



## **Ombudsman NT Report**

# **Taser use and Management of NT Police conduct issues**

**December 2017**



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## EXECUTIVE SUMMARY

1. This report examines the benefits and risks of Taser use by NT Police in the context of a particular incident involving the tasing of a 12 year old child. It discusses the current state of the literature on Taser use, NT Police rules regarding Taser use and the circumstances of the particular case.
2. It supports the finding of the NT Police investigator that an officer breached rules made by the NT Police in relation to Taser use.
3. It examines options available for action by NT Police in relation to management of police conduct issues and discusses potential future directions, as well as the action taken by NT Police in relation to the specific incident.

### Taser benefits and risks

4. In Chapter 1, I consider a broad range of recent publications from around the world which discuss the benefits and risks of Taser use.
5. There is no doubt that the Taser can be a valuable tool for law enforcement, particularly as an alternative to use of a firearm in situations where there is a serious threat to safety. Nevertheless, a range of risks are identified, from wounds arising from Taser barbs, to the potential for injury from Taser induced falls, to injuries caused through igniting flammable substances. However, by far the most serious and contentious risk is its association with a number of deaths.
6. I conclude that the current state of the literature is such that no definitive causal connection can be drawn between Taser use and death. However, the occurrence of a substantial number deaths associated with Taser use cries out for caution. Given the large number of times Tasers have been deployed, compared with even the highest estimates of associated deaths, the risk of death must be realistically assessed as very low. But the severity of the potential outcome is extreme. I conclude that a rigorous and cautionary approach to Taser use must prevail.
7. I further conclude that, while the evidentiary basis is somewhat equivocal, there are pointers to a range of people with certain vulnerabilities being more susceptible to harm following use of a Taser. Children, and more particularly children who are small in stature, fall within that group and even greater caution must be adopted with regard to these individuals.

### NT Police rules about Taser use

8. Bearing that in mind, in Chapter 2, I review NT Police rules which place specific restrictions on the circumstances in which Tasers can be used. I conclude that it is essential for specific restrictions to be retained and clarified or amended in light of the matters discussed in this report.
9. I also express concern that there needs to be greater emphasis within NT Police on the fact that there are specific restrictions, so that Taser use cannot be regarded as merely part of a continuum of reasonable options. While Taser use can be the right option in the right circumstances, officers always need to bear in mind the risks of Taser use and ensure that threshold tests are met.

10. Although I have noted contrary views, I have not formed the view that Taser use on children (even 'young' children) should be banned, so long as appropriate restrictions are maintained that limit the circumstances of use. However, given the opposing views, this is a matter on which the NT Government and the Commissioner of Police may wish to deliberate, informed by my report and other relevant material.

## Management of Police conduct issues

11. In Chapter 3, I consider the various options open for handling conduct and performance issues within the public sector and the traditional approach applied within disciplined forces, such as the NT Police.
12. I note a move away from discipline as the primary tool for managing conduct issues in police forces in other jurisdictions.
13. I discuss the options for action open to NT Police. These include formal disciplinary proceedings under Part IV of the *Police Administration Act* (the PAA), counselling or caution under section 14C of the PAA and performance management.

## Specific incident

14. In Chapter 4, I discuss the incident that gave rise to the investigation and the outcome of the investigation.
15. In brief, the complainant was one of three occupants of a stolen vehicle (all children). Between 7:15 and 8:00 on a Monday morning there were a number of reports to Police about erratic and dangerous driving on roads and in public places, including schools. The vehicle had already been driven off from one service station when Police had tried to intercept it. Police Officers A and B anticipated the movements of the vehicle and got into position at another service station prior to the arrival of the stolen vehicle. The officers waited in two different positions.
16. The vehicle pulled up at a bowser and Officer B approached the driver of the vehicle (Child B) once he got out of the vehicle to fill up with petrol. Officer A drew his Taser as Officer B approached Child B. Officer A then ran towards the front of the vehicle, pointing his Taser through the windscreen at the complainant (who had moved into the driver's seat). While Officer B struggled with Child B outside the vehicle, Officer A struck the driver's side window several times.
17. The complainant then exited the vehicle through the passenger side door and ran away through the forecourt of the service station. He was pursued by Officer A, who fired the Taser at him from about three metres away. The Taser was activated once and disengaged by Officer A after approximately four seconds. The complainant fell over when struck. He suffered stinging, soreness and bleeding from the spot on his back where a Taser barb struck him. His elbow was injured when he fell and was bandaged at hospital.
18. The incident was investigated by the Police Standards Command (PSC) under the supervision of the Ombudsman's Office and a report prepared. In examining the available materials, it was accepted that events took place within a short space of time and that Officer A was very concerned to ensure that any potential for further dangerous driving was negated. It was acknowledged that the conduct of Officer A needed to be judged in light of "*the pressure of events and the agony of the moment, not by reference to hindsight*".

19. Taking these and other relevant factors into account, the PSC Investigator determined that both the drawing of the Taser and its discharge were contrary to Police General Orders. The PSC Report concluded that, at the time of the discharge, there was not an 'immediate physical threat of serious harm' to any person and that there was a less forceful option reasonably open (namely, continuing to pursue the complainant on foot).
20. Also in issue was the fact that the complainant was only 12 years old at the time. Police General Orders contained no absolute prohibition on use of a Taser on a child but did require that a Taser be used on a 'young child' only in extraordinary circumstances. This term was not defined. The PSC Report concluded that Officer A did not know the complainant or the age of the complainant and that, given the height and build of the complainant, the rapidly developing situation and the seconds available to make an assessment, there were not sufficient grounds for Officer A to have acted on the basis that the complainant was a 'young child', and so there was no breach of the General Order in this regard.
21. I accepted those conclusions.
22. The PSC Report recommended that Managerial Guidance be given to Officer A under section 14C of the PAA. I urged the Commissioner of Police to give consideration to commencing disciplinary action under Part IV of the PAA but he declined to do so. Managerial Guidance was given to Officer A and a written caution issued.
23. However, shortly after this, the Commissioner determined to suspend the use of section 14C generally and, at the same time, to rescind the Managerial Guidance given in this case. I do not consider that the rescission was warranted or beneficial to anyone in the circumstances. The action taken in relation to Officer A and the decision to rescind are discussed in Chapter 4.

## Recommendations

24. In light of the issues raised and materials considered in the course of this investigation, I have made a number of general recommendations in relation to Taser use and management of police conduct issues.
25. Recommendations relating to Taser use include the need for retention of specific restrictions, increased emphasis on training, guidance and monitoring and review and clarification of the circumstances in which Taser use is open.
26. Recommendations relating to management of police conduct issues concern the need for additional guidance for decision-makers regarding the circumstances in which particular options for action should be adopted and in which particular disciplinary sanctions should be considered.
27. The recommendations, set out on the following page, have been accepted by NT Police.
28. This report is prepared with the intention that the commentary and recommendations in it will contribute to better informing discussion within the Legislative Assembly, the Northern Territory Government and the community about these issues of public significance.

**Peter Shoyer  
Ombudsman**





## RECOMMENDATIONS

- 1) NT Police continue to maintain specific restrictions on Taser use.
- 2) NT Police supplement the Use of Force General Order by additional guidance, illustrations and scenarios to better inform officers of the inherent risks of Taser use, particularly in relation to special circumstances.
- 3) NT Police training materials and courses be reviewed to ensure substantial emphasis on consideration of alternatives to use of force and specific restrictions on use of accoutrements like Tasers and chemical sprays.
- 4) NT Police carefully consider the question of whether Tasers should be used on children and, if they continue to be used, consider the inclusion of Taser use on a child (regardless of age) as a special circumstance.
- 5) NT Police review the special circumstances list in the Use of Force GO with consideration to the issues discussed in Chapters 1 and 2, including:
  - a. defining 'young child', if that remains a separate special circumstance;
  - b. use on people with small stature or slight build;
  - c. use on people with other vulnerabilities;
- 6) NT Police review the specific restrictions on Taser use, with consideration to:
  - a. whether there is a need to provide some differentiation in terms of the circumstances in which use is allowed between the different uses of a Taser;
  - b. extension of the circumstances for use of a Taser to a fleeing suspect where there is a reasonable belief that a suspect being pursued in relation to a serious violent crime presents a real risk that, if not immediately detained, they will cause serious harm in the future.

(But only after the additional measures in relation to training and guidance discussed in these recommendations are implemented).
- 7) NT Police maintain a system for regular monitoring and reporting on Taser use to a senior executive officer responsible for oversight of all instances of Taser use.
- 8) NT Police produce substantial written guidance to decision makers to assist them in determining which option to recommend or pursue when considering action in relation to the conduct of an individual officer.
- 9) NT Police produce substantial written guidance to decision makers to assist them in determining which sanction (if any) to recommend or impose in relation to the conduct of an individual officer.

## Consultation

The solicitor's for the complainant were provided with a copy of my Assessment Report (including attachments) which is in broadly similar terms to this report and invited to make any comments should they or their client wish. They did not make further comment.

A draft of this report was provided to NT Police for comment and arrangements were made for NT Police to consult Officer A with regard to the aspects of the report directly relevant to him. Advice was received from NT Police that Officer A did not wish to comment.

NT Police made the following comments:

*The Northern Territory Police Force will continue to maintain specific restrictions on Taser use (recommendation 1).*

*The Northern Territory Police Force are currently working on amendments to the Operational Safety and Use of Force GO to provide additional guidance to officers in the use of Taser's, particularly in special circumstances. We are reviewing current training materials and the focus on alternatives to the use of appointments, the use of Taser on a child to being a special circumstance (and consideration of other vulnerabilities which might fall within this category), the use of Taser's on 'fleeing suspects', and a better monitoring system for Taser usage (recommendations 2 to 7).*

*As you will no doubt understand, this work involves a great deal of consultation both internally and externally to identify best practice advice, guidance and training. I will update you on this work as it progresses.*

*In September 2017, I wrote to you concerning my decision to suspend the use of section 14C. Better guidelines have been prepared for distribution to police officers concerning the manner in which minor matters of breaches of discipline might be better dealt with outside of Part IV of the Police Administration Act.*

*[The current] Commander ... of the Police Standards Command has been asked to consult with you on these brief draft guidelines prior to publication.*

*In the meantime work continues on the review of our disciplinary regime. [The relevant] Assistant Commissioner ... has spoken with both yourself and the Acting Deputy Ombudsman and I am informed that draft amendments, as will be proposed by the Northern Territory Police, will be provided to your office ... . Accompanying these draft proposals will be a new Complaints Management Manual for consideration (recommendations 8 and 9).*

*... Officer A has been subject to remedial [Taser] training. The officer has been provided remedial advice in respect to the use of a Taser to break a window and its use in a flammable environment, the use of excessive force, and compliance with the Code of Conduct and Ethics.*

# CHAPTER 1: TASER BENEFITS AND RISKS

1. This Chapter contains general comments on Taser use derived from a review of current literature.
2. It should be noted that, in addition to the trade name, Taser, these weapons are described in various ways, for example, Electro-muscular Control Devices (ECDs), Conducted Energy Weapons (CEWs) and Conducted Energy Devices (CEDs).

## Taser benefits

3. In a 2012 report on Taser use by NSW Police, the NSW Ombudsman identified the following key arguments in support of Taser deployment:<sup>1</sup>

*The key arguments in support of Taser use are that they:*

- *are an alternative to lethal force*
- *reduce injuries to police officers, the public, and the people threatening and behaving violently to police and others*
- *can be an effective deterrent, sometimes even without being discharged*
- *help police to resolve violent incidents.*

*There is anecdotal evidence supporting these claims, and in the last few years there has been some credible quantitative research supporting some of the assertions. The overseas research in particular provides weight to these arguments, although the research that has been done in Australia with law enforcement agencies has been less consistent in providing evidence that supports the arguments for Taser use.*

4. There can be little doubt that the Taser offers an attractive alternative to use of a 'lethal force' weapon, such as a firearm, in extreme cases.
5. The NSW Ombudsman noted that, in the majority of cases, the Taser was not discharged:<sup>2</sup>

*In 73% of incidents a Taser was drawn but not fired. In 17% the Taser was discharged once in probe mode. In 7% of incidents a Taser was used multiple times or continuously, and in 4% of incidents a Taser was used in drive-stun mode. In the majority of cases (94%), only one person was subjected to Taser use during the incident.*

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<sup>1</sup> *How are Taser weapons used by the NSW Police Force?*, NSW Ombudsman, October 2012, p.8.

<sup>2</sup> *Ibid*, p. 9.

6. In the United Kingdom, the Independent Police Complaints Commission (IPCC) has commented:<sup>3</sup>

*The IPCC has always accepted that there are legitimate reasons for using Taser in policing – as long as it is used appropriately and monitored by police forces correctly. It can be a valuable tool in assisting police officers to manage difficult and challenging situations, provided it is used appropriately. The device was originally introduced as an alternative to firearms, so that police officers had what is described as a ‘less lethal’ option available to them.*

7. There is some empirical support for the proposition that, beyond use relating to avoidance of ‘lethal force’, Taser use reduces the likelihood of officer and suspect injury (at least if minor dart punctures are discounted).<sup>4</sup>

## Taser risks

8. It is probably fair to say that there is some general agreement about the types of risks that may be presented by Taser use. However, it is equally true that there has been substantial, ongoing and often bitter public and academic debate about the extent of those risks.

9. In very brief terms, the risks involved may be described as:

- an unquantified and arguably uncertain risk of death associated with Taser use, which is raised by a number of deaths that have occurred following Taser use;
- a risk of less serious physical harm or injury of varying degrees attributable to Taser use;
- a risk of psychological harm; and
- a risk of misuse and mission creep – use of Tasers beyond authorised purposes.

10. A more detailed description of potential medical implications of Taser use is set out below:<sup>5</sup>

- *Muscular contraction or strain-related injury (including bone fractures, hernia rupture and dislocation).*
- *Injuries, particularly to the head, from falls or other uncontrolled movements. This risk may be exacerbated in people who are running or are located at height at the time the discharge is administered.*
- *Injury from probe penetration of the eye, blood vessels, genitalia, breast, neck, throat, thorax and other sensitive structures.*

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<sup>3</sup> IPCC review of Taser complaints and incidents 2004-2013, Independent Police Complaints Commission, July 2014, p.3. For a recent general description of UK developments in this field, see T McGuinness, *Taser Use in England and Wales*, House of Commons Library Briefing Paper, September 2016, No. 7701.

<sup>4</sup> Robert J. Kaminski, Robin S. Engel, Jeff Rojek, Michael R. Smith & Geoffrey Alpert (2015) *A Quantum of Force: The Consequences of Counting Routine Conducted Energy Weapon Punctures as Injuries*, *Justice Quarterly*, 32:4, 598-625, DOI: 10.1080/07418825.2013.788729. Valerie G. Womack, Robert G. Morris, and Stephen A. Bishopp, *Do Changes in TASER Use Policy Affect Police Officer Injury Rates?*, *Police Quarterly*, 2016, Vol. 19(4) 410–434.

<sup>5</sup> *Statement on the Medical Implications of Use of the TASER X2 Conducted Energy Device System*, Scientific Advisory Committee on the Medical Implications of Less-Lethal Weapons UK, (October 2016), p.4.

- *People on anticoagulants or who have a disorder that impairs coagulation may be at increased risk of internal bleeding from penetrating injury or head injury.*
- *Adverse effects on the heart, circulation and respiratory system triggered by the physiological stress induced by CED discharge.*
- *Injuries (for example, abrasions, scars and electrical burns) from handset stun electrodes and fired probes.*
- *Cardiac capture from the electrical discharge, specifically linked to probes or electrodes in close proximity to the heart.*
- *Epileptic seizure (particularly in people with pre-existing epilepsy).*
- *Spontaneous abortion has been linked to the administration of CED discharge, although the strength of the association is uncertain.*
- *Rhabdomyolysis<sup>6</sup> has been associated with CED use and is a rare side-effect associated with use of statins, which are widely prescribed to those over 40-years-old. Any risk of rhabdomyolysis associated with CED use may be elevated in persons taking statins. About 20% of uses of CED in the UK are on people in this older age group.*
- *Thermal burns from the discharge-induced combustion of flammable liquids (such as petrol or the solvent used in CS spray).*
- *Blast injury due to discharge-induced ignition of explosive vapour (for example, petrol vapour).*
- *Risk of drowning for people who are partially submerged in, or who are located next to, standing water due to loss of posture under the influence of electrical discharge.*
- *Psychological harm may be caused by the trauma associated with exposure to CED discharge. This aspect of CED use is under-researched. Such harm is not confined to CED use and applies to other forms of force employed by law enforcement officers.*

## Reports of associated deaths

11. While other risks cannot be ignored, identifying any risk of death attributable to Taser use is of fundamental importance.
12. Perhaps the most emphatic reporter of Taser associated deaths has been Amnesty International. In 2012, the NSW Ombudsman noted:<sup>7</sup>

*Amnesty International has claimed that since June 2001 more than 330 people are reported to have died in the US after being subjected to Taser use, and 25 similar deaths have been reported in Canada. In at least 50 cases, coroners are reported to have listed the Taser as a cause or contributory factor in the death.*

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<sup>6</sup> Rhabdomyolysis is the rapid destruction of skeletal muscle resulting in leakage into the urine of the muscle protein myoglobin. Risks of rhabdomyolysis include muscle breakdown and kidney failure because myoglobin is toxic to the kidneys. MedicineNet.com.

<sup>7</sup> NSW Ombudsman, op cit, p.50.

13. The number of associated deaths reported by Amnesty International USA has since grown to over 700.<sup>8</sup> Reuters has also developed a website in which it identifies over 1,000 deaths it states have been associated with Taser use.<sup>9</sup>
14. The NSW Ombudsman also referred to four deaths associated with Taser use in Australia.<sup>10</sup> The Ombudsman stated:<sup>11</sup>

*The question of whether a Taser can directly cause a person's death continues to be debated within the medical profession. There is no doubt that a concerning number of deaths have occurred in connection with a Taser. In many of these cases the Coroner has been unable to determine any cause of death, and in some cases the Coroner has found that the Taser contributed to the person's death.*

*The risks relating to serious injury are well recognised. Taser International (the manufacturer of the Taser devices used by the NSWPF) has on several occasions issued advice and cautions on Taser use. The risks relating to mission creep and Taser misuse and abuse have been documented in a number of significant reports both in Australia and overseas. Both the WA CCC and the Qld CMC have published reviews on Taser use that highlighted concerns and risks around mission creep and Taser misuse.*

15. In the United Kingdom, the Scientific Advisory Committee on the Medical Implications of Less-Lethal Weapons (SACMILL) reported in 2016:<sup>12</sup>

*Since the introduction of CEDs into British policing in 2003, the devices have been discharged operationally more than 13,000 times. Over this period, there have been seventeen fatalities in which the discharge of TASER CEDs featured as one of the uses of force. In two of these deaths, both of which occurred in 2013, the TASER CED discharge was concluded to have been a causal or contributory factor. One of these cases involved the discharge-induced ignition of petrol. In the other case, the inquest concluded that the TASER CED discharge was one of a number of factors that contributed towards the fatal outcome. The cause of death has yet to be determined in five of the seventeen UK fatalities in which the use of a CED featured. Two of these deaths were in 2014 and three have been recorded to date in 2016.*

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<sup>8</sup> Noor Mir, *Is Dept. of Justice Use of Force Database enough?*, Amnesty International blog, 21 October 2016 <http://blog.amnestyusa.org/us/is-dept-of-justice-use-of-force-database-enough/>

<sup>9</sup> Reuters Investigates: *Shock Tactics*, <https://www.reuters.com/investigates/special-report/usa-taser-database/#>, accessed 2 November 2017.

<sup>10</sup> NSW Ombudsman, op cit, p.50.

<sup>11</sup> NSW Ombudsman, op cit, p.8. See also *The Use of Taser Weapons by the Western Australia Police Summary Report*, WA Corruption and Crime Commission, October 2010, <https://www.ccc.wa.gov.au/sites/default/files/Summary%20of%20Report%20-%20Use%20of%20Taser%20Weapons%20by%20WAPOL.pdf> and *Evaluating Taser reforms: A review of Queensland Police Service policy and practice*, Queensland Crime and Corruption Commission, April 2011, <http://www.ccc.qld.gov.au/research-and-publications/publications/police/tasers/evaluating-taser-reforms-review-qps-policy-and-practice.pdf>.

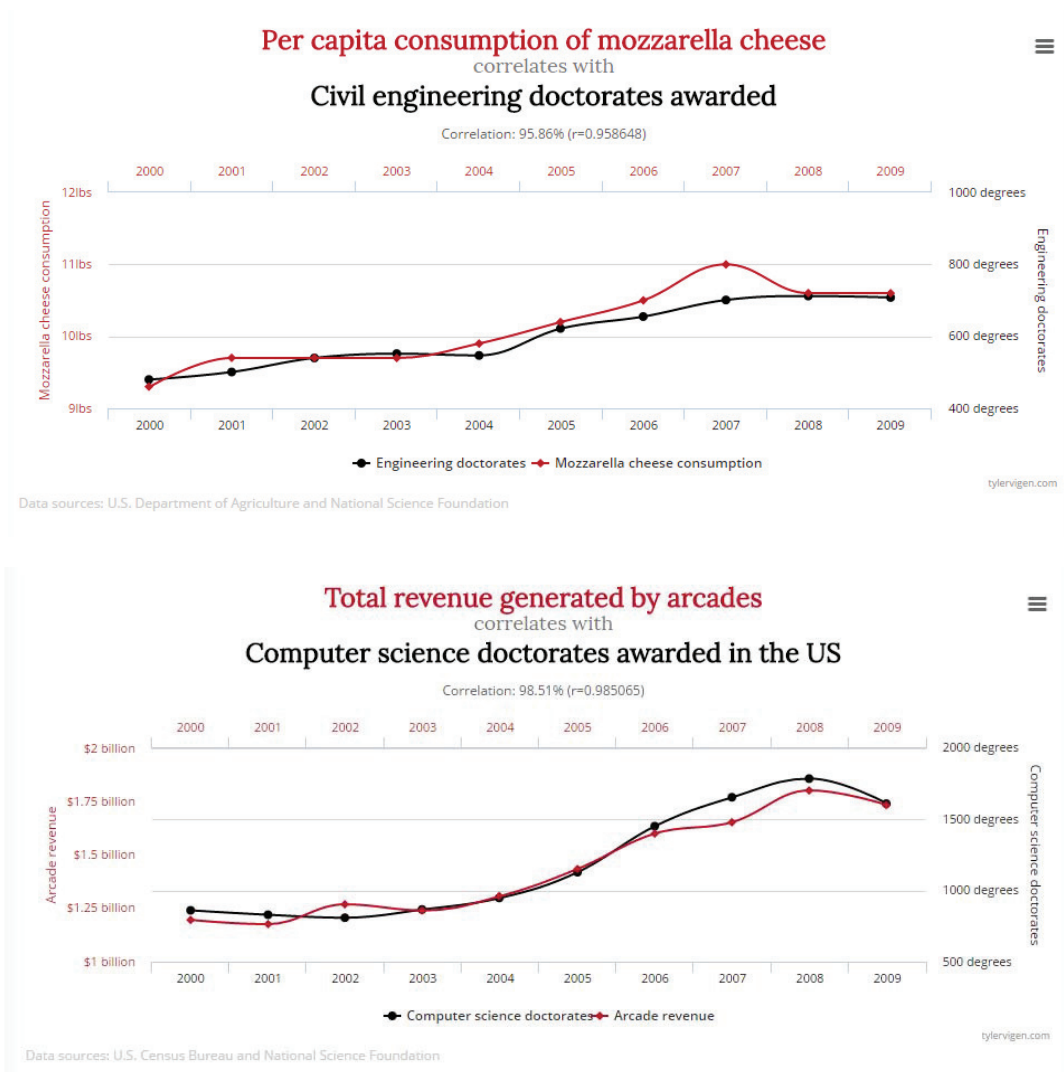
<sup>12</sup> *Statement on the Medical Implications of Use of the TASER X2 Conducted Energy Device System*, Scientific Advisory Committee on the Medical Implications of Less-Lethal Weapons UK, October 2016, p.4.

16. In Canada, an Expert Panel reported in 2013:<sup>13</sup>

*Based on media reports and documented inquest processes alone, to date at least 33 deaths have been proximal to CEW use in Canada, but were not necessarily results of CEW deployment.*

### Association is not causation

17. It is important to stress that a temporal association between Taser use and death does not necessarily mean that Taser use caused or contributed to death.
18. The distinction between association (or correlation) and causation can be illustrated by the two graphs shown below.<sup>14</sup>



<sup>13</sup> *The Health Effects of Conducted Energy Weapons*, The Expert Panel on the Medical and Physiological Impacts of Conducted Energy Weapons, The Council of Canadian Academies & the Canadian Academy of Health Sciences, Canada, 2013, p. vii.

<sup>14</sup> From Tyler Vigen, Spurious correlations website, <http://www.tylervigen.com/spurious-correlations>.

19. The first graph suggests a close correlation over a number of years between mozzarella cheese consumption and civil engineering doctorates awarded. However, no one would suggest a causal affect.
20. The second graph shows a similar correlation between computer science doctorates and arcade revenue. While this might for a fleeting moment raise the prospect of a more direct connection, a causal relationship is again unrealistic.
21. These examples are not included to make light of a serious matter but rather to illustrate that even a close apparent association or correlation between two things does not mean that they are necessarily linked or that one has caused the other.
22. In the case of Taser use and reported deaths there is a spatial and temporal association. This raises a much more direct and obvious association than the above illustrations but the fact that one event has occurred following another does not mean the first caused the second.
23. Considerable evidence and analysis is still required to establish a causal link, particularly when there are numerous other factors that may have caused or contributed to an outcome.

### Difficulties in establishing causation in deaths following Taser use

24. A fundamental obstacle to establishing a causal link between Taser use and death is the range of other 'exceptional' factors that will often come into play when Police are seeking to apprehend a suspect. Cases will commonly involve a mix of factors that may include the influence of alcohol or other drugs, physical exertion, physical struggles, unusual manoeuvres aimed at avoiding escape, use of restraints and other weapons. Establishing a cause of death from such a crowded array raises many problems.
25. The following extracts from a Canadian Expert Panel report in 2013, highlight the challenges in establishing a causal connection:<sup>15</sup>
  - *Some animal studies suggest CEWs can induce fatal cardiac arrhythmias (abnormal heart rhythm) when a number of discharge characteristics, either alone or in combination, are in place: probe placement on opposite sides of the heart (i.e., current is delivered across the heart), probes embedded deeply near the heart, increased charge, prolonged discharges, or repeated discharges. These studies indicate the biological plausibility of adverse health outcomes following CEW exposure.*
  - *A small number of human cases have found a temporal relationship between CEWs and fatal cardiac arrhythmias, but available evidence does not allow for confirmation or exclusion of a causal link. If a causal link does exist, the likelihood of a fatal cardiac arrhythmia occurring would be low, but further evidence is required to confirm the presence and magnitude of any risk.*
  - *The roles of co-factors common to real-world CEW incidents (e.g., intoxication, exertion, restraint) and other co-factors (e.g., body type, existing health complications) that may increase susceptibility to adverse effects have not been adequately tested to properly establish an understanding of increased vulnerability in humans.*

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<sup>15</sup> *The Health Effects of Conducted Energy Weapons*, The Expert Panel on the Medical and Physiological Impacts of Conducted Energy Weapons, The Council of Canadian Academies & the Canadian Academy of Health Sciences, Canada, 2013, pp.viii-x.



*These conclusions are limited by a number of challenges presented by the available laboratory-based experimental research studies, including translation of findings from computer and animal model studies to humans, human studies with mainly healthy subjects who do not represent the varying populations involved in CEW events, the absence of adequate control groups, lack of diverse and robust experimental designs and monitoring, and small sample sizes. Large-scale population-based studies that better capture the complexity of real-world CEW deployment scenarios, along with a range of potential co-factors, are lacking.*

**3. Sudden in-custody death resulting from a use-of-force event typically involves a complicated scenario that includes multiple factors, all of which can potentially contribute to a sudden unexpected death. This makes it difficult to isolate the contribution of any single factor. Although the electrical characteristics of CEWs can potentially contribute to sudden in-custody death, given the limited evidence, CEW exposure cannot be confirmed or excluded as the primary cause of a fatality in most real-world settings.**

...

*In addition, there is insufficient evidence to determine whether the use of CEWs increases or decreases the probability of sudden in-custody death in the presence of co-factors such as mental illness or excited delirium syndrome (a highly controversial classification denoting a state characterized by signs and symptoms such as agitation, elevated body temperature, disorientation, and aggression).*

...

**4. There are a number of overarching challenges in funding, conducting, and interpreting CEW research, which create knowledge gaps related to the health effects of CEWs across varying populations and across the operational settings in which CEWs are deployed.**

...

*The Panel further identified five overarching gaps in health-related CEW knowledge:*

**Establishment of causal relationships** – *Establishing causality is not a simple task. While some research indicates an association between CEW exposure and certain health effects, other research does not, and in many cases there is simply not enough research to make any definitive conclusions. The effects of confounding factors may provide a number of possible explanations for those relationships, or the lack thereof. Thus, the Panel considered it difficult to establish the extent to which CEW exposure could act as the primary cause of severe adverse health effects in real-world settings, largely due to the challenge of weighting the contribution of multiple factors.*

**Establishment of time necessary for probability** – *There are no guidelines to specify the length of time needed between CEW discharge and the development of a health effect that would allow one to conclude the CEW was responsible for that effect. It may be beneficial to consider a continuum where, as the time of a health effect moves farther away from the time of deployment, the probability that a CEW was directly responsible for that event diminishes.*

**Understanding of varying populations** – *Laboratory based experimental CEW research on human subjects typically involves healthy, physically fit volunteers. There is therefore a paucity of knowledge of the health effects associated with CEW use outside controlled settings and within varying, potentially vulnerable populations. Large-scale population-based field studies involving detailed and consistent collection of information on the characteristics of the subjects and the events surrounding CEW use hold promise for addressing ethical constraints and identifying health effects across a range of populations.*

**Lack of standardization** – *The ability to carry out adequate surveillance and population-based study is hindered by lack of standardization and inconsistent reporting and record-keeping practices related to use-of-force events. There are few central registries with standardized recording of CEW incidents by both law enforcement and medical personnel. The lack of standardization hinders the ability to conduct population-based studies and to form evidence based conclusions about the relationship between CEW use and adverse health effects.*

**Transparency and independence of research** – *Many research studies of CEWs appear to be affiliated with, or receive support from, CEW manufacturers or individuals with perceived conflicts of interest (e.g., paid medical experts), and funding sources are not always transparent. Although these studies may be scientifically robust, there is a perceived conflict of interest that limits their widespread acceptance. Independent research by organizations without financial or other ties to CEW manufacturers or others with perceived conflicts is desirable.*

26. The challenges of establishing causation and the extent of any causation or contribution in the face of multiple factors cannot be resolved by a conclusion that risk can be safely ignored if it has not been categorically proven to exist.
27. It is necessary for authorities to respond to the potential risks raised by Taser use on the basis of the best available information even if that information is presently incomplete. While there is evidence of an association between Taser use and death, it is prudent and appropriate to take a cautionary approach and make decisions based on the best assessment of the risks that may be involved.

## **Taser International warnings**

28. A good starting point in considering the risks presented by Taser use are the warnings given by the maker of the product, Taser International Inc.<sup>16</sup> *TASER® Handheld CEW Warnings, Instructions, and Information: Law Enforcement* is an 8 page document produced in March 2013. In the document, the Taser is described as Conducted Electrical Weapon (CEW).
29. While it is important that any potential user should read the whole of the most recent applicable version of the document, the following points have been extracted to give a sense of the more serious risks identified by the maker:

*When used as directed in probe-deployment mode, CEWs are designed to temporarily incapacitate a person from a safer distance than some other force options, while reducing the likelihood of death or serious injury. However, any use of force, including the use of a CEW, involves risks that a person may get hurt or die due to the effects of the CEW, physical incapacitation, physical exertion, unforeseen circumstances, or individual susceptibilities. Following the instructions and warnings in this document will reduce the likelihood that CEW use will cause death or serious injury. ...*

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<sup>16</sup> Taser International has recently changed its name to Axon.

## SAFETY INFORMATION: CEW RISKS AND RISK AVOIDANCE

**⚠️ WARNING** **Cumulative Effects.** CEW exposure causes certain effects, including physiologic and metabolic changes, stress, and pain. In some individuals, the risk of death or serious injury may increase with cumulative CEW exposure. Repeated, prolonged, or continuous CEW applications may contribute to cumulative exhaustion, stress, cardiac, physiologic, metabolic, respiratory, and associated medical risks

which could increase the risk of death or serious injury. Minimize repeated, continuous, or simultaneous exposures.

***Physiologic and Metabolic Effects.** CEW use causes physiologic and/or metabolic effects that may increase the risk of death or serious injury. These effects include changes in blood chemistry, blood pressure, respiration, heart rate and rhythm, and adrenaline and stress hormones, among others. In human studies of electrical discharge from a single CEW of up to 15 seconds, the effects on acid/base balance, creatine kinase, electrolytes, stress hormones, and vital signs were comparable to or less than changes expected from physical exertion similar to struggling, resistance, fighting, fleeing, or from the application of some other force tools or techniques.*

*Some individuals may be particularly susceptible to the effects of CEW use. These susceptible individuals include the elderly, those with heart conditions, asthma or other pulmonary conditions, and people suffering from excited delirium, profound agitation, severe exhaustion, drug intoxication or chronic drug abuse, and/or over-exertion from physical struggle. In a physiologically or metabolically compromised person, any physiologic or metabolic change may cause or contribute to sudden death.*

...

**⚠️ WARNING** **Cardiac Capture.** CEW exposure in the chest area near the heart has a low probability of inducing extra heart beats (cardiac capture). In rare circumstances, cardiac capture could lead to cardiac arrest. When possible, avoid targeting the frontal chest area near the heart to reduce the risk of potential serious injury or death.

*Cardiac capture may be more likely in children and thin adults because the heart is usually closer to the CEW-delivered discharge (the dart-to-heart distance). Serious complications could also arise in those with impaired heart function or in those with an implanted cardiac pacemaker or defibrillator.*

...

**⚠️ WARNING** **Muscle Contraction or Strain-Related Injury.** CEWs in probe-deployment mode can cause muscle contractions that may result in injury, including bone fractures.

**⚠️ WARNING** **Higher Risk Populations.** CEW use on a pregnant, infirm, elderly, or low body-mass index person or on a small child could increase the risk of death or serious injury. As with any force option, CEW use has not been scientifically tested on these populations. Use a CEW on such persons **only** if the situation justifies an increased risk.

## Conclusions of recent studies and reports

30. In its 2016 statement on the Taser X2, the UK Scientific Advisory Committee on the Medical Implications of Less-Lethal Weapons UK reported:<sup>17</sup>

*Despite the broad range of potential injuries that have been linked to the use of CEDs, the internationally reported incidence of serious injury – as judged by the relatively low number of published clinical case reports – appears to be low relative to the widespread use of CEDs.*

<sup>17</sup> Statement on the Medical Implications of Use of the TASER X2 Conducted Energy Device System, Scientific Advisory Committee on the Medical Implications of Less-Lethal Weapons UK, October 2016, pp. 5-6.

Notwithstanding the likelihood of under-reporting in the medical literature, the infrequency of reports of serious injury implies that most uses of CEDs result in unremarkable medical outcomes.

31. In 2013, the Canadian Expert Panel stated:<sup>18</sup>

**2. Certain physical injuries such as superficial puncture wounds are common as a result of CEW discharge, but rarely pose serious medical risks. Although it is difficult to state any firm conclusions on the neuroendocrine, respiratory, and cardiac effects of CEWs due to an absence of high-quality evidence, available studies suggest that while fatal complications are biologically plausible, they would be extremely rare.**

- Although limited studies suggest CEW exposure can induce the stress response and increase hormone levels, these increases are of uncertain clinical relevance. It is also unclear to what extent the discharge of a CEW adds to the high level of stress already being experienced by an individual in an arrest scenario.

- Studies of animals subjected to prolonged or repeated CEW exposure indicate the potential for respiratory complications (e.g., pronounced acidosis). Although published experimental data identify respiratory changes in healthy human subjects typical of vigorous physical exertion, studies involving more heterogeneous groups or humans subjected to prolonged or repeated exposure have not been conducted.

...

A small number of human cases have found a temporal relationship between CEWs and fatal cardiac arrhythmias, but available evidence does not allow for confirmation or exclusion of a causal link. If a causal link does exist, the likelihood of a fatal cardiac arrhythmia occurring would be low, but further evidence is required to confirm the presence and magnitude of any risk.

If a causal relationship does exist, the likelihood that a CEW will be the sole cause of a sudden in-custody death is low. The extent to which the device would play a role in any death is unclear and dependent on the co-factors involved. Further research is needed to better define these relationships.

32. There are journal articles that contend any link with Taser use and death has been overstated, for example:<sup>19</sup>

*In previous reports, durations of incapacitating effects and possible associations of CEWs with deaths-in-custody have often been overstated or exaggerated. Comparisons of CEW effects with “electrocution” are misleading. Clarification of these misconceptions may be important during policymaker decisions, practitioner operations, expert witness testimonies, and court proceedings. Despite misconceptions in the literature, CEWs can still be a valuable tool for law enforcement activities. Scientists, medical professionals, legal advisors, and investigators of police tactics should be aware of these misconceptions.*

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<sup>18</sup> *The Health Effects of Conducted Energy Weapons*, The Expert Panel on the Medical and Physiological Impacts of Conducted Energy Weapons, The Council of Canadian Academies & the Canadian Academy of Health Sciences, Canada, 2013, pp. viii-ix.

<sup>19</sup> James R. Jauchem, *TASER conducted electrical weapons: misconceptions in the scientific/medical and other literature*, *Forensic Sci Med Pathol*, 2015 Mar;11(1):53-64. doi: 10.1007/s12024-014-9640-x. Epub 2014 Dec 31, Abstract.

33. There have been attempts to quantify the risk of cardiac mortality arising from exposure to Tasers. For example, Rich and Brophy (2015) stated:<sup>20</sup>

*Although the results of this analysis suggest that the risk of CEW mortality is likely small it should not be concluded that it is inconsequential. Results of our analysis suggest that the risk is possibly several orders of magnitude larger than what has been suggested by the manufacturer. In absolute terms, it has been estimated that between 100 and 300 people per million US adults are exposed annually to CEWs. Although we appreciate a possibly large amplification of errors in extrapolation to a population level, our analyses, if correct, suggests that between 30 to 60 individuals (based on the “optimist” and “pessimistic” previous beliefs, respectively) might possibly die annually because of this “less than lethal” technology.*

...

*A strength of the present study is its transparency in stating the range of previous beliefs. Current debate has been clouded by accusations on both sides of the debate concerning conflicts of interest and potential bias.*

...

*Finally, we have provided only an estimate of the overall marginal risk of CEW mortality. Extreme caution should be exercised in applying these population risks to individual cases because potential competing causes and mediators of mortality including location of the CEW darts with a likely higher risk for chest “hits,” number of CEW deployments, underlying individual cardiac pathology, concomitant use of physical and chemical restraints, drug intoxications, and their potential interactions with CEWs need to be considered. This is not dissimilar to the judgement required in attempts to extrapolate the overall results from a clinical trial and apply them to individual patients.*

34. However, that effort has been subject to strident criticism and debate.<sup>21</sup>
35. The current state of the literature is such that no definitive causal connection can be drawn between Taser use and death. However, the occurrence of a substantial number deaths associated with Taser use cries out for caution. Given the large number of times Tasers have been deployed, compared with even the highest estimates of associated deaths, the risk of death must be realistically assessed as very low. But the severity of the potential outcome is extreme.
36. Only in circumstances where future research could conclusively discount the risk to a vanishingly small prospect should anything but a rigorous and cautionary approach to Taser use prevail.

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<sup>20</sup> Ben Rich and James M. Brophy, *Estimating the Risk of Cardiac Mortality After Exposure to Conducted Energy Weapons*, Systematic Review/Meta-analysis, Canadian Journal of Cardiology 31 (2015) 1439-1446, pp.1443-4.

<sup>21</sup> See Mark W. Kroll, Richard M. Luceri, Dhanunjay Lakireddy, Hugh Calkins, *Do TASER Electrical Weapons Actually Electrocute?* Letter to the Editor, Canadian Journal of Cardiology 32 (2016) 1261.e11 [www.onlinecjc.ca http://dx.doi.org/10.1016/j.cjca.2015.12.030](http://dx.doi.org/10.1016/j.cjca.2015.12.030) ; and in reply, James M. Brophy, Benjamin Rich, *Reply to Letter From Kroll et al. — Risk of Death With Conducted Energy Weapons*, Letter to the Editor, Canadian Journal of Cardiology 32 (2016) 1261.e13 [www.onlinecjc.ca, http://dx.doi.org/10.1016/j.cjca.2016.01.001](http://dx.doi.org/10.1016/j.cjca.2016.01.001).

## Taser use in the Territory

37. Tasers were first introduced into the NT Police Force in 2001 but were distributed more widely from 2007-08.
38. In his 2012 report, the NSW Ombudsman recounted the NT Coroner's findings in relation to the death of an Indigenous Territorian following the use of a Taser and multiple bursts of OC spray:<sup>22</sup>

*In April 2009, a 39 year old Aboriginal man died in the Northern Territory after he was subjected to two Taser applications as well as multiple bursts of OC spray by police. The man had been behaving strangely and causing concerns to his family. When police arrived, they considered that the man was exhibiting irrational and extreme behaviour, and decided to take him into their custody or control so that he could receive a mental health assessment at the hospital. The man did not wish to go to the hospital, resulting in a confrontation with police. After being subjected to two Taser applications and a considerable amount of OC spray, he experienced breathing difficulties and later died in the hospital. The cause of death was found to be coronary atherosclerosis.*

*The Coroner heard that:*

- *The man might have been suffering mental health issues, or had suffered them in the past.*
- *The man had heart disease and might have already been suffering a heart attack when the police arrived at the scene, which could explain his strange behaviour.*
- *The man's heart condition presented a very significant risk of sudden and unexpected damage to the heart, which frequently results in death.*
- *A combination of stresses the man was under around the time of the incident could have led to his heart attack – including his arguments with family and police, his scuffle with the police, being placed on the ground, being subjected to multiple Taser and OC spray uses, and running around and falling down.*
- *There was no evidence to support a finding of positional asphyxia.*

*The Coroner determined that although the Taser was discharged eight times over two minutes and 14 seconds, the probes were not connected at the time and only two of the Taser applications seemed to have been successful. He expressed the view that due to the other great stresses the man was under at the time, the actions of the police might or might not have contributed to the man's death. However he did find that the use of the Taser in this case was premature and inappropriate, stating that:*

*In hindsight, and in circumstances where the deceased was not armed nor making any threats to kill or cause serious harm, in my view the use of the Taser was premature and inappropriate. However, given the speed and confusion of the event, and agitation and noncompliance of the deceased, I do not wish to criticize the inexperienced and junior police officer himself. ... In my view, better training of officers such as ... in just when to use the Taser is necessary.*

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<sup>22</sup> NSW Ombudsman, op cit, pp.50-51.

*The Coroner heard evidence that the use of the Taser fell within the previous guidelines – under which the Taser should only be used where there is a real and imminent risk of violence – but that there is a proposal to increase the threshold to ‘real and imminent risk of serious harm’. He accepted that the use of Taser in such situations would not be appropriate if the proposal is accepted. The Coroner expressed the view that the threshold for discharging a Taser should be increased:*

In my view, the community as a whole would expect that police would not utilise the Taser except in the most serious of circumstances and as a method of last resort, ie. prior to the utilisation of lethal force via a firearm. It is important that police understand this and that it is conveyed to each and every officer during the course of their training, and subsequent re-training.

*The Coroner accepted that it would be illogical to provide junior police with a firearm, which could result in lethal use of force, but not a Taser. However, he stressed that:*

... it should be made clear to all police officers, and in no uncertain terms, that Tasers or ECD devices should only be deployed in cases where there is a real and imminent risk of serious harm and that all other less forceful methods have been considered and discounted.

*The Coroner recommended that:*

... police training in relation to the use of Tasers be such that police understand quite clearly that Tasers should not be used simply as a compliance tool and their use should only be considered in the most serious of circumstances.

*He further recommended that the Commissioner of Police continue with his review of Tasers and implement certain amendments to the good practice guide – including an amendment that the recommended target areas should be the back when practical, and when such shots are not practical the lower centre of mass for front shots.*

## **Taser risks in children and other vulnerable groups**

39. Police use of Tasers on children is certainly not limited to the Northern Territory. A recent UK article stated that 431 children in England and Wales had Tasers drawn on them in 2013.<sup>23</sup> In that year, the youngest child to have a Taser drawn on them was 11 and the youngest to be fired at with a Taser was 14. The article also stated:

*Police use of stun guns has increased ..., with 38 per cent more incidents in which they were aimed at children in England and Wales in 2013 than the previous year.*

...

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<sup>23</sup> Henry Austin, *United Nations warns UK Government to 'stop tasering children'*, Independent, 13 February 2016 <http://www.independent.co.uk/news/uk/crime/united-nations-warns-uk-government-to-stop-tasering-children-a6872591.html>. Between 2014 and 2016, they are reported as having been deployed on children 1,445 times and either fired or used on a stun setting 115 times: T Meyjes, *Police use Taser on child*, 9, Metro.co.uk, 11 July 2017

*A 15-year-old boy with learning difficulties was Tasered by police at his school in Plymouth after reports of an alleged assault on a teacher. Devon and Cornwall Police said at the time of the December 2013 incident that officers arrived to find three boys holding knives.*

*Earlier that year a 12-year-old girl holding two knives was Tasered in St Helens, Merseyside. Last year, the Independent Police Complaints Commission found that officers had acted in a “proportionate” way when they Tasered a 17-year-old who was behaving in a threatening manner at her Blackpool home.*

*It is thought the youngest person to have a Taser aimed at them was a boy of 10, who had a knife and threatened self-harm, when West Yorkshire police cornered him. The incident is known to have taken place within the past two years.*

40. In addition to general comments about people with individual susceptibilities, Taser International’s *TASER® Handheld CEW Warnings, Instructions, and Information: Law Enforcement* contains the following comments on specific groups:

*Some individuals may be particularly susceptible to the effects of CEW use. These susceptible individuals include the elderly, those with heart conditions, asthma or other pulmonary conditions, and people suffering from excited delirium, profound agitation, severe exhaustion, drug intoxication or chronic drug abuse, and/or over-exertion from physical struggle. In a physiologically or metabolically compromised person, any physiologic or metabolic change may cause or contribute to sudden death.*

...

*Cardiac capture may be more likely in children and thin adults because the heart is usually closer to the CEW-delivered discharge (the dart-to-heart distance). Serious complications could also arise in those with impaired heart function or in those with an implanted cardiac pacemaker or defibrillator.*

...

**⚠️ WARNING** Higher Risk Populations. CEW use on a pregnant, infirm, elderly, or low body-mass index person or on a small child could increase the risk of death or serious injury. As with any force option, CEW use has not been scientifically tested on these populations. Use a CEW on such persons **only** if the situation justifies an increased risk.

41. In 2012, the British Defence Scientific Advisory Council Sub-Committee on the Medical Implications of Less-Lethal Weapons (DOMILL) released a Statement with specific reference to medical implications for Taser use on children and vulnerable adults.<sup>24</sup>

42. Principle findings that referred to children were:

*(a) A recent human study has shown that Taser discharge, applied through a barb that has penetrated the frontal chest in a region overlying the heart, is capable of inducing an inappropriately high heart rate by a mechanism known as cardiac capture. Although the device used in the study was neither the Taser X26 nor M26, DOMILL is concerned that a comparable effect could be elicited by these latter devices. While a short period of rapid cardiac capture in young and healthy individuals may not have major clinical implications,*

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<sup>24</sup> Statement on the Medical Implications of Use of the Taser X26 and M26 Less-Lethal Systems on Children and Vulnerable Adults, DOMILL, 2012.



*serious complications could arise in those with impaired heart function caused by an underlying heart condition or through the action of certain licit or illicit drugs. Cardiac capture from chest-penetrating barbs may be more likely to arise in children and thin adults as the heart will generally be closer to the source of discharge.*

*(d) Others who may be at heightened risk of injury from Taser-induced falls include people whose protective reflexes may be impaired, such as those intoxicated with alcohol, illicit drugs or certain prescription medications. People affected by osteoporosis, young people during the adolescent growth period, individuals with a history of a bleeding or clotting disorder and those on anticoagulant or antiplatelet therapy, may also be more prone to an adverse outcome following a fall.*

*(e) Superficial burns from the discharge current passing through the skin are a recognised minor complication of Taser use. Children and vulnerable adults are unlikely to be differentially affected compared with notionally healthy adults.*

*(g) Children and thin adults may be at greater risk of internal injury from tissue-penetrating Taser barbs as body wall thickness generally will be less in these groups. Children and adults of short stature may also be at greater risk of injury to sensitive structures in the head and neck regions due to the closer proximity of these structures to the most commonly used point of aim (the frontal chest).*

*(j) The longer-term psychological implications of exposure to an extremely painful Taser discharge, especially among children, remain unexplored.*

43. Other principle findings were:

*(b) The physiological burden arising from the Taser-induced muscle contractions and associated pain, combined with the stressful circumstances in which Tasers are likely to be used, may adversely affect certain groups. These susceptible groups include the elderly, those with heart conditions, people who have taken certain drugs, and those affected by asthma or other pulmonary conditions.*

*(c) Risks to the pregnant woman and fetus from Taser discharge are incompletely understood. While there is no evidence that abdominal application of Taser discharge is able directly to induce uterine muscle contraction, Taser-induced muscle contraction commonly leads to falls. Fall injuries in general have been associated with an increased probability of delivery by caesarian section and low birth weight.*

*(f) The intense muscle contractions induced by the Taser discharge may lead to musculoskeletal injury. Older people may be more prone to this type of injury.*

*(h) There is equivocal evidence to indicate that Taser discharge may induce epileptic seizures following barb penetration of the scalp. There is also evidence to indicate that Taser discharge may trigger seizures in those affected by epilepsy, irrespective of barb location. Consistent with this, emotional stress and physical exertion, both of which are likely to feature in incidents involving administration of Taser discharge and many other forms of force, are among the seizure-precipitating factors reported by those affected by epilepsy.*

*(i) There is the potential for Taser discharge to be administered to individuals whose behaviour has been influenced by an underlying medical condition or with whom communication is in some way impaired due to non-medical reasons.*

- *Aggressiveness and non-cooperation may be manifested during and shortly after an epileptic seizure.*
- *Adverse changes to behaviour may be exhibited by those with uncontrolled diabetes.*
- *Language barriers and hearing or vision impairment may lead to difficulties in communication which may increase the likelihood of exposure to Taser discharge.*
- *Mental health conditions, learning difficulties and neurodevelopmental or neurobehavioural conditions (for example, cerebral palsy and autistic spectrum disorders) may negatively influence how affected individuals interact with the police and thereby elevate the risk of exposure to Taser discharge or other forms of force.*

*(k) Taser discharge is unlikely to differentially affect persons fitted with cardiac pacemakers or implantable cardioverter defibrillators. However, the effect of Taser discharge on the function of other types of implantable electronic devices, such as vagus nerve stimulators and cochlear implants, is unknown.*

44. In 2013, the Canadian Expert panel commented:<sup>25</sup>

*Internal Co-Factors — Body Type*

*Although research has not been conducted on children, the elderly, or subjects with low body weight, these groups have been identified as populations that may be more likely to suffer adverse effects following CEW exposure than adults with larger weights (Panescu & Stratbucker, 2009; NIJ, 2011). To date, the only evidence that subjects of smaller stature have a higher probability of ventricular fibrillation comes from animal studies that have suggested a lower body weight and a shorter distance from the probe to the heart (dart-to-heart distance) correlate with a higher likelihood of ventricular fibrillation (McDaniel et al., 2005; Wu et al., 2008; Sun et al., 2010; Leitgeb et al., 2011). A single case study describing the death of a seven-month-old infant following the application of a CEW by a guardian has been reported. The small size of the infant and the location of CEW discharge (near the heart) suggested the CEW injury was responsible for the infant's death (Turner & Jumbelic, 2003). While a higher body weight may protect a subject from the electrical effects of CEWs, if an individual is overweight or obese this may pose an increased risk for other adverse effects during a use-of-force encounter, such as a greater likelihood of experiencing compression of veins carrying blood to the heart when prone positioning is used (Brodsky et al., 2001; Ho et al., 2011b).*

...

*In comparison to adults (age 19 or older), sudden cardiac deaths in children and adolescents (age 2 to 18), although rare occurrences, are more likely to occur during moderate to vigorous exertion (Pilmer et al., 2013). This finding may be relevant for adolescents involved in physically demanding use-of-force encounters with law enforcement. Many sudden unexpected death cases in young individuals, however, remain unexplained because medical history and autopsy results are absent or fail to provide a probable cause (Tan et al., 2005).*

...

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<sup>25</sup> *The Health Effects of Conducted Energy Weapons*, The Expert Panel on the Medical and Physiological Impacts of Conducted Energy Weapons of the Council of Canadian Academies & the Canadian Academy of Health Sciences, Canada, 2013, pp. 40, 43 and 57.

*A common theme in the CEW review literature is the speculation that certain groups — such as pregnant women, the elderly, children, and individuals with implantable cardiac devices — are potentially vulnerable during exposure to electrical impulses (Hancock & Grant, 2008; Adler et al., 2010). Although CEW literature often speculates on potentially vulnerable populations, no risk assessment structure, data, or methods seem to be in place to quantify the nature or magnitude of the putative increased risk faced by these populations. CEW research on vulnerable populations in a laboratory setting is unlikely to be approved [56] by an ethics committee for a number of reasons related to informed consent from certain populations, lack of direct therapeutic benefit to an individual, the presence of pain (which could be considered a harm) and an unacceptable risk-benefit ratio. These types of studies would also not represent the actual circumstances that make up a dynamic police use-of-force encounter. One alternative involves simulating the vulnerable condition, such as alcohol intoxication, in the laboratory on healthy subjects who are able to give informed consent before reaching a vulnerable state.*

*For populations whose vulnerability cannot be simulated, such as mental illness, it will likely be necessary to perform large-scale population-based field studies that involve detailed and consistent collection of information on the characteristics of the subjects and the events surrounding the CEW incidents. Data collection for population-based studies requires a lot of time and study across a large population of interest to correctly identify risk profiles.*

*However, difficulties in spotting certain characteristics in field settings and privacy restrictions prevent access of data on certain populations (e.g., minors), particularly in cases of police interaction, and this hinders epidemiological studies. In addition, some individuals, particularly those with implantable cardioverter defibrillators (ICDs) and those who are pregnant, represent a small segment of those involved in use-of-force incidents and an even smaller subset of those experiencing CEW deployment; therefore, it will be challenging to collect enough data for population-based analyses. For these reasons, population based studies capturing real-world CEW scenarios and subject characteristics, including vulnerable populations, are lacking.*

45. One recent study on children, based on 100 Taser uses against children ranging in age from 13 to 17 years, noted that there were no significant (moderate or severe) injuries reported but that 20% of suspects sustained mild injuries, 2/3 of them from superficial punctures from the Taser probes.<sup>26</sup> The report concluded that the data suggested that “adolescents are not at a substantially higher risk than adults for serious injuries after” Taser use.
46. This finding has been relied on in other journal articles to illustrate the absence of evidence for increased risk for children:<sup>27</sup>

*A case report of a 15-year-old combative male who was “subdued via taser” and exhibited a “pattern of deficits observed in children who have experienced an anoxic event secondary to cardiac arrest” was presented as illustrating particular vulnerability of adolescents. There is also no basis for this assertion. Gardner et al. reported no significant injuries in 100 consecutive CEW uses against suspects who ranged from 13 to 17 years in age.*

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<sup>26</sup> Gardner AR, Hauda WE, Bozeman WP, *Conducted electrical weapon (TASER) use against minors: a shocking analysis*, Pediatric Emergency Care. 2012 Sep; 28(9):873-7. doi: 10.1097/PEC.0b013e31826763d1.

<sup>27</sup> James R. Jauchem, *TASER - conducted electrical weapons: misconceptions in the scientific/medical and other literature*, Forensic Sci Med Pathol. 2015 Mar;11(1):53-64. doi: 10.1007/s12024-014-9640-x. Epub 2014 Dec 31, p. 58.

47. While the evidentiary basis is somewhat equivocal, there are pointers to range of people with certain vulnerabilities being more susceptible to harm following use of a Taser. Children, and more particularly children who are small in stature, fall within that group.
48. It is essential that further caution be employed when considering whether to use Tasers in relation to such groups.

## Public comment on Taser use

49. A number of entities have commented negatively on the use of Tasers on children.
50. For example, in 2016, the United Nations Committee on the Rights of the Child called for the United Kingdom to "*Prohibit the use of electrical discharge weapons, such as Taser guns, AEPs (Northern Ireland) and any other harmful devices on children and systematically collect and publish age disaggregated data on their use in order to monitor the implementation of such prohibition*".<sup>28</sup>
51. In the wake of the current incident, the National Children's Commissioner, Megan Mitchell, was quoted as follows:

*After watching the footage, National Children's Commissioner Megan Mitchell said she found it difficult to "accept that alternate methods for constraining and apprehending children can't be found and that officers would not be skilled in these".*

*"I don't think it's ever appropriate [to taser a child] and I think it should be avoided at all costs, unless it's an extreme situation and the public is in extreme danger," Ms Mitchell said.*

*"These are high-voltage instruments and they pose great risk to developing organs, the brain and eyes, they would hurt and they sometimes even result in death I understand.*

...

*Ms Mitchell said the footage should prompt governments to review guidelines they have in place for the use of tasers.*

*"Especially in relation to children and the damage that can be done to children, and I think that we need to be supporting the police to apprehend young offenders without having to resort to tasers," she said.*

52. The Victorian Equal Opportunity and Human Rights Commission has also commented:<sup>29</sup>

*Although Tasers provide an alternative to the use of firearms, their use must be approached with caution.*

*While the Commission commends Victoria Police for their moderate approach so far to using Tasers in volatile situations, this incident is a timely reminder that they can have serious consequences for people both physically and for their human rights more generally.*

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<sup>28</sup> Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Committee on the Rights of the Child, June 2016.

<sup>29</sup> *Commission urges caution on the use of Tasers*, Media Release, 16 May 2014.

*As Victoria Police continues to roll out the use of Tasers across Victoria, it is crucial that its members are aware of their obligations under the Charter of Human Rights and Responsibilities, namely that they must consider human rights before using force against members of the public.*

*There are several rights protected in the Charter that may be engaged in the use of these weapons, including:*

- the right to life and protection from torture and cruel, inhuman or degrading treatment*
- the right to privacy*
- the right to liberty and security of person, and;*
- in a custodial environment, the right to humane treatment when deprived of liberty.*

*It is understandable that police want every available means to protect the general public as well as themselves, but it is ultimately in our shared public interest that the exercise and use of new powers and weapons be controlled, monitored and reviewed. It is a priority that police are equipped to de-escalate conflict through non-violent means wherever possible.*

*There are good reasons to be cautious. The use of Tasers in other Australian jurisdictions and also in internationally has been documented to show they can have a disproportionate impact on vulnerable groups who are over-represented in encounters with police.*

*For example, in Western Australia, the Corruption and Crime Commission found that Tasers were used disproportionately against Aboriginal people. In other states they have been the cause of avoidable deaths. There is also ongoing debate and research about the effect of Tasers on people with a range of health conditions, not all of which are obvious during police encounters.*

*Victoria Police must continue to show transparency as they carry out their duties and systems need to be rigorously maintained to ensure appropriate training, guidelines, monitoring and reporting.*

53. The United Kingdom IPCC has noted:<sup>30</sup>

*There appears to be a difference between the way that members of the public view the significance of Taser use, and the way in which it is viewed – and therefore used – by the police service. In many of the cases the IPCC has examined, police officers have said that Taser was the most appropriate option available to them, and there was less risk of an injury being sustained than, for example, a baton strike. However, it is clear from many complainants, non-police witnesses and media reporting that Taser is viewed outside the police service as a relatively high-level use of force.*

*...*

*There can be little doubt that there remains considerable public concern about the use of Taser, as well as limited understanding of how and why it is deployed. There is an obvious mismatch between the public perception that Taser is a high level use of force that should only be considered when faced with the most serious threats of violence, and the police's most frequent rationale for use, that Taser presents a lower risk than other equipment such as CS spray, physical restraint or a baton. The IPCC is aware of cases where Taser is said to have saved lives and reduced injuries both to the public and the police.*

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<sup>30</sup> UK IPCC, op cit., pp.3, 21.

## Taser misuse and mission creep

54. The NSW Ombudsman made the following comments in regard to the potential for Taser misuse and mission creep over time:<sup>31</sup>

*The use of Tasers for law enforcement purposes has been hailed as an effective tactical option. It is a less-lethal use of force compared to firearms and reduces injuries to both police and the individuals involved in altercations with police. However, the Taser has also been criticised as being a dangerous device associated with a concerning number of deaths and a weapon that is open to misuse and mission creep – for example, being used as a compliance device and diminishing police skills in using other methods to de-escalate situations.*

...

*Mission creep, in the context of Taser use, has been defined as ‘the tendency for police to, over time, use Tasers in situations for which they were not intended’.*

Rather than using Tasers only in situations where there is a risk of serious injury, officers may start to become over-reliant on Tasers as a use of force option, using them in situations where there is no risk of serious injury or where a lesser use of force option would have been as effective. Mission creep may also be indicated by officers using Tasers earlier on in their interactions with people, reflecting the Taser becoming ‘a weapon of first choice’ or ‘go-to’ option for resolving situations. [Queensland Crime and Misconduct Commission]

*Related to this is the risk that police will increasingly use Tasers simply to obtain a subject’s compliance – in the absence of a sufficient threat of harm or injury to justify the Taser use. This unreasonable use for compliance is the area where we are most likely to identify mission creep.*

55. The UK IPCC has expressed the same concern:<sup>32</sup>

*In light of this significant increase in use, it is important to ensure there has not been ‘mission creep’: that Taser is not being used inappropriately or as a default choice where other tactical options, including communication, could be effective. For that reason, it is very important that each individual use is supported by a rationale that can be defended, and that police forces closely analyse the extent and type of use.*

56. Professor Colin Rogers of the International Centre for Policing and Security has stated:<sup>33</sup>

*Clearly the development of non injurious control technologies is to be welcomed. The development of Tasers provides police officers with the opportunity to use less force than a situation might otherwise demand. However, the problem lies when the Tasers have come to replace less invasive and more humane ways in which police can assert their social and legal authority.*

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<sup>31</sup> NSW Ombudsman, op cit. pp.32, 52.

<sup>32</sup> UK IPCC, op cit. p.3.

<sup>33</sup> Colin Rogers, *Taser! Taser! Problems Underlying the Police Mis-Use of Electronic Stun Guns*, Australasian Policing: A Journal of Professional Practice and Research, Volume 7 Issue 1 (Winter 2015) 27, p.31.

*Rather than engaging in the harder work of persuading citizens to accede to police demands and thereby acquiring control over a situation, using or threatening to use Tasers to ensure conformity has become common.*

...

*Rather than using the Taser/stun gun as the first option, they should be considered as weapon of 'nearly last resort' and then only to be accompanied by a rigorous accountability and investigative process into its use. Only by adopting such an approach can the public be confident and supportive of their police, whilst the misuse of Tasers will ultimately be reduced.*

57. Given the need for a cautionary approach discussed above, it is essential that the framework for use of Tasers emphasises the careful and considered appraisal of use of force options before the Taser is deployed.

## Training and Monitoring

58. Many reports comment on the need for close monitoring of Taser use and rigorous and ongoing training for Police, not only in how to use Tasers but in when and how to avoid their use. For example, the IPCC has stated:<sup>34</sup>

*One of the key areas that arises when the IPCC considers appeals from complainants who are unhappy with police investigations is the justification for Taser use given by police officers. Many of the appeals the IPCC has upheld have shown that police forces take a police officer's account at face value without any further probing. It is important that police officers record their rationale for using Taser with reference to the specific circumstances of the case. When that rationale is investigated by police forces it should be subject to robust challenge where required.*

*Through its work the IPCC has found that training is vital in ensuring police officers are properly supported in making appropriate decisions about the use of force and in providing a rationale. This applies to those equipped with Taser and those who authorise its use. However, correct Taser use relies on more than training.*

*There is also a need to ensure that training is implemented within police forces and that selection processes are properly followed so that the police officers who are equipped with Taser are suitable. It is also important that Taser use is monitored locally by police forces themselves. This will enable police forces to review their training and policies in light of any learning, trends or issues; make appropriate decisions about the number of police officers who are equipped with Tasers; and contribute to national learning and debate about the use of Taser. It should also look expressly at concerns in some communities that they are subject to proportionately more discharges than others. Monitoring of Taser use may be an area in which Police and Crime Commissioners can play a useful oversight role as part of their role in holding chief officers to account.*

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<sup>34</sup> UK IPCC, op cit, p.4-5.

59. The NSW Ombudsman has commented:<sup>35</sup>

*We noted during our investigation that the likely threshold was not recognised and/or well understood as being a criterion for use of a Taser in draw and cover mode. This was evident from our focus groups with police officers, our own interpretation of the Taser SOPs and that of our independent expert. We have therefore recommended that the Taser training be amended to reflect the likely criterion and emphasise the requirement to disarm a Taser if it is no longer likely that discharging it will be justified.*

*The TEC should also monitor the frequency of Taser use to evaluate the impact of changes to the threshold for use of a Taser.*

*There is also a particular risk that – with the introduction of the likely threshold – Tasers may be used more frequently for compliance only. This risk can best be mitigated by the Taser SOPs being amended to clearly state that Taser use (in any mode) on noncompliant subjects exhibiting non-threatening behaviour or on passive noncompliant subjects is a prohibited use – and would constitute a breach of the criteria for use.*

60. The importance of effective and ongoing training cannot be overstated. It must facilitate effective use of the Taser in appropriate circumstances but also promote a circumspect approach to Taser use which recognises the gravity of the potential outcomes.
61. Currently, officers undertake an initial three day training course on Use of Force, one module of which concerns Tasers. This is then updated annually by way of an online module. It is vital that all NT Police officers receive regular face-to-face and scenario based training, not only about technical aspects but also about the relevant General Orders and how to make decisions regarding use of force and de-escalation.
62. There must also be careful monitoring of Taser use and where necessary, Police must be prepared to step in and take action where there has been some flaw or error. Prompt action at an appropriate level will promote better understanding of the gravity of Taser use and compliance with the framework established by Police. Failure to act promptly to address errors will only lead to confusion and uncertainty on the part of officers.
63. Police must always be aware that this is a dangerous weapon that should only be discharged to counter threats of serious physical harm and even then only when there is no less forceful option reasonably available.
64. Specific recommendations in relation to NT Police use of Tasers are contained in Chapter 2.

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<sup>35</sup> NSW Ombudsman, op cit, p.13.



## CHAPTER 2: NT POLICE RULES ABOUT TASER USE

### Use of Force provisions

65. The NT Police General Order, *Operational Safety and Use of Force* was promulgated on 20 December 2012. It was amended after that time but not in any particular relevant to this discussion. I will refer to it as the *Use of Force GO*.<sup>36</sup>

66. 'Use of Force' includes using:

- a firearm (including all animal destruction);
- a baton;
- an aerosol subject restraint (ASR) or other chemical spray;
- any weapon, instrument or implement (including vehicles);
- any empty hand tactic, hold, blow, punch, kick, block and restraint or similar tactic (except escort holds) when independently used to move a person in custody from one point to another);
- an Electro-muscular Control Device (ECD) or Taser;
- handcuffs or similar restraint (except in the case of prisoner escort or transport or when used merely to safely search a person in custody); or
- a police dog or horse to directly apply force [38.1].

67. The *Use of Force GO* set out a number of general principles governing use of force. The key elements are adequately reflected in the following extracts:

*5. The Northern Territory Police Force (NTPF) recognises and respects the value and special integrity of each human life. While each officer is vested with the lawful authority to use force to protect life, public welfare and property, a careful balance of all interests is required.*

*6. It is the policy of the NTPF that officers are issued with appropriate equipment and provided with specific training so that they may use only that force necessary on reasonable grounds, to effectively bring a situation under control while protecting lives and property.*

*7. It is the policy of the NTPF that each situation must be carefully assessed so that only the minimum level of force will be applied to resolve each situation safely and effectively. Pursuant to their responsibilities, officers will only resort to the use of force when strictly necessary and to the extent required to control the particular situation.*

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<sup>36</sup> An amended General Order, *Operational Safety and Use of Force* was promulgated on 23/3/2017 but unless otherwise stated, references in this document will be to the GO in force in 2016. The recommendations set out in this Chapter remain equally relevant.

8. *Officers should only use the minimum amount of force necessary to defend themselves or another, control a subject and/or effect arrest and apprehension.*

...

19. *The use of force by Officers raises fundamental human rights issues. Allegations regarding improper use of force undermine the legitimacy of police and, therefore, undermine public confidence and respect for police.*

20. *Officers must comprehensively understand the situations and circumstances in which they can use force, and the legal foundation of their use of force. They must also be able to justify these actions at law.*

21. *Police should only use force that is reasonable, necessary, proportionate and appropriate to the circumstances. Police should use the minimum amount of force required for the safe and effective performance of their duties.*

22. *The goal of ensuring a safe and secure community requires the application of force by police on a daily basis. One of the challenges police face lies in balancing the need to bring situations to a safe and effective conclusion with the need to avoid any unnecessary application of force.*

68. Points to note are:

- Within the boundaries discussed below, Police have a broad discretion on whether to use force and the type of force used in the exercise of their duties;
- Use of Force is not the sole or immediate solution in policing. Police must balance the need to bring situations to a safe and effective conclusion with the need to avoid any unnecessary application of force;
- If force is used, it must be reasonable, necessary, proportionate and appropriate to the circumstances. Police should use the minimum amount of force required.

69. The *Use of Force GO* goes on to make specific provision in relation to a variety of uses of force. In some cases where the risks of use are potentially greater, for example, firearms, chemical sprays and Tasers, additional restrictions are placed on the broad discretion noted above.

## Taser use

70. Use of a Taser or ECD is broadly defined to include:

- a) drawing the ECD from the holster and warning that an ECD may be used;
- b) activating the Laser on a subject as a further warning ('laser painting');
- c) arcing between the contacts on the body of the ECD as a further warning;
- d) direct contact by 'drive stun' to a part of the subject's body without discharging the probes, to achieve a localised effect. Where there is no time to remove a cartridge it may be necessary to fire the cartridge into the subject at close or contact range. In such circumstances the use constitutes a 'direct contact' and a 'firing'; or
- e) firing the probes into a subject's body or clothing, or attempting to. [38.1]

71. The rationale for introducing the Taser (ECD) to the use of force options available to NT Police officers is described below:

*187. After extensive research, evaluation and trials ECDs were added as a tactical option for NT officers. These devices enhance the safety of officers and because they may reduce the need for more forceful options. The ECD is likely to reduce the overall amount of force that is necessary and reduce injury rates to officers and subjects. ECDs have been introduced into service as a tactical option to:*

*187.1 reduce injuries to officers from arrest related causes;*

*187.2 reduce injuries to subjects from arrest related causes; and*

*187.3 provide an alternative to lethal force in some situations;*

### **Immediate physical threat of serious harm**

72. While the Taser falls within the list of uses of force available to police officers, NT Police has imposed additional restrictions on its use, in light of the possibility that it may cause serious harm. At the time of the incident, the *Use of Force GO* provided:

#### ***Justification for use***

*191. Any use of an ECD must be a reasonable response in the circumstances and not an unnecessary use of force. On every occasion, the amount of force used by an officer must be proportionate to the situation presented and justified by the provisions of the Criminal Code Act.*

*192. An ECD can be used by an officer when they believe it is necessary to:*

*192.1 resolve an incident where a person is acting in a manner to cause the officer to believe there is an immediate physical threat of serious harm to the officer, the person, or others, and the officer cannot reasonably protect themselves, or others, less forcefully; or*

*192.2 deter attacking animals.*

*193. Officers are not to use an ECD solely as a method of subject compliance at any time.*

73. Putting to one side attacking animals, it is a clear requirement of the General Order that a Taser must not be used unless a person is acting in a manner to cause the officer to believe there is an **immediate physical threat of serious harm** to someone.
74. When viewed in the overall context, the provisions impose both a subjective and objective test. The officer must actually believe there is an immediate physical threat of serious harm to someone. And that belief must be objectively reasonable if the response is to be reasonable and proportionate.
75. Therefore, whatever the general principles may say in relation to a discretion to balance competing factors, Taser use will be contrary to the General Order if there is not a belief (which is reasonable in the circumstances) that there is an immediate physical threat of serious harm.

76. One major limitation is that the threat must be 'immediate'. A simple possibility that the person might escape and at some later time present a physical threat of serious harm is not enough.
77. Another important limitation is that the officer **must be unable to 'reasonably protect themselves, or others, less forcefully'**. This draws added attention to the requirement for 'minimum force' set out in the principles quoted above.
78. It is important to appreciate that the question here is not about whether any action was unlawful or indeed whether it might be regarded as reasonable on some more global assessment. The question is whether the GO has been breached. Any use which is not in compliance with these requirements will be a breach of the GO.
79. And a breach of the GO is a breach of discipline under section 76(d) of the *Police Administration Act* (the PAA).
80. It should also be noted that these are not alternative requirements to 'extraordinary circumstances' discussed below. If these requirements are not met, Taser use is in breach of the GO.
81. Turning for a moment to GO 193, it provides that the Taser is not to be used 'solely' as a method of subject compliance. This is a useful reminder to officers but should not be taken too far. Where there is an immediate physical threat of serious harm, an officer will naturally be seeking to gain compliance or control to mitigate that threat. Ideally, that threat will be mitigated by achieving compliance, which is preferable to having to exercise physical control in the form of discharge of the Taser.
82. An officer who seeks to obtain compliance by Taser use in order to mitigate an immediate physical threat of serious harm will not be doing so 'solely' as a method of subject compliance and so will not be in breach of GO 193.

### Extraordinary circumstances

83. At the relevant time, the *Use of Force GO* went into specific detail regarding circumstances where a Taser may not be used:

#### **When an ECD should not be used**

*194. Except for extraordinary circumstances an ECD is not to be used:*

*194.1 against a person only providing passive resistance;*

*194.2 against young children;*

*194.3 against infirmed people (elderly, frail etc.);*

*194.4 against people who are known to be or who appear to be suffering from serious medical conditions such as serious cardiac conditions;*

*194.5 against people who are known to be or who appear to be suffering from a mental illness;*

*194.6 against women known to be pregnant;*

*194.7 against a person at elevated risk of serious injury due to falling;*

*194.8 against a prisoner who is handcuffed or otherwise secured;*

*194.9 against a subject in water where there is a risk of drowning;*

*194.10 against a subject armed with a firearm where muscular contraction may cause the firearm to discharge;*

*194.11 against the occupants of a vehicle where there is a danger of the vehicle going out of control and injuring the occupants or other people;*

*194.12 in the presence of volatile or flammable chemicals that may be ignited by the use of the ECD;*

*194.13 the face of a subject (because of eye damage risk); and*

*194.14 the chest region of a human subject where practicable.*

*195. In each of the circumstances mentioned above there is no specific cut off level or absolute prohibition point but the characteristic mentioned is a contraindication for use that must be balanced against other identified risks that may exist.*

84. The stark requirement in GO 194 for “extraordinary circumstances” appears to be somewhat at odds with the less strident words “contraindication for use” in clause 195. The former suggests a clear and very high threshold, while the latter points more to a balancing exercise with attention being drawn to particular factors.
85. This distinction created potential for some uncertainty in officers as to the precise requirements in cases that fall within GO 194.
86. Again, if the relevant circumstance arises, this is a separate requirement from immediate physical threat of serious harm. A finding that there is no breach of GO 192, would not preclude a breach of GO 194.
87. For the sake of completeness, I note that the Use of Force GO also deals with issues concerning Multiple, repeated or continuous deployment of an ECD, Reporting operational use, Public order demonstrations, Medical aftercare, Watch House management considerations, Storage, Station Register, Servicing and Transporting ECDs.

## **Qualification and re-qualification**

88. Operational Safety Training (OST) is described as an ongoing multi-faceted programme. All operational officers must successfully complete the relevant approved OST modules, which are delivered by qualified OST instructors. [cl.50]
89. The content of the OST is to be developed by the Operational Safety Section (OSS) and endorsed by the Training and Assessment Advisory Committee (TAAC). Only OST training endorsed by the TAAC is delivered by OST Instructors. Instructors will not deliver training that deviates from the approved OST Training Modules. Modules include, but are not limited to defensive tactics, including Tasers. [cl.51-52]

90. Only trained and qualified officers are authorised to carry and use a Taser. Qualification as a 'Taser Operator' is obtained by successfully completing a 'Taser Operator' course. Annual re-qualification occurs during annual OST re-qualification by undertaking the approved online training. [cl.188, 190]

## Comments on Use of Force General Order

91. There are a number of respects in which I consider the Use of Force GO can be improved. I have identified below several issues that I believe should be considered with regard to its future operation.

### 'Extraordinary'/'Special' circumstances

92. The potential ambiguity between 'extraordinary circumstances' and 'contraindication' in Use of Force GOs 194 and 195 has been discussed above.
93. On 23 March 2017, the Commissioner promulgated a new Use of Force GO which removes the reference to 'extraordinary circumstances'. The new GO retains a list of 'special' circumstances in relation to which "Additional consideration must be given in circumstances where an ECD is to be used" (GO 272).
94. The new GO 273 then provides:

*In each of the circumstances mentioned above there is no specific cut off level or absolute prohibition point. However, the characteristic mentioned prompts a requirement for additional justification for use balanced against a continual assessment of other identified risks that may exist.*

95. This provides a less ambiguous but substantially less onerous restriction on Taser use. It should be noted that the separate requirement for 'immediate physical threat of serious harm' to someone who the officer 'cannot reasonably protect ... less forcefully' is retained (GO 270).
96. The amended Use of Force GO continues to restrict Taser use but is certainly less restrictive than its predecessor. It allows greater discretion on the part of individual officers and places greater responsibility on them. It is incumbent on NT Police to ensure that officers are well informed and equipped to exercise that discretion.

### Spelling out risks and reasons

97. The discussion of Taser risks in Chapter 1 makes it clear that the Taser should not be simply one of a number of options equally available to officers. It presents substantial risks and is justifiably subject to specific restrictions. This is the logic behind the greater restrictions on Taser use in the Use of Force GO made by the Commissioner of Police.
98. However, at the moment, the Use of Force GO does not go into any detail about why officers should exercise greater caution in Taser use. It does not explain why use is limited to cases where there is an immediate physical threat of serious harm. It does not talk about why use on a 'young child' is an extraordinary or special circumstance or give any view as to the level of risk involved.

99. Officers are given a very substantial power in being able to utilise the Taser. They must be in a position to exercise that power prudently with due consideration to all the circumstances. If they are not adequately informed of the risks and levels of risk posed by Taser use, how can they be in a position to assess that risk against the risks presented by a suspect or offender?
100. I accept that relevant information will be provided in existing training and supporting materials. Some may argue that a General Order is not a training document and need not contain detail of that kind.
101. I certainly accept that a General Order need not replicate training materials. However, in my view, the exercise of the discretion to use a Taser is sufficiently problematic that the General Order should at least include key pointers, examples and scenarios to keep the core learnings of training fresh in the minds of officers.
102. So for example, there could be a brief discussion of risks in the General Order, including an acknowledgement that Taser use has been associated with a number of deaths and other serious injuries worldwide. It could be accompanied by a statement about the low incidence of such associations. A statement to that effect would act as a reminder to officers that Taser use is to be considered very carefully.
103. Further, the relaxation of restrictions in relation to 'special circumstances' makes it even more important for officers to be given detailed guidance on the nature and extent of risks that arise in those circumstances.
104. So, the General Order could provide additional information about the rationale for at least some of the 'special circumstances'. For example, it could provide brief information on why 'young children' should be treated as a special case and what risks are involved in Taser use near flammable gases or liquids.
105. This additional information would provide context for officers to make better informed decisions with regard to Taser use. Provision of useful examples and scenarios would also add to the strength of the General Order.
106. Some may suggest that simply having a test of 'reasonableness' or leaving the description of special circumstances at a high level provides the greatest level of flexibility for individual officers. I strongly disagree.
107. In some cases, this may proceed from a mindset of being able to deny liability in situations where things go wrong. A situation where the discretion is so broad and the detail so limited that it is hard to criticise or make a finding against the officer concerned whatever they do.
108. I do not accept that this is a reasonable approach. I firmly believe that officers on the ground should be sufficiently informed about risks and guided to make a sound judgement and do the right thing in the first place. This does not limit the exercise of their discretion but puts them in a better place to make a good decision.
109. Simply leaving open a broad discretion without providing adequate information and guidance sets up officers to fail. Success should not be measured by whether an officer can avoid civil liability or a disciplinary sanction after things go wrong but rather by the quality of decision making at the time.
110. I consider the General Order has a key role to play in better informing and reminding officers about relevant risk factors involved in Taser use.

## **Review of special circumstances list**

111. I also consider it important for NT Police to review the current list of special circumstances to ensure that all relevant circumstances raised by the existing literature are appropriately covered. As knowledge about the impacts of Taser use increases over time, it is appropriate that the 'special circumstances' list be reviewed regularly.
112. The literature I have discussed in Chapter 1 refers to a number of potential special circumstances where risk of injury or death may be increased. A review may identify additional circumstances or necessary changes to the wording of existing special circumstances. I refer below to a number of specific cases but believe that the review should be comprehensive and not limited to those cases.

## **Special circumstances – Young children**

113. One of the cases that previously required 'extraordinary circumstances' but now requires 'additional consideration' is young children. There is no definition of what constitutes a 'young' child. This is problematic in two regards. In the first place, it provides little in the way of helpful guidance to officers as to when and why they should be exercising additional caution in a particular case. In the second, it makes it extremely difficult for NT Police to take any action in respect of a potential breach of this provision.
114. This problem is heightened under the amended General Order because there is even greater discretion to be exercised without clear guidance.
115. It is important that this provision be clarified. The nature of the clarification will depend on the approach taken to the matters discussed below.

## **Special circumstances – Small stature, slight build**

116. The literature points to additional concern where a subject's build is smaller than an average adult. This might be the case with a young child, an elderly person or a person of any age who is slightly built.
117. The amended Use of Force GO provides for additional consideration in cases involving young children and infirmed people (elderly, frail, etc).
118. It would be appropriate for the Commissioner to consider whether a further special circumstance should be included relating to individuals of slight build or small stature.

## **Special circumstances - Children**

119. There is commentary supporting the view that NT police should not be permitted to use Tasers on children at all (see Chapter 1). This would appear to be supported by the United Nations Committee on the Rights of the Child.
120. As noted, the limited evidence available raises a concern that smaller children may be subject to greater physiological risks. However, many older children may be of substantial build such as to not give rise to concern about small stature. Even so, there may still be concerns about the impact of Taser use on a developing body. There is also concern about the potential for ongoing psychological impacts of Taser use on children although, again, there is limited research to support that view.



121. While I accept that these risks raise real concerns, I also consider that the Taser can be a valuable tool in cases involving a threat of serious harm. A large 16 or 17 year old can present just as problematic a physical threat to officers and others as an adult. I believe that there will be situations where an officer, considering all the circumstances, and having assessed all alternatives, will justifiably be able to conclude that the most effective and least forceful way of handling a situation is to use a Taser on a child.
122. I therefore consider that the best way of approaching the risks involved is by not precluding Taser use on a child but ensuring there are appropriate restrictions and considerations observed by officers when they are faced with circumstances involving a person who is known or appears to be a child.
123. Having said that, I appreciate that there are persuasive arguments to the contrary being put forward by respected authorities. In that circumstance, I consider it would be appropriate for the Northern Territory Government and the Commissioner of Police to carefully review the current literature and make a decision on this issue.

### Special circumstances – Volatile or flammable chemicals

124. One of the special circumstances in the Use of Force GO is *'the presence of volatile or flammable chemicals that may be ignited by the use of the ECD'*.
125. The *TASER® Handheld CEW Warnings, Instructions, and Information: Law Enforcement*, provides:

**Fire and Explosion Hazard.** *CEW use can result in a fire or explosion when flammable gases, fumes, vapors, liquids, or materials are present. Use of a CEW in presence of fire or explosion hazard could result in death or serious injury. When possible, avoid using a CEW in known flammable hazard conditions.*

*A CEW can ignite explosive or flammable clothing or materials, liquids, fumes, gases, or vapors (e.g., gasoline, vapor or gas found in sewer lines or methamphetamine labs, butane-type lighters, flammable hair gels or some self-defense sprays). Do not knowingly use a CEW in the presence of any explosive or flammable substance unless the situation justifies the increased risk.*
126. It is difficult from this description to assess just how great the risk is of igniting chemicals. How can an officer weigh this risk against the risks involved in not discharging a Taser in a particular case if there is no guidance?
127. What, for example, are the chances of flammable gases or vapours being present to sufficient degree in a service station driveway to make this a real risk? Would it require a direct hit on a fuel bowser or gas hose? What is the chance of fumes igniting as darts fly through the air?
128. While the challenges of assessing the risk of death due to Taser use have been discussed in Chapter 1, it would appear to be a relatively straightforward matter to seek advice from the manufacturer to establish quite detailed guidance regarding the use of Tasers in or near petrol stations and petrol bowsers.
129. I accept that general orders cannot provide for every situation. However, petrol stations are not an uncommon incident of daily life and will certainly be the most common situation in which consideration of this special circumstance arises. Police officers deserve to be provided with the best available information regarding this risk in order to properly inform them about the exercise of their discretion.

130. I believe that the General Order should include additional information to clarify the position of NT Police with regard to Taser use in and around petrol stations.

### Differing provisions for differing uses

131. The Use of Force GO describes several 'uses' of a Taser, from simply drawing it, to pointing it, to arcing it, to drive-stun and firing. However, all uses are dealt with in the same way. A question arises as to whether this 'one size fits all' approach represents best practice.

132. In his 2012 report, the NSW Ombudsman noted:<sup>37</sup>

*The NSWPF argue that the lower threshold to use a Taser in draw and cover mode:*

- *is an effective policing tool*
- *helps officers to gain control of a situation*
- *ensures the officer can draw a Taser in operational readiness.*

*They have also argued that, in many cases, simply drawing a Taser has resolved a situation – without the Taser being discharged. If a higher threshold of 'imminent' or 'actual' violent confrontation or violent resistance is required, the situation will have already escalated to the point where the Taser operator is required to discharge the Taser to manage the situation. We accept these arguments have merit.*

*However, our concern about introducing the lower threshold for use of a Taser in draw and cover mode is that it increases the risk of a Taser being used for compliance only – that is, in the absence of threatening, dangerous or aggressive behaviour – and may also result in unreasonable decisions to discharge a Taser.*

*On balance, we are persuaded by the arguments for the lower threshold of use for a Taser in draw and cover mode. However, this is contingent upon the implementation of our recommendations to:*

- *improve and clarify the criteria for use in the Taser SOPs [Standard Operating Procedures]*
- *develop best practice guidelines to supplement the Taser SOPs and training*
- *improve the TRP [Taser Review Panel] process for assessing uses.*

133. The act of drawing and pointing is quite distinct from the act of discharging the Taser. I accept that results may well be obtained from the former action without resort to the latter.

134. However, the risk of a natural flow from 'draw and cover' to discharge of the Taser should not be underestimated. There is a distinct prospect that once the Taser is to hand, it will be viewed as easier, in the heat of the moment, to use it rather than try to re-holster it.

135. It is nevertheless a matter which the Commissioner, in consultation with the NT Government, may wish to consider. I would stress that any such change should only be contemplated if processes and procedures of the nature discussed in the above quote from the NSW Ombudsman are implemented.

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<sup>37</sup> NSW Ombudsman, op cit., pp. 12-13.

## Taser use on fleeing suspect

136. At present the Use of Force GO only operates where there is immediate physical threat of serious harm. This provides a sound basis for Police action in most cases where there is a confrontation or potential confrontation with a suspect.

137. However, there may be other cases where a threat or potential for harm is real but not immediate. One such case may be where a serious violent offender is fleeing but not presenting the 'immediate' physical threat currently required.<sup>38</sup>

138. In that regard, the NSW Ombudsman stated:<sup>39</sup>

*The SOPs [Standard Operating Procedures] for discharging a Taser are drafted in a way that covers situations involving confrontation. In our view, this is because it is generally contemplated that the use of a Taser would only be considered as proportionate force in such situations.*

*In practice, Tasers have been discharged not to calm down a confrontational situation – but to stop a person from running away from police. We have serious concerns about the use of a Taser for such a purpose. Unless a person is armed or poses a real danger to other people, we do not accept that this level of force can be justified against a fleeing person.*

*There were 14 cases that we reviewed where the Taser was used in this way. In seven cases the Taser was used in probe mode and in the other seven in draw and cover mode. The TRPs [Taser Review Panels] did not adopt a consistent approach when reviewing whether or not the use was in accordance with the Taser SOPs.*

*We have recommended that the NSWPF amend the Taser SOPs to specify that the discharge of a Taser to prevent people fleeing from police should not occur unless warranted by the seriousness of the offence(s), and their escape poses a serious risk that they are likely to re-offend or cause serious injury to themselves or others if not immediately apprehended.*

*Additional guidance should also be provided through examples of scenarios where exigent circumstances are met and where use of a Taser on a fleeing person might be justified.*

139. The approach proposed by the NSW Ombudsman is to prohibit the use of a Taser in most cases where there is a fleeing individual but to allow for its use in cases where the threat posed by escape is serious enough to warrant it.

140. So, for example, a fleeing suspect, may have committed numerous violent crimes and may even have stated an intention to continue to do so. They may not present as an immediate threat in the course of a pursuit but the ultimate outcome of their escape may place people in danger at some stage in the future.

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<sup>38</sup> United States constitutional protections recognise flight as one reasonable basis for Taser use in appropriate circumstances. "There are, moreover, three factors the Court enumerated to guide this balancing. First, we look to "the severity of the crime at issue"; second, we examine the extent to which "the suspect poses an immediate threat to the safety of the officers or others"; and third, we consider "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.* (alteration supplied) [quoting *Graham v. Connor*, 490 U.S. 386, 388 (1989) at 396]. "To properly consider the reasonableness of the force employed we must 'view it in full context, with an eye toward the proportionality of the force in light of all the circumstances.'" *Armstrong v Village of Pinehurst and Taser International Inc*, United States Court of Appeals for the Fourth Circuit, No. 15-1191, 11 Jan 2016.

<sup>39</sup> NSW Ombudsman, *op cit.*, p13.

141. It may be prudent for the Commissioner, in consultation with the NT Government, to consider whether it is appropriate to amend the Use of Force GO to make clear provision for use of a Taser against a fleeing suspect on the basis of a reasonable belief that the suspect is being pursued in relation to a serious violent crime and presents a real risk that, if not immediately detained, they will cause serious harm in the future. Any such discretion should remain subject to a requirement that there is no less forceful option reasonably available to detain the offender.
142. Again, any extension of the scope of Taser use should only be considered if it is accompanied by rigorous training and monitoring measures as discussed above.

## Recommendations

143. In light of the above, I make the following recommendations.

- 1) **NT Police continue to maintain specific restrictions on Taser use.**
- 2) **NT Police supplement the Use of Force General Order by additional guidance, illustrations and scenarios to better inform officers of the inherent risks of Taser use, particularly in relation to special circumstances.**
- 3) **NT Police training materials and courses be reviewed to ensure substantial emphasis on consideration of alternatives to use of force and specific restrictions on use of accoutrements like Tasers and chemical sprays.**
- 4) **NT Police carefully consider the question of whether Tasers should be used on children and, if they continue to be used, consider the inclusion of Taser use on a child (regardless of age) as a special circumstance.**
- 5) **NT Police review the special circumstances list in the Use of Force GO with consideration to the issues discussed in Chapters 1 and 2, including:**
  - a. **defining 'young child', if that remains a separate special circumstance;**
  - b. **use on people with small stature or slight build;**
  - c. **use on people with other vulnerabilities;**
- 6) **NT Police review the specific restrictions on Taser use, with consideration to:**
  - a. **whether there is a need to provide some differentiation in terms of the circumstances in which use is allowed between the different uses of a Taser;**
  - b. **extension of the circumstances for use of a Taser to a fleeing suspect where there is a reasonable belief that a suspect being pursued in relation to a serious violent crime presents a real risk that, if not immediately detained, they will cause serious harm in the future**

**(But only after the additional measures in relation to training and guidance discussed in these recommendations are implemented).**
- 7) **NT Police maintain a system for regular monitoring and reporting on Taser use to a senior executive officer responsible for oversight of all instances of Taser use.**

## CHAPTER 3: MANAGEMENT OF POLICE CONDUCT ISSUES

144. This matter also gave rise to consideration of the options open to NT Police in addressing police conduct issues. The references to Police General Orders and other Police procedures are as at the time of the incident.

### Public sector personnel management

145. General principles of public sector personnel management in the NT make a clear distinction between discipline on the one hand and managing unsatisfactory performance on the other.<sup>40</sup> The great majority of performance related issues in the NT public sector are dealt with by way of routine management action, including regular communication and feedback and more structured performance management and development processes.

146. Disciplinary processes make up a very small proportion of action taken in relation to conduct warranting action or improvement.

147. In contrast, the traditional approach to dealing with or correcting unsatisfactory conduct within a disciplined force such as a police force is through disciplinary processes. This is a reflection of the extraordinary powers held by police, the dangerous situations they face on a daily basis, the need for them to closely and quickly follow direction and the historical development of such disciplined forces. In the NT, this structure is evident in the *Police Administration Act (PAA)*, of which *Part IV Discipline* comprises a substantial part.<sup>41</sup>

148. I will first discuss changes to this focus on discipline that have been proposed or undertaken in Australia in recent years before moving on to consider the position in the NT and options that may be open to the Commissioner.

### The situation in other jurisdictions

149. In more recent times, there have been moves for police forces to depart from a predominantly disciplinary approach towards a balance between discipline and performance management which more closely equates to modern public sector management practices. The rationale for such a move is explained in a report of the Victorian Office of Public Integrity (the OPI):<sup>42</sup>

*This report examines the current Victoria Police discipline system, and finds that it is archaic, punitive, bureaucratic, and slow. It fails to support the integrity of police members, undermines their well-being, impedes their professional development and hinders the effective management of Victoria Police.*

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<sup>40</sup> *Public Sector Employment and Management Act*, parts 7 and 8. A third element which it is not necessary to discuss here, is Inability.

<sup>41</sup> There are other provisions that relate to control and management of the Police Force which will be discussed later.

<sup>42</sup> *A Fair and Effective Victoria Police Discipline System*, Office of Public Integrity (OPI), October 2007, pages 3-4.

*Police have a unique and demanding role, but policing in Victoria is not so different from policing elsewhere. Recent reviews of police discipline systems in other jurisdictions, interstate and overseas, have been unanimous in recommending changes to radically reform the police discipline system, generally agreeing that it should be aligned with systems applicable in other employment areas.*

*The report acknowledges that the needs and requirements of the office of constable and policing services may require some specific adjustments or refinements from systems applicable to others in the public sector workforce, but makes recommendations based on re-aligning the Victoria Police discipline system with contemporary public sector employment practices. It identifies four fundamental changes necessary to reform the Victoria Police discipline system:*

- **Shift the focus from a punitive system bent on establishing guilt to one that concentrates on providing remedial assistance to individuals so that they can rectify their mistakes or bad habits and improve their performance.***
- Simplify the system and remove the numerous intermediate sanctions for less serious misconduct that currently exist. **If misconduct is not sufficiently serious to justify dismissal**, the best means of getting someone do their job better in the future is not to punish him or her through a slow formal process, but to **provide assertive management support** that sets performance expectations to improve behaviour.*
- Streamline and speed up the dismissal process, without compromising fairness to the individual facing dismissal. It is neither fair to an employee nor an organisation to have a long drawn out dismissal process. When the conduct is dishonest, criminal or otherwise inconsistent with the person remaining a member of Victoria Police, or when performance improvement measures have failed, it should be straightforward for Victoria Police to dismiss the person.*
- Ensure managers at all levels take an active role in managing people effectively and accept responsibility for setting expectations for those they manage, motivating and developing their staff and monitoring their performance.*

*The proposed scheme presents a number of significant implementation challenges for Victoria Police. In addition to the legislative change that will be required, the successful implementation of the proposals will require a fundamental change in attitude towards performance management and discipline. As Victoria Police moves from a punitive system to one focused on learning from mistakes and improving performance, a key to the success or failure of the reform will be how Victoria Police management, from sergeants to superintendents and above, implement the system and demonstrate by example the fundamental differences in the new approach. **A cornerstone of the new system will be acceptance that a frank and open admission of an honest but reasonable mistake, will provide opportunities for a member to improve his or her performance, and will not work to the detriment of the individual.***

*Without a reformed performance management and disciplinary system, Victoria Police will be ill-equipped to meet the future needs of the Victorian community. [emphasis added]*

150. A follow-up report by the OPI elaborated on those reasons and steps taken by the Victoria Police:<sup>43</sup>

*Following OPI's earlier recommendations, Victoria Police has strengthened its performance management system. The system requires further refinement, but OPI is encouraged that Victoria Police has recognised the value of such a system in a professional workforce.*

*Victoria Police has not yet addressed the link between performance and conduct management, although OPI understands this issue will be addressed as part of a Victoria Police Ethical Health process review internally sponsored by Acting Commissioner Emmett Dunne, Ethical Standards Department. In OPI's view, the performance management system provides an ideal framework within which to address less serious misconduct issues. While Victoria Police reports that such matters are increasingly managed informally, incorporating the management of less serious misconduct into the performance management framework would allow patterns of less serious misconduct to be addressed as underperformance rather than dismissed as isolated incidents.*

***Incorporating less serious conduct management into performance management (except where misconduct is serious enough to warrant consideration of dismissal) is required to streamline Victoria Police systems. OPI has provided a more streamlined model for managing standards of conduct, service and performance.*** [emphasis added]

151. The Commonwealth has also moved in the same direction with changes to the *Australian Federal Police Act* (AFPA) which place increased emphasis on dealing with less serious AFP conduct issues managerially rather than through formal disciplinary processes.

152. The AFPA recognises four categories of conduct of increasing seriousness:<sup>44</sup>

**Category 1 conduct**

*Category 1 conduct covers inappropriate conduct that relates to minor management matters, customer service matters or reveals a need for improvement in the performance of the AFP appointee concerned and does not warrant being treated as Category 2 or Category 3 conduct.*

**Category 2 conduct**

*Category 2 conduct is minor misconduct by an AFP appointee, inappropriate conduct that reveals unsatisfactory behaviour by an AFP appointee or conduct that would otherwise be Category 1 conduct but warrants treatment as category 2 conduct, due to its repeated nature. Category 2 conduct must also be conduct which does not warrant being treated as category 3 conduct.*

**Category 3 conduct**

*Category 3 conduct is serious misconduct by an AFP appointee; or raises the question whether termination action should be taken in relation to an AFP appointee; or involves a breach of criminal law, or serious neglect of duty, by an AFP appointee and in each case is conduct which does not raise a corruption issue.*

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<sup>43</sup> *Improving Victoria Police discipline and complaint handling systems: A progress report*, OPI, June 2011, pages 7-8.

<sup>44</sup> Descriptions appear in *Explanatory Statement to Determination of AFP Categories of Conduct*, 2013, issued by the authority of Commissioner of the Australian Federal Police and the Commonwealth Ombudsman.

### **Corrupt conduct**

*Conduct captured under this category is defined in s 6 of the Law Enforcement Integrity Commissioner Act 2006 (Cth) to refer to conduct that involves abuse of office, perverting the course of justice or corruption of any other kind.*

153. Category 1 and 2 matters are to be dealt with managerially and may be addressed by training and development action (Category 1 or 2) or remedial action (Category 2).<sup>45</sup>

154. Remedial action may include:<sup>46</sup>

- action taken to improve the AFP appointee’s behaviour, including:
  - counselling the AFP appointee or arranging for the AFP appointee to be counselled;
  - reprimanding the AFP appointee;
  - giving the AFP appointee a formal warning;
  - requiring the AFP appointee to adopt particular improvement strategies;
- structured changes to the AFP appointee’s employment, including;
  - changing the AFP appointee’s shifts or arranging for or recommending such a change;
  - restricting the AFP appointee’s duties or arranging for or recommending such a restriction;
  - reassigning the AFP appointee to other duties or arranging for or recommending such a reassignment;
  - transferring the AFP appointee to another part of the Australian Federal Police or arranging for or recommending such a transfer;
- the recording of adverse findings against the AFP appointee (whether for a particular period or permanently).

155. The Commissioner of the AFP and the Commonwealth Ombudsman have agreed on a six page Determination that classifies AFP conduct into the categories discussed above.<sup>47</sup> The Determination defines minor and serious misconduct as follows:

**Minor Misconduct:** *means intentional or negligent conduct that is inconsistent with the AFP Code of Conduct and/or values of the AFP, and should reasonably be dealt with through training and development or remedial action in the workplace. Minor misconduct does not include matters of underperformance or workplace conflict. These matters should be dealt with through the appropriate managerial mechanisms before being referred as a conduct issue.*

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<sup>45</sup> Sections 40RB(4), 40TI, 40TJ, AFPA.

<sup>46</sup> Section 40TD, AFPA.

<sup>47</sup> *Australian Federal Police Categories of Conduct Determination 2013.*



**Serious Misconduct:** means intentional, deliberate or grossly negligent conduct that demonstrates wilful or reckless indifference to the AFP Code of Conduct and/or values of the AFP, whether in the AFP appointee’s official capacity or otherwise, and /or could reasonably raise a question of employment suitability. In accordance with Part V of the Act, serious misconduct may include the commission of a criminal offence.

156. The following extract from the Determination illustrates the approach taken and has some pertinence in the present case:

**Category 2**

Category 2 conduct issues include:

- Minor misconduct;
- Inappropriate conduct that reveals unsatisfactory behaviour by an AFP appointee;
- Conduct that would otherwise be a Category 1 matter but warrants treatment as Category 2 due to its repeated nature; or
- Misconduct as defined in Part V of the Act, which does not warrant being classified as either a Category 3 conduct issue or a corruption matter.

Complaints that begin as a Category 2 matter may be elevated to a Category 3 complaint on the recommendation of the relevant CMT or by determination of PRS management.

<b>Conduct</b>	<b>Description</b>
<i>Breach of Commissioner’s Orders</i>	<i>Breach of a Commissioner’s Order where that breach is not specifically identified within this Determination.</i>
<i>Breach of Commissioner’s Order 3 on Operational Safety</i>	<i>Breach of Commissioner’s Order 3 on Operational Safety (not relating to excessive use of force).</i>
	<i>A complaint of excessive use of force where the circumstances are unlikely to amount to serious misconduct or serious negligence.</i>
	<i>Unauthorised discharge of a conducted energy weapon.</i>

157. Points to note include:

- Matters of underperformance and workplace conflict should be dealt with through other appropriate managerial mechanisms.
- Serious misconduct extends to deliberate and grossly negligent conduct that demonstrates wilful or reckless disregard.

158. The above examples are included to show the trend in other jurisdictions and to provide comparisons where these approaches may, by analogy, have some relevance to the situation here.

159. The Commissioner of Police has indicated strong support for an approach along the lines discussed above for the NT Police Force. I accept there is scope for a move in that direction so long as there is Government support for the approach, disciplinary action remains an option for serious misconduct (as described above) and the scheme operates within legislative parameters.

## NT laws and policies

160. Section 14 of the PAA charges and invests the Commissioner with the general control and management of the NT Police Force.

161. Part IV of the PAA deals at length with potential breaches of discipline. Section 76 defines a breach of discipline. This includes being negligent, inefficient or careless in the discharge of duties, contravening the Code of Conduct and failing to obey a lawful direction, instruction or order (including general orders and instructions issued under section 14A(1)).

162. Accordingly, a breach of a General Order will be a breach of discipline.

163. Section 14C provides for an alternative to formal disciplinary action whereby counselling and cautions may be given to an officer who commits a breach of discipline that is of such minor nature as not to warrant action being taken under Part IV.

164. While the primary statutory focus is on discipline, there is an alternative basis for managing officer conduct and unsatisfactory performance in the General Orders and policies promulgated by the Commissioner. At the time of the incident in question<sup>48</sup>, relevant instruments included the *General Order – Performance Management and Internal Investigations*, the *General Order - Command Management Teams*, the *Performance Plus Policy* and the *Managing Underperformance Guidelines*.

165. The rationale for Performance Plus is described below:

*2. The purpose of Performance Plus is to align the business objectives with our People Strategy to ensure employees are motivated to deliver sustainable results with the appropriate consequences in promotion, recognition, support and career development.*

*3. This policy provides the parameters for the operation of the NTPFES Performance Plus. It is intended as a reference for all employees and supervisors in understanding and meeting the requirements of formal individual performance management in NTPFES.*

*4. The Performance Plus framework provides supervisors and employees with opportunities to identify, discuss, review and plan for performance, and ensure links with business outcomes through clear expectations and capability development.*

...

*7. Performance Plus was developed as an outcome of the NTPFES Strategic Plan 2011-2013 and the NTPFES People Strategy 2010-2015. The purpose of the People Strategy is to assist in how we plan to recruit, develop, retain and support employees regardless of their employment status or arrangements, so they will have the required capabilities, tools and systems to allow us to deliver organisational goals and meet government and community needs.*

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<sup>48</sup> I understand at least parts of this process may have subsequently been superseded but this discussion remains relevant as illustrating the type of options open in terms of a personnel management approach.

*8. Performance Plus is an ongoing performance assessment of regular, constructive feedback and communication, with individual Performance Plus assessments formalising connections between each of us and the organisations strategic framework.*

166. The *Performance Plus Policy* stressed the importance of timely and ongoing feedback and provided the following guidance on dealing with cases where performance is not meeting expectations:

*51. Where a supervisor considers an employee is not fully meeting the key deliverables set out in their Performance Plus, the Managing Underperformance Guidelines must be implemented to assist the employee to achieve and maintain a satisfactory level of performance.*

*52. Minor performance issues should be dealt with as part of the ongoing feedback provided on the job and through formal and informal discussions and as part of the annual review.*

*53. Where an employee does not have a Performance Plus assessment in place, these Guidelines may still be used to manage underperformance. In these situations, the supervisor will need to clearly define in writing what is expected of the employee and formalise these in writing, to outline where the employee is not meeting those expectations/standards. It should only be in exceptional circumstances that an employee does not have a Performance Plus assessment in place.*

*54. The Managing Underperformance Guidelines apply to all NTPFES Employees.*

167. Relevant elements of the *Managing Underperformance Guidelines* included:

*The aim of these guidelines are to:*

- provide a structured and supportive approach to address and correct an employee's underperformance, and*
- enhance productivity, accountability and leadership.*

*The Managing Underperformance Guidelines are to be utilized to assist supervisors to coach and counsel [sic] employees who are not performing to established expectation and/or fulfilling commitments set out in the employee's Performance Plus appraisal.*

*The Managing Underperformance Guidelines assist supervisors to address employee underperformance in two stages:*

*Stage 1 – Informal Discussion*

*Stage 2 - Implementation of a Personal Improvement Plan (PIP)*

*...*

*The level of intervention required for overcoming and dealing with a poor performance will vary. In the majority of cases particularly where regular feedback is provided, an informal discussion with an employee about a performance or behavioural gap and the possible causes or influences contributing to poor performance together with clarifying expected standards, can resolve the situation.*

*There may be occasions where informal discussions or supported development does not remedy the situation. These may include where a performance gap is ongoing or significant, or where the employee has not been able to sustain significant improvement. In these instances intervention to assist the employee in overcoming poor performance will require a more structured approach and plan.*

168. The Guidelines go on to provide considerable detail on implementation, including the development of individual Performance Improvement Plans and documenting performance meetings (formal and informal).
169. On its face, a scheme of this nature provides an alternative to disciplinary action.

## Choices open to the Commissioner

170. Under the present structure of the PAA, the range of conduct that constitutes a breach of discipline is very broad. There are a huge number of General Orders covering almost every aspect of police functions, from the most serious to the relatively mundane. And any failure to obey a General Order is a breach of discipline.
171. What then are the options for the Commissioner (or prescribed member) who believes, on reasonable grounds, that an officer has failed to obey a General Order?
172. Section 79 of the PAA provides that the Commissioner ‘**shall** serve a notice’ under Part IV in those circumstances if they consider that the breach is ‘serious enough to warrant action being taken under [Part IV]’. [emphasis added]
173. It would certainly appear arguable that this is a mandatory provision. If the breach is serious enough, the Commissioner (or prescribed officer) is compelled to take action under Part IV. He or she cannot, for example, choose instead to go down the managing underperformance path discussed above. Any latitude that the Commissioner may have to take a different approach lies in the determination of whether the breach is serious enough to warrant Part IV action.
174. How does the Commissioner determine what is or is not serious enough to proceed under Part IV? One provision that touches on the subject of less serious breaches of discipline is section 14C. This allows for the Commissioner to issue instructions relating to counselling and cautioning of members who commit breaches that are of ‘such minor nature as not to warrant action being taken under Part IV’.
175. Section 14C is therefore limited to matters of a minor nature. On its face, section 14C might be suggested to interact with section 79 in such a way as to confine the assessment of what is not serious enough to warrant Part IV action to matters of a minor nature.
176. In that regard I note that, although section 79 was amended at the same time as section 14C was inserted in the PAA, the operative provisions of section 79 were in the same terms prior to the inclusion of section 14C. Section 79 therefore operated without the benefit of section 14C prior to that time and there is no reason to believe that there was an intention to limit the interpretation of section 79 by the insertion of section 14C.
177. In short, what this means is that the assessment required in section 79 of whether a breach is serious enough to warrant Part IV action is not guided by, or limited to, the circumstances in section 14C.

178. In my view, Part IV and section 14C do not present a code for action in relation to breaches of discipline. If a breach is serious enough to be dealt with under Part IV, it is certainly arguable that the Commissioner must deal with it under Part IV. However, if it is not sufficiently serious to warrant action under Part IV, it would appear that it may be dealt with as allowed by section 14C (if appropriate) or by other means, for example, under the then prevailing personnel management policies and procedures.
179. Having come to this conclusion, I acknowledge that there is room for debate about the options open for dealing with conduct that amounts to a breach of discipline and clarification would be helpful.

### **Part IV action**

180. Before leaving this topic, I should note that, while action under Part IV may be seen by some as escalating a matter, it also provides protections for the officer concerned by establishing a detailed process for testing the allegations and an entrenched right to appeal any decision.
181. Further, commencing action under Part IV does not inexorably lead to any sanction against an officer. Even if a breach is established, the Commissioner or prescribed officer may take no further action. If a sanction is imposed, there are a broad range of options to consider, starting from counselling and caution.
182. Properly conducted, action under Part IV, should not necessarily be seen as contrary to the best interests of the officer.

### **Time limit on Part IV process**

183. As noted above, the first step in pursuing action under Part IV is to issue a notice under section 79 of the PAA. This gives the officer 7 days to respond. If the officer does not respond or admits the breach of discipline, the Commissioner or prescribed officer may impose a sanction on the officer. However, if the officer responds and does not admit the breach of discipline, Part IV provides for an investigation prior to the laying of formal charges. The steps leading up to laying a charge may therefore in themselves take a considerable length of time.
184. The PAA sets a 6 month time limit on laying a charge under Part IV relating to a breach of discipline. An extension to that timeframe can be sought but once the time limit or extended time limit has expired, an officer can object to any charge on the basis that the time for laying the charge has expired.
185. It may be theoretically arguable that a notice under section 79 could be served after the expiry date and acted on if the officer does not respond or admits the breach of discipline. However, there must be a real question as to whether it would be appropriate for NT Police to do so.
186. It is therefore essential for processes involved in the conduct of Ombudsman investigations that may lead to action under Part IV, including provision of the final PSC Report and the Ombudsman's assessment, to be finalised with a substantial time still to run before the expiry of the time limit for laying a charge under Part IV. If an extension is required, it is important that the additional time sought factors in the considerable procedural steps involved in the *Ombudsman Act* investigation and processes and any further preliminary steps which may be necessary prior to laying a charge.

## Section 14C and breaches of a minor nature

187. As noted above, a question arises as to the scope of the term 'minor nature' in section 14C. On one view, it could simply refer to any breach that would warrant a sanction of counselling or caution, as these are at the lower end of the range of penalties that might be imposed under Part IV. On another, it could refer to a subset of such breaches which are at the most minor end of the scale.
188. In this regard, I note that the AFP scheme discussed above includes within 'minor misconduct' a broad range of Category 2 matters that are by no means at the lowest level of unsatisfactory conduct (admittedly with the support of a detailed statutory scheme).
189. If 'minor' is interpreted in contrast to 'major' or 'serious', as it is in the AFP scheme, then the 'Lesser in importance, seriousness, or significance' can still encompass a relatively broad range of substantive but less serious breaches. In this sense, it would include considerably more than negligible or inconsequential breaches. As noted above, under the AFP scheme it would have the potential to include unauthorised discharge of a conducted energy weapon (Taser).
190. In any event, I consider it is essential to look not merely at the description of the breach (e.g., unauthorised discharge of a Taser) but all the circumstances of the breach to determine whether it can be dealt with under section 14C.
191. Again, written clarification from NT Police would be helpful.

## Conclusion

192. In summary, if there is a failure to obey a General Order, the Commissioner (or prescribed officer) must first consider whether it is serious enough to warrant action under Part IV. If not, it would appear to be open for the Commissioner to take action in line with section 14C (if applicable) or in line with other performance management options.
193. I am not aware of any current NT Police policy documentation that would provide detailed elaboration or guidance to assist in making decisions of the type discussed in the preceding paragraphs. No guidance can cover every situation but broad guidance as to the factors that should be considered in making such a decision and as to how such decisions should be approached is important.
194. There would be considerable value in NT Police developing such documentation to promote understanding and consistency in decision-making. This would assist internal decision-makers, external reviewers, complainants/stakeholders who may be involved in complaints and the public generally to understand the basis on which different options for action are considered.
195. In that context, it would also be invaluable for NT Police to develop substantial guidance for decision makers who are required to recommend or impose sanctions in relation to individual officer conduct. These might take the form of written guidance on relevant principles, a precedent bank of prior decisions in the NT and other jurisdictions and/or a matrix along the lines of the AFP model discussed above.

196. In light of the above, I make the following recommendations.

- 8) NT Police produce substantial written guidance to decision makers to assist them in determining which option to recommend or pursue when considering action in relation to the conduct of an individual officer.**
- 9) NT Police produce substantial written guidance to decision makers to assist them in determining which sanction (if any) to recommend or impose in relation to the conduct of an individual officer.**

## CHAPTER 4: THE TASER INCIDENT

197. In this case, the PSC Investigation Report identified 15 allegations and one ancillary issue from a complaint lodged on behalf of the complainant. It examined each of the allegations in some detail and extended to 52 pages in length. It found a number of the allegations sustained.
198. The most serious allegation related to the discharge of the Taser by Officer A. My discussion here will only touch on the drawing and subsequent use of the Taser on the complainant.

### Background

199. The complainant was one of three occupants of a stolen vehicle (all children). Between 7:15 and 8:00 on a Monday morning there were a number of reports to Police about erratic and dangerous driving on roads and in public places, including schools. Judge Fong Lim provided the following background in *Police v KL & DP* (Youth Justice Court, 9 February 2017):

*1. Both Defendants are youths. They were in a stolen vehicle as passengers which vehicle was being driven by another youth. The vehicle had come to the attention of police as driving erratically and the police were on the lookout for that vehicle. At one stage the vehicle passed a police vehicle and one of the officers in that police car recognised the driver. At no stage were the police aware KL and DP were in the vehicle until it was finally apprehended at a service station. Prior to that apprehension the vehicle had stopped at another service station and when officers approached the vehicle it was driven away without refuelling.*

*2. During the day in question the vehicle was being tracked by various police officers who had observed it and reported back through police communications where it was at various times. No pursuit was undertaken because the area in which it was being driven was populated and at times in places where there were many pedestrians. The police assumed the vehicle was in need in of fuel because of the previous stop at a petrol service station and so anticipated given the direction it was moving, it may stop at the Woolworths service station in Bakewell. [Officers A and B] travelled to that place and waited for the vehicle to arrive which it did. [Officer B] upon seeing the vehicle arrive, instructed the console operator to disable the pumps so that fuel could not be obtained. What happened next is recorded on the CCTV of that service station. The footage is from cameras at nine different angles and was tendered by consent subject to a voir dire on its admissibility.*

200. The following chronology is a reconstruction from the various angles of CCTV footage of the sequence of events from the time the vehicle arrived at the service station to the time the complainant was tasered. No one camera covered all relevant angles but this chronology provides a reasonable description of the course of events.

Time elapsed (seconds)	Event
00	The stolen vehicle pulls up at the service station.
23	Officer B starts to approach the stolen vehicle from the service station shop, taking effort to avoid detection.



27	Child B gets out of the vehicle and walks around the back of the vehicle to the petrol bowser.
30	The complainant starts to move from the passenger seat to the driver's seat.
37	The complainant is settled into the driver's seat. Child B looks around in concern at the approach of someone (Officer B).
40-41	Officer A appears from his hiding spot, running towards the vehicle while reaching for his Taser. Child B starts to back into the vehicle and Officer B reaches him.
43	Officer B grabs at the complainant and holds him for a short time. (From this time until he exits the vehicle, the complainant is leaning towards or on the passenger seat.) Officer A points his Taser at the windscreen of the vehicle.
45	Officer B and Child B move outside the vehicle. (They continue a violent struggle until well after the complainant is tasered.)
48	Officer A starts hitting the driver's window of the vehicle. He uses the Taser initially but then holds the Taser against his body and uses his baton.
59	The complainant gets into the passenger's seat, then out of the passenger side door of the vehicle and starts to run. Officer A chases him.
62	Child C exits the vehicle.
64	Officer A Tases the complainant.

## General considerations

201. The PSC Report made the following comment on the approach that should be taken in assessing the conduct of an officer:

### Hindsight Principle

In considering the allegations, findings and recommendations, the Reporting Officer considered the following authorities which relate to the making of assessments about a Police Officer's conduct with the benefit of hindsight.

In *Slaveski v Victoria* [2010] VSC 441, Kyrou J summarised the current authorities relating to the assessment of a Police Officer's actions after the fact:

*"In Walker & Anor v Hamm & Ors [2008] VSC 596, Smith J emphasised that an assessment of the reasonableness of a police officer's conduct must be made in a 'realistic manner' that takes into account the 'reality that the officer has to make decisions quickly, often in emergencies and under pressure'. Similar statements appear in other cases. In Woodley v Boyd for example, Heydon J said that 'In evaluating the police conduct, the matter must be judged by the pressure of events and the agony of the moment, not by reference to hindsight'. His Honour then referred to the following observation of Connor J in McIntosh v Webster 'Arrests are frequently made in*

*circumstances of excitement, turmoil and panic [and] it would be altogether unfair to the police as a whole to sit back in the comparatively calm and leisurely atmosphere of the court room and there make minute retrospective criticisms of what an arresting constable might or might not have done or believed in the circumstances."*

202. I accept that those passages form an appropriate basis for considering the conduct of a Police officer in the circumstances described. There must be a substantial appreciation of the difficulties of the job undertaken by Police and the urgency with which they may be called on to act. This does not excuse wrongful conduct by an officer but it can be factor in assessing conduct in a particular case.
203. Generally, Police have a broad discretion on whether to use force and the type of force used in the exercise of their duties. However, use of force is not the sole or immediate solution in policing. Police must balance the need to bring situations to a safe and effective conclusion with the need to avoid any unnecessary application of force. If force is used, it must be reasonable, necessary, proportionate and appropriate to the circumstances. Police should use the minimum amount of force required.
204. In some instances, additional restrictions are put in place with regard to particular uses of force. As can be seen in Chapter 2, this is true of Taser use. The full text of the relevant restrictions established by NT Police are set out in that Chapter.
205. In brief terms, the General Order, *Operational Safety and Use of Force* (the Use of Force GO) restricts Taser use to situations where there is an immediate physical threat of serious harm to someone, and the officer cannot reasonably protect themselves, or others, less forcefully. An officer who acts contrary to that requirement commits a breach of the General Order which is in turn a breach of discipline under the *Police Administration Act* (the PAA).

## Drawing the Taser

206. With regard to the initial drawing of the Taser and its use on approach to the vehicle, Judge Fong Lim stated:<sup>49</sup>

*18. In relation to the drawing of the taser, the evidence of [Officer A] was that he had no intention of actually shooting the taser and he was using it to ensure compliance of the subject and while there was no evidence of any warnings having been given, I accept in the circumstances that was the original intention of the officer.*

...

*24. It is clear that he had drawn his taser before he was aware of [the complainant] trying to start the car. He did not say that he felt he was in immediate danger but expressed concerns that should the behaviour not be stopped, members of the public would again be put in danger. His aim was to arrest the driver and stop him using the vehicle. It was after he raised his taser and after [Officer B] had wrestled with the driver near the vehicle that he saw [the complainant] in the driver's seat trying to start the vehicle. In his oral evidence he stated he had drawn the taser as a deterrent to get subject compliance. That use is in direct contravention to the General Order number 193.*

...

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<sup>49</sup> *Police v KL & DP* (Youth Justice Court, 9 February 2017). It should be noted that Judge Fong Lim had the opportunity to hear evidence from relevant witnesses, including Officer A.

26. Again it is important at this point to note that the actions of [Officer A] should be considered in the context of the circumstances. The police were aware of a stolen vehicle driving around in an erratic manner and that vehicle was being driven by a youth who had already shown disregard for the police. The vehicle had been driving around for an extended period of time and in the minds of the officers, needed to be stopped before someone was hurt. It was a matter of seconds from the time in which the vehicle pulls up to the service station, the driver gets out, [Officer B] arrests him and [Officer A] approaches the vehicle. It is a matter of seconds that in which the passenger swaps seats with the driver and [Officer A] pulls out his taser. [Officer A] clearly making a split second decision to use a device available to him and he has very little time to balance up all of the options. However given their powers and the weapons and devices in their control, our police officers must be held to a high standard when exercising those powers.

27. With the benefit of hindsight it was not proper for [Officer A] to brandish his taser specifically to obtain compliance from the subject given the driver was outside of the vehicle, [the complainant] was a youth, he was in a vehicle which could have driven off, and they were in a petrol station. These are all situations which require there to be extraordinary circumstances to exist before a taser is deployed. At the time he drew his taser he did not know there was another person in the vehicle and there were no extraordinary circumstances existing or immediate danger to [Officer A] or other persons in the immediate vicinity. [Officer A] was also aware that there were other police units in the vicinity, as he had given the command to "go go go" and should have been borne in mind if [the complainant] had succeeded in driving away, he would probably not have got far as the vehicle apparently needed fuel.

...

31. In all of those circumstances the deployment of the taser before or during the arrest of each of the defendants was an impropriety of a very high level ...

32. In my view the impropriety of the raising of the taser is grave and even though I am of the view that [Officer A] thought he was justified in raising the taser and his impropriety was not deliberate.

207. The most obvious potential basis on which one might consider an argument that there was an 'immediate physical threat of serious harm' that might justify the use of the Taser was the clearly stated concern of Officer A about the potential that the offenders might drive off and present an ongoing danger to themselves and others.
208. I would not dismiss this lightly. In Australia each year, around 1,200 people die and about 35,000 people are hospitalised from road trauma. There is no such thing as a 'joy ride'. When a car is being driven by underage, inexperienced drivers the risk is increased many times over.
209. In this case, the car had already been driven away from one service station to avoid apprehension. The driving of the car in a range of settings raised great concerns from a number of witnesses. I am satisfied that the way it had been driven had presented a significant danger to its occupants and to others.
210. The wipers were left on at the service station, so the engine was either on or at least the key in the ignition. The complainant moved into the driver's seat soon after Child B left it to fill the vehicle with petrol. The officers stated that several attempts were made to start the car although the complainant denies this. Officer B also states that Child B yelled, "Drive, Drive, Drive". On the evidence available, it appears that Officer A drew his Taser after the complainant was settled into the driver's seat but before it is likely that any effort would have been made to 'start' the car or drive off.

211. Officer A acknowledges that in drawing and ultimately pointing the weapon it could not be successfully fired through the windscreen. He was essentially using it in the hope of distracting or deterring the person in the driver's seat from taking action. I would accept that such a step might be effective in some cases, although it might perhaps be just as likely to have the counterproductive effect of influencing a driver contemplating absconding to drive away before the Taser could actually be used.
212. In that regard, I should note that the Use of Force GO provided (and still provides) that the Taser is not to be used 'solely' as a method of subject compliance. This is a useful reminder to officers but should not be taken too far. Where there is an immediate physical threat of serious harm, an officer will naturally be seeking to gain compliance or control to mitigate that threat. Ideally, depending on the circumstances, that threat will be mitigated by achieving compliance which is preferable to having to exercise physical control by actual use of the Taser.
213. An officer who seeks to obtain compliance by Taser use in order to address an immediate physical threat of serious harm will not be doing so 'solely' as a method of subject compliance and so would not be in breach of that provision.
214. As noted above, the first question is whether there was an immediate physical threat of serious harm. If the first question is answered in the affirmative, the second, is whether the officer was unable to protect themselves and others less forcefully.
215. In this regard, I note that Officer A made the decision to draw the Taser at an early stage, in a situation where other options had not been explored, and there was no practical prospect of being able to fire it while the complainant remained in the vehicle. I accept the finding of the PSC Report that the complaint is sustained with respect to drawing the Taser.

## Firing the Taser

216. Again, the first question is whether there was an immediate physical threat of serious harm, and if answered in the affirmative, the second, is whether the officer was unable to protect themselves and others less forcefully.
217. I accept that Officer A was operating with considerable concern that one of the offenders might get away and into another vehicle. Officer B could not be relied on to assist as he was otherwise engaged in a struggle with Child B. Officer A knew that other officers were rapidly approaching but I accept that Officer A considered he had to deal with the complainant himself.
218. Even so, it was incumbent on Officer A to consider the situation at the time when he was faced with the decision to use the Taser or pursue another course.
219. By that time, the complainant was out of the car and running through the service station. Officer A was within three metres of him. There was no threat to Officer A as the complainant was running away from him. There was a vehicle in front of the complainant but it was occupied. The complainant had given no indication that he was likely to attempt to drag a person out of a vehicle so he could drive away in it. Even given the rapidly evolving situation, I do not accept that the circumstances provided a reasonable basis for a view that the complainant presented an immediate physical threat of serious harm.

220. Even if that had been the case, I do not accept that Officer A was unable to protect others by less forceful means. The most obvious of these would have been to pursue and attempt to gain physical control of the complainant. This in itself was not without risks to the officer and the complainant. One or both may have fallen. One cannot say with certainty that Officer A would have apprehended the complainant in that way. However, I consider there was a high likelihood that he would have. Indeed, if the complainant had made any attempt to get into a car, this would have provided Officer A with the clear opportunity to catch up and restrain the complainant.
221. In essence, having chosen to draw the Taser at an early stage, and having been unable to easily re-holster it while hitting the car window, Officer A found himself with the Taser in one hand and a baton in the other while he ran after the complainant. This would have presented a challenge in trying to control the complainant physically. Rather than re-holster or drop one or both accoutrements to facilitate the other option, Officer A chose to fire the Taser.
222. In saying this, I acknowledge that Officer A was acting within a very short timeframe and under great pressure. These are factors to be taken into account when considering what action should be taken in relation to Officer A but in the circumstances they do not mean that there was compliance with the General Order.

## Use on a young child

223. The Use of Force GO required that a Taser must only be used on a 'young child' in extraordinary circumstances. That term is not defined in the General Order. The PSC Report went to some effort to try to establish who may or may not be a 'young child'.
224. Noting that analysis, I would regard a 12 year old as being a young child. However, this disagreement merely points to the problematic nature of the provision when the term is not defined. I have commented on the need for change to this provision in Chapter 2.
225. In any event, I accept that a breach of this provision can only be based on actual knowledge or the objective appearance of the child in question. Officers A and B both stated that they knew nothing about the complainant but thought he was an older teenage child.
226. The complainant's build and height did not suggest that he was a young child. Children come in all shapes and sizes but it would be unfair to attribute a breach of discipline to an officer acting in an emerging situation on the basis of an unknown actual age, when the child objectively appears to be older.
227. I do not believe that Officer A was required to consider this as an extraordinary circumstance due to the complainant being a young child.
228. I have discussed the use of Tasers on children generally in Chapters 1 and 2.

## Action in relation to the individual officer

229. Options open in relation to management of conduct issues concerning individual officers have been discussed in Chapter 3. In this case, they were:
- take no action;
  - take action in line with corporate personnel management policies and procedures;

- undertake counselling or caution (including written caution) under section 14C of the PAA;
  - commence action under Part IV of the PAA, allowing consideration of a broader range of penalties, if there was a finding of breach of discipline.
230. As noted in Chapter 3, there is currently little in the way of guidance for decision-makers as to when a particular course of action is open or should be adopted. That approach allows for flexibility but does not promote consistency or confidence or aid decision making. This has been raised with NT Police by my Office on a number of occasions in recent years and I have again recommended that this be addressed by NT Police.
231. There would be great benefit in NT Police providing guidelines on when to use section 14C and Part IV, and developing guidelines, precedent banks and/or decision matrices for those who have to consider action to be taken in relation to the conduct of officers.
232. In the meantime, it was necessary to consider what action should be taken in this case. Searches by my Office did not identify any cases in other jurisdictions which are sufficiently on point to provide assistance.
233. I have noted that the Australian Federal Police (AFP) scheme (agreed between the AFP Commissioner and the Commonwealth Ombudsman) classifies unauthorised discharge of a Taser as Category 2 conduct (minor misconduct) which would normally be dealt with managerially and may be addressed by training and development action or remedial action. The AFP scheme has no binding force in this case but the approach is nonetheless instructive. The scheme is discussed in more detail in Chapter 3.
234. Although the comments of Judge Fong Lim regarding drawing of the Taser are noted, the situation involving the discharge of the Taser was clearly more serious than drawing and pointing it at the vehicle windscreen. In the absence of the actual discharge, it seems to me that a written caution under section 14C would have been a reasonable action in relation to that conduct.
235. The actual discharge of the Taser requires further consideration. The PSC report identified a number of mitigating factors:
- The circumstances generally, including the serious offending that had already occurred and that Officer A was genuinely of the belief that the offending would continue if the complainant was not apprehended;
  - The very limited amount of time that Officer A had to consider his options;
  - The acceptance by Officer A, in hindsight, that at least in the first instance the continuation of the foot pursuit was an option;
  - The minor extent of harm suffered by the complainant, which was not comparatively different to that suffered by Child C who was pursued on foot and tackled;
  - The frank and honest evidence given by Officer A during his directed interview which aligns with the expectations set by the Police Commissioner;
  - The past record of Officer A which does not include repeated concerns about his use of force;
  - That there are recommendations stemming from this incident recommending that the General Order justification for use be reviewed.

236. With regard to the last factor, it is appropriate to consider the clarity and certainty of the guidance given to officers by NT Police with regard to the use of Tasers.
237. In that regard, the Use of Force GO was quite clear in describing the restrictions on Taser use, including the limitation to immediate physical threat of serious harm and inability to protect by less forceful means.
238. However, I do consider that there is some potential for conflict within NT Police corporate documentation between the idea a continuum of use of force options (Tactical Options Model) and the absolute restrictions on Taser use in the Use of Force GO. This could potentially encourage a tendency to place less emphasis on the absolute restrictions.
239. In this regard, it is arguable that there should be a greater corporate emphasis on recognition of the risks of Taser use and the importance of compliance with relevant requirements rather than a simple reliance on what may appear reasonable in the circumstances.
240. As I have indicated in Chapter 2, I believe it is essential to maintain specific restrictions for particular accoutrements, including the Taser. This case is not a reason to downgrade the importance of providing clear guidance to officers on the risks of particular actions.
241. Without wanting to overstate its significance, the potential that the interplay of the various General Orders may have led to a lack of absolute certainty as to the importance of compliance with the particular restrictions, has some bearing on consideration of the appropriate action in relation to Officer A.
242. I have discussed in Chapter 1, the nature of the risks involved in Taser discharge. I noted that the current state of the literature is such that no definitive causal connection can be drawn between Taser use and death. However, the occurrence of a substantial number deaths associated with Taser use cries out for caution. Risk of death must be realistically assessed as very low but the potential cannot be dismissed.
243. With regard to use on children, while the evidentiary basis is somewhat equivocal, there are pointers to range of people with certain vulnerabilities being more susceptible to harm following Taser use. Children, and more particularly children who are small in stature, comprise one of those groups. It is essential that further caution be employed when considering whether to use Tasers in relation to such groups.
244. This should not be taken to suggest that the Taser should not be used. It has a valid place in the range of options open to Police. However, it is appropriate that its use continue to be subject to specific restrictions and that Police be acutely aware of the risks that it poses.
245. Accordingly, it is important that suitable action be taken to stress to the individual officer, to other NT Police officers and to the community that Taser use will and must be undertaken subject to careful controls.
246. On the other hand, I note the substantial mitigating factors identified in the PSC Report. Officer A has an exemplary record and I accept that he was operating with a real concern at the potential for the complainant to escape and engage in dangerous behaviour. He was called on to assess the situation and act within a matter of seconds.
247. In this case, it appeared to me that action in the nature of a written caution or a good behaviour bond might be considered.

248. The former could have been imposed under section 14C of the PAA (as recommended in the PSC Report), while the latter would have required action being taken under Part IV of the PAA.
249. In the circumstances, particularly if an officer acknowledges that he has acted contrary to the General Order, it might seem preferable to undertake the simpler process involved in section 14C. However, the use of the words “minor nature” in section 14C cause some concern about the scope for its use in a case like this.
250. The use of Part IV processes would have allowed the decision maker more scope to assess the appropriate sanction if there was a finding of a breach of discipline. This would not necessarily have precluded a sanction available under section 14C but would have allowed consideration of additional options such as a good behaviour bond and would have avoided any limitations that might arise from the wording of section 14C.
251. In this case, the 6 month time limit for laying of charges under Part IV was extended by NT Police for a period of 3 months. However, the final PSC Report was provided to my Office with a covering letter from the Acting Assistant Commissioner on 2 August 2017, leaving just over two weeks until the expiry of the time limit.<sup>50</sup>
252. I wrote to the Commissioner of Police the next day, regarding the potential for initiating action under Part IV of the PAA.
253. I discussed the advantages of commencing action under Part IV noted above. I acknowledged that if the Officer were to contest the allegation, it would be problematic to go through all the steps required to lay a formal charge before the deadline. I nevertheless requested that he give urgent consideration to the preparation and service on the Officer of a notice of alleged breach of discipline under section 79 of the PAA.
254. The Commissioner replied by letter dated 10 August 2017, indicating that a section 79 notice would not be served. In doing so, he stated that advice from the author of the PSC Report was to the effect that:
- The range of penalties available under Part IV were wholly considered;
  - Decisions and beliefs were based on:
    - the dynamic circumstances generally;
    - the frank and honest evidence given by the officer;
    - the past record of the officer;
    - a recommendation that the General Order be reviewed.
255. The Commissioner also advised that he was informed that some of the sustained allegations hinged on the officer’s honest evidence, given with knowledge that he was the subject officer. He stated that this is to be commended and is in line with his expectation of officers, especially when participating in directed interviews.

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<sup>50</sup> Measures have since been agreed between PSC and my Office to limit the prospect of this recurring in the future.



256. Given that response and the expiry of time for action under Part IV, I ultimately accepted in my Assessment Report the PSC recommendation for Managerial Guidance under section 14C and stated that imposition of a written caution would be appropriate.
257. Managerial Guidance was given to the Officer on 15 August 2017 on the basis of failure to comply with paragraph 26 of the Code of Conduct and Ethics (professional conduct) and failure to comply with sections 192 and 193 of the Use of Force GO.
258. In the course of the Managerial Guidance, the Officer acknowledged he had breached General Orders but stated that he had not done so with any malice or ill intention and believed he was doing the right thing. The Officer was given a written caution.

## Rescission

259. Following enquiries from my Office, by letter dated 5 September 2017, the Commissioner advised:

*The Northern Territory (NT) Police Force currently utilises section 14C of the Police Administration Act (the Act) for breaches of discipline of such a minor nature as to not warrant action being taken under Part IV of the Act.*

*Section 14C is a formal procedure which, on occasion, limits an appropriate proportionate response to sustained findings of minor misconduct. It is further complicated when the section is used for matters which are substantially performance issues, which should be dealt with, at least initially, by education and training. In addition, there are no proper guidelines currently issued by the NT Police Force to guide Commanders through the appropriate use of section 14C of the Act.*

*With this in mind, I have directed that the use of section 14C be suspended. Sustained matters of minor misconduct must still be dealt with and I have asked Commanders to utilise a number of different options to do so. I have directed that consideration should be given to dealing with these matters by other means such as (but not limited to) professional, authentic conversations which may (or may not) amount to counselling, guidance, mentoring, and training (if needed) and to utilise the MyCareer framework where appropriate. Clearly some minor performance and conduct issues fall within a human resource, rather than a disciplinary regime.*

260. The Commissioner also advised that, concurrently with directing the use of section 14C be suspended, he had rescinded one section 14C Notice. Checks confirmed that this was the notice given to Officer A in this case.

261. The Notice of Rescindment of Managerial Guidance dated 29 August 2017 gave the following basis for rescission:

*You have now been provided with remedial training advice specifically relating to the use of a Taser and the General Order – Operational Safety and Use of Force. Additionally, during the service of the managerial guidance the Code of Conduct and Ethics was discussed in detail. Based on that discussion and your response, I am now satisfied that an appropriate course of action is for your performance to be monitored by your supervisor through your MyCareer performance management, rather than by managerial guidance pursuant to section 14C of the Police Administration Act.*

262. The Assistant Commissioner responded to my Assessment Report by letter received on 12 September 2017. Regarding the decision to rescind section 14C action, he stated:

*Regarding recommendations made in the PSC report relating to Complaint Allegation 6: Excessive Use of Force — ECD and Complaint Allegation 13: Conduct — Inappropriate language used by Police; on 15 August 2017 the subject officer was issued with managerial guidance pursuant to section 14C of the Police Administration Act. During that meeting, the prescribed member engaged the subject officer in a professional, genuine conversation about his conduct and concluded that the subject officer had not intended any malice or ill will and sincerely believed that, in the main, he was doing the right thing. The subject officer also acknowledged the general order breaches, all of which was recorded in the subject officer's response to the section 14C notice.*

*During the same meeting, remedial training and remedial training advice relating to Taser use was provided by the prescribed member who is an experienced Taser instructor.*

*Given the subject officer's response and the provision of remedial training, I am informed the prescribed member felt that a more appropriate course of action was for the subject officer's performance to be monitored following remedial training and advice, rather than by the service of a Notice in accordance with section 14C. Subsequently, on 29 August 2017, a Rescindment Notice pursuant to section 43 of the Interpretation Act and section 14C of the Police Administration Act was served on the subject officer.*

*This action aligns with a recent direction from the Commissioner of Police who acknowledged that the application of managerial guidance pursuant to section 14C of the Police Administration Act may not always be appropriate. I believe this is particularly so in circumstances where conduct arises from a genuine mistake or can be appropriately addressed by training or re-training. The Commissioner has suspended the use of section 14C to deal with complaint matters as part of his desire for a new managerial framework to address complaints against Northern Territory Police. I understand he has corresponded with you in respect of this. A new managerial framework to address complaints against Northern Territory Police Officers is currently being considered, and this is a matter in which your office will be extensively consulted.*

263. NT Police subsequently confirmed that there is no intention to take further specific action in relation to Officer A with regard to this incident.

264. With regard to the decision to suspend the use of section 14C, I consider that the section 14C process can be a valuable option for action in respect of police conduct if adequate guidance is provided for its use (see Chapter 3 for further discussion). I believe the decision to suspend its use leaves a gap in available options and that this gap should be addressed quickly.

265. Turning to the decision to rescind, I do not consider that there was any cogent reason for such action arising from the decision of the Commissioner to suspend use of section 14C. The Officer had already received managerial guidance and a written caution. He had acknowledged that he had breached General Orders. The matter had been finalised. It should have been left to stand as such.

266. The decision to rescind a relatively minor sanction after a breach had been admitted and the matter disposed of, can do nothing but lead to confusion and uncertainty for the officer and for other police. I do not accept that the decision was in the best interests of anyone.

267. Having said that, from the point of view of the individual officer, he has already been subjected to the potential for action against him for a protracted period, has no doubt spent considerable time reflecting on his actions since the time of the incident, has undergone managerial guidance, received a written caution and undergone remedial advice and training.
268. As unsatisfactory as the rescission decision may have been, I do not consider that additional action in terms of adoption of personnel management options or an effort to somehow reinstate managerial guidance is likely to further emphasise to the officer the need to comply with General Orders that restrict Taser use.
269. From the perspective of the message sent to other officers, the rescission is certainly counterproductive.
270. This was a clear breach of General Orders by which the Commissioner of Police has (quite correctly) chosen to restrict the use of a potentially dangerous weapon to specific circumstances. It was not open to the officer to decide to use the Taser based on some broad assessment of what was reasonable in the circumstances. This is a message that must be clearly conveyed to all officers. The issue of a written caution to the Officer was part of establishing that clear understanding. Its rescission undermines that message.
271. In the circumstances, it is incumbent on NT Police to stress this message to officers in other ways, including during the implementation of the general recommendations identified earlier in this report.

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