IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S119 of 2019

BETWEEN: **STATE OF NEW SOUTH WALES**
Appellant

and

BRADFORD JAMES ROBINSON
Respondent

RESPONDENT'S SUBMISSIONS

PART I: PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUE

2. The issue raised by this appeal is whether an arrest performed under s.99 of the *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW) (**LEPRA**) was lawful where the arresting police officer did not have an intention to charge the person at the time the arrest was carried out. The appellant asserts so, the respondent asserts not.

PART III: SECTION 78B NOTICE

3. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

PART IV: FACTS

4. The respondent accepts the statement of the facts at paragraph 6 of the appellant's submissions (AS [6]), as far as it goes. So far as the findings of the primary judge set out at (AS [8]) are concerned, it is not, however, entirely correct to say that they were unchallenged. The findings set out at (AS [8(c) and (d)]) were implicitly challenged in the sole ground of appeal run below, and expressly challenged in argument.

5. As for the matter addressed at (AS 12), McColl JA did not say that the police officer is required at the time of arrest to state the charge using technical or precise language, as distinct from language sufficient to convey the criminal conduct in

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respect of which the person is being arrested.[1] Rather, her Honour specifically acknowledged that such language was not required (CA [51] [**CAB 50**]), and her terminology accords with that in *Christie v Leachinsky*.[2]

6. It is submitted that when McColl JA stated in her conclusion that Constable Smith did not inform the appellant of the reason for his arrest (CA [128] [**CAB 69**]), her Honour was intending to convey no more than that the true reason, as found by her, for the appellant's arrest was to interview him – a purpose which in and of itself the appellant accepts is unlawful (AS [34]). The ensuing sentence in her Honour's reasons makes that clear.

10 **PART V: ARGUMENT**

7. It may be accepted, as the appellant asserts, that the question in this matter is one of construction of s.99 of LEPRA, and that that task must begin and end with a consideration of the statutory text[3], within the provision's context. The context must be considered in the first instance, and not merely at some later stage when ambiguity might be thought to arise.[4] Here, context is used "in its widest sense"[5] to include such things as the existing state of the law[6], and while the task of statutory construction begins, as it ends, with the statutory text, that text, from beginning to end, is construed in context.[7] The text must also, of course, be considered in light of the legislative purpose.[8] If the text is inconsistent with the purpose of the provision,
20 that meaning must be rejected.[9] Importantly, too, as both McColl JA (CA [35] [**CAB 46**]), and Basten JA (CA [134] [**CAB 70**]) recognised, in this case s.4 of LEPRA

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[1] *Christie v. Leachinsky* [1947] AC 573 (**Christie**); s.201(1)(c) LEPRA.
[2] *Christie* at 587, per Viscount Simon.
[3] *Alcan (NT) Alumina Pty Limited v. Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 46 [47]; *Commissioner of Taxation v. Consolidated Media Holdings Limited* (2014) 250 CLR 503 at 519; [2002] HCA 55 at [39].
[4] *CIC Insurance Limited v. Bankstown Football Club Limited* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.
[5] *Project Blue Sky Inc & Ors v. Australian Broadcasting Authority* (1998) 194 CLR 355 at 384; [1998] HCA 28 at [78] per McHugh, Gummow, Kirby and Hayne JJ, where their Honours cited with approval the words of Mr Bennion in his text, statutory interpretation 3rd edition (1997), pp 343-344.
[6] *CIC* at p 408; *Alphaphram Pty Limited v H Lundbeck A/S* (2014) 254 CLR 247 at 265; [2014] HCA 42 at [42].
[7] *SZTAL* at 374 [37] per Gageler J.
[8] *CIC* at p 408; *SZTAL v. Minister for Immigration and Boarder Protection* (2017) 262 CLR 362 at 368 [14]; [2017] HCA 34; *Mighty River International Limited v. Hughes, Mighty River International Limited v. Mineral Resources Limited* [2018] HCA 38 at [42].
[9] *SZTAL* at [14].

preserves a police officer's powers of arrest at common law (including the power to arrest to prevent a breach of the peace), adding to the need to consider the common law background as part of the necessary context.

8. Where the legislation embodies common law principles, as it does here, decisions in which the common law or earlier statutory provisions, which also embody it, are helpful in the application and understanding of the provision.[10] The question in this case, like that in *Williams*, "although ultimately one of statutory construction, must necessarily be considered against the background of the common law which provides in this instance the spirit if not the letter of the law."[11] Moreover, "the presumption which requires clear words to override fundamental common law principles has an obvious application in a matter as basic as the liberty of the person."[12] As Glesson CJ said in *Al-Kateb v Godwin*[13], "Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment."

Purpose

9. The task of construing s.99 of LEPRA, therefore, cannot properly be undertaken without a consideration of the common law context and its legislative history, including consideration of the cases that construed its statutory predecessor in s.352 of the *Crimes Act* 1900. That section provided for, inter alia, arrest without warrant of any person whom the police officer suspected, with reasonable cause, of having committed an offence. Section 352 expanded the common law power of a constable to arrest in respect of both felonies and summary offences, but has also been

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[10] *Williams v The Queen* (1986) 161 CLR 278 at 304 per Wilson and Dawson JJ.
[11] *Williams* at 304 per Wilson and Dawson JJ.
[12] *Williams* at 304 per Wilson and Dawson JJ; see also *Nolan v. Clifford* (1904) 1 CLR 429 at p 444; *North Australian Aboriginal Justice Agency Limited & Anor v. Northern Territory of Australian* (2015) 256 CLR 569 at 581 [11] (**NAAJA**).
[13](2004) 219 CLR 562; [2004] HCA 37 at [19]

regarded as embodying, or reinforcing it. As Davidson J, speaking for the Court (Street CJ and James J), said in *Clarke v. Bailey:*[14]

> ... in my opinion, the effect of the section is merely to reinforce the common law principle, and is not intended to give the Constable discretion in the matter except to the same extent as existed before.

10. Two years later, in *Bales v. Parmeter*[15], Jordan CJ (with whom Stephen and Street JJ agreed), in considering whether the arrest in that case was unlawful because the person had been held against her will at her home and then at the police station, held that a restraint of the plaintiff's liberty under s.352 of the *Crimes Act* had, as its *only* purpose, that of taking the arrested person before a magistrate to be charged and dealt with according to law.[16] The Court held that a purpose of asking the person questions or making investigations "*in order to see whether it would be proper or prudent to charge her with the crime*" was an extraneous one, rendering the arrest unlawful.

11. In *Drymalik & Anor v. Feldman*[17] the Supreme Court of South Australia, in banco[18], in construing s.78(1) of the *Police Offenders Act* 1953-1961 which imposed a requirement that a person apprehended without warrant be "forthwith" delivered into the custody of the member of the police force who is in charge of the nearest police station, to be brought before a Justice to be dealt with according to law, said, in a similar vein:

> The requirement is – *and it follows that the immediate purpose of the arrest must be* – to bring the person arrested forthwith before the Justice. [Emphasis added].

12. In that case, the Court disapproved of the plaintiff's arrest in circumstances where there was "no pretense that the arrest was necessary to ensure the plaintiff's appearance before a Court ...". Their Honours observed that the power entrusted to every member of the police force by s.75 of the *Police Offenders Act*, although very wide, "imports a power that has to be exercised within limits, and for the purposes,

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[14] [1933] 33 SR (NSW) 303 at 309.
[15] [1935] 35 SR (NSW) 182.
[16] At 190.
[17] [1966] SASR 227.
[18] Napier CJ, Bright and Mitchell JJ.

contemplated by the enactment", so that, "even if the arrest is effected ostensibly in execution of the statutory power and within its letter, it must nevertheless be held not to come within the power, unless it is effected in good faith, *and for the purposes* contemplated by the enactment." [Emphasis added.]

13. To similar effect, s 352 of the Crimes Act was held, in *Zaravinos v State of NSW*[19], not to displace general principles with respect to arrest. In employing language reflecting the common law, the section "must be understood as indicating the only proper purpose for which an arrest may be carried out." That purpose was said to be to "[bring] the person before a justice and [conduct] a prosecution."[20] The literal fulfilment of the terms of the statute is not enough, unless the power it confers is exercised in good faith and for that purpose.[21] The lawfulness of the arrest remains examinable, notwithstanding the existence of the circumstances contemplated in the provision conferring the power.[22]

14. Thus, in *Lake v Dobson & Anor*[23], Samuels JA, who spoke for the Court, observed that arrest was "a means of setting the criminal process in train" and that it "should be reserved for situations where it is clearly necessary, and ... not be employed where the issue of a Summons will suffice." The NSW Court of Appeal, similarly, in *State of NSW v Smith*, observed that arrest should be reserved for circumstances in which it is clearly necessary, and that it is inappropriate to resort to the power when the issue and service of a summons (now, a Court Attendance Notice) would suffice.[24] And in *Dowse v New South Wales*[25], the NSW Court of Appeal addressed the very question raised by this appeal, holding that "an arrest will not be valid merely because the officer believes that an offence has been committed, in circumstances where the officer has no intention of charging the person or having the person charged with that offence."[26] To the extent that the Court of Appeal differed

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[19] (2004) 62 NSWLR 58; [2004] NSWCA 320 at [23] (Bryson JA, Santow JA and Adams J agreeing).
[20] *Zaravinos, supra*, at [37].
[21] *Zaravinos, supra*, at [24].
[22] *Zaravinos, supra*, at [37].
[23] New South Wales Court of Appeal, Unreported, 19 December 1980.
[24] [2017] NSWCA 194 at [102] (McColl JA, Leeming JA and Sackville AJA agreeing)
[25] (2012) 226 A Crim R 36; [2012] NSWCA 337 at [26]-[27] per Basten JA, McColl and Hoeben JJA agreeing
[26] *Dowse, supra*, at 46 [27].

from that approach in *Clyne v State of NSW*[27], holding, rather, that an arrest merely for the purpose of investigation was lawful, that decision should not be followed. It is contrary to principle, and to the appellant's concession here that an arrest for such a purpose would be unlawful. It was decided without reference to the decision of this Court in *Williams*.

15. In light of those decisions (excluding *Clyne)*, the appellant's concession at (AS [41]) is properly made. Arrest is the first step in the criminal process.[28] As such, it is a step which, unless discontinued, necessarily, and inevitably, results in a person's being taken before a court to be made answerable to a criminal charge. It is not an end in itself, but exists for the purpose of securing that end.[29]

16. Before moving to the appellant's textual arguments, a question may be said to arise as to whether, in order for the respondent's position to prevail, a *decision* to charge must have been made when the arrest was carried out or whether the arresting officer must simply have formed an intention that the person *be* charged. As McColl JA recognised (CA [32] **[CAB 45]**), the State sought in the Court of Appeal to frame Mr Robinson's position as the former, and Mr Robinson, the latter. Each might be seen to have differing focuses – "I have already decided that you will be charged"; or, "I intend that you will be charged, because the provision under which I am arresting you requires, and has as its purpose, that I take you before a court to answer a charge". (In this regard, *R v Walsh*[30] recognizes that it need not be the arresting officer who will lay the charge - an intention that another will do so is sufficient.) Ultimately, however, whichever way the question is posed, the answer reduces to this proposition: if the motivation for the arrest is to take the person before a court to answer a charge, no complaint can be made, but if it is not, the purpose motivating the arrest must be extraneous to that for which the power exists. For reasons expressed below, the provision in s 105 of LEPRA for the discontinuance of an arrest at any time does not dilute that proposition. As Basten JA expressed it below, "It is unclear why the conferral of an additional power to release following arrest should

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[27] [2012] NSWCA 265 (Macfarlan JA, Campbell and Meagher JJA agreeing).
[28] *Christie v Leachinsky* [1947] AC 573 at 584-5, where Viscount Simon endorsed the observation to that effect of Scott L.J. in the Court of Appeal; *Dowse, supra,* at 46.
[29] *Williams v The Queen* (1986) 161 CLR 278 at 305 per Wilson and Dawson JJ; *Dowse,* supra.
[30] NSWCCA, Unreported, 18 October 1990 (Gleeson CJ, Samuels JA, Studdert J).

be read as allowing an arrest for a purpose other than the conventional purpose." (CA [176] [**CAB 85**]).

Text

17. In its submissions concerning the text of s.99, the appellant pays insufficient heed to the mandate contained in s.99(3). The statutory presumption contained there that, upon being taken before an "authorised officer" the arrested person will be "dealt with according to law", continues to reflect the common law and necessarily presupposes that that authorised officer will have jurisdiction so to deal with the person. In the absence of a charge, no such jurisdiction will exist.

10 18. Neither a magistrate nor a registrar of the Local Court has *any* jurisdiction to deal with a person brought before the Court pursuant to s.99(3) of LEPRA unless and until criminal proceedings have been commenced by the filing and issuing of a Court Attendance Notice. Section 99(3), which reflects the common law requirement, therefore presupposes that a charge *will* be laid. To say that s 99(3) does not say anything of the state of mind of the officer at the time of the arrest (AS [28]), directing itself only to that which must be done after arrest is carried out, is to ignore that obvious presupposition.

19. Turning to the matters in s 99(1)(b), a distinction needs to be made between the underlying and long-recognised purpose of an arrest without warrant, and the
20 "reasons" for which a police officer must be satisfied an arrest is reasonably necessary under that subsection. Once it is accepted that the purpose of an arrest is to take the person before a court and make him or her answerable under the criminal law, the "reasons" contained in sub-s (1)(b) can only properly be seen as reasons why a police officer arrests and *then* charges, as distinct from merely charging the person. Understood in that way, the s 99(1)(b) reasons operate as a *constraint* on the power of arrest (CA [163]-[164] Basten JA [**CAB 82**]), rather than, as the State would have them read, a broadening of its purpose. Were it otherwise, and the 99(1)(b) "reasons" were to be regarded as independent *purposes* of the arrest, a police officer could, for example, arrest a person merely to establish her identity[31], even though he does not

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[31] Section 99(1)(b)(iii).

intend to charge her, then or ever, with the suspected offence. To find such an arrest to be lawful, by a "literal fulfillment" of the conditions imposed by s 99(1), would, we submit, be to recognise a radical encroachment on the subject's liberty, and to favour an interpretation of s 99 which offends the principle of legality. That is particularly so where the reasons in sub-s (1)(b) can, instead, be read to point the other way, by limiting the power. In this regard, it ought also to be observed that the arrest power under s.352 of the *Crimes Act* imposed no condition on the power it conferred, beyond the requirement that the police officer suspect, with reasonable cause, the person to have committed an identified offence. The imposition of the condition on the exercise of the power now to be found in s 99(1)(b) should therefore be viewed as an added constraint.

20. The individual matters enumerated in s 99(1)(b) are all capable of being read consistently with the continued observation of the constraint for which the respondent contends. They are concerned, in the main, with securing the person's attendance before a court ((ii), (iii), (iv)), or securing (or preserving the integrity of) evidence to be tendered in the person's prosecution ((v), (vi), (vii)). Those concerned with the protection of the safety of others find a power, equally, in the (preserved) common law power to arrest to prevent a breach of the peace. It is noteworthy that there is to be found in none of the s 99(1)(b) reasons, that of affording the police officer time to decide whether to charge.

21. It is convenient to deal here with the appellant's examples at (AS [27]). Contrary to the submission made there, an acceptance of the position for which the respondent contends would, in none of those cases, prevent an arrest. In the examples of the person fleeing, that fact, in itself, would provide powerful reason to *believe* his or her involvement in the commission of an offence, and the belief is there based on material known *personally* to the police officer. There is therefore no question, in those examples, of the police officer's not believing the material, on which his or her persuasion of the person's involvement in the suspected offence is based, to be true. The intention behind an arrest in any of those cases will be to secure the person's attendance before a court, so that they can be made answerable for the criminal conduct in which their flight suggests them to be involved. If not for that purpose, it could only be "merely" to investigate – a purpose accepted by the appellant to be

insufficient. True it is that following such an arrest material may emerge which exculpates the person, but "reasonable and probable cause" is concerned with the material available at the relevant time. The motivating reason behind the arrest in each of the flight examples is to secure the person's attendance before a court. Self-evidently, that reason contemplates a purpose for the person to be taken there. The only purpose known to the law for a person to be taken before a criminal court is that the person answer a criminal charge, or, pending trial, be admitted to bail.

22. An arrest to establish identity, equally, could only be necessary if it is intended to take some action against the person. Finally, in the case of arrest to protect the apparent victim of domestic violence from the apparent aggressor, arrest under the common law power to prevent a breach of the peace would be readily available. The existence of such an independent power in the circumstances favours the respondent's argument that the s 99(1)(b) "reasons" are to be read as discriminators between whether a police officer arrests and charges, or merely charges. It is unclear, were it otherwise, why an arrest could be held to be unlawful because the issuing of a Court Attendance Notice, alone, would suffice, yet an arrest where it is not intended to charge could be lawful.

Section 99(4) and Part 9 of LEPRA

23. The appellant argues, further, that the extended detention provisions to be found in s 99(4) and Part 9 of LEPRA have shifted the power of arrest without warrant away from its long recognised purpose and, in some unspecified way and for an unspecified time, introduced a period after arrest during which deliberation by the arresting officer as to *whether* the person will be charged is allowed. But the provision of a power to detain a person, *following* a lawful arrest, to enable investigation of the person's involvement in the suspected offence, does not, and could not, detract from the purpose of taking the person before a court to conduct a prosecution.

24. *First*, s 99(4) makes explicit that the power of detention beyond the period described by the term "as soon as reasonably practicable" in s 99(3) may only be invoked where the arrest is lawful. That is, clearly enough, the anterior question. The appellant seeks, nevertheless, to rely on the posterior power to inform the answer to

the anterior question of what *is* a lawful arrest. That is not sanctioned by the established principle of construction, relied upon by the appellant in support of its argument, that the provisions of a statute must, as far as is possible, be read harmoniously with each other.[32] No disharmony does, or could, result from applying the anterior requirement as an anterior step.

25. *Secondly,* the primary requirement of lawfulness is further reinforced by s 113(1), which provides not only that Pt 9 of LEPRA does not confer any power to detain a person who has not been lawfully arrested, but also, importantly, that it does not "confer any power to arrest a person". The second of those stipulations makes clear that an arrest *to* investigate remains unlawful. That is consistent both with the stated limitations on the powers of detention to investigate when they were introduced into the *Crimes Act*[33], and the refusal by Messrs Tink and Whelan to recommend the conferral of such a power, even when asked by police to do so, in their recommendations to the NSW parliament leading to the 2013 amendments to LEPRA[34]. It is also consistent with what we understand to be the appellant's concession at (AS [34]) and, more importantly, with the approach of the NSW Court of Appeal in *R v Dungay*[35], as to which further comment is made below.

26. *Thirdly*, it is axiomatic that the investigation of a person's involvement in the offence may lead either to evidence that confirms or dispels the arresting police officer's suspicion. But the fact that confirmatory evidence may be unearthed does not render lawful an arrest effected merely to investigate, and it is difficult to see what other purpose an arrest could have if the police officer has yet no intention to charge when he or she arrests. Section 99(1)(b) does not provide an answer, for, as we have submitted, the "reasons" for arrest there set out, act as a constraint on the power to arrest on reasonable suspicion alone, not as independent justifications for arrest.

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[32] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[70] per McHugh, Gummow, Kirby and Hayne JJ.
[33] *Crimes Amendment (Detention after Arrest) Bill* - Second reading speech of the Attorney-General, The Hon. G. Shaw, NSW Legislative Council 26 June 1997.
[34] Review of the Law Enforcement (Powers and Responsibility) Act 2002, The Hon. Paul Whelan and Mr Andrew Tink, 25 October 2013 (**Tink/Whelan report**), Part 1, pp 4 and 7.
[35] [2001] NSWCCA 443 at [41].

27. *Fourthly*, the period of further detention provided for by Part 9 is the only available extension of the time otherwise described by the words "as soon as is reasonably practicable" in s 99(3). The relevant object of Pt 9, as expressed in s.109, is to provide for a period of detention "*to enable* the investigation of the person's involvement in the commission of an offence", and the power conferred by s.114 is expressed to be to detain "*for the purpose of* investigating whether the person committed the offence for which the person is arrested." The said detention must, therefore, be understood to provide for the person's detention *only* for the purpose of enabling the said investigation to occur. That being so, the understandable desire by police further to investigate a person's involvement in an offence, after the person's arrest, does not, of itself, lead to the extension of the person's detention under Part 9. In most cases, the person's detention will in fact be unnecessary for the stipulated purpose, and, where an arrested person declines to be interviewed, the occasion for detaining him or her "to enable" investigations to occur will be rare indeed. It would be curious if, despite the fact that an extension of the usually tightly constrained detention period will rarely be available, the provision in s 99(4) and Part 9 for such further detention should be seen to have overturned the recognised purpose of arrest.

28. The flaw in the appellant's argument that it should be so, may be demonstrated by example. Take the case of a person who, like the respondent, attends a police station at the request of police but, unlike the respondent, has already indicated that he will decline to be interviewed. Suppose, further, that there are no further investigations that will be enabled by the person's detention, so excluding the operation of Part 9, and that a magistrate is sitting in the building next to the police station when the person arrives there. If, like Constable Smith, the police officer arrests the person immediately upon his attendance at the station, purportedly pursuant to s 99(1), but does not intend to charge him because of insufficient evidence, he is nevertheless obliged by s.99(3) to take him next door as soon as is reasonably practicable. In the circumstances, there can be no lawful reason for delay in doing so. But once there, the magistrate will have no jurisdiction to deal with him. There is no charge, and therefore no occasion to adjudicate his guilt or innocence, or to deal with the question of bail. The detention powers in Part 9 have nothing to add to the problem posed by that situation. Rather, s 99(3), alone, stipulates the time allowed. Where

there is nothing in the nature of questioning or other investigations that might be undertaken, and Part 9 is therefore not available, it is quite inconsistent with the time stipulation in sub-s (3) that there should be time to deliberate - there is nothing to deliberate upon.

29. In *Williams*, the expression "as soon as is practicable" was held to mean the same as "as soon as is reasonably possible". The addition to the first of those terms of the word "reasonably", should, equally, not be regarded as making a material difference to its meaning in s 99. The recognition of a period, within that described time, in which for the police officer to deliberate about whether or not to charge, would be incongruous in a statutory scheme where the only extension of that time period under the statute, provided for by Part 9, is the subject of strict limitation and safeguards.[36] None of the pre- s 99 cases, properly understood, recognised such an allowance. The comment, relied upon by the appellant, of Mason and Brennan JJ in *Williams*[37] that "reasonable time must be allowed for making a decision to prefer a charge and preferring it" needs to be understood in its context. It followed immediately upon a consideration by their Honours of the decision of the House of Lords in *John Lewis & Co Ltd v Tims*[38]. In that case two private store detectives (not police officers) had arrested the suspected shoplifter and taken her back to the store so that the chief store detective and a managing director of the store could be informed of the circumstances and make a decision about whether to prosecute. The system in place at the store was not to leave that decision in the hands of the store detectives, who were "subordinate officials", but to refer it to management. Lord Porter, who spoke for the House, said[39]:

> *Those who arrest must be persuaded of the guilt of the accused*; they cannot bolster up their assurance or the strength of the case by seeking further evidence and detaining the man arrested meanwhile or taking him to some spot where they can or may find further evidence. But there are advantages in refusing to give private detectives a free hand and leaving the determination of whether to

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[36] A similar observation was made by Wilson and Dawson JJ in *Williams* (at 311), concerning the then absence of time stipulations for detention to investigate, rendering the power there contended for "unacceptably open-ended".
[37] At 300.
[38] [1952] AC 676.
[39] At 691.

> prosecute or not to a superior official. Whether there is evidence that the steps taken were unreasonable or the delay too great is a matter for the judge. Whether, if there be such evidence, the delay was in fact too great is for the jury. [Our emphasis.]

30. The facts of that case are an unlikely base on which to erect a general principle that a police officer - with whom the decision to charge *does* rest, and who, in the words of Lord Porter, must at the time of the arrest, be "persuaded of the guilt of the accused" - may take further time following the arrest to consider whether or not to charge the person, as distinct from *formulating* a charge which properly reflects the criminality of the alleged conduct. Understood in the context in which Mason and Brennan JJ made their comment, their Honours should not be understood to have been doing so. Not only does that context, and the apparent acceptance of what Lord Porter said, point away from that proposition, but the recognition of such a principle is inconsistent with their Honours' later comments (to which further reference is made below) that there is "[no] reason to think that, in general, an arresting police officer would be unable to make a complaint or to lay an oral information until he had had an opportunity to question the person arrested."[40]

31. Moreover, in *their* reasons in *Williams*, Wilson and Dawson JJ rejected unambiguously the interpretation that had been adopted by police in England of the phrase "as soon as practicable", in response to comments in some of the English cases favouring flexibility (themselves not followed in *Williams*), as meaning "as soon as we have decided whether to charge him". Their Honours found there to be allowance in the words "as soon as is practicable" for reasonable time to "*formulate and lay* appropriate charges for the purpose of bringing a person before a justice" but squarely eschewed any suggestion that that time accommodated detention of a person "to enable them to gather the evidence necessary to support a charge."[41] As their Honours had earlier observed, while it is recognised that imprisonment before trial may be necessary in the administration of criminal justice, for arrest to be justified in accordance with the law, "there must be a charge."[42]

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[40] At 300.
[41] *Williams* at 312-313.
[42] *Williams* at 305.

32. Although s 99(4) was introduced by the 2013 amendments to LEPRA, Part 9 itself is not new. It is in almost identical terms to Part 10A of the *Crimes Act*, which was introduced in 1997 following this Court's decision in *Williams.* Since its introduction, numerous cases have held that its insertion into the statutory scheme has not changed the position that an arrest to investigate is unlawful, and, critically, that a purpose of arrest other than to take the person before a court to conduct a prosecution is extraneous to the purpose for which the arrest power exists and, therefore, unlawful.[43] In *R v Dungay*[44], Ipp JA (with whom Studdert and Greg James JJ agreed) addressed directly the argument relied upon here by the appellant, observing that the duty to bring an arrested person before a judicial officer as soon as is reasonably practicable is one of the foundations of a democratic society, and that Pt 10A did not detract from the "fundamental proposition" that no person should be arrested merely for the purpose of investigating. That decision is squarely against the appellant's position.

33. The arrest in this case was performed in circumstances where Constable Smith did not have an intention to charge the respondent because he did not have sufficient evidence. It is difficult to see, in that case, how the arrest could have been carried out for any purpose *other than* to investigate. Where there was an admitted absence of intention to charge, the reason proffered for the arrest of ensuring the respondent's appearance before a court and the seriousness of the offence, is nonsensical. This case is relevantly indistinguishable from that of *Foster v R*[45], where, as here, the arresting officer accepted that he did not, when he arrested the person, have sufficient evidence to support a charge and did not have an intention to charge him. In that case the plurality[46] said, "In circumstances where, at the time when the appellant was arrested, the police had neither the intention to charge him with an offence nor the evidence to justify such a charge, the gravity of the infringement of the appellant's rights involved in his public arrest and subsequent detention in custody is

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[43] *Zaravinos,* supra; *Dungay*, supra; *Dowse,* supra.
[44] [2001] NSWCCA 443 at [41].
[45] (1993) 113 ALR 1.
[46] Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

apparent."[47] The infringement of his rights was said there to be "both serious and reckless."[48]

Section 105

34. There is, equally, nothing in s 105 which assists the appellant's position. *First*, the insertion, in the 2013 amendments, of sub-s (3) of s 105 was done simply out of an abundance of caution.[49] It added nothing of real substance to s 105(2), or to the obvious proposition that if a charge originally intended to be laid is no longer to be, there is no occasion to take the person before a court and, therefore, no continuing reason to hold him. As already observed, in the absence of a charge, the court would lack jurisdiction to deal with the person at all.[50] *Secondly*, s 105(2)(b) contemplates the discontinuance of an arrest not because there is absent a satisfaction that an offence has been committed but that it is considered more appropriate that the offending conduct either be dealt with non-curially or, in the case of the issue of a CAN, that the person attend court on the appointed day without physical compulsion. None of those matters points away from the need for the arresting officer to intend, at the time of arrest, that criminal proceedings be taken against the person. Rather, they represent a pragmatic recognition that, despite the original intention to charge and hold the person until he could be taken before a court, circumstances may subsequently render the person's continued detention unnecessary. *Thirdly,* similarly to sub-s (2)(b), sub-s (2)(a) manifests no more than a pragmatic recognition that the original suspicion may be dispelled or that the "reason" for the arrest (which ought be taken to be a reference to those reasons enumerated in s 99(1)(b)) no longer exists. Again, that does not contradict the proposition that the purpose of the arrest power in s 99 remains that for which the respondent contends. If anything, it supports it, because the section sets out a list of reasons why the process that is put in train upon arrest may be *abandoned*, rather than diluting the requirement originally imposed by sub-s (3).

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[47] (1993) 113 ALR 1 at 8.
[48] Ibid.
[49] Tink/Whelan p.7.
[50] As to which, see *Wiltshire v Barrett* [1966] 1 QB 312 (CA), where Davies L.J. (at 330) regarded as absurd the proposition that, despite there being no charge, the requirement to take the person before a court subsisted – "I shudder to contemplate the reaction of a busy metropolitan magistrate if a man were brought before him … and, upon inquiring what the charge was, the magistrate were told by the police "None."

35. Moreover, s 107, as recognised by McColl JA (CA[63] [**CAB 53**]), points to the continuing purpose of arrest being that for which the respondent contends. That section, by stating that nothing in Part 8 affects the power of a police officer to "commence proceedings ... *otherwise than* by arresting the person", specifically contemplates that arrest is the first step in the criminal process, and thereby demonstrates a recognition by the legislature of statements to similar effect in the case law. The terms of s 107 are consistent only with an understanding that there will not be an arrest without an intention to commence proceedings, because arrest is itself a part of that process.

Context: Other legislation

36. There is yet a further indication that the parliament did not intend to depart, in s 99, form the established purpose of arrest. It has, in other legislation that provides specifically for arrest and detention by police solely for investigative purposes, stipulated that the provisions of LEPRA with which this appeal is concerned do not apply.[51] It is worth noting also that statutory powers of arrest without warrant in other jurisdictions have specifically conferred a power to arrest to investigate[52] - a position which has repeatedly been eschewed in NSW.

Differing mental states?

37. The appellant asserts that it would conflict with the text of s 99 to recognise an implied requirement at the time of arrest that the arresting officer have formed an intention to charge the arrested person. That assertion is made on the basis that the officer would place himself at risk of damages at the suit of the person in the tort of malicious prosecution if he were to charge the person on the basis of suspicion of guilt of the offence charged, as distinct from having a genuine *belief* in the person's guilt. The Court of Appeal, by majority, rejected that proposition. It was correct to do so.

38. The element of the tort that requires consideration is that of the *absence* of reasonable and probable cause (it must not be overlooked that the plaintiff in a

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[51] *Terrorism (Police Powers) Act 2002* ss25A, 25C, 25E
[52] *Police Powers and Responsibilities Act 2000* (QLD); *Police Administration Act 1978* (NT)

malicious prosecution suit is required to prove the negative proposition). The critical question presented by the *subjective* aspect of this element of the tort is: what does the plaintiff demonstrate about what the prosecutor made of the material that he or she had available when deciding whether to prosecute or maintain the prosecution?[53]

39. The "qualitative element of the contention that the prosecutor acted without reasonable and probable cause may often best be captured by the word 'honesty', and, in most cases the allegation of lack of honesty will require consideration of what the prosecutor knew, believed or concluded about some aspect of the material available to him or her *when commencing or maintaining the prosecution.*"[54]

10 40. While it may be accepted that there is a qualitative difference between the state of mind described as a belief and that described as a suspicion[55], the knowledge or belief of which this Court spoke in *A v NSW*, is, properly understood in the context of a police officer charging a person on the basis of information supplied by a third party, a belief in the truth of the *material* on which the officer held a suspicion of the person's guilt, and not one that the person would ultimately be found to be guilty as charged.

41. The requirement in s 99 that a police officer suspect that the person is committing or has committed an offence on *reasonable* grounds, itself assumes a belief on the part of the officer in that material. It could not be said that a relevant suspicion were held
20 on *reasonable* grounds if it were otherwise.[56]

42. The issue of the putative tension to which the State points was addressed directly by Mason and Brennan JJ in *Williams*. Their Honours said[57]:

> Nor is there any reason to think that, in general, an arresting police officer would be unable properly to make a complaint or to lay an oral information until he had had an opportunity to question the person arrested. In the ordinary case of an arrest on suspicion, the arresting officer must have satisfied himself at the time of the arrest that there are reasonable grounds for suspecting the guilt of the

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[53] (2007) 230 CLR 500 at 527.
[54] Ibid.
[55] *George v Rockett* (1990) 170 CLR 104.
[56] See also, Criminal Procedure Act 1986 (NSW) s47 and s172 - a suspicion also grounds the commencement of criminal proceedings by the issue and filing of a Court Attendance Notice.
[57] At 300.

> person arrested (*Dumbell v. Roberts* (1944) 1 All ER 326, at p 329), although the grounds of suspicion need not consist of admissible evidence (see *Hussien v. Chong Fook Kam* (1970) AC 942, at pp 948-949). If the arresting officer believes the information in his possession to be true, if the information reasonably points to the guilt of the arrested person and if the arresting officer thus believes that the arrested person is so likely to be guilty of the offence for which he has been arrested that on general grounds of justice a charge is warranted, he has reasonable and probable cause for commencing a prosecution (see *Mitchell v. John Heine & Son Ltd* (1938) 38 SR(NSW) 466, at p 469; *Commonwealth Life Assurance Society Ltd. v. Brain* (1935) 53 CLR 343, at p 382; *Glinski v. McIver* (1962) AC 726, at pp 766-767). There is no practical necessity to construe the words "as soon as is practicable" in s.34A(1) so as to authorize the detention by the police of the person arrested for the purpose of questioning him or conducting inquiries with his assistance.[58]

43. The ultimate question concerning the subjective aspect of this element of the tort of malicious prosecution is whether the plaintiff has proven that the prosecutor did not *honestly* form the view that there was a "proper case for prosecution".[59] But, as this Court also observed in *A v NSW*, that expression is not susceptible of exhaustive definition without obscuring the importance of proving the *absence* of reasonable and probable cause.[60] Importantly, those cases that speak of "belief" about probable guilt, "do not sufficiently encompass cases where the prosecutor acts upon information provided by others."[61]

44. Equally, however, in those cases where a police officer is *not* basing his suspicion on what he has been told, but on what he has, himself, perceived, there is no sensible distinction to be drawn between the test of suspicion on reasonable grounds and that of a belief in the person's guilt, if that be the test, because, as already observed, if the officer does not believe, honestly, that the perceived material supports the bringing of a prosecution, he could not be said *reasonably* to suspect the commission of the offence.

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[58] The reference by their Honours in that passage to the decision of the Privy Council in *Hussien v Chong Fook Kam* demonstrates that they turned their minds to one of the principal issues in that case, which was the difference between a belief and a suspicion - the very issue raised by the appellant here – yet rejected that as a basis for finding that the fact of an arrest's being based on suspicion impeded the laying of a charge.
[59] *A v NSW* at 528.
[60] Ibid.
[61] Ibid.

45. The observations in the passage cited from *Williams* conform to the more recent exposition by this Court, in *A v NSW*, of what are the relevant considerations in determining whether there is an absence of reasonable and probable cause in a case of malicious prosecution. Those observations are an answer to the appellant's attack on the reasons of the majority in the Court of Appeal and to the position taken by the primary judge.

46. They also accord with the approach taken by Sir Frederick Jordan in *Bales v Parmeter*[62] to what was necessary to establish reasonable and probable cause to arrest under s 352 of the *Crimes Act*. Such reasonable and probable cause, the Chief Justice observed, "may be established by proving that [the arresting officer], with reasonable cause, suspected the person whom he arrested of having committed a crime or an offence." Although that observation may be said to be directed to the words in s.352, it is plain, as McColl JA observed (CA [91] [**CAB 61**]), that his Honour was of the view that if the police officer proved the relevant suspicion was held, that would demonstrate the relevant belief to ground a finding of "reasonable and probable cause" to which his Honour referred three years later in *Mitchell v John Heine & Son Ltd.*[63]

47. Properly understood, the state of persuasion to which the tort of malicious prosecution directs attention does not conflict with that of reasonable suspicion in s 99. Not only are there differing onuses, but where the recognised purpose of arrest is to set the processes of the criminal law in motion, the proposition that a relevant conflict exists does not, as McColl JA observed (CA [95] [**CAB 61**]), withstand scrutiny.

Conclusion

48. There is nothing in the reasons now provided for in s 99(1)(b), or in the provisions of s 99(4) or Part 9 of LEPRA, that derogates from the long recognised purpose of arrest.

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[62] (1938) 38 S.R. (NSW) 466.
[63] (1938) 38 S.R. (NSW) 466 at 469.

49. Once it is recognised, as it was in *NAAJA*[64] and in the numerous cases decided before it, that the purpose of arresting a person is to charge and bring him or her before a court if not earlier released on bail or unconditionally, it follows that statutory provisions which provide for *additional* conditions on the lawfulness of the arrest, such as those in s 99(1)(b), or for extended detention *following* a lawful arrest, such as those in s 99(4) and Part 9, cannot, consistently with the principle of legality, be regarded as derogating from that purpose. Much clearer language would be needed to express the parliament's intention that a rudiment of the law of arrest, aimed at the protection of personal liberty, be disturbed.

10 50. The recognition that that purpose underlies the power conferred by s 99 necessarily entails a requirement that, to be lawful, an arrest under that provision be executed with a contemporaneous intention of charging the person. There having been no such intention in this case, the arrest was unlawful. The appeal should be dismissed.

PART VI: NOTICE OF CONTENTION

51. The respondent does not rely on a Notice of Contention.

PART VII: ORAL ARGUMENT

52. The respondent estimates his oral argument will occupy some 2 hours.

Dated: 27 June 2019

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[64] At [11] and [23] per the plurality and at [223] per Nettle and Gordon JJ.