responsibilities. Individual officers do not have a licence to act recklessly, carelessly or dangerously or with excessive force.
>
> 57 In the pursuit, tasering (particularly in drive stun mode), tackling, spraying and restraining of Roberto Laudisio Curti, those responsibilities were cast aside, and the actions of a number of the officers were just that: reckless, careless, dangerous, and excessively forceful. They were an abuse of police powers, in some instances even thuggish, as described by Mr Gormly. Mr Hamill's analogy with the character in Joseph Heller's Catch 22, screaming "Help, Police!" as a cry for help against police action is searingly apt. Roberto's only foes during his ordeal were the police. There was no victim other than Roberto, no member of the public who suffered an iota from his delusionary fear. Certainly, he had taken an illicit drug, as has become all too common in today's society. But he was guilty of no serious offence. He was proffering no threat to anyone. There was no attempt by police to consider his mental state. He was, in the words of Mr Alsheyab, "just crazy". Left alone, there is not a shred of evidence that he would have caused any harm, other than to himself.
>
> 58 It is of concern to me that so many of the involved police were extremely junior and inexperienced, and yet were armed with Tasers. Senior Sergeant Davis did not agree that probationary officers should not be issued with Tasers. That opinion must be queried in light of what happened on March 18,

[126] *Galeano Inquest* at 94-95.

as must current training methods. Tasers are far from toys, and cause serious pain and temporary loss of self-control. Even current SOPs warn against their multiple or prolonged use because of the risk of serious injury or death. If any officers are to be entitled to carry these significant weapons (and I recognise that they were introduced as a far safer option than a firearm), then there is a considerable need for them to be clearly taught the circumstances in which they should or should not be used, and to be educated more deeply in the exact meaning of the SOPs.

59 Probationary Constable Barling's wild and uncontrolled use of the drive stun mode suggests that he had no such understanding, despite only recently having undertaken the Taser course. A few of the other Constables seem to have thrown themselves into a melee with an ungoverned pack mentality, like the schoolboys in 'Lord of the Flies', with no idea what the problem was, or what threat or crime was supposedly to be averted, or concern for the value of life.

…

63 No thought whatsoever was given to Roberto's mental state. According to the evidence, at no stage did he act aggressively, to any member of the public or officer, other than to struggle wildly to escape the pain he was experiencing from being tasered, drive stunned, sprayed and lain upon by 'half a ton' of police officers (as Ralph described it). As all the civilian witnesses, and a few officers, told the court, at all times Roberto was merely trying to get away. No one had told him he was under arrest, or why. We now know that he was almost certainly in a psychotic state of paranoia and fear, but this did not translate into any violence other than his need to flee. While not all uses of force by Police were excessive, the attempted arrest of Roberto involved ungoverned, excessive police use of force, principally during the final restraint.

154. Her Honour made detailed findings in relation to the individual actions of the police officers including whether they were reasonable or necessary or in accordance with the SOPs.[127] Several of the police involved are being prosecuted by the DPP for offences arising out of the incident.

[127] *Curti Inquest* at [65]-[69].

## REASONABLE FORCE AND THE *LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) ACT 2002*

### The pre-*LEPRA* common law position on use of force

155. In the decision of ***Woodley v Boyd*** **[2001] NSWCA 35**, Heydon JA (with whom Foster AJA and Davies AJA agreed) compiled a review of the commentary and common law position on the use of force to effect an arrest before the introduction of the *LEPRA* regime (all emphasis added):

> 37 According to some writers, at common law, which applies in New South Wales, a person effecting an arrest may use whatever force is "reasonable" in the circumstances (Archbold: *Criminal Pleading Evidence and Practice 2000* para 19-39) or "reasonably necessary" (*Wiltshire v Barrett* [1966] 1 QB 312 at 326 and 331). "Thus **if the arrestee offered resistance, the arrestor could increase his force in proportion to the force of that resistance**": R W Harding, *The Law of Arrest in Australia* (eds Duncan Chappell and Paul Wilson) *The Australian Criminal Justice System* (2nd ed, Butterworths, 1977) p 254. A more elaborate test has been propounded in the context of whether the killing of a felon in the course of committing a felony is a justifiable homicide, or manslaughter, or murder. It was put thus by the Full Court in *R v Turner* [1962] VR 30 at 36:
>
> > "When a felony is committed in the presence of a member of the public, he may use reasonable force to apprehend the offender or for the prevention of the felony. What is reasonable depends upon two factors. **He is entitled to use such a degree of force as in the circumstances he reasonably believes to be necessary to effect his purpose, provided that the means adopted by him are such as a reasonable man placed as he was placed would not consider to be disproportionate to the evil to be prevented (i.e. the commission of a felony or the escape of the felon).**"
>
> It may perhaps be questioned whether the tests stated apply where the arresting party causes injury to the arrested party, as distinct from death. However, for present purposes it is convenient to assume, as counsel for both the plaintiff and the defendants did, that *R v Turner* states the law in that context as well. **In evaluating what is reasonable, necessary or reasonably necessary the duties of police officers must be remembered.** In *Lindley v Rutter [1981] Q*B 128 at 134 Donaldson LJ said:
>
> > "It is the duty of any constable who lawfully has a prisoner in his charge to take all reasonable measures to ensure that the prisoner does not escape or assist others to do so, does not injure himself or others, does not destroy or dispose of evidence and does not commit further crime such as, for example, malicious damage to property. This list is not exhaustive, but it is sufficient for present purposes. What measures are reasonable in the discharge of this duty will depend upon the likelihood that the particular prisoner will do any of these things unless prevented. That in turn will involve the constable in considering the known or apparent disposition and sobriety of the prisoner. What can never be justified is the adoption of any particular measures without regard to all the circumstances of the particular case."

The same duties and considerations apply where a police officer is deciding how to effect an arrest. And, **in evaluating the police conduct, the matter must be judged by reference to the pressure of events and the agony of the moment, not by reference to hindsight.** In *McIntosh v Webster* (1980) 43 FLR 112 at 123, Connor J said:

> "[Arrests] are frequently made in circumstances of excitement, turmoil and panic [and it is] altogether unfair to the police force as a whole to sit back in the comparatively calm and leisurely atmosphere of the courtroom and there make minute retrospective criticisms of what an arresting constable might or might not have done or believed in the circumstances."

38 … the question of whether touching is necessary and lawful when effecting an arrest arose. If a police officer touches but does not arrest a suspect, the conduct will be unlawful if, for example, it was designed to effect a detention against the suspect's will (*Ludlow v Burgess* (1971) 75 Cr App R 227*)*. But it will not be unlawful if the goal was to attract the suspect's attention: it may be an interference with the suspect's liberty, but it is a trivial one which does not take the officer out of the course of his duty (*Donnelly v Jackman* (1970*)* 54 Cr App R 229*)*. It is possible to effect a lawful arrest without touching the arrested person: *Grainger v Hill* (1838) *5 Scott 561 at 575*; *Greenwood v Ryan* (1846) 1 Legge 275*; Warner v Riddiford* (1858) 4 CB (NS) 180*; Alderson v Booth* [1969] 2 QB 216; *Dellit v Small, ex p Dellit* [1987] Qd R 303. Glanville Williams, "Requirements of a Valid Arrest" [1954] Crim LR 6 at 11 summarised the law as follows:

> "An imprisonment, or deprivation of liberty, is a necessary element in an arrest; but this does not mean that there need be an actual confinement or physical force. If the officer indicates an intention to make an arrest, as, for example, by touching of the suspect on the shoulder, or by showing him a warrant of arrest, or in any other way by making him understand that an arrest is intended, and if the suspect then submits to the direction of the officer, there is an arrest. The consequence is that an arrest may be made by mere words, provided that the other submits."

The difficulty of the field is illustrated by the fact that Glanville Williams' example of "touching" is, while not "physical force", nonetheless technically a battery unless it is otherwise justifiable. It is also possible to effect an arrest without using words of arrest, though it is desirable to use them if possible (*R v Hoare* [1965] NSWR 1167).

156. The common law approach required a court to assess a police officer's use of force, acknowledging the realities and role of operational policing, and without engaging in an armchair critique. It imported a partially subjective component whereby the court assesses the use of force by stepping into the shoes of the police officer, in the situation they faced, with the knowledge and experience they had of the person the subject of the force and the circumstances of the event. The test was, however, ultimately an objective one of reasonableness and necessity, balancing the need to achieve the police officer's purpose (whether it be arrest or search,

for example) against the notion that any unauthorised physical force is otherwise a battery.

## The legislative provisions for use of force: *LEPRA*

157. The introduction of the ***Law Enforcement (Powers and Responsibilities) Act 2002*** saw the legislative adoption of the term "reasonably necessary" in the context of police officers using force in exercising their duties as well as other people helping police or carrying out a citizen's arrest. Part 18 *LEPRA* reflects the pre-existing common law position.

> ***Law Enforcement (Powers and Responsibilities) Act 2002***
>
> **Part 18 Use of force**
>
> **230 Use of force generally by police officers**
>
> It is lawful for a police officer exercising a function under this Act or any other Act or law in relation to an individual or a thing, and anyone helping the police officer, to use such force as is reasonably necessary to exercise the function.
>
> **231 Use of force in making an arrest**
>
> A police officer or other person who exercises a power to arrest another person may use such force as is reasonably necessary to make the arrest or to prevent the escape of the person after arrest.

158. The term "reasonably necessary" is not defined in the legislation, however, it clearly denotes an objective yardstick for the use of force. However, as the common law and post-*LEPRA* case law states, the assessment of use of force also requires a subjective test, to the extent that it is necessary to consider what the individual officer may have perceived or believed about what was occurring.

159. The common law commentary (summarised above) on how to assess use of force is still instructive.

160. In ***DPP v CAD & Ors* [2003] NSWSC 196 at [26]**, Barr J was critical of an approach that sought to "counsel perfection" finding that a police officer's "actions have to be judged according to the way things must have appeared to him at the time."

## NSW Police Force Handbook

161. A number of tactical options may fall into the category of reasonably necessary force in any given situation. However, the NSW Police Force Handbook directs police officers to use the minimum amount of force that is appropriate.

> The goal of promoting a safe and secure community necessitates the application of force by police officers on a daily basis, at a range of levels. One of the challenges you will face lies in balancing the need to bring situations to a safe and effective conclusion with the need to avoid excessive applications of force. To avoid excessive application of force and maintain and effective incident response **you should use the minimum amount of force that is appropriate** for the safe and effective performance of your duties and proportionate to the risks you face.[128]

162. Police officers are required to record in the Event General Details screen in the Computerised Operational Policing System ("COPS") the details of instances where force is used by a police officer, against a police officer, or in other situations (as appropriate).[129]

## National Guidelines

163. The "National minimum guidelines for incident management, conflict resolution and use of force" laid down by the Australasian Centre for Policing Research define an excessive use of force as:

- any force when none is needed;
- more force than is needed;
- any force or level of force continuing after the necessity for it has ended;
- knowingly wrongful use(s) of force; and
- well-intentioned mistakes that result in undesired use(s) of force.[130]

164. The Guidelines comprehensively assess the issues relating to use of force and best practice in relation to each of the different options and methods available to police.

## Reasonably necessary force and Tasers

165. The Taser SOPs now specifically address the *LEPRA* mandate and requirements for use of force:

> The authority to use force is derived from law. Individually, police are accountable and responsible for their use of force and must be able to justify their actions at law. Any use of force by NSW Police must be reasonable as defined under LEPRA:
>
> - Section 230 (General Power)
> - Section 231 (Arrest)

[128] NSW Police Force Handbook as at August 2013 at 485. Emphasis added. Available at: http://www.police.nsw.gov.au/__data/assets/pdf_file/0009/197469/NSW_Police_Handbook.pdf.

[129] NSW Police Force Handbook as at August 2013 at 485.

[130] "National minimum guidelines for incident management, conflict resolution and use of force", Australasian Centre for Policing Research (1998) at 2. Available at: www.acpr.gov.au.

> Police should only use force that is reasonable, necessary, proportionate and appropriate to the circumstances. Police should use no more force than is reasonably necessary for the safe and effective performance of their duties. The decision to apply force, including the use of a Taser, is an individual one for which every officer will be held accountable. Every decision to use force should be the subject of continuous assessment prior to the application of another use of force.[131]

166. In the context of the use of a Taser, Magistrate Heilpern in ***Ali Alkan*** stated:

> 62 I note that s230 applies even where a function is being exercised under a different Act or law, which would include common law. I note further that the word "reasonable" imports an objective test, and the opinions of the officer himself are one important factor, but that the assessment of the force is to be determined by other factors also. These other factors include the level of criminal conduct involved, and ought to take into account that there may be little time for calm reflection in emergency situations which often confront police.
>
> 63 There are several types of force open to police who seek to arrest, grading from informing the person being arrested, to placing a hand on the shoulder, to the use of unarmed force, to the use of batons, OC Spray and firearms. In my view, the use of Tasers is very high on that scale.

167. Following ***Ali Alkan***, Magistrate Dunlevy in ***Phillip Bugmy*** held that the objective test lessened the relevance of the individual police officer's thinking and subjective point of view, although still gave SC Charman's views some weight.[132] His Honour considered that it was appropriate to take into account some of the subjective factors because applying the objective test must be done in a realistic environment.[133] Subjective factors to be taken into account might include that the police officer had been assaulted by the accused previously, or was aware that the accused had a history of violence towards police and/or others; and the stressful, chaotic, confusing or dynamic nature of the situation.

168. Magistrate Dunlevy ultimately couched the question in these terms:

> Would a reasonable police officer in the position of Senior Constable Charman, when faced with the situation that existed between the police and Mr Bugmy, use the Taser device on Mr Bugmy in the way that Senior Constable Charman used the Taser device?[134]

169. It was argued on behalf of Mr Bugmy in the Local Court that Senior Constable Charman used force that was clearly more than "reasonably necessary" and that because his action was not otherwise justified by the

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[131] SOPs, v 2.0 at 20. The SOPs cite the Australia New Zealand Policing Advisory Agency (ANZPAA) *Use of Force Guidelines* in relation to the requirement to use "no more force that is reasonably necessary…".
[132] Transcript 17.2.12 at page 6.
[133] Transcript 17.2.12 at page 6.
[134] Transcript 17.2.12 at page 6.

law of self-defence, then it amounted to a criminal assault against Mr Bugmy. Magistrate Dunlevy accepted that the firing of the Taser was more than was "reasonably necessary" and at the very least an act of impropriety but did not go so far as to directly label it unlawful or an assault.[135]

170. State Coroner Jerram referred to the evidence of a police tactics and weapons expert in the ***Curti Inquest*** in relation to the use of force and particularly in the context of the use of Tasers, including after handcuffing:

> The underlying principle is accepted that where there is a real need, any reasonable weapon of force can be used, but the use of Tasers in drive stun mode is open to abuse, which is why many American states have severe restrictions. Once a person is under control, the use of any force is a form of punishment. Once cuffed, the question must be asked, with foresight not hindsight, if there is a risk of escape; what is the impact if there is an escape, including is the person likely to commit a serious crime and what threat would thereby be posed to police or members of the public? In Roberto's case, were he to escape there was no real threat of him committing a serious crime or any threat of violence to any person. Furthermore, there were a sufficient number of officers to have controlled him without the use of Tasers or OC spray once he was on the ground. Professor Alpert said "I can't imagine agreeing with the use of a Taser after someone has [sic] handcuffed on the ground, under control."[136]

[135] Transcript 17.2.12 at page 7.
[136] *Curti Inquest* at [52].

## SECTION 138 *EVIDENCE ACT 1995* AND "OBTAINED" REASONING

171. Section 138 of the *Evidence Act 1995* provides that evidence obtained by police unlawfully or improperly or in consequence of an impropriety or contravention or a law ought be excluded unless the court is satisfied the evidence should be admitted.

172. In some cases involving the use of Tasers the question will arise as to whether offences committed after the Tasering were "obtained" by police by an unlawful or improper use of a Taser or in consequence thereof.

173. In both ***Ali Alkan*** and ***Phillip Bugmy***, it was conceded by the prosecution in the Local Court that the relevant evidence was "obtained" for the purposes of s 138 *Evidence Act*, such that if the police were found to have acted improperly or unlawfully and the balancing exercise tended towards exclusion, then the evidence should be excluded resulting in the respective charges being dismissed. Accordingly neither Magistrate Heilpern, nor Magistrate Dunlevy dealt with this issue in any substantive way.

174. In considering this issue it may be helpful firstly to consider some different categories of evidence that might be sought to be excluded under s 138(1).

1. 'Real' evidence eg. articles found by search, results of breathalyser tests, recordings of conversations, fingerprint, DNA or other forensic procedure material.
2. Admissions to police.
3. Evidence intentionally procured or induced by some harassment, manipulation, some level of encouragement, persuasion or importunity by police in relation to the commission of an offence, eg. supplying drugs or receipt of stolen property.
4. Evidence "in the aftermath" of the impugned conduct in the form of alleged further offending which stemmed from or is causally linked to the impugned conduct, eg. assault/resist/intimidate police, offensive language/conduct, damage property, fail to comply with move-on direction.

175. In ***Phillip Bugmy*** the evidence of intimidation of the police officers fell into the last category. Where the evidence sought to be excluded relates to discrete actions by your client after the improper or unlawful conduct, the issue of whether that evidence was "obtained" for the purposes of section 138(1) *Evidence Act 1995* may arise.

176. The last decade has seen a number of Supreme Court cases (familiar in ALS circles) in which the issue arose. In some decisions, the findings are in *obiter dicta* only and the issue was not decided in ***CAD*** at all.

***Robinett v Police* (2000) 78 SASR 85** per Bleby J on 24 Nov 2000

177. The accused was arrested for a number of offences and transported to another police station. The accused had been sprayed with capsicum spray during the arrest. The accused was placed in the observation cell. The accused made repeated requests for medical treatment, which were ignored by police. The accused made the following threats:

> "I will fucking kill you. I will bury the fat cow. I will get you Michelle and your husband. I will bury you, you fucking dog. I will rape the arse out of you and as for the rest of you…"[137]

178. The accused successfully appealed against the Magistrate's decision to admit the evidence of the threats.[138] Bleby J of the South Australian Supreme Court considered three questions in the context of the common law "public policy discretion" to exclude the evidence:

> The first is whether the conduct is of a type that could give rise to the exercise of the public policy discretion. Second is whether the conduct caused or contributed to the commission of the offence. If the answer is 'Yes' to both of those questions, it must then be asked whether it called for the exercise of the discretion to exclude the evidence.[139]

179. Bleby J considered a number of failures by the police put forward on behalf of the accused, including a failure to properly caution the accused, a failure to administer bail rights. Ultimately the case turned on the police failures in relation to providing medical assistance to the accused. His Honour made the following remarks in relation to the facts:

> 53 It can therefore be seen that at the time when the appellant was placed in the cell, shortly before he uttered the material threats and abusive language, he had made several unheeded and unacknowledged requests for medical assistance associated with the irritation to his eyes and alleged subjection to an attack of asthma.
>
> 54 The appellant's increasingly offensive language and ultimately the threats directed at Senior Constable Smith would appear to have been a direct consequence of a number of factors. The first was the ongoing irritation to his eyes caused by the capsicum spray. Second was the ignoring by police of his concerns over asthma and his requests for a doctor. There was his enforced confinement in the holding cell and, of course, the appellant's intoxication. Absent any one of those factors, the words in question may not have been uttered. One would have to conclude that the failure to respond to the requests for assistance was a contributing cause to the ultimate threats and abusive language.

[137] *Robinett v Police* [2000] SASC 405 [7].
[138] *Robinett* at [81].
[139] *Robinett* at [56].

180. Bleby J held that the behaviour of the police:

> … was not only inappropriate, but…fell into that category of impropriety or unfairness that gives rise to the exercise of the public policy discretion. It was a neglect which, if allowed to persist, was almost certain, in the circumstances, to give rise to the type of offending which in fact occurred on this occasion.
>
> I repeat: I do not consider that the police officers in this case allowed the situation to develop merely for the purpose of encouraging the commission of another offence. However, their inaction almost inevitably had that effect.
>
> …
>
> The conduct [of the police] was not illegal. On the part of the police officers, there was probably not even a conscious apprehension of the impropriety or unfairness. There was nevertheless a conscious failure to act when some ameliorating steps should have been taken.[140]

181. His Honour imported a question of proportionality in relation to the exclusionary discretion.

> … assuming the improper police conduct (or misconduct) was significant and the offences were not of medium to major seriousness, the evidence may be excluded.[141]

***DPP v Carr* (2002) 127 A Crim R 151; [2002] NSWSC 194** per Smart AJ on 25 Jan 2002

182. ***Carr*** dealt with "the well known trilogy of an ill-advised arrest where a summons should have been employed, resist police and assault police and, as so often happens, the utterance of coarse threats by a moderately intoxicated man."[142] Mr Carr was originally arrested for offensive language. He threatened the police whilst in the dock at the police station:

> "I'm going to get you knocked, you go to Sydney I'll get you killed, you and that other cunt, I'm going to kill your kids and I'm going to kill you. I'm going to get my brothers to cut your throat, I'm going to kick the cunt right out of you."[143]

183. At first instance, the Magistrate found that "the evidence relating to resist police, assault police and intimidate police was obtained in consequence of an impropriety in the sense that the actions and words that flowed after the words 'you are under arrest' would not have occurred had the officer not acted improperly."[144] The evidence was excluded

[140] *Robinett* at [69] to [70] and [73].
[141] As referred to in *Carr* at [66].
[142] *Carr* at [68].
[143] *Carr* at [7].
[144] *Carr* at [51].

pursuant to s138. On appeal, Smart AJ upheld the Magistrate's decision on this point.[145] Smart AJ reflected:

> The consequences of the employment of the power of arrest unnecessarily and inappropriately… are often anger on the part of the person arrested and an escalation of the situation…[146]

184. His Honour referred to some different categories of evidence in relation to past offending and offending following improper police conduct:

> There is a distinction between the commission of further offences by a defendant as a result of improper police conduct which precipitated them and the evidence of them which becomes available to be adduced on the one hand, and evidence improperly obtained as to past offences and unconnected with further offences. Can s138(1) operate to render inadmissible evidence obtained of the commission of further offences following an improper act or omission by the police such as an ill-advised arrest as to an earlier offence and/or the withholding of medical treatment? A number of situations may arise. The person arrested may in a state of anger at his ill-advised arrest commit a serious crime, for example, attempted murder or maliciously inflict grievous bodily harm with intent to do so. In such a case, the evidence of those subsequent acts would be admitted. On the other hand he may commit a relatively minor crime such as a mild assault or resist arrest. Further, he may, if moderately intoxicated, utter threats never intended to be carried out. There is also the example of a reaction at the police omitting to summon necessary medical or other attention when they should have done so.[147]

185. Smart AJ similarly applied a proportionality test.

> … if the offences were moderately serious to serious and disproportionate to an ill-advised arrest it would not be possible to contend that the evidence of such offences was obtained in consequence of an impropriety. A question of degree is involved.[148]

***DPP v CAD & Ors* [2003] NSWSC 196** per Barr J on 26 March 2003

186. ***CAD & Ors*** involved a number of young persons who were charged with assaulting an off-duty police officer in circumstances where he was seeking to arrest another unidentified young person, apparently their friend, for throwing a rock at his car at about midnight in Maroubra. Magistrate Mulroney excluded the evidence of any assaults upon finding that the arrest of the unidentified young person amounted to an impropriety as extracted in Barr J's decision at [19]:

> 19 The magistrate stated his conclusion in these words -
>
> > I am satisfied that the behaviour of Det Senior Constable Johnston amounted to impropriety. Before deciding to haul the youth off in the

[145] *Carr* at [70].
[146] *Carr* at [36].
[147] *Carr* at [63].
[148] *Carr* at [68].

> direction of Maroubra Police Station he should have taken steps to ascertain the identity of the youth and then considered, if satisfied as to his identity, whether to proceed by way of summons. It was not necessary in the circumstances to take the youth to the police station for questioning. Once his identity had been established, arrangements could have been made for him to be further interviewed at a later stage.

187. Barr J stated that:

> There were raised for the magistrate three distinct questions, namely whether the conduct of the complainant was unlawful or improper, if so whether the evidence relied on by the prosecution was obtained in consequence of that unlawfulness or impropriety and, if so, whether, striking the balance mandated by s 138, the evidence was inadmissible. The magistrate decided all three questions in favour of the defendants.[149]

188. The Crown appealed against all three decisions. Barr J held that a finding of impropriety was not open to the Magistrate and remitted the matter to the Children's Court for redetermination according to law. It followed that Barr J did not determine the second question on whether the evidence was "obtained" for the purposes of s 138(1). His Honour went on at [30] and following to criticise the Magistrate's approach to s 138(3) in circumstances where there was no evidence in relation to the nature of the assaults against the off-duty officer.

***DPP v Coe* [2003] NSWSC 363** per Adams J on 1 May 2003

189. ***Coe*** was another Crown appeal from a Magistrate's decision to exclude evidence pursuant to s138 and accordingly dismiss offences of assault occasioning actual bodily harm, assaulting a police officer in the execution of his duty occasioning actual bodily harm, and common assault brought against the accused. This decision goes against the stream of authority in *Robinett* and *Carr* and the later decision of *AM*.

190. The alleged offences arose from an incident in Kings Cross at about 1am. The impropriety in question was the alleged unlawful arrest or attempted unlawful arrest of Raymond Munro. Two patrolling police heard shouting and arguing from a group. They saw Mr Munro was injured and bleeding. The police approached him and asked what had happened. Mr Munro replied, "It's nothing to do with you, just fuck off, you dog". The police continued to try to find out what had happened and also offered to call the ambulance. Mr Munro continued to swear at police. The police told Mr Munro to stop swearing and continued to ask what had happened, saying "Come here, tell me what happened". Mr Munro was pacing and waving his arms frantically. Con Baker reached out and "just managed to touch" Mr Munro's arm in order, he said "to calm him down." Mr Munro pushed his arm against him, forcing the police officer to take a half step back. The accused then punched the right side of Con Baker's head. The

[149] *DPP v CAD & Ors* [2003] NSWSC 196 at [4].

police officer fell down and the accused continued to assault him by kicking his head whilst he was on the ground. Other police helped Con Baker and the accused and Mr Munro were arrested. Con Baker suffered a severe and very painful laceration to his head behind his right ear requiring six stitches.

> [On behalf of the accused it was] submitted that the questioning of Mr Munro by Constable Baker amounted to an arrest or an attempted arrest, having regard to the fact that the questions were asked by a uniformed and armed police officer, that words of compulsion or demand were used, that questions were repeated despite the refusal of Mr Munro to answer them, that the constable took steps towards Mr Munro as he walked away, and that he touched Mr Munro. The [DPP] submitted that there was no arrest – nor was there an attempt to make an arrest – arguing that it was evidently reasonable to suspect that someone had committed an unlawful and quite serious assault and, this being so, there could be no doubt that it was Constable Baker's duty to investigate this suspicion and his statement that he "had to find out what happened" meant no more than this. It was also right for him to attempt to get Mr Munro to accept treatment for his injury, which was potentially very serious. Both parties agreed that there was no lawful basis for an arrest. The learned magistrate held in favour of the defendant, stating that the Constable did make, or attempted to make, an unlawful arrest. Her Worship held that the words of the constable, despite the protests of Mr Munro, together with putting out his hand amounted to detention.[150]

191. Adams J distinguished Bleby J's approach in *Robinett* as a feature of the common law, as opposed to the test required under s138(1) *Evidence Act 1995*. Referring to the three questions extracted above, His Honour stated:

> There appears to me to be a significant difference between the formulation of his Honour's second question and that which falls to be asked under sub s138(1) of the Act. … [They] are clearly not the questions, in substance or in form, posed by s138 of the Act.
>
> … It may be (if *Robinett* be right) that the common law has moved beyond s138 but I do not see how that can justify an approach that ignores the plain meaning of "obtained" by interpreting it as no more than "brought about by" let alone (as seems to be the case here) "triggered by".[151]

192. Ultimately, Adams J held that something more than "a mere causal link" or "trigger" is necessary to bring evidence within the scope of s 138(1).[152]

> The word "obtained" is in ordinary parlance and should not be unduly or artificially restricted: *Haddad & Treglia* (2000) A Crim R 312 per Spigelman CJ at [73] but it cannot apply more widely than circumstances which fairly fall within its ambit. Where "real evidence" is indeed obtained as a result of impugned conduct, then the case would, of course, come within the purview of the section, even if the conduct was not undertaken for the purpose of acquiring the evidence. Where, however, the evidence in question is that of

[150] *Coe* at [6].
[151] *Coe* at [13] and [21] to [22].
[152] *Coe* at [12].

> offences which have been caused by the impugned conduct, it does not seem to me that the evidence will have been "obtained" unless something more is shown than the mere causal link: the circumstances must be such as to fit fairly within the meaning of "obtained", almost invariably because the conduct was intended or expected (to a greater or lesser extent) to achieve the commission of offences.[153]

193. Adams J seems to leave the door open, however, in his Honour's next remark:

> In some cases, of which *Robinett* and *Carr* may be examples, there could be such an expectation that offences will result from the impugned conduct that it will be reasonable to say, as an objective matter, that they were "obtained" by that conduct but these situations will be rare.[154]

194. His Honour also commented that there was no distinction in the circumstances of that case to be made between evidence that was improperly obtained or obtained in contravention of a law and evidence that was obtained in consequence of an impropriety or in consequence of a contravention of a law.

> I interpolate that in the present case, I do not think that there is any relevant difference between the meanings of paras 138(1)(a) and (b) by the use of the words "in consequence of…" in the latter paragraph.[155]

195. In analysing *Carr*, Adams J seemed to indicate that the principle of proportionality is part of the requirement for causation within the scope of the term "obtained":

> It is, I think important to note (as a matter very relevant in the present case) that his Honour [Smart AJ in *Carr*] was of the view that "if the offences were moderately serious to serious and disproportionate to an ill-advised arrest, it would not be possible to contend that the evidence of such offences was obtained in consequence of an impropriety"… This was a reference, not to the balancing process prescribed by the concluding words of subs138(1) but to the necessity of establishing a causal link between the impropriety and the offences committed by the defendant. A disproportionate reaction meant that, although the impropriety was the occasion for the offences, it was not the cause, which must then be found in the voluntary acts of the defendant. Applying this reasoning to the present case, the mere fact that the unlawful arrest or attempted unlawful arrest "triggered" what followed, did not dispose of the problem of causation and the failure of the learned magistrate to consider this matter amounted to a fundamental error of law.[156]

196. However, in a seemingly reverse conflation of the concepts, Adams J went on to make the following finding:

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[153] *Coe* at [24].
[154] *Coe* at [24].
[155] *Coe* at [22].
[156] *Coe* at [23].

> It is obvious from the facts here that the alleged response of the defendant to the constable's conduct was so disproportionate and so serious an offence that, even if it was "obtained" by that conduct, was not caused by it.[157]

197. It is on the basis of that finding, that Hall J later declared Adams J's findings on the "obtained" point to be obiter.

***DPP v AM* [2006] NSWSC 348** per Hall J on 2 May 2006

198. The final decision in this line of cases, also a Crown appeal, is *AM*, a decision of Hall J. AM was charged with resist police, assault police and offensive language. She pleaded guilty to the offensive language and in the Children's Court the two other offences were dismissed following a successful s138 objection. Hall J determined the appeal on the basis that there was no impropriety justifying the application of s138(1). His Honour also decided that the Magistrate erred in law by failing to give reasons for his decision and then went on in *obiter* to consider the meaning of "obtained" for the purposes of s138(1).

199. The accused, a young person, was in a group of people who were told to move on from near a shopping centre by police following a report of a broken window. As the police were leaving, the group returned and the young person called out "Fuck you. Fuck off pigs". The facts as outlined in Hall J's judgment at [11] to [12] continue:

> 11 Constable Molyneux stopped the vehicle and Constable Thomas spoke to one of the 18 year old males in the group. The defendant approached the police officers and swore again. This was in the vicinity of Woolworths. Constable Molyneux, in her statement, referred to the fact that, at this point, she could see people coming in and out of Woolworths and, at that time, asked the defendant her name and the defendant replied, "Get fucked. I'm not telling you". Constable Molyneux then reached for the defendant's bag as Constable Thomas said, "We need some identification then you can leave". The defendant responded, "Fuck off. You're not getting it".
>
> 12 The defendant and another (unspecified and unidentified) member of the group lunged at Constable Molyneux and grabbed the bag. The 50 year old woman in the group said, "Her name is …" (stating only the defendant's first name). Constable Molyneux turned to the defendant and said, "This is your final warning. You need to move on and stop using offensive language". The defendant replied, "Get fucked, you pig". Constable Molyneux then arrested the defendant. Another member of the group intervened, calling out to the defendant to run away and the defendant allegedly ran off. She was subsequently apprehended and allegedly then committed the "assault police" offence.

200. His Honour surveyed the fundamental principles of arrest as a last resort, and particularly the law in relation to arrest of young people (although the age of the accused was not known to the police) and went on to state:

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[157] *Coe* at [23].

> Notwithstanding that the offence to which the defendant pleaded guilty was at the lower end of the criminal scale, I do not consider that the arrest was improper within the meaning of s.138(1). The factual circumstances indicate that the complainant was faced with a defiant juvenile who persisted in a course of conduct, notwithstanding that initially police had allowed the group, including the defendant, to move on, and subsequently issued a warning to the defendant, which was ignored. The request made to the defendant to identify herself was met by a further offensive statement by way of adamant refusal. As circumstances unfolded up to the point of arrest and as demonstrated by the defendant's subsequent actions in running away, there was present a risk of flight as in the case of CAD (supra). I do not consider that the statement of the female witness tendered before the magistrate established to the requisite degree of clarity that information of a relevant identifying nature had in fact been provided to police, or, in particular, drawn to Constable Molyneux's attention before the arrest. Given that that witness was not called to give evidence, the magistrate, in my opinion, was required to accept the otherwise uncontradicted evidence of Constable Molyneux. In the circumstances leading to the arrest, I do not consider that the failure of the police officer to embark upon an inquiry as to the defendant's age in itself establishes impropriety.[158]

201. His Honour was concerned not to confine the concept of "obtained" to deliberate or intentional conduct.

> The fact that evidence may be obtained either by deliberate action or by inadvertence during the course of an investigation underlies the proposition referred to by Smart, AJ. in *Carr's* case and by Howie, J. in *Cornwell* that an impropriety or contravention referred to in s.138(1) is not necessarily associated with conduct that is wilful or intentional.[159]

202. Hall J disagreed with Adams J's approach in *Coe*. His Honour made the following remarks at [80] to [82]:

> Before identifying the area of disagreement, I record the following propositions:-
> (a) Where a law enforcement officer intentionally engages in purposive action designed or expected to procure or induce the commission of offences, then plainly evidence of those offences will have been "obtained" in relation to them.
> (b) Where a person is subject to an ill-advised or unnecessary arrest but the suspected offender acts in a way which amounts to a disproportionate reaction, an issue may arise, as it did in *Coe*, as to whether that offence can, as a matter of causation, be said to be a consequence of the arrest.
> (c) In other circumstances, however, offences that stem from an ill-advised and unnecessary arrest, may objectively be considered the anticipated or expected outcome and so "obtained" for the purposes of s.138. *Carr* is such a case.
> 81 The reservation that I have expressed in the preceding paragraph relates to the observation of Adams, J., that in the context of offences that are said to stem as an unintended consequence from an arrest, that there is a need

[158] *AM* at [61].
[159] *AM* at [73].

> to establish "conduct that was intended or expected (to a greater or lesser extent) to achieve the commission of offences" as a necessary and separate element in order to satisfy the notion of "obtained" in that context.
>
> 82 In the passages quoted from the judgment of Adams, J. set out in paragraphs [77] and [78] above, the proposition is advanced that in cases of the kind referred to in the preceding paragraph, the word "obtained" in s.138(1) requires, in addition to a causal nexus, that the impugned conduct must either be "intended" or "expected" to achieve the commission of offences. However, cases involving an ill-advised or unnecessary arrest which result in unintended consequential offences by definition lack a purposive element. In other words, offences stemming from such an arrest occur without any intention on the part of the arresting officer to provoke such offences. It is, for that reason, that I cannot agree with Adams, J. that in such cases the word "obtained" cannot be satisfied unless the causal nexus is also accompanied by "something more" in the nature of "intended" conduct. I do, however, with respect agree with his Honour's observation that in order in such cases for evidence to be "obtained", it may, in some such cases, be necessary that the conduct (the arrest) be of a kind that could be "expected" to give rise to the commission of further offences. The reference to an "expectation" by Adams, J. in Coe may, in some cases, be a material aspect and Robinett and Carr could, as his Honour observed, be seen as examples of that proposition.

***Police v Bugmy*** **[2012] NSWLC** per Dunlevy LCM on 17 February 2012, unreported

203. In ***Phillip Bugmy***, it was submitted, that the evidence was "obtained" in a manner that rendered the evidence inadmissible unless admitted as a matter of discretion. On the defence case, the Court was dealing with an unlawful and improper arrest involving excessive force followed by threats allegedly made after the accused was detained at the police station. It was submitted that the execution of the arrest (as opposed to the basis of the arrest itself) could be characterised as "ill-advised and unnecessary".

204. It was further submitted that the action taken by SC Charman escalated the incident and that the alleged intimidation flowed from that. The arrest and the conduct of the accused at the police station shortly thereafter were said to be "closely related and interconnected".[160]

205. Importantly for the purpose of the making of these arguments was that, Mr Bugmy explicitly referred to being shot with the Taser during the alleged intimidation:

> "You shot me you cunts, this is my town and I'm going to get bail tomorrow and I'll come back and I'll shoot you cunts. You wait, you're all dead."[161]

206. In this way, it was submitted that the use of the TASER contributed to the commission of the alleged intimidation offence and that on balance, but for the use of the TASER by SC Charman the words would not have been uttered and the evidence would not have been available. Note here that

[160] *Carr* at [68].
[161] Transcript 18.8.11 at 5.13-23.

both *DPP v Carr* and *Robinett* were threat cases and did not involve any direct content link between the impropriety and the words uttered in the threats. It is therefore not necessary to confine an argument in this way.

207. On the proportionality issue, it was submitted that it could not be said that the alleged intimidation was a moderately serious to major serious offence in the scheme of all criminal offences or in the particular example of the alleged offence; and secondly, the threats alleged were not disproportionate to the unlawful arrest and to a significant degree they were responsive to that unlawful arrest.

208. In relation to the threats and utterances by Mr Bugmy, Magistrate Dunlevy did comment that "particularly for the latter comments… there is a direct causal link between the words which were spoken by the defendant and his being shot earlier on with a Taser by Senior Constable Charman. And so there does appear to be a direct causal link and there is not a relationship or any level of distance or remoteness between the comments and the incident which forms the reals subject of the objection."[162] However, upon determining that the conduct of police amounted at least to an impropriety, (and in the context of the prosecution concession of the point) Dunlevy LCM simply held that it "led to the obtaining of this evidence" and moved on to the balancing exercise and s138(3) considerations.

[162] Transcript 17.2.12 at 4.47 to 5.1-2.

## THE ROLE OF THE MEDIA AND OPEN JUSTICE

209. The local media was very interested in the ***Bugmy*** case and eventually a radio journalist from ABC in Broken Hill made an application to Magistrate Dunlevy to obtain a copy of the Taser Cam video footage for dissemination in the news media.

210. The decision of Magistrate Dunlevy granting the application is available on the NSW caselaw website: ***Police v Phillip Charles Bugmy*** **[2011] NSWLC 28**.

211. The Taser Cam footage, which on the prosecution case, captured two of the four allegations against Mr Bugmy, was tendered in the substantive proceedings by the prosecution as Exhibit 1. Upon its entry into evidence, the ABC made an application pursuant to **Rule 8.10 of the Local Court Rules 2009** that provides for access to copies of court records:

> (1) This rule applies to committal proceedings, summary proceedings and application proceedings.
> (2) A party to the proceedings is entitled to:
> (a) access to a copy of the court record or transcript of evidence taken at the proceedings, or
> (b) on payment of any fee prescribed by regulations made under the Criminal Procedure Act 1986 or the Local Court Act 2007, obtain a copy of the court record or transcript of evidence taken at the proceedings.
> (3) A person who is not a party to the proceedings may, with the leave of the Magistrate or registrar:
> (a) have access to a copy of the court record or transcript of evidence taken at the proceedings, or
> (b) on payment of the prescribed fee, obtain a copy of the court record or transcript of evidence taken at the proceedings.
> (4) The Magistrate or registrar may grant leave for the purposes of subrule (3) if of the opinion that it is appropriate to do so in the circumstances.
> (5) In determining whether it is appropriate to grant a person leave for the purposes of subrule (3), the Magistrate or registrar is to have regard to the following matters:
> (a) the principle that proceedings are generally to be heard in open court,
> (b) the impact of granting leave on the protected person or victim of crime,
> (c) the connection that the person requesting access has to the proceedings,
> (d) the reasons access is being sought,
> (e) any other matter that the Magistrate or registrar considers relevant.

212. The term "court records" is defined in the Encyclopaedic Australian Legal Dictionary to include:

> "The official collection of pleadings, interlocutory applications, exhibits, affidavits, orders, and transcripts of testimony which have arisen during the course of proceedings."

213. It is apparent from Rule 8.10 that there is a different access regime depending upon whether the person who seeks access to the court record

is or is not a party to the proceedings. A party has access to the documents as of right whereas a person who is not a party can only obtain access if leave to do so is granted by the Magistrate or registrar.

214. Notwithstanding that the prosecution tendered the video footage in their case and relied on it heavily to make out the allegations against Mr Bugmy as well as seek to justify the actions of SC Charman, the prosecution opposed the ABC's application for copy access to the exhibit until the conclusion of the proceedings. The application hit its first stumbling block when the police raised the issue of copyright over the Taser footage. As is clear from s103B *Copyright Act 1968* (Cth), there is essentially a media exception:

> **103B Fair dealing for purpose of reporting news**
>
> (1) A fair dealing with an audio-visual item does not constitute an infringement of the copyright in the item or in any work or other audio-visual item including in the item if:
>
> (a) it is for the purpose of, or is associated with, the reporting of news in a newspaper, magazine or similar periodical and a sufficient acknowledgment of the first-mentioned audio-visual item is made; or
>
> (b) it is for the purpose of, or is associated with, the reporting of news by means of a communication or in a cinematograph film.

215. There is also a specific exception in relation to judicial proceedings and a report thereof.[163]

> **104 Acts done for purposes of judicial proceeding**
>
> A copyright subsisting by virtue of this Part is not infringed by anything done:
>
> (a) for the purpose of a judicial proceeding or a report of a judicial proceeding; or
>
> (b) for the purpose of seeking professional advice from:
>
> (i) a legal practitioner
>
> …
>
> (c) for the purpose of, or in the course of, the giving of professional advice by:
>
> (i) a legal practitioner
>
> …

216. Mr Bugmy supported the ABC's application, which was an unusual feature in the context of the case law on point.

217. At the time of the application, the prosecution case was still open. Con Gowans and SC Charman had given evidence and had been

[163] It was considered that the Taser footage fell into the category of "subject-matter other than works" but it may be that an issue arises in another case that involves an original literary, dramatic, musical or artistic work. There are similar provisions for fair dealing for the purpose of reporting news and also reproduction in judicial proceedings.

cross-examined extensively. The substantive matter had been adjourned part-heard for several months.

218. The application raised the important principle of open justice. Magistrate Dunlevy outlined a number of the pertinent principles as he surveyed the ABC's submissions at [10] to [13]:

> The fundamentally important nature of this principle was aptly stated in the Court of Appeal judgment of Spigelman CJ in *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344 at 352, which I respectfully quote:
>
> > It is well established that the principle of open justice is one of the most fundamental aspects of the system of justice in Australia. The conduct of the proceedings in public including, relevantly, the taking of the verdicts after a criminal trial, is an essential quality of an Australian court of justice.
>
> 11 Spigelman CJ then went on to observe at 353 that an important aspect of this principle of openness is the ability of the media to report on court proceedings:
>
> > The entitlement of the media to report on court proceedings is a corollary of the right of access to the court by members of the public. Nothing should be done to discourage fair and accurate reporting of proceedings.
>
> 12 During submissions for the ABC I was also referred to other cases where this reasoning had been applied in similar circumstances to the current application. Relevantly I have been asked to consider that in the case of an item marked as a public exhibit there is a *prima facie* right of the public to have access to such material which should only be refused in wholly exceptional circumstances: *R v Xu (No 1)* (2005) 152 A Crim R 17 at 21 per Kirby J.
>
> 13 The ABC has also submitted that the media are ' *the eyes and ears of the general public* ' (a term referred to in *Attorney-General v Guardian Newspapers Ltd (No 2)* (1990) 1 AC 109 at 183) and that this is an important factor as not all members of the public can attend court proceedings (as observed by Johnson J in *R v Sam (No 16)* [2009] NSWSC 544 at [16]). In this regard the ABC submits that them being granted access to the DVD is not enough to give effect to this principle and that in order for them to be the eyes and ears of the public, the public needs to be able to see the contents of the DVD.

219. His Honour then outlined the police arguments:

> 17 In furtherance of their position the Police have first referred to rule 8.10(3)(a) and submitted that the principle of open justice is subject to exceptions and limitations. It was pointed out to me that in *R v Sam (No 16)* Johnson J did not grant access to the relevant exhibit until after the subject trial was concluded and in a previous application dealt with in *R v Sam (No 5)* [2009] NSWSC 543 the media were refused access to the relevant exhibits. The Police also referred to *R v Xu (No 1)*, a case where access to exhibits was

denied by Kirby J on the basis that the public airing of their contents carried a measurable possibility of causing mental harm to the accused.

18 In relation to rule 8.10(3)(b) and (e) the Police have submitted that I should take into account the impact that releasing the footage will have upon the police who are the alleged victims in this matter as well as other factors that may affect the Wilcannia community. In that regard, the Police have presented sworn evidence in the form of an affidavit made by Inspector David Gallagher which forms Exhibit 1 in this application. Inspector Gallagher is an experienced police officer who is familiar with Wilcannia through his duties. He has an interest in community relations with Aboriginal people, is the chairman of the local Rugby League and is a member of the Broken Hill City Council. He is therefore well qualified to give evidence in relation to practical policing issues as well as broader community relations issues.

19 In his affidavit Inspector Gallagher refers to the fact that in recent years there has been a marked reduction in the number of assaults committed on police in Wilcannia. He attributes this drop to the efforts made by the police and broader community to reconcile past differences. There has also been an overall reduction in the amount of crime in Wilcannia, which has allowed the police to reduce the number of officers stationed in Wilcannia.

20 Notwithstanding the abovementioned improvements, for a town its size Wilcannia still has a very high number of assaults on police - 64 in the 12 months leading up to the making of the affidavit. Inspector Gallagher therefore has concerns that the broadcasting of the DVD may lead to an increase in the level of crime in Wilcannia in general, and more particularly crimes being committed against the police involved in this matter. He also has concerns that the premature broadcasting of the footage without the proper context may lead to rifts within the Wilcannia community with some people coming out in support of the police but others being angry with the police.

220. His Honour's analysis is ripe with 'motherhood' statements that capture the importance of the role of the media and the open system of justice in our courts.

21 The principle that court cases should be conducted publicly is one the hallmarks of the Australian court system. It allows the activities of the courts and the parties to proceedings to be subjected to public scrutiny and commentary. This principle is so fundamental to our justice system that it should be departed from only on the rarest of occasions.

22 Similarly, an unrestrained and properly informed media is one the hallmarks of Australian democracy. As stated above nothing should be done to restrict the fair and accurate reporting of proceedings subject to very rare exceptions. Such exceptions include the publication of details that might affect the objective deliberations of a jury, which is not a concern here.

23 I also think it relevant that the DVD has now been played in open court at Wilcannia on a number of occasions and in that regard is squarely in the public domain. In terms of the footage being taken out of context, it has been confirmed by police witnesses that the video footage shows virtually the

entire relevant incident and there is thus no reason to conclude that the footage cannot speak for itself.

24 In this case there are also no concerns as to the effect that the broadcasting of the DVD may have on the defendant. Rather, he wholeheartedly supports the ABC's application. I do however accept that there may be legitimate concerns as to the wellbeing of the police who are involved in this matter and I have taken that into account in coming to my decision.

25 It is tempting to allow concerns over the Wilcannia community's reaction to the broadcasting of the DVD overwhelm the other factors at play in this matter. There is no doubt that there has been a substantial reduction in crime in Wilcannia in recent years, one that I have been able to observe as its Magistrate and as a long-time resident of Broken Hill. There is the possibility that the airing of the DVD may set back some of the progress that has been made. However, I accept the ABC's argument that we should not be overly presumptuous as to the potential wrongdoings of unknown people.

…

27 One need only recall the public reaction to the findings of the Royal Commissions into Police Corruption and Aboriginal Deaths in Custody to realise that there are many members of the community concerned about the alleged misuse of police powers and alleged mistreatment of Aboriginal people at the hands of police. There are also many people who query whether tasers should be used at all by police.

28 I should also state that there are no doubt many people in the community who feel that the police do not have enough powers to deal with alleged criminals. We should not simply assume that members of the public who view the footage will react adversely. Such contrasting positions illustrate that the public viewing of the DVD may enliven public discourse on a number of important issues.

221. His Honour granted the application and the footage was ultimately aired on national ABC TV and is still available on the internet.[164]

[164] The footage is available at: http://www.abc.net.au/local/videos/2011/09/02/3308952.htm.

## THE 'IMPLIED UNDERTAKING' UNDER SUBPOENA

### Background to this issue

222. The video footage from the Taser Cam captured two of the four offences alleged against Mr Bugmy and was crucial to the defence case. Notwithstanding this it was not served in the brief of evidence nor was it disclosed upon request.

223. It was necessary for the ALS to issue a subpoena the footage along with many other documents relating to the Taser incident. The proceedings were initially delayed due to failure by the Police to comply with the subpoena.

224. Once ALS were in possession of the footage and various relevant documents related to the incident and the use of Tasers generally it became necessary for us to carefully consider in what way these materials could be used.

### The common law position

225. At common law, when a party obtains material under subpoena, the party obtaining those documents is taken to give an implied undertaking not to use the material produced by another party (or non-party) otherwise than for the purpose of the proceedings in which they were obtained. [165]

226. This principle was refined in ***Alterskye v Scott*** **[1948] 1 All ER 469** at 471 and explained by Lord Diplock in ***Riddick v Thames Board Mills Ltd*** **[1977] 3 All ER 677; [1977] QB 881**.[166] His Honour said at 687–688; 896:

> The memorandum was obtained by compulsion. **Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party, or anyone else, to use the documents for any ulterior or alien purpose.** Otherwise the courts themselves would be doing injustice. Very often a party may disclose documents, such as inter-departmental memoranda, containing criticisms of other people or suggestions of negligence or misconduct. If these were permitted to found actions of libel, you would find that an order for discovery would be counter-productive. The inter-departmental memoranda would be lost or destroyed or said never to have existed. In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purposes of the action in which they are disclosed. They are not to be made a ground for comments in the newspapers, nor for the bringing of a libel action, or for any other alien purpose. The principle was stated in a work of the highest authority 93 years

[165] See *Harman* [1983] 1 AC 280 at 304 per Lord Diplock.

[166] This principle is well established at common law in the United Kingdom: *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] QB 613 (per Talbot J at 618-620); *Home Office v Harman* [1983] 1 AC 280.

> ago by Bray J (The Principles and Practice of Discovery (1885) p 238): 'A party who has obtained access to his adversary's documents under an order for production has **no right to make their contents public or communicate them to any stranger to the suit**: nor to use them or copies of them for any collateral object … If necessary an undertaking to that effect will be made a condition of granting an order.' **Since that time such an undertaking has always been implied**, as Jenkins J said in *Alterskye v Scott* [1948] 1 All ER 469 at 470–471. A party who seeks discovery of documents gets it on condition that he will make use of them only for the purposes of that action and no other purpose.

227. ***Hearne v Street* (2008) 235 CLR 125** involved a noise nuisance claim by residents near Luna Park in North Sydney. At the beginning of proceedings, material which had been served on Luna Park but not yet read in court was provided to the Daily Telegraph which then published disparaging reports of the residents' claims. The residents' solicitors wrote to their opponent and an apology and express undertaking not to repeat any disclosure of unread affidavits was forthcoming. Further affidavit and expert material was served. Over the following months, the managing director and development manager sent emails attaching affidavit and expert material to the Minister for Tourism to lobby for change to the legislation in favour of Luna Park. An Act was passed shortly thereafter with retrospectivity and the first hearing fixture had to be vacated as a result. The residents sent interrogatories on the issue of costs thrown away on the adjournment to discover the further contemptuous behaviour. They then filed and eventually succeeded in contempt proceedings against both men. One of the key issues in the High Court was whether the 'implied undertaking' or obligation which was binding on Luna Park extended to its agents, the managing director and development manager.

228. Whilst routinely referred to as an "implied undertaking", the High Court in ***Hearne v Street*** held that it is now better understood as a "substantive legal obligation".[167] In reality, the situation gives rise to a legal obligation or duty on a party and others to whom the material is given or available (knowing that the material was generated in legal proceedings) not to use the material for a collateral purpose. To do so amounts to contempt of court.[168] The obligation is far-reaching and extends to bind others to whom the document or information is given, for example expert witnesses and solicitors or barristers, court officers and transcribers, and agents of a party.[169]

229. The joint judgment of Hayne, Heydon and Crennan JJ continued at [107]:

> To speak in terms of 'undertaking' serves:
>
> "a useful purpose in that it confirms that the obligation is one which is owed to the court for the benefit of the parties, not one which is owed simply to the

[167] Gleeson CJ at [3], agreeing with the joint judgment of Hayne, Heydon and Crennan JJ.
[168] *Hearne v Street* (2008) 235 CLR 125 at [103].
[169] *Hearne v Street* (at [109].

> parties; likewise, it is an obligation which the court has the right to control and can modify or release a party from. It is an obligation which arises from legal process and therefore is within the control of the court, gives rise to direct sanctions which the court may impose (viz contempt of court) and can be relieved or modified by an order of the court."

230. Furthermore, in order to be liable for contempt, it is only necessary to establish that the person had knowledge of the origin of the document or information in the court proceedings, not knowledge of the legal obligation that attaches to the material or the consequences of breaching it.[170] This is consistent with the principle that ignorance of the law is no defence.

231. The facts in ***Home Office v Harman*** **[1983] 1 AC 280** provide a useful illustration. Ms Harman, a legal aid solicitor, appeared for a prisoner client in civil proceedings against the Home Office, arising from her client's conditions of custody. During the course of her preparation, Ms Harman obtained discovery of 6,800 pages of documents from the Home Office. She identified 800 pages of the documents as relevant and prepared a bundle of those 800 pages for the hearing. Counsel who appeared on behalf of her client opened the case by reading onto the record the content of all 800 pages.

232. After the case was determined, Ms Harman (who was also a legal officer for the National Council for Civil Liberties) spoke to a journalist from *The Guardian* newspaper. The journalist had not been present in court. The journalist asked for, and Ms Harman allowed him, access to the 800 pages. He then wrote an article severely criticising the Home Office. The Home Office then initiated contempt proceedings against Ms Harman on the basis that she had breached 'the implied undertaking' in respect of discovered documents.

233. Ms Harman was found guilty of contempt at first instance. By majority 3:2, the House of Lords dismissed her appeal, finding that because the documents were solely in her possession for the purposes of preparing her client's civil proceedings, she was not entitled to use them for any other purpose. The House of Lords said that there is a public interest in opposing parties providing full disclosure of their material to each other, without fear of wider disclosure, because the fairness of the court process would be compromised if each party were to withhold relevant information. Collateral use of the material by a legal practitioner, for any purpose (even one involving the public interest, such as *The Guardian* article), was not permitted because the legal practitioner's implied undertaking was to the Court.

234. Ms Harman argued that because the 800 pages of documents had been (literally) read onto the court record in open court, the information contained in those documents had become publicly available and her implied undertaking therefore no longer applied. The House of Lords responded to this argument by saying that it gave rise to two competing

[170] *Hearne v Street* at [57], [111] and [112].

considerations; first, the necessity for all of the parties to litigation to fully and openly disclose relevant material in order to assist the court, even if that material were sensitive, embarrassing or damaging in another context, and secondly, the public's right to transparent court proceedings. If sensitive, embarrassing or damaging evidence were disclosed in the course of the proceedings, and publicly reported, then that was a necessary, if unfortunate (for the disclosing party), incident of court proceedings. A legal practitioner's duty not to disclose to third parties was owed to the Court and there was no principle of the common law that the implied undertaking ever lapsed. Disclosure in court therefore did not result in a legal practitioner's release from his or her undertaking to the court.

235. The Law Lords in the minority were of the opinion that once a document was disclosed in open court, the implied undertaking lapsed.

**When the obligation lapses**

236. Following ***Harman***, the English Rules of the Supreme Court were amended so as to expressly provide that the undertaking ceases to apply to any document:

> [A]fter it has been read to or by the Court, or referred to, in open court, unless the Court for special reasons has otherwise ordered on the application of a party of the person to whom the document belongs.[171]

237. There is no statutory equivalent to this provision in NSW. However, the current state of the common law appears to be that once tendered in evidence, the obligation in relation to that document ceases to apply.

238. There is scant NSW authority as to the continued operation of an implied undertaking after the relevant document has been tendered in the course of the proceedings in which the document was obtained. In the leading decisions of ***Ainsworth v Hanrahan*** **(1991) 25 NSWLR 155**, ***Esso Australia Resources Ltd v Plowman*** **(1995) 183 CLR 10** and ***Hearne v Street***, the relevant document had not yet been tendered in proceedings.

239. However, by way of *obiter* in ***Ainsworth v Hanrahan*****,** Kirby P. said (at 168):

> Once [the document is] tendered or read in open court, *pace Harman*, the liability in contempt for [its] later use will evaporate: *cf. Gardner v Moult* (1839) 10 Ad & El 464; 113 ER 176; *Richards v Morgan* (1863) 4 B & S 641; 122 ER 600 and *Fleet, Administratrix of Mary Anne Ross v Perrins* (1868) LR 3 QB 536 at 540.[172]

240. In ***Esso v Plowman*** Mason CJ said:

[171] *Rules of the Supreme Court* O.35, r.14A (since amended)
[172] Definition – *pace*: "with all due respect to"

> The implied undertaking is subject to the qualification that once material is adduced in evidence in court proceedings it **becomes part of the public domain**, unless the court restrains publication of it. (Emphasis added)

241. This *dicta* was adopted by Hayne, Heydon and Crennan JJ in ***Hearne v Street***, where they said at [96], again *obiter*:

> Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given **unless it is received into evidence**. (Emphasis added, footnote deleted)

242. It should be noted that the Justices referred to this part of their judgment as "background legal principles which were not in controversy."

243. Similarly, in ***Moage Ltd v Jagelman and Others*** **[2002] NSWSC 953; 43 ACSR 173**, Gzell J said *obiter* at [12]:

> Once a document has been read in open court, however, it loses its confidentiality and loses the protection of the undertaking.

244. The *obiter* remarks of Kirby P, Mason CJ, Hayne, Heydon and Crennan JJ, and Gzell J suggest that, in NSW, the undertaking does lapse without the need for an application to be made by the party seeking to use the document for a corollary purpose.

245. This also appears to be the position in Western Australia, although again, the relevant observations were *obiter*: *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 145 (per Ipp J at 323, Pidgeon J concurring).

246. In Victoria, the Court of Appeal has held that if a party wants to use a document to which an implied undertaking applies, for a corollary purpose after it has been tendered in open court, that party should make an application to the court to be released from the undertaking: ***British American Tobacco Australia Services Ltd v Cowell (as representing the estate of Rolah Ann McCabe, deceased)*** **[2003] VSCA 43; (2003) 8 VR 571**.[173] There, the Court said at [35]:

> The fact that, by reason of its tender, [a document] has passed into 'the public domain' may be a consideration when leave is sought to use the document otherwise than for the purposes of the litigation in which it was produced, but it does not *per se* gainsay the continuance of the undertaking.

[173] This decision has been applied in other Victorian cases: *Rowe v Silverstein & Ors* [2009] VSC 157 at [26].

## How to be released from the obligation

247. As the obligation is one owed to the court (not your opponent), the appropriate avenue to be released from the obligation is to make an application for leave to the relevant court.

248. ***Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217; 110 ALR 685**, was a matter determined in the Federal Court but which originated in the NSW Supreme Court. In that case, Hong Kong Bank, not a party to the original proceedings, made an application to the court to be permitted to use a witness statement prepared for the original proceedings in another matter. The document sought to be used for a corollary purpose had not been tendered in court as the original proceedings settled before the trial. Wilcox J held that the party could be released from the implied undertaking if "special circumstances" existed. His Honour said:

> For "special circumstances" to exist it is enough that there is a special feature of the case which affords a reason for modifying or releasing the undertaking and is not usually present. The matter then becomes one of the proper exercise of the court's discretion, many factors being relevant. It is neither possible nor desirable to propound an exhaustive list of those factors. But plainly they include the nature of the document, the circumstances under which it came into existence, the attitude of the author of the document and any prejudice the author may sustain, whether the document pre-existed litigation or was created for that purpose and therefore expected to enter the public domain, the nature of the information in the document (in particular whether it contains personal data or commercially sensitive information), the circumstances in which the document came into the hands of the applicant for leave and, perhaps most important of all, the likely contribution of the document to achieving justice in the second proceeding.[174]

249. In that last regard, it will be relevant whether the information or document may give rise to the author being called as a witness, and therefore the document used as examination-in-chief, or useful in construction or executing cross-examination, or even if the author is not called by either party, the likelihood of the document being useful in opening up avenues of inquiry.[175]

250. Citing ***Esso v Plowman*** and ***Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 1 WLR 756 at 775; [1991] 3 All ER 878 at 895**, the High Court in ***Hearne v Street*** confirmed the above "special circumstances" test:

> The importance with which the courts have viewed the obligation under discussion is indicated by the fact that although it can be released or modified by the court, that dispensing power is not freely exercised, and will only be exercised where special circumstances appear.

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[174] *Springfield* at [26].
[175] *Springfield* at [12].

> [per Hobhouse in *Prudential Assurance*] "Circumstances under which that relaxation would be allowed without the consent of the serving party are hard to visualise, particularly where there was any risk that the statement might be used directly or indirectly to the prejudice of the serving party."[176]

251. In ***Phillip Bugmy***, I applied to the Local Court in Broken Hill to be released from the 'implied undertaking' in relation to the Taser SOPs. It was submitted that an entitlement to circulate the SOPs to colleagues at the ALS arose following the document's tender into evidence in open court. However, in the absence of direct authority in NSW, it was considered prudent to make an application to the Court to be expressly released from the obligation. Initially the NSW Police resisted the application but on the day of hearing, they consented to my being released from the obligation for educational purposes.

252. The Court may only release you on certain terms, and confine the purpose for which the document can be used upon release from the obligation, as was the case in Mr Bugmy's matter.

253. Another avenue for collateral use of a document is to seek permission directly from the author/creator of any particular document, although as in ***Springfield v Bridgelands*** it may be unlikely that permission is forthcoming.[177]

**A further word of warning: collateral use of police briefs**

254. It is axiomatic to say that one ought to exercise caution when dealing with documents obtained as a solicitor in the course of court proceedings.

255. Whilst the above discussion has focussed on material obtained under subpoena, the common law principle has much broader application.

256. As Hayne, Heydon and Crennan JJ stated in ***Hearne v Street***:

> Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, **or otherwise**, to disclose documents or information, the party obtaining the disclosure cannot, without leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence. The **types of material disclosed** to which this principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an *Anton Piller* order, **witness statements served pursuant to a judicial direction** and affidavits. (Emphasis added)

257. In ***Springfield v Bridgelands***, Wilcox J agreed with an earlier decision of McPherson J in ***Central Queensland Cement Pty Ltd v Hardy*** **(1989) 2 Qd R 509** in which His Honour stated:

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[176] *Hearne v Street* at [107].
[177] *Springfield* at [7].

> I am therefore in no doubt that the undertaking applies equally to the witness statement [prepared and delivered pursuant to a Court direction] as it would to any other document produced by one side to the other for the purpose of litigation.[178]

258. Wilcox J added that witness statements are in a category of "document brought into existence for the purpose of the instant litigation which may contain confidential or personal information and which may, or may not, ultimately be read in open court. There is every reason for subjecting their use to the same constraints."[179]

259. Given the breadth of the comments, it appears that the legal obligation not to use material for a collateral purpose may extend to briefs of evidence served according to Magistrate's timetabling brief service orders, notwithstanding that the material is provided in accordance with the prosecution duty of disclosure in criminal proceedings as opposed to a specific coercive court order in a commercial or equity context.[180]

260. This issue may arise for consideration in the following situations:

- Media requests for information or material; or a client's desire to involve the media before proceedings have been finalised
- Referral of a client for possible civil claim
- Use of material for an educational purpose
- Cross examination using brief material obtained in other proceedings

261. In particular, caution should be exercised in a scenario where the brief of evidence has been served, but the prosecution ultimately seek leave to withdraw all charges and the proceedings are dismissed without any evidence being tendered in court; or no evidence is offered.

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[178] *Springfield* at [21].
[179] *Springfield* at [21].
[180] Sections 75 and 183 *Criminal Procedure Act 1986* mandate prosecution disclosure of material in committal and summary matters respectively. Section 60 appears to be a case management timetabling provision rather than a mechanism by which courts order disclosure.
[+] I wish to acknowledge Christian Hearn, who appeared for Mr Bugmy for a significant part of the proceedings in the Local Court at Wilcannia, including cross-examining the police officer who fired the Taser, SC Charman. I also wish to thank Public Defenders Janet Manuell SC and Richard Button SC (as his Honour then was) who provided such excellent advice in relation to the implied undertaking issue that the police conceded the point.