IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M45 of 2015

BETWEEN:

NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LIMITED (ACN 118 017 842)

First Plaintiff

and

MIRANDA MARIA BOWDEN

Second Plaintiff

and

NORTHERN TERRITORY OF AUSTRALIA

Defendant

PLAINTIFFS' SUBMISSIONS

Part I: Internet Certification

1. The plaintiffs certify that these submissions are in a form suitable for publication on the internet.

Part II: Concise Statement of the Issues

2. This case concerns the right to liberty in a classic context – detention of citizens by the Executive, without any involvement of the judiciary. The legislation at issue authorises persons suspected by the police of having committed minor public order offences to be taken into police custody and held in custody for a period of time,

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bypassing altogether any judicial process. The plaintiffs challenge the validity of the legislation. The questions arising in the proceedings are those set out in the questions stated at the end of the Special Case. The answers to those questions suggested by the plaintiffs are set out at Part VIII of these submissions. In essence, this case involves the following key issues:

(a) First, does the separation of powers enshrined in Ch III of the Commonwealth Constitution limit the legislative power of the Parliament under s 122 of the Constitution? If so, does it limit the legislative power of the Legislative Assembly of the Northern Territory (the **NT**) because the stream cannot rise higher than its source? And if so, do the impugned provisions contravene the separation between judicial and executive powers?

(b) Secondly, do the impugned provisions (by effectively removing from judicial oversight the involuntary detention of a citizen) undermine the institutional integrity of the courts of the NT contrary to the principle in *Kable v Director of Public Prosecutions (NSW)*?[1]

Part III: s 78B Notices

3. The plaintiffs have served notices under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Judgments below

4. This matter is brought in the Court's original jurisdiction pursuant to s 76(i) of the Constitution and s 30(a) of the *Judiciary Act 1903* (Cth).

Part V: Facts

5. This case involves a challenge to the validity of Div 4AA of Part VII of the *Police Administration Act* (NT) (the **PA Act**). Division 4AA was inserted into Part VII of the PA Act by the *Police Administration Amendment Act 2014* (NT) (the **Amending Act**), which commenced on 17 December 2014. Because this is a challenge to the validity of Div 4AA, there are few facts relevant to the Court's determination of the issues arising. The Special Case, at [1]-[7], sets out facts relevant to the plaintiffs' standing. Briefly put, the first plaintiff provides legal services to Aboriginal and Torres Strait

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1 (1996) 189 CLR 51.

Islander people in the NT and is the largest legal service in the NT.[2] A disproportionately high number of those persons detained under s 133AB of the PA Act since it came into effect are indigenous.[3] The second plaintiff, Ms Bowden, was arrested and taken into custody purportedly pursuant to s 133AB(2)(b) of the PA Act on 19 March 2015, and was held in custody for almost 12 hours.[4]

Part VI: Argument

Legal and practical operation of Division 4AA

6. The new Div 4AA purports to significantly expand the powers conferred on NT police for taking into and holding a person in custody in relation to minor offences. The new powers apply where a member of the police force arrests a person without a warrant under s 123 of the PA Act, and does so believing on reasonable grounds that the person has committed, was committing, or was about to commit an "infringement notice offence".[5]

7. This new class of offences is defined in s 133AA of the PA Act to mean an offence under another Act for which an infringement notice may be served and which is prescribed for Div 4AA by regulation. Some 35 different offences fall within this class.[6] The majority are minor offences for which no term of imprisonment could be imposed as a penalty for the offence, if the person is found guilty by a court.[7] Many are of a "public order" character. The offences include, for example, the making of "undue noise" in contravention of a direction from a member of the police to stop the noise,[8] and causing a nuisance through neglecting to keep a clean yard.[9]

8. The new powers purport to authorise police to take a person into custody and hold the person for a period of up to four hours (s 133AB(2)(a)) or, if the person is intoxicated,

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2 Special Case [2].

3 Special Case [30].

4 Special Case [4]-[6].

5 PA Act, s 133AB(1).

6 Special Case, Attachment E, sets out a schedule of all offences as at the date of the Special Case falling within the definition, as well as the penalties attaching to them.

7 These offences are set out in the Special Case at Attachment D.

8 An offence under s 53B(3) of the *Summary Offences Act.*

9 An offence under s 78 of the *Summary Offences Act.*

for a period longer than four hours until the member believes on reasonable grounds that the person is no longer intoxicated (s 133AB(2)(b)). In Ms Bowden's case, she was held in custody for almost 12 hours on the basis of a purported exercise of power under s 133AB(2)(b).[10]

9. On the expiry of the period of time in custody authorised by s 133AB(2), subsection (3) gives the police four options for dealing with the imprisoned person: (a) unconditional release; (b) release with the issue of an infringement notice in relation to the infringement notice offence; (c) release on bail; or, (d) under s 137, bringing the person before a justice of the peace or a court for the infringement notice offence or another offence allegedly committed by the person.

10. Significantly, during the period a person is held in custody under s 133AB(2), there is no mandated judicial oversight of the process. The arrest itself is without warrant,[11] and a person may be held under s 133AB(2), and then released under s 133AB(3)(a)-(c), without any involvement by the courts. For the duration of a person's detention under s 133AB(2), there is no obvious (or practically possible) way for the detained person to have the fact of his or her detention (or its duration) reviewed by a court. Accessing the courts will be all the more difficult where the arrest occurs in remote parts of the NT. The period of detention (within the limit set by s 133AB(2)) is at the discretion of the police, and if the police elect to release the person under s 133AB(3)(a)-(c), the PA Act provides the courts with no role whatsoever. The lack of judicial oversight is particularly concerning given there is no other mechanism for protection against abuse of the powers conferred under Div 4AA. For example, there is no provision preventing a member of the Police Force detaining a person under s 133AB, releasing the person, and then immediately detaining the person again.

11. In contrast, prior to the commencement of the Amending Act, a police member taking a person into custody was obliged by s 137(1) of the PA Act to bring the person before a justice or a court as soon as practicable, absent a grant of bail or release of the person. Section 137(2) authorises a longer period in custody for the purposes of questioning or investigation, but (unlike s 133AB) this longer period is not open to the

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10 Special Case [6].

11 PA Act, s 133AB(1).

police if the relevant offence does not involve a term of imprisonment as a maximum penalty and it can only be for a reasonable period in any event.[12]

12. Thus, the new powers authorise the police to deprive a person of their liberty through the imposition of what is effectively a period of imprisonment solely on the basis of a police officer's belief on reasonable grounds that the person had committed, was committing or was about to commit, an "infringement notice offence". As already observed, the new powers are available in relation to a large number of minor offences, including offences that do not carry a term of imprisonment as an available penalty.

13. If a person detained under s 133AB wished to have his or her detention reviewed by a court, the practical difficulties involved in bringing such an application would be overwhelming. Moreover, the role of the court on any such application is confined by the PA Act. The court could consider whether s 133AB applied (by determining whether the conditions of s 133AB(1) were met). However, in any case involving detention under s 133AB(2)(a), the legislature dictates that the person may be held in custody for up to four hours, thereby depriving the court of any meaningful review of the period in custody. The court is excluded from supervising the detention except to the extent of determining whether the conditions in s 133AB(1) are met. The period of time for which the person might be held in custody is not referable to any rational standard – it is simply an upper limit set by the legislature and to be applied at the discretion of the police themselves.

14. In the case of persons held under s 133AB(2)(b), the courts may have more of a role in relation to the duration of the time in custody (for example, a determination as to intoxication). However, even in such a case, there are insuperable practical difficulties in seeking judicial review of the detention.

15. Persons taken into custody under s 133AB(2) are not simply deprived of their liberty. They will have their photograph, fingerprints and other "biometric indicators" taken, and are liable to be searched.[13] A period of time in custody carries with it a range of other degradations and risks, including physical harm (whether from others in custody,

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12 PA Act, s 137(2), (3).

13 Section 133AC.

members of the police or self-harm). Other charges (such as assault police charges) may result. In light of the disproportionately high number of indigenous persons already subjected to these new powers,[14] a grave concern is that indigenous persons are more likely to die in police custody than non-indigenous persons.[15]

16. The new powers conferred on NT Police are unprecedented in Australia and in the common law world. In comparing these NT powers to existing powers in other jurisdictions, two features are striking: *first*, Div 4AA purports to authorise a period in custody of up to four hours without any requirement even that the time be used for the purpose of investigating an offence; and *secondly*, Div 4AA fails to provide for judicial oversight of the process.

17. The second reading speech for the Police Administration Amendment Bill makes plain that these new powers were intended to provide police with an easier way to "clean up the streets", and that the by-passing of the courts was deliberate. The Attorney-General saw the amendment as giving police a "new vehicle" for dealing with "individuals who present themselves as offending generally against the Summary Offences Act. It will give police a vehicle by which to remove them, contain them and then release them. It is a form of catch and release".[16] The Attorney-General described the overall purpose of the amendment as follows:

> The purpose ... is to provide members of the Northern Territory Police Force with an alternative post-arrest option, where a person who has committed certain prescribed offences may be held by police for up to four hours and can then be released with an infringement notice, *as opposed to requiring that the person be charged and have those charges heard by a court.* I will refer to the concept as "paperless arrest".[17]

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14 Special Case [30].

15 Louise Porter, "Indigenous deaths associated with police contact in Australia: Event stages and lessons for prevention" (2013) 46(2) *Australian & New Zealand Journal of Criminology* 178, 178-79; Chris Cunneen, "Aboriginal Deaths in Custody: A Continuing Systematic Abuse" (2006) 33(4) *Social Justice* 37, 41. Relevantly, Porter notes that the Royal Commission into Aboriginal Deaths in Custody "identified that Aboriginal people were more likely to have died in police custody than in prisons" (at 178).

16 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 26 November 2014, 13 (second reading debate). It should be noted that the NT's *Parliamentary Debates* are not published in hard copy, and the electronic version does not have page or paragraph numbers. **Annexure B** to this outline is a print-out of the relevant pages of the *Parliamentary Debates* with page numbers on the bottom left hand corner, and it is those (unofficial) page numbers to which these submissions will refer.

17 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 22 October 2014, 1 (emphasis added).

It was an advantage, he said, that under the new powers police would not be "detained for long periods preparing necessary paperwork for a court to consider the charges".[18]

18. The Attorney-General, on the third reading of the Bill, urged the police to "pick up the cudgels of this new power".[19] Certainly, the NT police have done so: in the first quarter of 2015, the power in s 133AB was used over 700 times.[20]

The separation of judicial power in Ch III of the Constitution limits s 122

19. Members of this Court and commentators alike have long noted that cases on s 122 and Ch III have "not resulted in a coherent body of doctrine".[21] Griffith CJ set the jurisprudence on a particular course when his Honour concluded in *R v Bernasconi* that Ch III "has no application to territories".[22] As the majority was to observe some 40 years later in *R v Kirby; Ex parte Boilermakers Society of Australia*:

> It would have been simple enough to follow the words of s 122 and of ss 71, 73 and 76(ii) and to hold that the courts and laws of a Territory were federal courts and laws made by the Parliament. ... But an entirely different interpretation has been adopted, one which brings its own difficulties ...[23]

20. Contrary to Griffith CJ's conclusion, Ch III is not wholly irrelevant to s 122. Recent cases make clear that Ch III does intersect with s 122 in several ways. Section 76(ii) includes laws made pursuant to s 122.[24] While territory courts are not "federal courts" within the meaning of Ch III, they can receive federal jurisdiction. It follows that they come within the *Kable* doctrine.[25]

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18 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 22 October 2014, 1.

19 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 26 November 2014, 14 (third reading).

20 Special Case [30].

21 See, eg, *Spratt v Hermes* (1965) 114 CLR 226 at 265 (Menzies J); *Northern Territory v GPAO* (1999) 196 CLR 553 at 602 [124] (Gaudron J); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 594-595 [173]-[174] (Gummow and Hayne JJ); James Stellios, *The Federal Judicature: Chapter III of the Constitution Commentary and Cases* (2010) §§8.100-8.114; Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (3rd ed, 2002) 156-193.

22 (1915) 19 CLR 629, 635. See also *Kruger v Commonwealth* (1997) 190 CLR 1 at 43-44 (Brennan CJ), 62 (Dawson J, 141-142 (McHugh J).

23 (1956) 94 CLR 254 at 290 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

24 *Northern Territory v GPAO* (1999) 196 CLR 553; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

25 See *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146.

21. Recent cases have also discarded the theory underpinning Griffith CJ's conclusion that regarded the territories as separate from the federal system in favour of a more integrationist outlook. This Court has increasingly held that a limitation found elsewhere in the Constitution limits legislative power under s 122 as it does legislative power under s 51.[26]

22. The wholesale disconnection between Ch III and s 122 is, therefore, both untenable and unjustifiable in the light of current authorities. This Court should now hold that the exercise of power under s 122 is limited by the separation of judicial from executive and legislative powers effected by Ch III. Notwithstanding *R v Bernasconi*, this holding has commended itself to members of this Court.[27] It is a holding which is mandated by accepted principles of constitutional interpretation.

23. The Constitution must be read as a whole.[28] Section 111 provides that a territory surrendered to the Commonwealth "shall become subject to the exclusive jurisdiction of the Commonwealth", which phrase is apt to include the Commonwealth's legislative, executive and judicial power.[29] The judicial power of the Commonwealth is provided for in Ch III, which bears the heading "The Judicature" and which contains no indication that its operation should be limited to the Commonwealth's legislative powers in s 51.[30]

24. Moreover, the underlying purposes for which judicial power is separated from the political branches of government have significance to the territories. The separation of powers represents more than the bulwark of federalism; it works also to maintain the rule of law[31] and protect the liberty of the individual.[32] As A V Dicey observed about the rule of law:

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26 See, eg, *Capital Duplicators Pty Ltd v Australian Capital Television [No 1]* (1992) 177 CLR 248; *Wurridjal v Commonwealth* (2009) 237 CLR 309.

27 See, eg, *Kruger v Commonwealth* (1997) 190 CLR 1 at 84 (Toohey J), 108-109 (Gaudron J), 176 (Gummow J).

28 *Spratt v Hermes* (1965) 114 CLR 226 at 242 (Barwick CJ), 278 (Windeyer J).

29 *Kruger v Commonwealth* (1997) 190 CLR 1 at 164-165 (Gummow J).

30 *Kruger v Commonwealth* (1997) 190 CLR 1 at 171 (Gummow J).

31 See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 (Dixon J); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351-352 [30] (Gleeson CJ and Heydon J); *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61] (Gummow and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1 at 42 [61] (French CJ).

> We mean, in the first place, that no man is punishable or can lawfully be made to suffer in body or in goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.[33]

Both purposes have as much relevance to the people of the territories as to any other people throughout the Commonwealth.

25. To conclude that the separation of powers limits legislative power under s 122 does not call into question the result, as opposed to the reasoning, in *R v Bernasconi*. That case concerned the specific relationship between s 80 and s 122 and it can stand for what it held on that point. And so to conclude does not require this Court to revisit the question whether territory courts are "federal courts" within the meaning of Ch III.[34] The separation of powers does not require territory courts to be "federal courts". Territory courts fit within the schema of s 71 not as "federal courts" constituted in accordance with s 72 but as one of those "other courts" which the Parliament invests with federal jurisdiction.

The Northern Territory Executive cannot exercise judicial power

26. One consequence of the separation of powers is that the Parliament cannot invest judicial power otherwise than in accordance with s 71 of the Constitution.[35] If Ch III applies to s 122, it follows that the Parliament cannot enact a law under s 122 in contravention of this principle.

27. A further analytical step is necessary where, as here, legislation is enacted by a self-governing territory. "[D]ifferent considerations may apply"[36] to such laws because they are enacted by the territory legislature in the exercise of its own independent and unqualified authority, and not as the agent or delegate of the Parliament in any sense.[37] So much may be accepted, yet the step should nonetheless be taken that this same

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32 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 11-12 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

33 *An Introduction to the Study of the Law of the Constitution* (9th ed, 1885).

34 See *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591; *Spratt v Hermes* (1965) 114 CLR 226; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322.

35 *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254.

36 *Kruger v Commonwealth* (1997) 190 CLR 1 at 109 (Gaudron J). See also *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 349 [69] (Gummow and Hayne JJ).

37 *Capital Duplicators Pty Ltd v Australian Capital Television [No 1]* (1992) 177 CLR 248 at 281 (Brennan, Deane and Toohey JJ).

restriction on the Parliament applies to restrict the legislative power of the NT legislature.

28. There is a general principle in Australian constitutional law that the "stream cannot rise above its source."[38] If the Commonwealth Parliament is denied legislative power by a constitutional limitation, it is incompetent to clothe the legislature of a self-governing territory with the power to make laws free from that constitutional limitation. The Parliament cannot grant a greater power than it itself possesses. Because the Parliament cannot confer judicial power on anything other than a court specified in s 71, it follows that the NT legislature cannot do so either.

10 29. Furthermore, the better view is that territory courts always and only exercise federal jurisdiction.[39] This is because all matters which territory courts adjudicate arise under a Commonwealth law either immediately (where the applicable law is a Commonwealth statute) or mediately (where the applicable law is a territory statute supported ultimately by s 122). And because all judicial power in the territories falls within the judicial power of the Commonwealth, both the Parliament and the NT legislature can only invest that power in a "court" within the meaning of s 71 of the Constitution.

30. It follows that the NT Executive cannot exercise judicial power. Only the NT courts can do so. In so far as it is necessary, the plaintiffs seek leave[40] to re-open *Spratt v*
20 *Hermes*[41] and *Capital TV and Appliances Pty Ltd v Falconer*.[42] As noted in paragraph 19 above, the cases on s 122 and Ch III have not resulted in a coherent body of doctrine.[43]

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38 *Heiner v Scott* (1914) 19 CLR 381 at 393 (Griffith CJ).

39 See *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 341 [40] (Gaudron J); *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 585 (Dixon J); *Kruger v Commonwealth* (1997) 190 CLR 1 at 168-169 (Gummow J); *O'Neill v Mann* (2000) 101 FCR 160. See also Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (3rd ed, 2002) 183-185; Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (2012) 24-26.

40 See *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311.

41 (1965) 114 CLR 226.

42 (1971) 125 CLR 591.

43 Cf *John v Commissioner of Taxation (Cth)* (1989) 166 CLR 417 at 438-439.

Division 4AA confers judicial power on the Northern Territory Executive, and is invalid

31. *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[44] remains the starting point for considering whether executive detention without judicial order or warrant amounts to the exercise of judicial power by the Executive.

32. The general principle which Brennan, Deane and Dawson JJ (with whom Mason CJ agreed) laid down was that it would be "beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt."[45] They explained that, "putting to one side the exceptional cases ..., the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt."[46] Outside these exceptional cases, they posited "a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth."[47]

33. The exceptional cases which their Honours identified were "the arrest and detention in custody, pursuant to executive warrant, of a person accused of crime to ensure that he or she is available to be dealt with by the courts", detention "in cases of mental illness or infectious disease" and detention in pursuance of the exclusion and deportation of aliens.[48] In that last category of case, their Honours held that a law authorising executive detention would not be punitive so as to infringe Ch III of the Constitution if "the detention which [the law] require[s] and authorize[s] is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered."[49]

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44 (1992) 176 CLR 1.

45 (1992) 176 CLR 1 at 27.

46 (1992) 176 CLR 1 at 27.

47 (1992) 176 CLR 1 at 28-29.

48 (1992) 176 CLR 1 at 28.

49 (1992) 176 CLR 1 at 33.

34. Members of this Court have expressed divergent opinions about some of what was said in *Chu Kheng Lim*. Do citizens enjoy a constitutional immunity from executive detention absent judicial order or warrant except in "exceptional cases"?[50] Is the distinction between punitive and non-punitive purposes useful?[51] Must the law authorising detention be "reasonably capable of being seen as necessary" for a non-punitive purpose at all?[52]

35. Yet whatever else *Chu Kheng Lim* stands for at the periphery, its core has never been questioned by this Court. This Court has never retreated from the proposition that executive detention without judicial order or warrant *can* amount to an exercise by the Executive of judicial power.[53] Whatever room for debate and uncertainty remains is of a second-order kind only: how are those instances of executive detention that amount to the exercise of judicial power to be identified?

36. It is in keeping with this Court's approach to other implied limitations on legislative power, and with the course of authority since *Chu Kheng Lim*, to approach that question in the following manner, having regard always to substance over form.

37. First, a law authorising executive detention without judicial order or warrant will be treated as punitive, and therefore as an exercise or incident of judicial power, unless it can be shown that the law authorises detention for some non-punitive purpose. The requirement that a non-punitive purpose be demonstrated acknowledges that "ordinarily, the involuntary detention of a citizen by the State is penal or punitive in character".[54] As McHugh J observed in *Re Woolley; Ex parte Applicants M276/2003*:

> If no more appears than that the law authorises or requires detention, the correct inference to be drawn from its enactment is likely to be that, for some

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50 *Kruger v Commonwealth* (1997) 190 CLR 1 at 110 (Gaudron J); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 24-25 [56]-[59] (McHugh J); *Al-Kateb v Godwin* (2004) 219 CLR 562 at 648 [257]-[258] (Hayne J).

51 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 612 [137] (Gummow J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 612-613 [80]-[81] (Gummow J).

52 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 648 [255]-[256] (Hayne J).

53 See *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 370 [141] (Crennan, Bell and Gageler JJ).

54 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 12 [17] (Gleeson CJ). See also James Stellios, *Zines's The High Court and the Constitution* (6th ed, 2015) 316.

> unidentified reason, the legislature wishes to punish or penalise those liable to detention without the safeguards of a judicial hearing.[55]

38. The purpose of the law authorising detention is to be "arrived at by the ordinary processes of statutory construction".[56] That is a familiar process. Relevant are "the terms of the law, the surrounding circumstances, the mischief at which the law is aimed and sometimes the parliamentary debates preceding its enactment".[57]

39. Second, while purpose has been described as the "yardstick"[58] of validity, a non-punitive purpose is a necessary but not sufficient condition for avoiding the conferral of judicial power on the Executive. The scope of the law and of the detention which it authorises might be so disproportionate to the non-punitive purpose which it is said to pursue that the detention can only be effected as a result or incident of the exercise of judicial power. It should not be enough that detention is authorised for a legitimate non-punitive purpose, lest the pursuit of that purpose go too far. As Callinan and Heydon JJ observed in *Fardon v Attorney-General (Qld)*, "[t]his is not to say ... that this Court should not be vigilant in ensuring that the occasions for non-punitive detention are not abused or extended for illegitimate purposes."[59]

40. Hence the importance and vitality of the caveat entered by Brennan, Deane and Dawson JJ in *Chu Kheng Lim* that the laws there were valid because the detention which they authorised was limited to what was "reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered."[60] This caveat has been emphasised by this Court in recent times.[61] The duration of detention must be reasonably capable of being seen as necessary for a non-punitive purpose.

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55 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 26 [60] (McHugh J).

56 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 557 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

57 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 26 [60] (McHugh J).

58 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 660 [294] (Callinan J); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 26 [60] (McHugh J).

59 (2004) 223 CLR 575 at 654 [217].

60 (1992) 176 CLR 1 at 33.

61 See *Kruger v Commonwealth* (1997) 190 CLR 1 at 162 (Gummow J); *Al-Kateb v Godwin* (2004) 219 CLR 562 at 609-610 [128]-[129], 611 [133] (Gummow J); *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 13-14 [21] (Gleeson CJ), 84 [260] (Callinan J); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 369-370 [137]-[141].

41. Application of the above principles leads to the conclusion that Div 4AA purports to confer judicial power on the Executive of the NT, and is invalid as a result.

42. This is one of those rare cases where no more appears than that Div 4AA authorises detention because "the legislature wishes to punish or penalise those liable to detention without the safeguards of a judicial hearing."[62] The ordinary process of statutory construction reveals no other purpose. This point requires some elaboration.

43. Prior to the Amending Act, where a member of the Police Force believed on reasonable grounds that a person had committed what is now known as an infringement notice offence, the member could:

10 (a) under Division 4A of Part VII, issue and serve a notice to appear;

(b) issue an infringement notice; or

(c) under s 123 of the PA Act, arrest and take that person into custody, after which the member could:

(i) release the person;

(ii) grant the person bail;

(iii) issue a notice to appear and/or infringement notice; or

(iv) bring the person before a justice or court after a reasonable period has elapsed for questioning in accordance with s 137 of the PA Act.

44. After the Amending Act, Div 4AA leaves in place option (a) and it postpones for four
20 hours the decision whether to exercise the options in (b) and (c)(i) to (iii). As for option (c)(iv), if the infringement notice offence has a maximum penalty of a term of imprisonment, the only additional effect of Div 4AA is to permit the person to be detained in circumstances where, under s 137, that person ought to have been brought before a justice or court because it was not, or was no longer, reasonable to detain the person for questioning. If the infringement notice offence does not have a maximum

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(Crennan, Bell and Gageler JJ); *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 88 ALJR 847 at 853 [26] (French CJ, Hayne, Crennan, Kiefel and Keane JJ); *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207 at 272 [374] (Gageler J).

62 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 26 [60] (McHugh J).

penalty of a term of imprisonment, Div 4AA permits the person to be detained for four hours in circumstances where, under s 137, it would otherwise be necessary to bring the person before a justice or court as soon as is practicable because the statute presupposes that it is not reasonable to hold that person for questioning at all.

45. The statute reveals no purpose as being served by this superadded four hour period of detention other than to postpone a decision (under options (b), (c)(i) to (iii)) or to permit a person to be held when otherwise he or she would have to be brought before a justice or court (under option (c)(iv)). Where an infringement notice is issued at the end of the four hour period, the effect is little short of double punishment. Whereas the person would have received an infringement notice alone prior to the Amending Act, the person has now been detained for four hours (or longer) in addition to receiving an infringement notice. This is what occurred in Ms Bowden's case.

46. During that superadded period, a person may, under s 133AB(4), be questioned for the purposes of "deciding how to deal with the person" at the expiry of the four hour period. Yet there is no requirement that the detention be utilised in this way or that the detention be necessary to enable such questioning to occur. It sheds no light on whether the period of detention in truth serves any non-punitive purpose.

47. The absence of any non-punitive purpose discernible from the statutory text is reinforced by consideration of the legislative history of Div 4AA. The second reading speech makes clear that the scheme of Div 4AA was crafted with the express design of detaining individuals while avoiding having to bring those individuals before a court. While the class of legitimate non-punitive purposes is not closed, of one thing we can be sure: reducing paperwork and detaining people for four hours while avoiding the courts fall outside that class.

48. The balance of the second reading speech records that "[a]n additional benefit to the community is intended by the use of such an option to de-escalate social disorder situations or potential situations of public disorder before they escalate into major incidents."[63] Whether or not this would be a legitimate non-punitive purpose, it finds no foothold in the statutory text. A person may be arrested under s 123 and then detained for four hours under s 133AB irrespective of whether circumstances of

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63 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 22 October 2014, 1.

escalating social disorder accompanied either the offending or the arrest. Any such circumstances may well have dissipated by the time the person is arrested under s 123 and detained under Division 4AA. Sections 123 and 133AB impose no necessary temporal connection between the alleged offending and the arrest and detention.

49. Moreover, Division 4AA is only engaged when a person has been arrested and taken into custody: they are already "out of circulation", to adopt the second reading speech's terminology.[64] While it is no doubt descriptively accurate to notice that a person who is in detention is necessarily not to be found on the streets, there is nothing in the statutory text to show that the purpose of this superadded four hour detention has anything to do with keeping the peace.

50. Even if Div 4AA could be regarded as pursuing some public order purpose, the four hour period of detention is not reasonably capable of being considered necessary for achieving that purpose. The NT Police already have a very broad power of arrest under s 123 of the PA Act, and the individual will have already been arrested and thus removed from the scene. Continuing to hold the individual for up to four hours becomes, in effect, a form of preventative detention if this non-punitive purpose is to be believed. Yet there is no express or implied limitation in Div 4AA to restrict the detention to circumstances where this preventative detention for four hours is necessary to achieve any public order purpose.

51. Because detention under Div 4AA lacks any non-punitive purpose, and because it cannot be regarded as being reasonably capable of being considered necessary for any such purpose, the detention which that Division authorises can only be an incident or result of a judicial order or warrant. Division 4AA purports to allow this detention at the instance of the Executive without judicial order or warrant. It is therefore invalid for conferring judicial power on the Executive rather than on a court as required by s 71 of the Constitution.

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64 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 26 November 2014, 11.

Division 4AA offends the Kable Principle

52. Further or in the alternative, Div 4AA is invalid on the basis of *Kable*. The following submissions apply even if, contrary to the above submissions, the separation of powers does not apply to the NT.

53. The "central *Kable* principle" is that state Parliaments may not legislate to confer powers on state courts that are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth.[65] The *Kable* principle limits the power of the legislatures of the territories, as well as the states.[66] It is not limited, however, to situations involving an attempt to confer a particular duty or function on a state or territory court.

54. The *Kable* principle is concerned with protection of the "institutional integrity" of state and territory courts from "legislative or executive intrusion".[67] Institutional integrity can be impaired in various ways, not only by an attempt to confer a particular function on a court. It may be impaired by legislative or executive action that usurps the courts, including by seeking to remove a "defining or essential characteristic"[68] of a court, or by excluding the courts from performing a function that is central to the role of a court. Accordingly, the *Kable* principle extends to situations where, as here, the legislature's intrusion on the institutional integrity of the courts is not through the conferral of a particular duty or function, but rather by usurping or undermining the courts.

55. Although there is no decision applying *Kable* in this way, it has been recognised that "there cannot be any single, let alone comprehensive, statement of the content to be given to that essential notion" of repugnancy to or incompatibility with the institutional integrity of state or territory courts.[69] Moreover, in *International Finance*

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65 *Kuczborski v Queensland* (2014) 314 ALR 528 at [102] (Hayne J).

66 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [28]-[29]; *Wainohu v New South Wales* (2011) 243 CLR 181 at 229 [105] (Gummow, Hayne, Crennan and Bell JJ).

67 *Wainohu* (2011) 243 CLR 181 at 228 [105] (Gummow, Hayne, Crennan and Bell JJ). See also at 208 [44] (French CJ and Kiefel J).

68 In *Wainohu*, French CJ and Kiefel J said that "the term 'institutional integrity', applied to a court, refers to its possession of the defining or essential characteristics of a court": (2011) 243 CLR 181 at 208 [44].

69 *Kuczborski v Queensland* (2014) 314 ALR 528 at [106] (Hayne J). See also *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 89 [124] (Hayne, Crennan, Kiefel and Bell JJ).

Trust Co Ltd v New South Wales Crime Commission,[70] French CJ recognised that institutional integrity may be impaired by *depriving* a court of "an important characteristic of judicial power".[71]

56. Two features of the Div 4AA framework impair the institutional integrity of the NT courts:

(a) *First*, that there is no real possibility of a person detained under Div 4AA approaching a court during the period of detention; and

(b) *Secondly*, that even if a detained person were able to approach a court, the court would be limited to reviewing the legislative criteria.[72] This deprives a court from taking into account the factors it would ordinarily consider when a person detained in custody and not yet convicted of any crime is brought before it. For example, when determining whether to grant bail under the *Bail Act* (NT), a NT court will apply the presumption in favour of bail for certain offences (s 8) and in applying s 24(1)(b), will consider whether the period of detention pending trial is likely to exceed any sentence imposed on conviction.[73] Thus, Div 4AA eviscerates the court's supervisory power in relation to the detention.

57. Judicial review of the detention of a person by the Executive has long been viewed as fundamental to common law legal systems.[74] It was the recognition of the need to protect the liberty right from arbitrary interference by the Executive that ultimately resulted, in England, in the *Habeas Corpus Act 1679*, and in the United States, in the Due Process Clause of the United States Constitution and the preservation of the writ of habeas corpus therein.[75]

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70 (2009) 240 CLR 319.

71 (2009) 240 CLR 319 at 354-55 [55]-[56].

72 Cf *South Australia v Totani* (2010) 242 CLR 1.

73 See, eg, *Suttie v R* [2013] NTSC 37 at [52], [60].

74 See the discussion in *Hamdi v Rumsfeld* (2004) 542 US 507 at 554-558 (Scalia J, dissenting, joined by Stevens J).

75 *Hamdi v Rumsfeld* (2004) 542 US 507 at 556-558 (Scalia J). The writ of habeas corpus is preserved in Art I §9, cl 2 of the United States Constitution.

58. In Australia, "the supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court".[76] The exercise of that jurisdiction is itself supervised by this Court.[77] It is established that the supervisory role of a state or territory court, exercised through (among other things) the grant of habeas corpus, is a "defining characteristic" of those courts.[78] The failure to provide for judicial oversight of the period of detention deprives NT courts of an essential characteristic and thereby impairs their institutional integrity.

59. An action for false imprisonment commenced after the four hours of detention is complete is a frail reed for vindicating the liberty interests of citizens detained under Div 4AA. Even if ex post facto review were an adequate substitute for immediate judicial scrutiny of and intervention to prevent executive detention, the scope for meaningful judicial review of the detention is limited, as explained above at paragraph 13. What was said in *Chu Kheng Lim* is thus on point, albeit that case was about the separation of powers. Brennan, Deane and Dawson JJ recognised that "the power to detain a person in custody pending trial is ordinarily subject to the supervisory jurisdiction of the courts", including the "ancient common law" jurisdiction to admit the person to bail.[79] These comments bespeak the significance of judicial oversight of deprivations of liberty.

60. For these reasons, Div 4AA constitutes an impermissible intrusion by the legislature upon the institutional integrity of the NT courts and is therefore invalid.

Part VII: Applicable Provisions

61. The applicable provisions are set out in Annexure A to these submissions.

Part VIII: Orders Sought

62. The questions for the Court's opinion should be answered as follows:

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76 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 580 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

77 *Kirk* (2010) 239 CLR 531 at 581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

78 *Kirk* (2010) 239 CLR 531 at 581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

79 (1992) 176 CLR 1 at 28.

Question 1: Yes (on both or either of the grounds set out in sub-paragraphs (a) and (b)).

Question 2: The defendant.

Question 3: Relief should be granted in terms of paragraphs A and B of the prayer for relief in the Amended Statement of Claim. An order should be made pursuant to s 44(1) of the *Judiciary Act 1903* (Cth) remitting the balance of the proceeding to the Supreme Court of the Northern Territory.

Part IX: Oral Argument

63. The plaintiffs estimate that 2.5 hours will be required for the presentation of their oral argument.

Filed: 6 July 2015

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ANNEXURE A

APPLICABLE PROVISIONS

Except where noted, Annexure A sets out the applicable constitutional, statutory and regulatory provisions in force at all relevant times from 17 December 2014 and still in force in the form set out in this annexure at the date of making the plaintiffs' submissions.

THE CONSTITUTION

Chapter III – The Judicature

71 Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

72 Judges' appointment, tenure and remuneration

The Justices of the High Court and of the other courts created by the Parliament:

(i) shall be appointed by the Governor-General in Council;

(ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;

(iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age.

The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court.

Subject to this section, the maximum age for Justices of any court created by the Parliament is seventy years.

The Parliament may make a law fixing an age that is less than seventy years as the maximum age for Justices of a court created by the Parliament and may at any time

repeal or amend such a law, but any such repeal or amendment does not affect the term of office of a Justice under an appointment made before the repeal or amendment.

A Justice of the High Court or of a court created by the Parliament may resign his office by writing under his hand delivered to the Governor-General.

Nothing in the provisions added to this section by the Constitution Alteration (Retirement of Judges) 1977 affects the continuance of a person in office as a Justice of a court under an appointment made before the commencement of those provisions.

A reference in this section to the appointment of a Justice of the High Court or of a court created by the Parliament shall be read as including a reference to the appointment of a person who holds office as a Justice of the High Court or of a court created by the Parliament to another office of Justice of the same court having a different status or designation.

73 Appellate jurisdiction of High Court

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:

(i) of any Justice or Justices exercising the original jurisdiction of the High Court;

(ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;

(iii) of the Inter-State Commission, but as to questions of law only;

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

74 Appeal to Queen in Council

No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

75 Original jurisdiction of High Court

In all matters:

(i) arising under any treaty;

(ii) affecting consuls or other representatives of other countries;

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(iv) between States, or between residents of different States, or between a State and a resident of another State;

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

76 Additional original jurisdiction

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

(i) arising under this Constitution, or involving its interpretation;

(ii) arising under any laws made by the Parliament;

(iii) of Admiralty and maritime jurisdiction;

(iv) relating to the same subject-matter claimed under the laws of different States.

77 Power to define jurisdiction

With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

(i) defining the jurisdiction of any federal court other than the High Court;

(ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;

(iii) investing any court of a State with federal jurisdiction.

78 Proceedings against Commonwealth or State

The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

79 Number of judges

The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

80 Trial by jury

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

Chapter V - The States

111 States may surrender territory

The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

Chapter VI - New States

122 Government of territories

The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

***POLICE ADMINISTRATION ACT* (NT)**

Division 3 - Arrest

123 Arrest without warrant by members of Police Force

A member of the Police Force may, without warrant, arrest and take into custody any person where he believes on reasonable grounds that the person has committed, is committing or is about to commit an offence.

Division 4AA - Taking person into custody for infringement notice offence

133AA Definition

In this Division:

infringement notice offence means an offence under another Act for which an infringement notice may be served and which is prescribed for this Division by regulation.

133AB Taking person into custody for infringement notice offence

(1) This section applies if:

(a) a member of the Police Force has arrested a person without a warrant under section 123; and

(b) the person was arrested because the member believed on reasonable grounds that the person had committed, was committing or was about to commit, an offence that is an infringement notice offence.

(2) The member may take the person into custody and:

(a) hold the person for a period up to 4 hours; or

(b) if the person is intoxicated – hold the person for a period longer than 4 hours until the member believes on reasonable grounds that the person is no longer intoxicated.

(3) The member, or any other member, on the expiry of the period mentioned in subsection (2), may:

(a) release the person unconditionally; or

(b) release the person and issue the person with an infringement notice in relation to the infringement notice offence; or

(c) release the person on bail; or

(d) under section 137, bring the person before a justice or court for the infringement notice offence or another offence allegedly committed by the person.

(4) For deciding how to deal with the person under subsection (3), the member, or another member, may question the person about the infringement notice offence, or any other offence in relation to which the person is of interest to police.

133AC When person taken into custody

(1) A member of the Police Force who takes a person into custody under section 133AB, or another member, must establish the person's identity by taking and recording the person's name and further information relevant to the person's identification, including photographs, fingerprints and other biometric identifiers.

(2) A member who takes a person into custody under section 133AB may:

(a) search or cause the person to be searched; and

(b) remove, or cause to be removed, from the person for safekeeping:

(i) any money or valuables; and

(ii) any item that is likely to cause harm to the person or another person; and

(iii) any item that could be used by the person or another person to cause harm to the person or another person.

(3) Any item removed from a person under subsection (2)(b):

(a) must be recorded in a register kept for that purpose; and

(b) must be returned to the person on the person being released from custody.

(4) Subsection (3)(b) does not apply if possession of the item by the person would be unlawful.

(5) The person must acknowledge receipt of any items returned under subsection (3)(b) by signing or making a mark in the register.

(6) For subsection (2)(a), a search of a female may only be carried out:

(a) by a female member of the Police Force; or

(b) if a female member of the Police Force is not available, a female authorised by a member to carry out the search.

(7) A member, or a person authorised under subsection (6)(b), may use the force that is reasonably necessary to exercise a power under this section.

(8) A person authorised under subsection (6)(b) to carry out a search of a female has, for that search, the same powers and protections as a member.

Division 4A - Notice to appear before Court

133A Definitions

In this Division:

Court means the Court of Summary Jurisdiction.

notice to appear means a notice issued under section 133B.

person does not include a youth within the meaning of the *Youth Justice Act*.

133B Member may issue and serve notice to appear

(1) A member who believes on reasonable grounds that a person has committed an offence may issue a notice requiring the person to appear before the Court in respect of the offence.

(2) The member must issue the notice to appear in triplicate and serve one copy personally on the person required to appear before the Court.

133C Form of notice to appear

(1) A notice to appear is to:

(a) be directed to the person alleged to have committed the offence; and

(b) state the substance of the offence the person is alleged to have committed; and

(c) require the person to appear before the Court at a specified time and place in respect of the offence; and

(d) state, if the person does not appear before the Court as required by the notice, the consequences include that the Court may issue a warrant for the person's arrest or proceed ex parte to a hearing of the offence and adjudicate on the offence as fully and effectually, to all intents and purposes, as if the person had personally appeared as required by the notice; and

(e) be signed by the member who issued the notice.

(2) The statement in the notice to appear of the substance of the offence need provide only general particulars of the offence, including:

(a) the nature of the offence; and

(b) the time and place it is alleged the offence was committed.

(3) The time specified in the notice to appear as the time when the person is required to appear before the Court is to be not less than 7 days after the notice is served.

(4) The place specified in the notice to appear as the place where the person is to appear before the Court is to be a place where the Court will be sitting at the time specified in the notice.

133D Notice to appear to be filed

After a person has been served with a notice to appear, and as soon as practicable before the date on which the person is required to appear before the Court, one copy of the notice is to be filed with the clerk of the Court at the place where the person is required to appear.

133E Person to be given complaint or information

A person who appears before the Court as required by a notice to appear is to be given a complaint or information (as the case requires) in accordance with section 190(1) of the *Justices Act*.

Division 6 - Bringing detained person before a justice or court and obtaining evidence, &c., after taking into custody

137 Time for bringing person before justice or court generally

(1) Without limiting the operation of section 123, but subject to subsections (2) and (3) of this section, a person taken into lawful custody under this or any other Act shall (subject to that Act where taken into custody under another Act) be brought before a justice or a court of competent jurisdiction as soon as is practicable after being taken into custody, unless he or she is sooner granted bail under the *Bail Act* or is released from custody.

(2) Notwithstanding any other law in force in the Territory (including the common law), but subject to subsection (3) a member of the Police Force may, for a reasonable period, continue to hold a person he has taken into lawful custody in custody to enable:

(a) the person to be questioned; or

(b) investigations to be carried out,

to obtain evidence of or in relation to an offence that the member believes on reasonable grounds involves the person, whether or not:

(c) it is the offence in respect of which the person was taken into custody; or

(d) the offence was committed in the Territory,

and the person shall not be granted bail under Part III or section 33 of the *Bail Act* while so detained, whether or not he or she has been charged with an offence.

(3) A member of the Police Force may continue to hold a person under subsection (2) for the purposes of enabling the person to be questioned or investigations to be carried out to obtain evidence of or in relation to:

(a) the offence in respect of which the person was taken into custody, only if it is an offence the maximum penalty for which, in the jurisdiction in which it is believed to have been committed, is imprisonment for any period; or

(b) an offence that is not the offence in respect of which the person was taken into custody, only if it is an offence the maximum penalty for which, in the jurisdiction in which it is believed to have been committed, is imprisonment for 5 years or more.

138 Determining reasonable period during which person detained, &c., to be brought before justice or court

In determining what is a reasonable period for the purposes of section 137(2), but without limiting the discretion of the justice or the court, a justice or court before whom or which the question is brought shall, so far as it is relevant, take into account:

(a) the time taken for investigators with knowledge of or responsibility for the matter to attend to interview the person;

(b) the number and complexity of matters to be investigated;

(c) the time taken to interview available witnesses;

(d) the need of investigators to assess relevant material in preparation for interviewing the person;

(e) the need to transport the person from the place of detention to a place where appropriate facilities were available to conduct an interview or other investigation;

(f) the number of people who need to be questioned during the period of detention in respect of any offence reasonably believed to have been committed by the person;

(g) the need to visit the place where any offence under investigation is believed to have been committed or any other place reasonably connected with the investigation of any such offence;

(h) the time taken to communicate with a legal adviser, friend or relative of the detained person;

(j) the time taken by a legal adviser, friend or relative of the person or an interpreter to arrive at the place where the questioning or the investigation took place;

(k) the time taken in awaiting the completion of forensic investigations or procedures;

(m) the time during which the investigation or questioning of the person was suspended or delayed to allow the person to receive medical attention;

(n) the time taken by any examination of the person in pursuance of section 145;

(p) the time the person in custody has been in the company of police prior to and after the commencement of custody;

(q) the time during which the investigation or questioning of the person was suspended or delayed:

(i) to allow the person to rest; or

(ii) because of the intoxication of the person;

(r) the time taken to arrange and conduct an identification parade;

(s) the time taken for an operating electronic recording facility to become available to record the interviewing of the person; and

(t) any interruptions to the electronic recording of the interviewing of the person because of technical reasons (such as a breakdown in equipment or a power failure) beyond the control of the interviewing member.

138A Time for holding intoxicated person before charging and bringing before justice or court

(1) This section applies in relation to a person under arrest, despite section 137(1) and any provision of the *Bail Act* to the contrary, if:

(a) a member of the Police Force has reasonable grounds to believe the person is intoxicated; and

(b) section 137(2) does not apply in relation to the person.

(2) The person may be held in lawful custody without being charged with an offence only for as long as it reasonably appears to the member that the person remains intoxicated.

(3) The member must charge the person with an offence and bring the person before a justice or court (unless already granted bail under the *Bail Act*) as soon as practicable after it reasonably appears to the member that the person is no longer intoxicated.

(4) In this section, intoxicated has the same meaning as in section 127A.

***POLICE ADMINISTRATION REGULATIONS* (NT)**

Part 4AA - Police powers

19A Infringement notice offence

For section 133AA of the Act, each of the following is prescribed as an infringement notice offence:

(a) an offence for which an infringement notice may be served under regulation 3 of the *Summary Offences Regulations*;

(b) a police infringement offence as defined in regulation 7(1) of the *Liquor Regulations*;

(c) an offence as defined in section 20A of the *Misuse of Drugs Act*.

***BAIL ACT* (NT)** [PRIOR TO AMENDMENT BY THE *BAIL AMENDMENT ACT 2015* (NT) AND IN FORCE FROM 9 SEPTEMBER 2014 UNTIL 15 APRIL 2015]

Division 2 Presumption in favour of bail

8 Presumption in favour of bail for certain offences

(1) This section applies to all offences except the following:

(a) an offence mentioned in section 7A(1);

(aa) an offence against section 181, 192(3), (4), (6), (7) or (8) of the Criminal Code, or section 120 of the *Domestic and Family Violence Act*, if the person accused of the offence has, within the period of 10 years immediately preceding the date of that offence, been found guilty of any of the following offences:

(i) the offence of murder;

(ii) an offence against section 181, 186, 188, 188A, 189A or 192 of the Criminal Code;

(iii) an offence against a law of a State or other Territory or another country that is similar to an offence mentioned in subparagraph (i) or (ii);

(ab) a serious offence (the ***relevant offence***) if the person accused of the relevant offence:

(i) is an adult charged with committing the relevant offence while on bail for a serious offence; and

(ii) has been found guilty of another serious offence within the period specified in subsection (1A);

(b) an offence where the accused person is the subject of an order made under section 40 of the *Sentencing Act* which may be breached if the person is convicted of the offence, unless:

(i) the offence is a contravention of or failure to comply with an instrument of a legislative or administrative character; or

(ii) the authorised member or court is of the opinion that the offence is so minor that a court is unlikely to regard it as a breach of the suspended sentence.

(1A) The following periods are specified for subsection (1)(ab)(ii):

(a) if the serious offence mentioned in subsection (1)(ab)(ii) is a serious violence offence – the period of 10 years immediately preceding the date of the relevant offence;

(b) if the serious offence mentioned in subsection (1)(ab)(ii) is not a serious violence offence – the period of 2 years immediately preceding the date of the relevant offence.

(2) A person accused of an offence to which this section applies is entitled to be granted bail in accordance with this Act unless:

(a) an authorised member or court is satisfied refusing bail is justified having considered the matters mentioned in section 24; or

(b) the person stands convicted of the offence; or

(c) the requirement for bail is dispensed with under section 9.

(3) Subject to subsection (4), a person is entitled under this section to be granted bail in respect of an offence to which this section applies even if the accused person is in custody for some other offence or reason for which the accused person is not entitled to be granted bail.

(4) A person is not entitled under this section to be granted bail in respect of an offence to which this section applies, if:

(a) he is in custody serving a sentence of imprisonment in connection with some other offence; and

(b) the authorised member or court is satisfied that the person is likely to remain in custody in connection with that other offence for a longer period than that for which bail in connection with the first-mentioned offence would be granted.

(5) To avoid doubt, if an offence mentioned in subsection (1)(a), (aa), (ab) or (b) is also mentioned in section 7A(1), section 7A applies to that offence.

Part 3 - Police bail

16 Authority for police to grant bail

(2) A police officer may, as an alternative to bringing a person the officer has arrested before a justice or a court of competent jurisdiction as required by Part VII, Division 6 of the *Police Administration Act*, within the time in which under that Division the officer would be required to bring the person before the justice or the court:

(a) inform the person charged of the person's right to apply for bail; and

(b) as far as practicable, ensure that the person charged is able to communicate with a legal practitioner or someone of the person's choosing in connection with an application for bail.

(3) An authorised member must, as soon as practicable after a person becomes entitled to apply for bail, determine whether bail should be granted under this Act.

(4) The police officer mentioned in subsection (2) may refrain from complying with subsection (2)(b) if the officer believes, on reasonable grounds, that it is necessary to do so in order to prevent:

(a) the escape of an accomplice of the accused person; or

(b) the loss, destruction or fabrication of evidence relating to an offence.

(5) A police officer who holds the rank of Sergeant or higher rank or any other police officer who is for the time being in charge of a police station may grant bail under this Part.

17 Bail in respect of several offences

Where a person is charged with 2 or more offences at the same time:

(a) an authorised member considering whether to grant bail to the person must decide, at the same time, whether to grant, or refuse to grant, bail to the person in respect of all the charges; and

(b) an application may be made for bail in respect of all the charges, but not otherwise; and

(c) any bail that is granted to the person must be granted in respect of all the charges and separate undertakings must not be required in respect of each charge.

18 Bail register

An authorised member must, upon granting bail to a person, enter either in a book kept for that purpose in the police station where bail is granted or cause to be stored on a computer maintained for that purpose elsewhere, the name, residence and occupation of the person and of a person who, pursuant to Part V, Division 3 makes an acknowledgement or enters into an agreement in respect of the person granted bail, together with details of the conditions of bail and details of any money or securities given or deposited, and must arrange to lay any undertaking, acknowledgement or agreement relating to the bail before a court before which the person is required to appear.

Part 4 - Court bail

19 General provisions as to court bail

(1) There is no limit on the number of applications in relation to bail that may be made to a court by a person accused of an offence.

(2) All applications to a court in relation to bail must be dealt with as soon as reasonably practicable.

(3) The Regulations may make provision for or with respect to the manner of making applications to courts in relation to bail.

(4) Despite subsections (1) and (2), a court may refuse to entertain an application in relation to bail if it is satisfied that the application is frivolous or vexatious.

20 Power of magistrates and justices to grant bail

(1) Subject to section 21, a magistrate or justice may, at any time:

(a) grant bail to a person brought or appearing before the magistrate or justice accused of an offence; or

(b) except as prescribed by the Regulations, grant bail to a person not brought or appearing before him, but being an appellant under Part VI, Division 2 of the *Justices Act*.

(2) Subject to section 21, a magistrate may at any time grant bail by telephone to a person who is apprehended by a police officer in accordance with a warrant to apprehend the person and bring him or her before a court.

21 Limitations on power of magistrates and justices

Subject to sections 31 and 38, bail may not be granted under section 20 by a magistrate or a justice to a person accused of an offence after that person has appeared before the Supreme Court following:

(a) the person's committal for trial or sentence in connection with the offence; or

(b) the person being brought up by a writ of habeas corpus in connection with the offence as mentioned in section 15(c).

22 Limitation on length of adjournments where bail refused

Where an accused person is refused bail by a justice in respect of an offence, an adjournment of the hearing by the justice must, except with the consent of the accused person, be for a period not exceeding 15 clear days.

23 Power of Supreme Court to grant bail

(1) The Supreme Court may grant bail in accordance with this Act to a person accused of an offence, whether or not the accused person has appeared before the Supreme Court in connection with the offence.

(2) If a person is arrested by a police officer under a warrant issued by the Supreme Court, a Judge may grant bail to the person by telephone or another form of electronic communication the Judge considers appropriate.

23A Limitation on power to grant bail

Despite anything in this Act, where an appeal is pending in the Court of Criminal Appeal against:

(a) a conviction on indictment; or

(b) a sentence passed on conviction on indictment;

bail must not be granted by the Court or any other court unless it is established that special or exceptional circumstances exist justifying the grant of bail.

Part 5 - Provisions applying to both police and court bail

Division 1 - Criteria to be considered in bail applications

24 Criteria to be considered in bail applications

(1) In making a determination as to the grant of bail to an accused person, an authorised member or a court must take into consideration so far as they can reasonably be ascertained the following matters only:

(a) the probability of whether or not the person will appear in court in respect of the offence for which bail is being considered, having regard only to:

(i) the person's background and community ties, as indicated by the history and details of the person's residence, employment and family situations and, if known, the person's prior criminal record; and

(ii) any previous failure to appear in court pursuant to a recognizance of bail entered into before the commencement of this section or pursuant to a bail undertaking; and

(iii) the circumstances of the offence (including its nature and seriousness), the strength of the evidence against the person and the severity of the penalty or probable penalty; and

(iv) any specific evidence indicating whether or not it is probable that the person will appear in court;

(b) the interests of the person, having regard only to:

(i) the period that the person may be obliged to spend in custody if bail is refused and the conditions under which the person would be held in custody; and

(ii) the needs of the person to be free to prepare for the person's appearance in court or to obtain legal advice or both; and

(iii) the needs of the person to be free for any lawful purpose not mentioned in subparagraph (ii); and

(iv) whether or not the person is, in the opinion of the authorised member or court, incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection;

(c) the risk (if any) that the accused person would (if released on bail) interfere with evidence, witnesses or jurors;

(d) the risk (if any) that the accused person would (if released on bail) commit an offence, a breach of the peace, or a breach of the conditions of bail;

(e) the risk (if any) that would result from the accused person's release on bail to the safety or welfare of:

(i) the alleged victim of the offence; or

(ii) the close relatives of the alleged victim; or

(iii) if the alleged victim is a child – any person (other than a close relative) who has the care of the child; or

(iv) any other person whose safety or welfare could, in the circumstances of the case, be at risk if the accused person were to be released on bail.

(2) For this section, the authorised member or court may take into account any evidence or information which the authorised member or court considers credible or trustworthy in the circumstances, including hearsay evidence.

(3) In assessing risks to others that could result from the release of an accused person on bail, the authorised member or court must have regard to risks of the following kinds:

(a) a risk of violence or intimidation;

(b) a risk of property damage;

(c) a risk of harassment;

(d) any other risk to safety or welfare.

(4) If the alleged victim of an offence is a child, or the alleged offence is a serious sexual offence or a serious violence offence, the safety and welfare of the alleged victim must be considered with particular care.

(5) In regard to a child's safety and welfare, the following matters are to be considered:

(a) the child's age;

(b) the age of the accused person;

(c) any familial relationship that may exist between the child and the accused person;

(d) the living arrangements for the child and for the accused person (assuming the accused person's release on bail);

(e) the desirability of preserving the child's living arrangements and family and community relationships;

(f) the emotional as well as the physical wellbeing of the child;

(g) any other relevant matter.

(6) If an alleged victim expresses concern to the prosecutor that the release of the accused person on bail could lead to a risk to the alleged victim's safety or welfare, the prosecutor must, wherever practicable, inform the authorised member or court about that concern and the reasons for it.

***BAIL AMENDMENT ACT 2015* (NT)**

8 Section 8 amended

(1) Section 8(1) and (1A)

omit, insert

(1) This section applies to an offence except an offence to which section 7A applies.

(2) Section 8(4)(a)

omit

he

insert

the person

(3) Section 8(5)

omit

10 Section 18 amended

Section 18

omit

Part V

insert

Part 5

11 Section 24 amended

(1) After section 24(1)(b)(iii)

insert

(iiia) any needs of the person relating to:

(A) any cognitive impairment, as defined in section 6A(2) of the *Mental Health and Related Services Act* of the person; or

(B) any mental impairment, as defined in section 43A of the Criminal Code of the person; and

(iiib) whether or not the person is a youth within the meaning of the *Youth Justice Act*; and

(iiic) any needs relating to the person's cultural background, including any ties to extended family or place, or any other cultural obligation; and

(2) Section 24(1), at the end

insert

Note for section 24(1)(b)(iiic)

When considering bail, an authorised member or court must have regard to section 15AB(1)(b) of the Crimes Act 1914 (Cth).

(3) After subsection 24(3)

insert

(3A) In assessing the risks to others under subsection (3), the authorised member or court must consider the following:

(a) the previous, current or proposed living arrangements for an alleged victim and for the accused person (assuming the accused person's release on bail);

(b) whether those arrangements include or would include their living in unreasonably close proximity to each other.

***BAIL ACT* (NT)** [AS AMENDED BY THE *BAIL AMENDMENT ACT 2015* (NT) AND IN FORCE FROM 15 APRIL 2015]

Part 2 - General provisions relating to bail

Division 2 - Presumption in favour of bail

8 Presumption in favour of bail for certain offences

(1) This section applies to an offence except an offence to which section 7A applies.

(2) A person accused of an offence to which this section applies is entitled to be granted bail in accordance with this Act unless:

(a) an authorised member or court is satisfied refusing bail is justified having considered the matters mentioned in section 24; or

(b) the person stands convicted of the offence; or

(c) the requirement for bail is dispensed with under section 9.

(3) Subject to subsection (4), a person is entitled under this section to be granted bail in respect of an offence to which this section applies even if the accused person is in custody for some other offence or reason for which the accused person is not entitled to be granted bail.

(4) A person is not entitled under this section to be granted bail in respect of an offence to which this section applies, if:

(a) the person is in custody serving a sentence of imprisonment in connection with some other offence; and

(b) the authorised member or court is satisfied that the person is likely to remain in custody in connection with that other offence for a longer period than that for which bail in connection with the first-mentioned offence would be granted.

Part 3 - Police bail

16 Authority for police to grant bail

(2) A police officer may, as an alternative to bringing a person the officer has arrested before a justice or a court of competent jurisdiction as required by Part VII, Division 6 of the *Police Administration Act*, within the time in which under that Division the officer would be required to bring the person before the justice or the court:

(a) inform the person charged of the person's right to apply for bail; and

(b) as far as practicable, ensure that the person charged is able to communicate with a legal practitioner or someone of the person's choosing in connection with an application for bail.

(3) An authorised member must, as soon as practicable after a person becomes entitled to apply for bail, determine whether bail should be granted under this Act.

(4) The police officer mentioned in subsection (2) may refrain from complying with subsection (2)(b) if the officer believes, on reasonable grounds, that it is necessary to do so in order to prevent:

(a) the escape of an accomplice of the accused person; or

(b) the loss, destruction or fabrication of evidence relating to an offence.

(5) A police officer who holds the rank of Sergeant or higher rank or any other police officer who is for the time being in charge of a police station may grant bail under this Part.

17 Bail in respect of several offences

Where a person is charged with 2 or more offences at the same time:

(a) an authorised member considering whether to grant bail to the person must decide, at the same time, whether to grant, or refuse to grant, bail to the person in respect of all the charges; and

(b) an application may be made for bail in respect of all the charges, but not otherwise; and

(c) any bail that is granted to the person must be granted in respect of all the charges and separate undertakings must not be required in respect of each charge.

18 Bail register

An authorised member must, upon granting bail to a person, enter either in a book kept for that purpose in the police station where bail is granted or cause to be stored on a computer maintained for that purpose elsewhere, the name, residence and occupation of the person and of a person who, pursuant to Part 5, Division 3 makes an acknowledgement or enters into an agreement in respect of the person granted bail, together with details of the conditions of bail and details of any money or securities given or deposited, and must arrange to lay any undertaking, acknowledgement or agreement relating to the bail before a court before which the person is required to appear.

Part 4 - Court bail

19 General provisions as to court bail

(1) There is no limit on the number of applications in relation to bail that may be made to a court by a person accused of an offence.

(2) All applications to a court in relation to bail must be dealt with as soon as reasonably practicable.

(3) The Regulations may make provision for or with respect to the manner of making applications to courts in relation to bail.

(4) Despite subsections (1) and (2), a court may refuse to entertain an application in relation to bail if it is satisfied that the application is frivolous or vexatious.

20 Power of magistrates and justices to grant bail

(1) Subject to section 21, a magistrate or justice may, at any time:

(a) grant bail to a person brought or appearing before the magistrate or justice accused of an offence; or

(b) except as prescribed by the Regulations, grant bail to a person not brought or appearing before him, but being an appellant under Part VI, Division 2 of the *Justices Act*.

(2) Subject to section 21, a magistrate may at any time grant bail by telephone to a person who is apprehended by a police officer in accordance with a warrant to apprehend the person and bring him or her before a court.

21 Limitations on power of magistrates and justices

Subject to sections 31 and 38, bail may not be granted under section 20 by a magistrate or a justice to a person accused of an offence after that person has appeared before the Supreme Court following:

(a) the person's committal for trial or sentence in connection with the offence; or

(b) the person being brought up by a writ of habeas corpus in connection with the offence as mentioned in section 15(c).

22 Limitation on length of adjournments where bail refused

Where an accused person is refused bail by a justice in respect of an offence, an adjournment of the hearing by the justice must, except with the consent of the accused person, be for a period not exceeding 15 clear days.

23 Power of Supreme Court to grant bail

(1) The Supreme Court may grant bail in accordance with this Act to a person accused of an offence, whether or not the accused person has appeared before the Supreme Court in connection with the offence.

(2) If a person is arrested by a police officer under a warrant issued by the Supreme Court, a Judge may grant bail to the person by telephone or another form of electronic communication the Judge considers appropriate.

23A Limitation on power to grant bail

Despite anything in this Act, where an appeal is pending in the Court of Criminal Appeal against:

(a) a conviction on indictment; or

(b) a sentence passed on conviction on indictment;

bail must not be granted by the Court or any other court unless it is established that special or exceptional circumstances exist justifying the grant of bail.

Part 5 - Provisions applying to both police and court bail

Division 1 - Criteria to be considered in bail applications

24 Criteria to be considered in bail applications

(1) In making a determination as to the grant of bail to an accused person, an authorised member or a court must take into consideration so far as they can reasonably be ascertained the following matters only:

(a) the probability of whether or not the person will appear in court in respect of the offence for which bail is being considered, having regard only to:

(i) the person's background and community ties, as indicated by the history and details of the person's residence, employment and family situations and, if known, the person's prior criminal record; and

(ii) any previous failure to appear in court pursuant to a recognizance of bail entered into before the commencement of this section or pursuant to a bail undertaking; and

(iii) the circumstances of the offence (including its nature and seriousness), the strength of the evidence against the person and the severity of the penalty or probable penalty; and

(iv) any specific evidence indicating whether or not it is probable that the person will appear in court;

(b) the interests of the person, having regard only to:

(i) the period that the person may be obliged to spend in custody if bail is refused and the conditions under which the person would be held in custody; and

(ii) the needs of the person to be free to prepare for the person's appearance in court or to obtain legal advice or both; and

(iii) the needs of the person to be free for any lawful purpose not mentioned in subparagraph (ii); and

(iiia) any needs of the person relating to:

(A) any cognitive impairment, as defined in section 6A(2) of the *Mental Health and Related Services Act* of the person; or

(B) any mental impairment, as defined in section 43A of the Criminal Code of the person; and

(iiib) whether or not the person is a youth within the meaning of the *Youth Justice Act*; and

(iiic) any needs relating to the person's cultural background, including any ties to extended family or place, or any other cultural obligation; and

(iv) whether or not the person is, in the opinion of the authorised member or court, incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection;

(c) the risk (if any) that the accused person would (if released on bail) interfere with evidence, witnesses or jurors;

(d) the risk (if any) that the accused person would (if released on bail) commit an offence, a breach of the peace, or a breach of the conditions of bail;

(e) the risk (if any) that would result from the accused person's release on bail to the safety or welfare of:

(i) the alleged victim of the offence; or

(ii) the close relatives of the alleged victim; or

(iii) if the alleged victim is a child – any person (other than a close relative) who has the care of the child; or

(iv) any other person whose safety or welfare could, in the circumstances of the case, be at risk if the accused person were to be released on bail.

(2) For this section, the authorised member or court may take into account any evidence or information which the authorised member or court considers credible or trustworthy in the circumstances, including hearsay evidence.

(3) In assessing risks to others that could result from the release of an accused person on bail, the authorised member or court must have regard to risks of the following kinds:

(a) a risk of violence or intimidation;

(b) a risk of property damage;

(c) a risk of harassment;

(d) any other risk to safety or welfare.

(3A) In assessing the risks to others under subsection (3), the authorised member or court must consider the following:

(a) the previous, current or proposed living arrangements for an alleged victim and for the accused person (assuming the accused person's release on bail);

(b) whether those arrangements include or would include their living in unreasonably close proximity to each other.

(4) If the alleged victim of an offence is a child, or the alleged offence is a serious sexual offence or a serious violence offence, the safety and welfare of the alleged victim must be considered with particular care.

(5) In regard to a child's safety and welfare, the following matters are to be considered:

(a) the child's age;

(b) the age of the accused person;

(c) any familial relationship that may exist between the child and the accused person;

(d) the living arrangements for the child and for the accused person (assuming the accused person's release on bail);

(e) the desirability of preserving the child's living arrangements and family and community relationships;

(f) the emotional as well as the physical wellbeing of the child;

(g) any other relevant matter.

(6) If an alleged victim expresses concern to the prosecutor that the release of the accused person on bail could lead to a risk to the alleged victim's safety or welfare, the prosecutor must, wherever practicable, inform the authorised member or court about that concern and the reasons for it.

INFRINGEMENT NOTICE OFFENCE PRESCRIBING PROVISIONS

SUMMARY OFFENCES REGULATIONS (NT)

3 Service of infringement notice

Where a member believes a person has contravened or failed to comply with section 47, 53(1)(a) or (7), 53A(2), 53B(3), 55, 65AA, 65A, 66(1)(a), 76, 78, 82(1), (2) or (3), or 85 of the Act, the member may serve an infringement notice on the person by:

(a) personally handing it to the person;

(b) posting it to the person at the person's last known postal address, place of residence or business; or

(c) leaving it for the person at the person's last known place of residence or business with some other person apparently resident or employed there and apparently not less than 16 years of age.

4 Particulars to be shown in infringement notice

(1) An infringement notice shall have clearly shown on it:

(a) the date, time and place of the offence;

(b) the nature of the offence or offences and the penalty or penalties payable;

(c) the place or places at which a penalty may be paid;

(d) the date of the infringement notice and a statement that the penalty may be paid within 28 days after that date;

(f) a statement to the effect that, if the appropriate amount specified in the infringement notice as the penalty for the offence is tendered at the place referred to in the notice within the time specified in the notice, no further action will be taken; and

(g) such other particulars and instructions as the Commissioner may approve.

4A Penalty

The penalty payable under these Regulations in lieu of the penalty that may otherwise be imposed in respect of an offence in respect of which an infringement notice has been served is:

(a) for an alleged offence under section 53(1)(a), 65AA, 65A, 66(1)(a), 76, 78, 82(1) to (3) or 85 of the Act – $144; or

(b) for an alleged offence under section 53(7) of the Act – $288; or

(c) for an alleged offence under section 47 or 55 of the Act – $432; or

(d) for an alleged offence under section 53A(2) or 53B(3) of the Act – $576.

6 Payment before expiry date of infringement notice

(1) Subject to regulation 7, where, before the expiration of the period specified in an infringement notice for the payment of a penalty, the amount of the penalty shown on the notice is paid at a place specified in the notice, the person to whom the infringement notice was issued shall be deemed to have expiated the offence by payment of the penalty and no further proceedings shall be taken in relation to the offence, unless the notice is, in accordance with regulation 5, withdrawn.

(2) Where a person tenders a cheque in payment of a penalty under this regulation at, or sends it by post to, a place specified in an infringement notice as a place where the penalty may be paid, payment shall be deemed not to be made unless the cheque is honoured on presentation.

***LIQUOR REGULATIONS* (NT)**

Part 3 - Infringement notices

7 Infringement offences and prescribed amount

(1) A police infringement offence is an offence against a provision of the Act specified in Schedule 2, Part 1.

[Remainder of provision omitted]

MISUSE OF DRUGS ACT (NT)

Part IIB - Infringement notices

20A Definitions

In this Part, unless the contrary intention appears:

offence means an offence against:

(a) section 7 where the prohibited plant is a cannabis plant and the number of plants being cultivated is not more than 2; or

(b) section 9 where the dangerous drug is one specified in column 1 of Schedule 3 and the amount of the drug in the possession of the person is less than the amount specified opposite the drug in column 2.

offender means a person who a member of the Police Force reasonably believes has committed an offence.

infringement notice means an infringement notice issued under this Part.

Schedule 3

Column 1 **Dangerous Drug**	**Column 2** **Quantity**
Cannabis oil	1.00g
Cannabis plant material (being any part of the Cannabis plant, including the flowering or fruiting tops, leaves, stalks and seeds)	50.00g
Cannabis resin	10.00g
Cannabis seed	10.00g

ANNEXURE B

Debates - 12Th Assembly, 1St Session - 10/21/2014 - Parliamentary Record No: 15

Topic: BILL
Subject: POLICE ADMINISTRATION AMENDMENT BILL(Serial 98) - presentation and second reading motion.
Date: 10/22/2014
Member: Mr ELFERINK
Other Speakers:
Status: Leader of Government Business

Bill presented and read a first time.

Mr ELFERINK (Attorney-General and Justice): Madam Speaker, I move that the bill be now read a second time. I move this amendment in accordance with my role as the minister with carriage of the Pillars of Justice policy.

The purpose of this bill is to amend the *Police Administration Act* to provide for two specific amendments. The first amendment is to provide members of the Northern Territory Police Force with an alternative post-arrest option, where a person who has committed certain prescribed offences may be held by police for up to four hours and can then be released with an infringement notice, as opposed to requiring that the person be charged and have those charges be heard by a court. I will refer to the concept as 'paperless arrest'.

The second amendment relates to Part IV of the act and sets out provisions to require members to answer questions put to them in the course of internal disciplinary investigations.

The concept of paperless arrests forms part of our Pillars of Justice law reform policy framework. The policy is to permit police officers to detain individuals for up to four hours in relation to public order-type offences, and where an infringement notice may be issued. The types of offences to be captured by this post-arrest option are offences attracting an infringement notice under the Summary Offences Regulations, the Liquor Regulations and the Misuse of Drugs Act.

Arrest for these public order offences will remain the same; however, where a person has been arrested for an infringement notice offence, that person can, if police consider it appropriate, be dealt with more expeditiously following arrest, and with much less paperwork, by the issuing of an infringement notice.

For this purpose, the bill inserts a new Division 4AA into Part VII of the act. The new division provides that where a member has arrested a person without a warrant on the grounds that the person has committed, was committing or was about to commit an infringement notice offence, as prescribed by the regulations, the member may hold the person for up to four hours and may then release the person with an infringement notice.

The bill also provides that where a person is intoxicated, the member may continue to hold the person beyond the initial four-hour period for so long as it reasonably appears to the member that the person remains intoxicated.

Requirements and protections are also put in place for people in custody in these circumstances, such as a requirement for police to establish the person's identity, to conduct a search of the person, the registration of the person's money and valuables and the use of reasonable force where required. These types of protection and circumstances are also reflected in the protective custody provisions set out in section 128 of the act.

The bill is not intended to limit police powers to the issuing of an infringement notice. In some circumstances, where a person is detained for an infringement notice offence and, for example, it is subsequently discovered that the same person is wanted on additional matters (or if they commit further offences while in custody), or it is considered that an infringement notice would be ineffective, police still have the power to charge a person with the original or other offences.

This alternative post-arrest option will provide further flexibility and efficiency in policing work. The option will enable police officers to return to their patrol in a more timely fashion, as opposed to being detained for long periods preparing necessary paperwork for a court to consider the charges. An additional benefit to the community is intended by the use of such an option to de-escalate social disorder situations or potential situations of public disorder before they escalate into major incidents.

The second amendment contained in this bill provides for the requirement of answers from members to questions put to them in the course of internal disciplinary investigations. These procedures are also known as 'directed interviews'. The ability of a Commissioner of Police to discipline police officers and require answers to questions in the course of a disciplinary investigation, even where those answers might incriminate the subject members,

has long been recognised as essential for maintaining the integrity of, and public confidence in, a police force. The High Court legal authority for this proposition is the case of the *Police Service Board v Morris and Martin*, which is reported at (1985), volume 156 of the *Commonwealth Law Reports*, at page 397.

In 2013, however, a single judge of the New South Wales Supreme Court determined that the New South Wales Commissioner of Police did not have powers under the New South Wales *Police Act* to direct a police officer to answer questions after the police officer has claimed the privilege against self-incrimination in criminal matters.

The decision is cited as *Baff v New South Wales Commissioner of Police* [2013], New South Wales Supreme Court judgment numbered 1205. This decision is not binding on the Northern Territory of Australia, and the High Court decision of *Morris* remains the binding legal authority in the Northern Territory. In addition, the decision of *Morris* has been applied by the Full Court of South Australia and is still relied upon by the South Australian Police Force to require officers to answer questions.

It is the position of the Northern Territory of Australia that the Commissioner of Police has the power under section 76(d) of the *Police Administration Act* to direct a police officer to answer questions. Despite this position, a management decision was taken following the decision in *Baff* not to pursue a directed interview where the member has claimed the privilege against self-incrimination. Directed interviews in these circumstances were put on hold pending this legislative provision to confirm the existence of the power, and that the power to require an answer to a question is intended to operate retrospectively. That is, the position will apply to current matters where a member is currently under internal investigation and no disciplinary outcome has been finalised.

The bill includes provisions to require a police officer to answer questions, as required, during the course of a disciplinary investigation. The disciplinary investigation can commence prior to the issuing of a notice of alleged breach of discipline under section 79 of the act, as recognised by the Northern Territory Supreme Court in the decisions of *Holmes and Bulger v Commissioner of Police* cited at [2011] Northern Territory Supreme Court judgment numbered 108.

The bill is intended to confirm the Commissioner of Police has the power to direct a police officer to answer questions during any time throughout disciplinary investigation for a breach of discipline or an alleged breach of discipline. An officer cannot claim the privilege against self-incrimination to avoid answering such questions.

To demonstrate the seriousness of a failure to answer a question in the context of a disciplinary investigation, the bill amends section 76 to provide that a member commits a breach of discipline where the member fails to obey a lawful direction, instruction or order given by, or caused to be issued by, the Commissioner of Police or a member or person having authority over the member, including general orders and instructions issued under section 14A(1), and directions, instructions or orders given in relation to a breach of discipline or an alleged breach of discipline. Where a member provides misleading information in the course of a disciplinary investigation is also provided for as a separate breach of discipline.

Failure to answer questions put to a member in a disciplinary investigation has the potential to seriously undermine the public confidence in a police force. For that reason, a failure to answer questions, or the provision of misleading information by a member during a disciplinary investigation, can be grounds considered by the Commissioner of Police to dismiss a member on public interest grounds under section 78 of the act. The policy basis for this position is that the Northern Territory Police Force is a body upon whose efficiency and probity is something our Territory must depend for the security of the lives and property of our community. Such a body can only operate effectively under proper discipline.

However, to put appropriate safeguards in place for police members, a direct immunity will apply to the answers provided by members, such that those answers are not admissible as evidence in any criminal or civil proceedings. The only exceptions that will apply to allow the use of these answers will be in respect of proceedings for perjury, tort claims against the Northern Territory by police officers, and proceedings from employment matters (which includes disciplinary proceedings).

The bill deliberately does not include immunity against a derivative use of the information provided in a direct interview. Such an immunity is considered too restrictive to allow police to exercise their functions, and will still permit alternative lines of inquiry to be pursued following information provided in a directed interview, such as already provided for in section 160A of the act.

Police officers are appropriately afforded special powers to exercise their duties. These powers include the authority to use force, to deprive people of their liberty and to access sensitive and confidential information.

It is crucial to have appropriate checks and balances in place to allow the Commissioner of Police to maintain the

integrity of and uphold public confidence in our police force and ensure that the exercise of powers by members is held to account.

I would like to take this opportunity to thank the multitude of stakeholders involved in the development of these reforms, including members and staff of the Northern Territory Police Force, members of the Pillars of Justice Steering Committee and the Northern Territory Police Association.

This bill is an example of this government's commitment to improve police practices and community safety to provide an additional and flexible post-arrest option, and to promote integrity and public confidence in the exercise of police powers through the conduct of directed interviews with appropriate protections in place.

I commend the bill to honourable members and table the explanatory statement to accompany the bill.

Debate adjourned.

Topic: BILL
Subject: POLICE ADMINISTRATION AMENDMENT BILL (SERIAL 98) - second reading in continuation, by leave, third reading
Date: 11/26/2014
Member: Ms WALKER
Other Speakers: Mr WOOD; Mr WESTRA van HOLTHE; Mr ELFERINK
Status: Nhulunbuy

Madam Speaker, this is my first bill in relation to police since taking on the shadow responsibility a few weeks ago. I place on the record my thanks to the member for Fannie Bay, who has held this portfolio responsibility in the Labor opposition for the past two years and done an excellent job. I also acknowledge that this bill is sponsored by the Attorney-General and not the Chief Minister as minister for Police.

Discussions on our side arrived at not only workload but looking at responsibilities. It was decided that I would respond in the second reading to this bill.

I recognise the vital role our police have in keeping our families and communities safe and the often dangerous work they do in law enforcement. The Attorney-General knows that only too well. I also recognise the need for contemporary legislation which best supports Territory police, men and women, to do their jobs.

I thank the police for their briefing on this bill. It was standing room only in my parliamentary suite office a couple of weeks ago with three senior members of the police force, two lawyers, the Chief Minister's police adviser, me and an adviser from the Leader of the Opposition's office. I thank them for the briefing on the bill. They are clearly, and not surprisingly, of the view that the two amendments to the *Police Administration Act* are both reasonable and logical.

However, the more I have spoken to people about this the more concerns have been raised. It is appropriate to highlight these concerns in my contribution today, in the hope that the Attorney-General can address these issues – as I am sure he will – in his reply later in this debate.

The amendments today contain two very different and unrelated elements of the *Police Administration Act,* and both deserve close scrutiny. I also need to add that concerns have been raised – and they are reasonable – about an overall review of the *Police Administration Act* and the need to understand what exactly the government's priorities are in reviewing the act. Why is it that these two amendments come before the House today, in the midst of – I understand from the Northern Territory Police Association – a current review already afoot into other parts of the act, including Parts IV, V and VI?

The first amendment I will speak to amends Part VII of the act, which pertains to police powers, and inserts a new Division 4AA, 'Taking person into custody for infringement notice offence'. This amendment enables the so-called paperless arrest. The legislation gives police the power to take someone into custody for a period of up to four hours before they commit an offence, if the police think it is in the best interest of the individual or the public to do so. Police may take the person into custody for a period longer than four hours if the person is intoxicated. The rationale behind this – and the examples that were given during the briefing – is if someone is drunk, as I have just mentioned, but not extremely intoxicated, or agitated, or at risk of committing an assault on anyone, then the police can bring this individual into custody to 'cool off' – was the language used – or have 'time out' for minor offences. Once the individual has cooled off an infringement notice can be issued and they do not have to go through the police or court system, hence the term 'paperless arrest'.

The example talked about was that the police can intervene before the individual goes too far and commits more serious offences – nipping things in the bud, you might say. On top of this, the rationale is that it will free up the courts and police resources from a lot of paperwork that would tie up the courts and police with things that would just be fineable offences anyway.

It was pointed out during the briefing that this amendment only covers infringements such as acting in a disorderly manner and intoxicated people, but not traffic infringements. It is focused more on the public nuisance scale of public drunkenness and situations where violence could occur or might be expected if the individual was allowed to continue with their behaviour.

On the surface this might seem like a reasonable amendment; it gives police an extra tool in their tool box to keep criminal acts down. It frees up courts and keeps police on the street, not behind a desk. It is perhaps not unlike the extra tool which was once the Banned Drinker Register, which went a long way to dealing with so many problem drinkers as a liquor supply and harm reduction measure. It was a tool police are on the record as saying

was very effective in their line of work, before the Attorney-General gagged them from offering further commentary.

Members on this side might initially support the principle of reducing paperwork. I hear the CLP's mantra of reducing red tape in the background. However, in discussing this legislation with stakeholders such as the Criminal Lawyers Association of the Northern Territory and NAAJA, it is clear there are some concerns. I raise those concerns with the Attorney-General now and hope to get some assurances and answers to the very valid questions they have raised, as well as the concerns we on this side of the House share.

As I said, the Criminal Lawyers Association and NAAJA are concerned by the paperless arrest amendment. The Criminal Lawyers Association said the paperless arrest bill is appalling, in their words, and that it gives carte blanche for police to apprehend and retain people for four hours on trivial matters.

It raises the question, what rights do these people have to put their case when detained under this proposed amendment for paperless arrest? What of a person who is, for instance, not intoxicated and has not even been drinking, but who may give the outward appearance of displaying behaviours similar to an intoxicated person because they are perhaps unwell or have a mental health issue? What if the individual is on medication for a condition – let us say this person has not taken or been able to take prescribed medication and, as a result, we see some unusual behaviour?

There are no nurses deployed to our remote police stations, such as where I come from in Nhulunbuy, nor at places like Galiwinku, Gapuwiyak and other communities where police stations, through federal funding, have been constructed. What avenues are there to assess the health and wellbeing of these individuals detained on the strength of a paperless arrest?

It was made plain in the briefing I had that the problem in instigating the paperless arrest and taking an individual into custody is the behaviour itself.

The Criminal Lawyers Association claims this is being misleadingly marketed as a scheme to reduce bureaucracy, rather than for what it is. They talk about, 'Legislation which will, in effect, give police the power to impose serious punishment ...' – we are talking about deprivation of liberty – '... on people suspected of committing minor offences, with none of the protections of the conventional criminal justice system'.

With the news a couple of weeks ago about the cessation of the Return to Country program, axed by government and, until recently, administered by Larrakia Nation, I am concerned we will see more people stranded in Darwin, unable to get back to their family and community, who will potentially feature amongst these new paperless arrests.

CLANT and NAAJA do not raise their misgivings lightly. Perhaps the minister can address these concerns. The fact that CLANT did not even see this legislation for input before it was introduced into the parliament is also of some concern. CLANT has said the Department of Justice, quite appropriately, always consults before legislation is introduced. This way, quite rightly, their concerns can be addressed or met or, in some instances, amendments put to proposed legislation. I will be grateful if the Attorney-General could advise which stakeholders were consulted on this bill.

Could the Attorney-General give the people of the Territory assurances that the deprivation of liberty that comes with this change will be addressed in a proper manner and what that manner will be? Can the Attorney-General explain if there will be systems in place for people to use if they believe they are being unfairly targeted by this law? Can the Attorney-General commit or explain if there will be an independent review of the system, such as the Ombudsman for example, to ensure this law is being used correctly? By virtue of being a paperless arrest, what systems will be in place to monitor who has been arrested for whatever infringement? Will the Attorney-General commit to a review of this law in 12 months to see if it is doing what it is intended to, and to enable scrutiny to ensure there is no misuse of this provision or no adverse incidents that arise as a result?

While this amendment may have more cons than pros, there are some questions that need to be answered to give Territorians assurances that there are checks and balances in place to ensure this bill and this intended law does not change what it is intended to do.

I note the Northern Territory Police Association advised it had no issue with this amendment. To a large degree that does not surprise me. We know they are really strapped for time, busy on their feet in their day-to-day work. Anything that would streamline things for them in doing their job obviously would be welcomed by their members.

I move to the second part of the bill which deals with an entirely separate matter. It is what makes it difficult to provide wholesale support or opposition for a bill when such diverse and entirely unrelated matters come before this House for consideration. But at the same time, I recognise this is part and parcel of the parliamentary and legislative process, namely that we are presented with one bill, elements of which we might find difficult to support or necessarily reject.

The second amendment pertains to Part IV of the act, 'Discipline', specifically section 76, 'Breaches of Discipline' and section 79, 'Service of notice for alleged breaches of discipline. I understand these amendments are about strengthening the power of the Commissioner of Police to require a police officer and member to answer questions under lawful direction in relation to an internal disciplinary investigation into the officer or perhaps another officer.

I was advised during the briefing with police that it is about giving clarity to the Police Commissioner during a process known as directed interviews, and when questioning a police member about an internal disciplinary matter, they must answer the question or questions put to them.

I am advised this amendment seeks to close a loophole following a decision in 2013 in the New South Wales Supreme Court which determined the New South Wales Police Commissioner did not have the powers under the New South Wales *Police Act* to direct an officer to answer questions after claiming the privilege against self-incrimination in criminal matters.

I understand it is putting into legislation what has been accepted as the common law principle when it comes to police dealing with their internal investigations. This amendment provides for the requirement of answers and removes the protection against claiming a privilege of self-incrimination, something which exists for employees in any other workplace.

On the surface this might appear to be a reasonable amendment. Joe Public might reasonably except that police should, when under internal investigation, answer questions truthfully so as to keep the integrity of the police force at the highest order.

It is also worth noting that this amendment does not have universal adoption into all state and territory laws. In fact, I am advised the Northern Territory will be the first to adopt this law, while other jurisdictions are looking at the result of the NSW decision in 2013.

My question to the Attorney-General is, why is the Northern Territory moving so quickly towards this amendment to the *Police Administration Act* when there are still many other amendments the NTPA has been calling for, and when there is already a broader view afoot of Part IV of the *Police Administration Act*?

The Northern Territory Police Association does not support this amendment, and is critical of the amendment and the lack of consultation around disciplinary investigations which will give the commissioner the power to direct a police officer to answer questions during a disciplinary investigation and remove the protection to claim the privilege against self-incrimination to avoid answering such questions.

During my meeting with Mr Vince Kelly, President of the NT Police Association, which was immediately after my briefing on this bill, I was made aware of the NTPA's disappointment with the lack of any discussion or issues paper as to why the proposed amendment we are discussing had been drafted, it would seem, in the absence of fulsome and genuine engagement.

In his second reading speech the minister thanked:

> *... the multitude of stakeholders involved in the development of these reforms, including ... the Northern Territory Police Association.*

This is a claim the NTPA describes as inaccurate. The NTPA, in representing its members, has provided me with its position on removal of these protections. It is a position I understand has been made very clear to the Attorney-General. Rather than paraphrase, in the interests of accuracy I will place on the record a couple of paragraphs from the correspondence sent to me by Vince Kelly:

> *Had we been properly consulted on the draft bill before it was tabled in parliament our association would have raised our concerns over the ability of civil plaintiffs being able to obtain discovery of transcripts of disciplinary hearings when making claims in tort against the Northern Territory and individual members of*

the police force as determined by the Chief Magistrate Mr Lowndes SM in the matter of Huddleston v Northern Territory of Australia 2012 NTNC039.

By extension of that decision, it is also likely that any testimony and documentary evidence disclosed in a disciplinary hearing could also be used against an impugned member in criminal prosecutions.

If this bill is to proceed and is passed by the parliament, we would seek that it be amended to provide protection to a member who has been charged with a disciplinary offence pursuant to section 84A of the act by inserting a new subsection under section 84B stating that hearings under that section are to be conducted in-camera *and that evidence, both oral and documentary, produced by an impugned member in such a hearing, and the transcript of the hearing, may not be used in any other proceedings against the member under the act other than in an appeal pursuant to Part VI, or in any civil or criminal proceedings in any court or tribunal other than the Police Appeals Board.*

Similarly, we ask that section 6 of the bill be amended so that section 79A clause 3(a) does not exclude the answers and information provided by an impugned member to be used in appeal proceedings under Part VI of the act, which would appear to be the effect of the current wording of that amendment.

The Northern Territory Police Association is on the record about the government's priorities in holding them to account about their failure to commit to progressing blood testing legislation, or dealing with the NTPA's call for reinstatement of welfare officers as a chaplaincy program.

These are very important reforms which go to important matters of health and wellbeing for police men and women. As an aside, we know the member for Fong Lim, when he held the portfolio, and then the Chief Minister, in rejecting not one, but two, private member's bills introduced by the member for Fannie Bay – the Workers Rehabilitation and Compensation Amendment Fire-Fighters Bill – said they would introduce their own bill in October sittings to look after firefighters who are overdue in their bid to adequately be compensated for cancer contracted through their work. Regrettably, the Chief Minister has done nothing of the sort. He is also the Police minister.

Presumably he is too busy with his own fire sale of public assets like TIO. At the eleventh hour, a ministerial statement on workers compensation was circulated yesterday which we will be debating today. While reference is made to compensation for firefighters and what the government will do, it is not a bill. We are talking about a bill which is yet to be delivered and is now long overdue. Obviously I am talking about firefighters, but we are talking about the same minister who has responsibility for police understanding the priorities.

The issues of blood testing and the need for the return of a chaplaincy program were both raised quite publicly at the NTPA AGM in outgoing President Vince Kelly's address. He did not spare the Chief Minister any pain in holding him to account about keeping his promises on the commitments he has made to police. Mr Vince Kelly was also critical of the Chief Minister's broken promise over extra police.

This is why I place on the record these questions. It seems that the priorities around policing, as far as the government is concerned, are at odds with members of the police who work tirelessly day in and day out to serve and protect the community in ways that often risk their own personal safety and wellbeing so they can uphold law and order, and in doing so, do their best to work with the government of the day in a manner which is positive and constructive.

Mr Kelly said in his address at the August conference, 'It is our view that government of any political persuasion will make better policy decisions by listening to all viewpoints on each issue, in our case the well-informed voice of operational police on the front line'.

The CLP claims to be a friend of the police but has done nothing except break promises to them in areas they see as desperately needed. Why is it the government sees the need to clarify this part of the act around disciplinary matters as a priority when other vital legislation, such as the promised amendments to the act giving a member powers to obtain blood samples from offenders taken into custody who have exposed that or another member to risks of bodily fluid transferred infection – the blood legislation – remains outstanding? This, along with more police and welfare officers, are promises that are well overdue.

When it comes to police, we have a government that will talk tough. When you look closer at it they are not friends of the frontline police, making them glorified bouncers at bottle shops, not giving them the support they need and expecting them to work harder for it. Although, I daresay the Attorney-General in his response will tell us they are supporting police with measures such as paperless arrests.

Madam Speaker, I look forward to hearing what others have to say during the second reading debate.

Mr WOOD (Nelson): Madam Speaker, I will not be voting on this, not because I do not want to, but because I was not able to get to the briefing. The briefing was at a certain time and it was impossible for me to get there. I would still like to contribute to the debate because I did get some correspondence from Vince Kelly, who is someone I respect as a fine member of our community and a hard-working President of the NT Police Association.

When a bill like this comes through, it obviously needs a good deal of discussion. From reading what the Police Association has said, it has concerns about the adequacy of consultation. I also get a little frustrated when we start talking about police; I hear many things said.

People might have seen some photographs in the *NT News* of some lads having to clean up some rubber on somebody's driveway. My area has rubber everywhere; it is all over the roads. If you look at the new road to the prison, there is more rubber than bitumen. I have asked the Chief Minister to try to do something in the form of CCTV cameras; I was told to dob them in. If you live in the rural area, you know how difficult it is to dob people in.

We need more police on the beat in those areas. That is where I would like to see a little more emphasis. I am before parliament talking about some amendments in relation to people being picked up if they look like they may commit a regulatory offence – I think that is the correct title; I will check. They may commit a prescribed offence that would attract an infringement notice.

These people cause many people in my rural area a lot of heartburn, yet I do not see any real action by the government in trying to do something about it. I asked for CCTV cameras because it is impossible to dob these people in. Their actions last about 20 seconds, and flying out of your house to try to get a number plate is simply impossible.

Perhaps police could follow a couple of cars around and put people away for four hours until they calm down. That might be one way of trying to do something about it. I get so frustrated when I see nothing or very little being done. I receive continual complaints about hooning in the rural area. If somebody from the government would like to come to the rural area I will take them on a tour of the doughnuts. Just about every intersection in the rural area is covered in doughnut marks yet it is so difficult to get this government to do something practical about that issue, which has been ongoing.

However, I am here today to discuss an amendment to provide members of the Northern Territory Police Force with an alternative post-arrest option, where a person who has committed certain prescribed offences may be held by police for up to four hours. Whether that is a good or a bad thing I am not sure.

We can talk about these things, yet when I see matters that need to be addressed and which have been raised in this parliament many times, I am so frustrated there is no real attempt of trying to do something. If the government wants to spend some of the money from TIO, may I ask they spend it on some CCTV cameras in the rural area, and maybe other places like the industrial area of Palmerston where those gentlemen at least nabbed a few fellows and made them clean up the mess.

Some of these things are overlooked in the bigger picture of crime, but they are matters which get the goat of many people in my area. Yet nothing seems to be done. Police can go there for an hour and you might not see them for another week or so. They try their best and probably do not have the number of people they would like to have to do something about it. When you see ATVs driven by people without helmets on, unlicensed, unregistered, running along the edge of the road, sometimes with two or three people on them, you know it is dangerous. You phone and ask for something to be done, but nothing is.

I am not knocking the police, they do the best they can. But it seems that sometimes they concentrate on some of the issues that are before us today. Whilst I am not saying they are not important issues, they are the sort of thing that would worry most people in my area or be regarded as major issues. The issue for them is trying to do something about people misbehaving on our roads.

Now I have that off my chest, member for Port Darwin, as sometimes you have to, I read the letter from the Police Association. Obviously I am interested to hear your response to that. I will not repeat it all because the member for Nhulunbuy has quoted a fair bit of that letter.

I do not believe I should vote on the bill because I have a lot of respect for the Police Association, especially Vince Kelly, and I have not received a briefing in relation to it which could at least give me the ability to balance this debate. Simply, I have not heard the other side of the story except what you have written in your second reading speech.

The other thing I wonder about is this being a paperless arrest. I have never seen anything paperless yet. What I normally see is a government department sends you an e-mail and you print it ...

Mr Elferink: I will explain it to you later. It is not quite that way.

Mr WOOD: Not quite that way? You are paperless and I am the one who gets the paper ...

Mr Elferink: No, no, do not panic.

Mr WOOD: Yes. I wonder about the concept of paperless arrest – whether in fact there will be a piece of paper somewhere that records this.

I will not go on any longer. I felt I needed to say something about what is happening in my area because we make a big fuss over these changes. The Police Association is not overly happy that many of the things they wanted to happen have not happened, yet some of these other things, which I do not think they believe have been fully consulted about, are being rushed through.

Whilst this is important, some of the material that hits my desk in the rural area is far more important, but unfortunately nothing happens. I hope the government will make an effort to take up some of these issues. I am sure the member for Goyder knows certain roads in her area that are burn-out pads. She will know about people at the back of Taylor Road who ride ATVs and motorbikes in a dangerous fashion. I am not against off-road vehicles, but in the right place and the right time – no trouble at all. There is behaviour about which the government needs to say enough is enough. People will lose their lives. People will also take the law into their hands if they feel their amenity of living in the rural area is being affected by hoons who have no respect for other people's property, quiet or lifestyle.

Madam Speaker, I will leave it at that, thank you.

Mr WESTRA van HOLTHE (Primary Industry and Fisheries): Madam Speaker, I support the amendment brought to the House by the Attorney-General this afternoon to bring about legislative changes that will embrace paperless policing as a part of moves to improve efficiency in the Northern Territory Police Force.

This amendment does not necessarily create an entirely paperless arrest, but it does allow for an improvement or an increase to police powers which, in effect, makes two things. First of all it makes sense, and it allows for police officers to spend more time on the road and less time tied up in police stations filling out paperwork.

I have 21 years' experience as a police officer in the Northern Territory so I can fully understand the exact paradigm this amendment fits into, what has gone before and what has happened in more recent years. I remember when, in years gone by, as an arresting police officer one used to be able to knock over an arrest file in about 30 minutes. In fact, you could probably do it in less time if it did not involve putting someone on a breathalyser. I remember the good days when you could bring a suspect in ...

Mr Wood: Those were the days!

Mr WESTRA van HOLTHE: They were the days, member for Nelson, indeed. You could bring a suspect in, have that person breathalysed, one police officer would do the précis and the other partner would do the apprehension report and, lo and behold, 30 minutes after you could be free and clear and hand over your arrested offender to the watch house staff who would then process and look after that individual.

Times have changed with the advent of computerised policing. The introduction of the PROMIS system in the early 1990s changed things a lot. The police force moved from a simplistic modus operandi to a more complicated and complex scenario where much more statistical information was gathered and held by the police force. This necessitated entries onto a computer system. That, I assure you, added an enormous amount of time to what was a very simple process for making an arrest.

Not so much in answer to that, but to improve policing powers throughout the years, we saw sections 137 and 138 of the PAA brought into being which allowed police officers to arrest people and hold them for specified

lengths of time. This allowed for certain things to occur around the investigation of an offence: being able to conduct interviews, find prisoners' friends and do a whole range of things. That took care of the top end of offending where serious offenders could be held in custody under those circumstances.

Throughout the course of time protective custody was often used as a simple mechanism to remove people who were causing a problem from the streets. Sometimes that protective custody led to the issuing of a summary infringement notice after that person was released.

I understand that, over time, the courts found there are some issues with holding people in protective custody, then issuing some punitive order at the end of it. It makes sense to provide police with an alternative power and, in effect, this is what this change of legislation is. It will allow police officers to arrest people for relatively minor offending, and for that person to be held in custody for four hours at which time, quite legitimately, an infringement notice or some other action could be issued against that person.

In effect, that does a number of things. One is it allows that offender to be removed from an offending situation. For example, that person might be involved in a fracas on the main street of Katherine. They might not be drunk, therefore not invoking the powers of section 128, but may have offended in a way which, if the police officer did not arrest that person, the offending might well continue or that situation escalate.

That person can be removed under arrest and placed into custody. Then, without the need for a police officer to sit for what might end up being a couple of hours to go through a normal arrest procedure of completing a file, that person would be held in custody until they could be issued with an infringement notice. That is a much simpler way of dealing with an offender from an administrative point of view.

Again, it is a mechanism whereby police officers can remove offenders from a situation and not be tied up doing oodles of paperwork, allowing them to get back out on the street as quickly as possible, which is critical in this day and age, as it always has been. This is a sensible, pragmatic way of dealing with those types of offences and situations as I have described them.

I can assure you that had this legislation been around when I was in the police force, I would have made quite hefty use of it. I worked very hard as a police officer. I remember in those very early days that arrest rates for me were very high because I loved my job. It was good fun to protect the community, but at the same time we took that job very seriously. I can only imagine the number of hours this type of provision would have saved us in paperwork over the course of the 21 years I served as a police officer.

Madam Speaker, I will not belabour this too long. It is good, sensible legislation. I know it is not necessarily supported by some quarters. I understand that the North Australian Aboriginal Justice Agency has publicly criticised this. That is what you would expect from a justice agency such as NAAJA. Nonetheless, this provision provides police officers with sensible powers and I am very pleased to support it today.

Mr ELFERINK (Attorney-General and Justice): Madam Speaker, as the Attorney-General, I wrap this up as I introduced the bill. Whilst it deals with police powers, it has come under the umbrella of the Pillars of Justice framework, which I have carriage of on behalf of the Northern Territory government.

There are a couple of things I need to address at the outset. I will deal with the Vince Kelly response first. I have not seen that letter from Vince Kelly. I understand he has sent it to other members, and conceivably sent it to me, but for some reason it has not found its way to me.

If I understood correctly what was read into the record by the member for Nhulunbuy, there was concern whether or not material evidence retrieved from a police officer in an interview which arose out of a breach of discipline could be used in a subsequent tortious action against the member. If I understood that correctly, then my reply is to draw the attention of the honourable member for Nhulunbuy to the proposed sections 79A(3) and (4), found in clause 6 of the bill. Those sections read as follows:

> *(3) However, the answer to a question or the information is not admissible as evidence against the member:*
>
> (a) *in any proceedings against the member under this Act or*
>
> (b) *in civil or criminal proceedings in a court.*

Civil or criminal proceedings in court:

(4) Subsection (3) does not apply in relation to proceedings for the following matters:

(a) *perjury;*

(b) *employment;*

(c) *a claim in tort against the Territory made by the member.*

The answers given by a member in such an interview can be used in a tortious action against the police force, but not in reverse, as seems to be suggested by the member for Nhulunbuy.

The commissioner has asked us for clarification around this uncertainty. This bill will restore the legislation to operate in a fashion that everybody always expected it to operate but for the decisions that I referred to in my second reading speech. I hope that helps the member for Nhulunbuy in relation to her inquiry. I also hope it helps the Police Association because it is not conceivable, under the interpretation of my reading of this legislation, for a tortious action to be brought against a member using the material extracted under the provision of the operation of this act.

Putting that to one side, I refer back to what this is about: the control of the streets. It is nothing more complex than that. I listened very carefully to the member for Katherine, who well remembers the day when processing a simple street offence was a very simple process. I obviously am a complete dinosaur because the PROMIS system post-dates me. All I remember is the simple act of arrest, doing your AP or a précis, the file going in, then you could go back on the street. If you and your partner were really quick and pretty good, you could knock it over in about 20 to 25 minutes pretty comfortably.

The PROMIS system came along, then the requirements for things like notebook entries, which I always had anyhow – I was always very particular and meticulous in keeping my notebook up to date – were introduced. As time passed, greater and greater impositions were made.

The IJIS system was introduced and created certain expectations on police officers, particularly in the days of unmanned watch houses which Alice Springs had. We used to keep 150 people under protective custody in Alice Springs – before the Royal Commission into Aboriginal Deaths in Custody – without the watch house being manned. Those were risky days, but that is how the system used to operate. Nobody thought too much about it.

The problem nowadays is that the process of arresting a person is laborious; it is hard. I want to paint a mental picture for members to provide an understanding of why I want to go down this path. The police will generally deny this, but on a quiet day, many will confess to it. On a Friday or Saturday night in Mitchell Street or in Alice Springs you will have X number of patrols. Let us just say you have three patrols in Mitchell Street on a Friday night, and there are a lot of drunken yobbos walking about committing offences. The offences they are committing are section 47 breaches of the *Summary Offences Act* – this is the old riotous, offensive, indecent language, disorderly behaviour or fighting section. I think that was the list from section 47.

A police officer would see this going on, stop the car or walk up to these people and tell them to cut it out, or they may go down the path of telling that person they will get a SIN – a summary infringement notice. Believe it or not, I pre-date summary infringement notices. I actually entered parliament in 1997 when these things were introduced. I remember saying to the then Police minister who introduced them that they were not a good idea. I am not really that warm towards summary infringement notices because of what the *Summary Offences Act* enabled police to do. It was a clean-up act. It was an act that enabled police officers to arrest a person and take them into custody and out of circulation.

Taking a person out of circulation was really important because every single copper out there will know this truth: the moron standing on a street corner being a foul-mouthed git at 9.30 pm at night is nearly always the person you are arresting at 2 am for a serious assault, sexual assault or something worse. If you take them out of circulation nice and early you are already well in advance of cutting off a lot of problems down the track.

This is where the problem arises. An arrest now generates, I am told, close on two hours of paperwork – let us accept one-and-a-half hours for the sake of conversation – and there are three units working on a Friday night. A police officer brings that person back to the watch house, and I understand they have to stand there and wait for the person to be processed. They then do the paperwork, which means updating a PROMIS job, generating an apprehension report, updating the IJIS system where necessary, as well as doing a précis of evidence. That takes a couple of hours.

I tell you what happens in the real world. The shift sergeant will be poking these coppers in the back of the head the whole time they are in the police station saying, 'Get out on the road, we need you out on the bloody road. There are jobs piling up.' Two units are out of commission doing an arrest, and that is really problematic. Police

try to deal with the matter by moving people on and dishing out a sinny, but they do not take these people out of commission. They do not remove them from the streets. They become – this is the part they will only whisper to you behind their hands – arrest averse, because they want to (1) avoid the aggravation of the shift sergeant yelling at them to get back out on the road and (2) make sure they do the right thing and stay on the streets as long as possible.

The arrest rate is not high, even when Mitchell Street has many problem people on the street. This robs the police of the power of control. I heard, of course, the complaints from lawyers who say this is arrest without trial and those sorts of things. It is not arrest without trial because there is capacity to have the matter heard through the normal hearing processes as described on the summary infringement notice.

Second, we already have a form of arbitrary arrest without a court appearance which you can find in section 128 of the *Police Administration Act*. We take people out of circulation for up to six hours, and if we have got them past midnight, we keep them until the morning. It is appealable. You can apply to a magistrate to have your condition reviewed.

This legislation does not create a circumstance which is not already in the contemplation of the law. I will give you an example. If a police officer does arrest somebody for a street offence and takes them into custody and places them in the watch house and they have been charged with that offence, bail may be set. If you read the *Bail Act* you will see it can take up to six hours – I think it is six hours, somebody remind me. Not too sure? Six hours, I am pretty sure of it. I will have to double check it. For six hours you can hold a person in custody before you determine bail. Even if it was four hours – and I will have to double check it – the effect is the same. If you have four hours to determine bail, the shift sergeant says, 'I will get around to it in the next two hours because I am busy at the moment', and that person is still sitting in custody.

People talk about the rights of citizens to be unmolested by their police forces unless they have reasonable grounds. Of course, you have the right to be brought before a court at the next practicable opportunity. In truth, the law has always accepted a time of deprivation of liberty as described by the member for Nhulunbuy, which has always operated under the law and continues to operate to this day.

This system simply restores a simple idea that when a police officer arrests a person for a street offence, they have taken that person out of commission. They bring them to the watch house, drop them off at the watch house, write out the summary infringement notice – so it is not entirely paperless – which goes into the property bag of the person who is then placed in the cells for the next four hours. In four hours' time, they come out, collect their property, collect their summary infringement notice, and if they wish to contest the allegations in the summary infringement notice, then there are processes for that to occur. Those processes are explained on the back of the summary infringement notice.

This means the police will no longer become arrest averse. It will actually say to the police that if these clowns are playing up, arrest them, take them into custody, get them out of circulation. I will bet you London to a brick serious assaults later on in the evening will substantially drop. Moreover, I will bet you London to a brick the police will feel a much greater level of control over the environment they police.

Police want to have a level of control, not because they are thugs and bullies, but because they believe in standing up for the integrity of social order in our community. In fact, that is what we ask them as members of parliament and as citizens of the Northern Territory do every day. We want them to do these sorts of things. We want them to respond.

I heard the member for Nelson say he wants the police to respond in this circumstance, in that circumstance, and to his needs. Part of the problem is that many of the police he wants to respond are sitting in police stations pumping out arrest files – at two hours each – and dealing with the logjam of paperwork which diminishes their capacity to respond.

That is what this legislation is. If you like, to a degree it is back to the future. We are doing it because at some time in the past, certainly within my memory and I have just heard the member for Katherine describe it within his memory – I am glad to see the member for Sanderson, who predates both member for Katherine and I; he is the stegosaur and we are from the Jurassic. Modern policing can look back to us reptiles and know we remember a time when we used to arrest people regularly, put them in cells and control the streets effectively.

This legislation is about restoring the concept of effective control back to the hands of the police force. I do not doubt the Criminal Lawyers Association of the Northern Territory will be highly critical of this because, of course, it represents criminals. That is not true, they are only criminals after they are convicted. Their predisposition will be one of absolute liberty rather than any form of custody. It is the default position they have.

Whilst I understand that default position, having studied law and political science I get the concept of liberty. But in the practical, real world of Mitchell Street when people are standing on street corners with their pants around their ankles blaring out expletives or baring their buttocks to passing cars, expectorating, fornicating, urinating, defecating and doing all the other things they do when they have a skin full of juba juice, we can now say to the police, 'Go out, lift them, pull them out of circulation'. You may be doing them a favour because whilst they are sitting in the cells they are not getting drunker still and committing, later in the evening, indictable offences.

That is basically what this power will be for the police: to quickly and efficiently deal with individuals who present themselves as offending generally against the *Summary Offences Act*. It will give police a vehicle by which to remove them, contain them and then release them. It is a form of catch and release. If a person wishes to object, they still have all the systems of appeal available to them, either through the courts, the internal police investigation process, the Ombudsman's Office or the civil courts. The remedies are there and the time spent in custody by a person does not exceed the contemplation of the *Bail Act* in any instance.

This no more an imposition on the good citizenry or burghers of the Northern Territory than any other legislative instrument has contained before. It represents efficiency and a capacity for the police to respond to minor street offences before they decay into indictable ones.

Motion agreed to; bill read a second time.

Mr ELFERINK (Attorney-General and Justice) (by leave): Madam Speaker, I move that the bill be now read a third time.

I am mindful there are seven minutes to go before General Business. I do not think it is worth bringing on business at this stage, so I will finish with some observations in the third reading stage to get us through to General Business.

As I said before, the amendments we are seeking to provide to the police force in the Northern Territory are welcome. I have spoken to a number of rank and file police officers in the street who, in many instances, do not know who I am. I do not recognise most police officers nowadays as I have been out of circulation for too long. When I introduce myself I talk to them about this idea of a paperless arrest. To a person, they understand exactly what I am proposing. From a rank and file perspective, the police officers of the Northern Territory have indicated to me they very much welcome these amendments. I understand the NT Police Association also has welcomed these amendments for similar reasons.

Operational police have a tough job in our community. They try very hard to maintain law and order on the streets, and they must be given the means by which to do it. This idea is not unique to the member for Port Darwin, as much as I would like to claim it as an original. In truth, this was mentioned to me by the Commissioner of Police in passing some months ago. My mind immediately seized upon it, and because I was in charge of the Pillars of Justice policy on behalf of government, I was able to intrude into the Minister for Police, Fire and Emergency Services' domain and have this legislation drafted up by the police. It has been brought before this House, and will, I suggest, pass in this House in about five minutes, and be sent off to the Administrator for passage into law.

I encourage the police, as soon as this becomes law, to establish a general order as soon as possible. I encourage rank and file police officers to begin using this as soon as this legislation passes into law. I want people to be safe on our streets. I want police to be able to clearly demonstrate to the people of the Northern Territory that they are in control of the streets. Whilst I sound like somebody who wants a police state, I certainly do not. But that is not to say I believe the streets should be abandoned to those who think any behaviour is proper behaviour, and the rat-baggery described by the *Summary Offences Act* is something you should aspire to rather than something you should be ashamed of.

Clearly the police have to deal with drunken morons. This is a young jurisdiction with many people in it who behave like young people. That makes them 10 foot tall, bullet proof, and in many instances, utterly irresponsible.

I cannot begin to count the number of times I arrested people for summary offences many moons ago. In 1983, this was a much younger jurisdiction, in the sense of self-government having only been brought to the Northern Territory five years earlier. That was the year I joined the Northern Territory Police Force. I was operational and up and about as a constable by 1985, regularly patrolling the streets of what was then called the A Sector, the Darwin CBD; I presume it still is.

The A Sector presented police with a very particular problem. The nightclubs at the time were Fannies in Edmonds Street and I think it was still Crystals or Darby's in the old casino site. There was Dicks as well in my old patrol district. There was any number of those pubs ...

A member: The Dolphin.

Mr ELFERINK: The Dolphin in Nightcliff was a spectacular hole, as was Lim's The Cage Bar. Goodness, gracious me, I would hate to think how many square inches of my skin are on the floors and car parks of some of these public houses because of having to control the wayward behaviour of some of these individuals. That was in a time when we were easily able to arrest these people and drag them out.

Now, because of the systems that have been put in place – and I understand the need for systems like PROMIS and IJIS – I am always mindful of the fact you do not necessarily want or need public servants, whether they be police officers or otherwise, to become slaves to a computer system. Computers, like everything else, should be tools which enhance the quality of the work done by public servants.

When a system becomes so onerous that it becomes an impediment to a public servant doing their work – including an operational police officer at three o'clock in the morning in front of a nightclub – then it is an impediment, not only for them but to the community as a whole. I could not think of a better way to remove red tape from operational police officers. I look forward to the police officers using this legislation, but them using it with discretion – the common law powers of discretion they have – and within the spirit of the law, not just necessarily the letter of the law.

I am sure a general order will be created to instruct police on how to use this system, but I encourage police to pick up the cudgels of this new power and use it for the proper maintenance in law and order and for the true welfare of the people of the Northern Territory.

Motion agreed to; bill read a third time.