
The Risks of Use of Capsicum Spray and Pain Compliance Techniques against Public Gatherings

Police Powers of Crowd Control
Submission to ACT Legislative Assembly
Legal Affairs Committee Inquiry

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Environmental Defender's Office (ACT)

Introduction

1. EDO ACT welcomes this opportunity to make representations to the Police Powers Inquiry of the 6th Standing Committee on Legal Affairs of the Australian Capital Territory Legislative Assembly. The Environmental Defender's Office ACT Inc. is a non-profit community legal centre advising on environmental and planning law with the aim to assist and increase public awareness of environmental laws and remedies.
2. The Environmental Defender's Office Inc is the only legal office in the ACT that provides specialist advice about public interest environmental law matters, with little if any overlap between the functions of the EDO and the work of any other organisation.
3. The EDO is part of a national network of independent EDOs that now extends to nine offices around Australia. Since 1985, EDOs have pursued a mission of providing public interest legal services to ensure compliance with environmental and planning legislation.
4. EDO ACT has a track record of providing legal advice and information on environmental and planning law to the ACT public since 1996.
5. The EDO was set up to meet a need in the community for a legal service providing planning and environmental law advice and assistance to the people of the ACT, in light of the fact that Legal Aid is not available for environmental matters in the Territory and the fact that many citizens cannot otherwise afford legal representation in the private sector in relation to such matters.
6. Over the years, the various EDO offices have been involved in a number of important conservation cases, which have helped to significantly develop public interest environmental law. These cases have had particularly important outcomes in the public interest which would often not have been achieved but for the role of the EDO.

Activities of the EDO

7. The EDO (ACT) has three main activities:

- *Provision of legal advice to members of the ACT community.*

The EDO (ACT) provides specialised legal advice in relation to matters of environmental and planning law. These include, but are not limited to, Administrative Appeals Tribunal appeals; the impact of changes to ACT planning, environment and heritage legislation; pollution and dumping law; tree protection; torts of nuisance and negligence; incorporation and insurance law; indigenous heritage law, neighbourhood disputes, as well as trade practices and defamation law.

- *Law reform.*

The EDO (ACT) makes formal submissions to government on environmental laws and policies. The EDO (ACT) is also consulted in relation to proposed amendments to legislation by government. The EDO (ACT) has most recently made detailed submissions in relation to the Commissioner for the Environment Review, the Human Rights Bill, the Tree Protection Bill and in relation to Crown immunities for Territory owned Corporations.

- *Community legal education.*

The EDO(ACT) assists the ACT community to understand their legal rights and responsibilities. This is achieved via presentations on the law to ACT schools, colleges and community groups; the publication and distribution of 'Plain English' fact sheets explaining ACT laws; the distribution of the ACT Environmental Law Handbook (140pp.) (launched November 2003 by the Chief Minister); and the regular distribution of electronic newsletters informing community members of legal and other developments in the ACT. The EDO ACT website www.edo.org.au also provides publications and other information to the public.

Background to EDO's Interest in Police Powers of Crowd Control

8. EDO has an interest in the subject matter of crowd control because from time to time we have been called upon by the Canberra Community to provide advice and representation in relation to legal issues arising from public gatherings or demonstrations that have been organized by people concerned about the protection of environmental quality.
9. One request for assistance in particular has prompted us to make a submission to this Inquiry. It came from two young Canberrans who were subjected to an unprecedented use of chilli pepper spray by police during their attendance at a protest against global warming held on federal Election Day in October 2004. This incident involved the use of chilli pepper spray against a peaceful political demonstration. It amounted to an attempt by police to use chemical weaponry to suppress the expression of political views in breach of the participant's human rights of peaceful assembly and freedom of expression. (see below)

Chilli pepper, capsicum or OC spray

10. Oleoresin capsicum ("OC") is a less lethal weapon derived from the oily extract of the cayenne pepper plant, which gives rise to its common name of "pepper spray." Exposure to pepper spray causes irritation to the skin, eyes, and respiratory tract. In 1973, pepper spray became available as an aerosol spray and had gained widespread use by law enforcement in the USA by the 1980s. Chilli pepper spray is commonly delivered via handheld canisters that emit an aerosol spray, liquid stream, or foam containing OC concentrations ranging from 1% to 10%.

11. Chilli peppers contain an alkaloid called capsaicin. Capsaicin is tasteless and odorless, but just 1 part per ten million can be detected by humans in the form of heat. Capsaicin is the active ingredient in pepper spray. The power or *heat value* of capsaicin is expressed in Scoville Units which can be determined through high-performance liquid chromatography. While a capsicum rates a zero on the heat scale, a jalapeno hits the 8,000 mark and a habanero chilli has a heat value of 350,000. Pepper spray rates somewhere around 5,300,000 on the heat scale, beat only by pure capsaicin at 16,000,000.
12. Contact with pepper spray particles incapacitates subjects by inducing an almost immediate burning sensation of the skin and burning and uncontrollable swelling of the eyes. When it is inhaled, pepper spray causes inflammation of the respiratory tract, resulting in a swelling of the mucous membranes lining the breathing passages that temporarily restricts breathing to short, shallow breaths (or even gasping and bronchial spasms).
13. Pepper spray produces the same debilitating physiological reaction on most people exposed to it: an involuntary swelling-shut of the eyes. Proponents of pepper spray cite its ability to cause temporary blindness and shortness of breath as an advantage for law enforcement in restraining violent individuals. Many pepper spray weapons have a limited range. Belt-carried canisters typically have an effective range of three to six feet. Larger "crowd control" projectile versions, discussed below, can be launched from a greater distance to disperse a crowd. The risks of pepper spray as a less lethal weapon may be exacerbated by other factors.

The Manion complaints

14. Hugh and Eleanor Manion (aged 16 and 18 years) were sprayed with chilli pepper spray by an AFP Officer at a public rally in Canberra on Election Day on 9 October 2004. That event led directly to their admission to Calvary Hospital later that afternoon.
15. The use of OC spray in the circumstances amounted to an unwarranted and excessive use of force in a situation that was definitely not life threatening. It therefore amounted to excessive use of force. Neither Hugh nor Eleanor Manion were arrested, summonsed or charged with any offence. There was no threat to the welfare of any AFP officer at the demonstration posed by the Manions. In short, there was no need to use the OC spray.
16. The following is an excerpt from the statutory declaration of Eleanor Manion dated 19 October 2004 (a full copy of which is attached to this submission):

My 16 year old brother, Hugh Manion was holding the "Reclaim The Streets banner. I saw my brother being thrown to the road by the police in a very aggressive manner. I had not seen Hugh doing anything to deserve this so I spoke to police about what had happened. They said nothing. I moved away.

Without any warning the police, started to arrest members of the crowd, some tried to free these people from the grip of the police. I remained among a group of others who stood nearby and did not touch police. All that I did was to yell "shame" at the police. At this point I saw my little brother (Hugh Manion) lying on the road again in extreme pain. He had just been sprayed with capsicum spray. I again asked the police what they were doing, and why they were using undue force. I was speaking directly to Sergeant WARNOCK of the Australian Federal Police (city police), Badge Number 5141 .

At that moment Sergeant Warnock I saw him take his can of chilli pepper spray, and then looked at me and he sprayed me twice in my left eye, and then he sprayed me four to five times in my right eye. Sergeant Warnock was standing about one meter from me and his can of pepper spray was half a meter from me when I was sprayed. At NO point did Sergeant Warnock or any police officer give me any direction to step back or do anything. At no point was pepper spray mentioned. At no stage was any warning given to me before chilli pepper spray was used. At no stage did any police officer ask if anyone in the crowd suffered from asthma or epilepsy to warn them to leave the area. The pain was incredibly intense, I could not help but scream. The effects lasted much longer than fifteen minutes, the period of time police led us to believe the spray would be effective for. As a result of having been sprayed in my eyes I lost my eyesight for at least half an hour. I could not see at all. My face was burning and without any water the pain was more intense. My nose was running incredibly, I was coughing.... That afternoon I was attending a public gathering and exercising my rights of public expression and had not been instructed by police to move or warned that I was breaking the law in any way. It is my honest belief that I had done nothing that would warrant or inspire forceful removal from a public event by the use of chemical weaponry."

17. This matter is the subject of an investigation by the Commonwealth Ombudsman and the AFP's Professional Standards (Internal Investigations) Division filed on behalf of the Manions by the Environmental Defenders Office. Despite having been filed on 29 October 2004 there has been little response from the Commonwealth Ombudsman or the AFP. *It took seven months, until 19 May 2005 for the AFP to even write acknowledging receipt of the complaint.* To date no detailed response or explanation has been forthcoming. The attached statutory declarations and complaints provide the detail of the incident.

AFP guidelines

18. The Committee should appraise itself of the details of the AFPs operational guidelines or instructions for the use of OC spray, particular as they relate to policing of political demonstrations and other public gatherings and assemblies.
19. It is our understanding that OC spray was originally introduced by Australian police forces as an alternative to the use of lethal force with firearms in situations which involve a risk to the life of police officers. The circumstances in play at the vast majority of political demonstrations could hardly warrant the use of OC spray.

20. On that basis we submit that the use of OC spray in the context of policing public gatherings would amount to excessive and unnecessary use of force and could involve an attempt to inflict torture or severe pain in certain circumstances. Amnesty International was of the opinion that this had been the case in one incident in Northern California in 1997 against Headwaters Forest protesters who had “locked on” in a demonstration against old-growth forest logging (see below).
21. We recommend that the use of OC spray in the context of policing public gatherings be prohibited unless exceptional and extreme circumstances are in play and then only with the express written authorization of the Police Minister tabled in the Legislative Assembly.

Human Rights and the Use of Chilli Spray

22. The use of spray to break up a peaceful gathering for the purpose of expression of political views on Federal Election Day in 2004 appeared to amount to a breach of the Human Rights Act 2004 (ACT). In particular it appears to have involved an infringement of the rights of citizens to exercise their freedom of assembly, freedom of association and freedom of political expression.
23. The use of the spray in that sense amounted to an attempt to exercise social and political control over an individual who was exercising her political views in a non-violent manner in a public place. The fact that the spray was used effectively compelled the victims to leave the demonstration to seek the assistance of paramedical personnel. The actions of the AFP led to breaches and/or infringements of the freedoms expressed in ss.10,13,15,16,17 of the Human Rights Act.
24. The recently enacted *Human Rights Act 2004* declares the following protections
 - “No one may be treated or punished in a cruel, inhuman or degrading way.” (s.10(1)(b))
 - “Everyone has the right to move freely within the ACT” (s.13)
 - “Everyone has the right of peaceful assembly.” (s.15(1)).
 - “Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her. (s.16(2))
 - Every citizen has the right, and is to have the opportunity, to ... take part in the conduct of public affairs, directly or through freely chosen representatives (s.17(a)).

Health risks

25. The EDO is concerned about assumptions that chilli pepper spray is inherently safe because it is naturally derived. The use of the terminology “capsicum spray” represents an attempt to downplay the true characteristics of the product by associating it with a common kitchen vegetable.

26. As the Hobart Community Legal Centre stated in a submission in 1998:

“On the contrary, capsaicin (the active ingredient in capsicum gas) — like other naturally-derived substances, such as arsenic — is potentially lethal in its own right. Evidence of the grave health risks posed by capsicum gas to such people as those suffering heart and respiratory disease, asthmatics and pregnant women led to the British Home Office abandoning its adoption as a weapon. The 1987 research by the FBI Firearms Training Unit (published in 1989), which led to the spray’s approval for use by FBI agents, was discredited in 1996 when the author of the research was convicted of fraud and of taking a bribe from a major capsicum spray manufacturer. In addition, whilst the commercially-produced spray originally (from 1973) contained 1% active ingredient (oleoresin capsicum), the FBI required a 5% concentration, and this became the standard solution.” ...

27. “One of the more credible studies of the medical implications of capsaicin — conducted in 1993 by Dr Salem et al — indicated that it may cause mutagenic effects, carcinogenic effects, cardiovascular toxicity, pulmonary toxicity, neurotoxicity and human fatalities. A subsequent study in 1996 by Woodhall Stopford found the following risks associated with capsicum spray’s usage: eye damage (including corneal abrasions for those with contact lenses), precipitation of an acute asthmatic attack or respiratory arrest, pulmonary edema in children and asthmatics, bronchospasm, and hypertensive crisis including increased risk of heart attacks and strokes.

28. Nevertheless, the discredited FBI research was the basis of the adoption of capsicum gas by the FBI, and then for its legalisation in California in 1992. At the same time, studies continue to highlight the dangers of capsicum spray usage. These dangers include its potential to contribute to fatalities. Whilst there have been claims that “only one” person has died as a result of capsicum gas usage by enforcement agencies in the USA, there are reports of in excess of 60 deaths as a result of such usage. In the period 1/1/93 to 1/6/95 in the state of California alone, there were 26 deaths among people sprayed with the weapon by the Police. That study drew the following conclusion: “Of 26 incidents examined in this report, the 24 in which cause of death has been determined all involve people who were either high on drugs or suffering from a serious psychiatric disorder. Yet autopsies found lethal levels of drugs, either methamphetamine or cocaine, in only a quarter of the victims. Two victims with histories of serious mental illness had no drugs at all and died of the frightening effects of schizophrenia or because their hearts failed as they fought with police after being pepper sprayed. ... Ten of these 26 cases autopsy reports are silent on the issue of pepper spray, implying that either police never told medical examiner personnel that pepper spray had been used on the

suspect or pathologists did not consider or had no reliable tests for pepper spray when determining cause of death. Ironically, pepper spray failed to work when police used it to try to control these irrational and combative victims in 100 percent of the 26 cases examined here." That research summarises its conclusion as follows: "In brief, with scarcely any scientific data to verify its safety — and in the face of serious reservations about profound dangers to high-risk populations like asthmatics and the mentally ill — pepper spray has become one of the most widely used weapons in California."

29. The submission continues

"Claims by Australian advocates of one-only death are due to the absence of protocols for death by capsicum gas in coronial examinations. As a result, whilst there are reports of more than 60 deaths recorded following people being subjected to capsicum gas by police in the USA, only one coronial report has specifically recorded that the cause of death was associated with such an assault. It has been noted that "no manufacturer of OC products had developed a reliable method of determining the presence of trace elements of pepper spray in a body and [... that] it is difficult to differentiate the effects of chemical artifacts of OC".¹

30. There is considerable evidence of dangers when used against persons with respiratory problems, children and pregnant women.² This literature is further reviewed in the journal article published in 2000 by Dr J. McCulloch in the *Journal of Law and Medicine*.

31. There is therefore an urgent need for constraints specifically prohibiting the use of chilli pepper or capsicum spray in the context of assemblies such as demonstrations and industrial pickets or other protests that seek to protect the rights of workers against attempts to degrade their working conditions.

Background: Introduction of chilli pepper spray in Australia

32. Around Australia, police have adopted so-called "less lethal" weapons technology for situations in which the use of firearms is neither required nor justified. However whilst intended only to incapacitate or restrain a dangerous or threatening person, these weapons are potentially capable of causing death or serious physical injury. The fact that they are less lethal than firearms should not in any way detract from the need to ensure that particular weapons are appropriate for law enforcement use, and to regulate and monitor their use by police officers.³

¹ Hobart Community Legal Centre (1998) *Submission to the Inquiry into Control of Weapons Bill 1998*, Hobart, Tasmania, <http://www.hobartlegal.org.au/docs/submissions.htm>

² McCulloch, J. (2000) "Capsicum Spray: Safe Alternative or Dangerous Chemical Weapon?" 7(3) *Journal of Law and Medicine* 311-323.

³ American Civil Liberties Union of Massachusetts (2004) *'Less Lethal Force: Proposed standards for Massachusetts law enforcement agencies'* (provides comprehensive and detailed report on the effects of capsicum spray and suggested regulation guidelines), 36pp.

33. In early 1996, in response to public concern over police shootings, Victoria Police became the first in Australia to trial the use of Oleoresin Capsicum (OC) defensive spray with a small number (about 80) of uniform General Duty Supervisors. It was introduced on a limited trial basis in 1997 in South Australia and was introduced in NSW in 1998. The AFP commenced use in the ACT "with full support from the ACT Government" in the 1999-2000 financial year.⁴
34. Considering the fact that several dozen deaths of people have occurred in the US after being sprayed with chilli pepper spray, we submit that the use of such a substance in Australia be adequately regulated and monitored.
35. On 4 December 2001, a 33 year old man died in Brisbane from a suspected heart attack after earlier being subdued by police using oleoresin capsicum (OC) spray. The incident is being treated as a death in custody and was investigated by the State Coroner and the Criminal Justice Commission.⁵
36. While use of the spray may be effective and provide additional safety to enforcing officers, studies indicate that exposure to pepper spray, when combined with pre-existing respiratory difficulties and asthma, can lead to fatalities. Moreover, although pepper spray produces the same debilitating reaction on most people exposed to it, close-range or long term exposure may require hospitalisation or physical rehabilitation.
37. The misuse of pepper spray may not only result in death or serious physical injury, but may also give rise to personal injury litigation against police departments and governments. In the US, there have been a number of such lawsuits in recent years.
38. We believe that it is necessary, in the public interest, to implement stringent regulation of pepper spray in order that public revenue is not lost through such misuse. Action against police departments is not likely when pepper spray is used reasonably.
39. However we submit, however, that the use of the spray against peaceful protests is not reasonable considering the adverse and potentially lethal effects of the substance. Regulation of the use of pepper spray, therefore, should prohibit its use in instances of peaceful protest.
40. Due to the great risks associated with the substance we believe that the potential misuse and abuse of pepper sprays ought to be addressed immediately.

⁴ Australian Federal Police (1999) *ACT Policing Annual Report 1998-99*, http://www.afp.gov.au/afp/page/Publications/AnnualReports/ACT/98_99/outcom.htm

⁵ Ian Ireland (2002) *Capsicum Spray-The Record to Date*, Research Note 19 2001-02, Law and Bills Digest Group, Commonwealth Parliamentary Library, 12 February 2002, at www.aph.gov.au.

41. International concerns about the use of chilli pepper spray were drawn to the attention of the Commonwealth Parliament by Ian Ireland of the Law and Bills Digest Group of the Parliamentary Library. He wrote :
- “A number of other reports, however, have associated serious adverse consequences, including death (over 60 deaths have been attributed to OC spray in the US), with the legitimate use, as well as misuse and abuse, of OC sprays. The use of OC spray has been rejected in the United Kingdom because of its potential carcinogenic properties.”

Inappropriate use against peaceful political demonstrations

42. Capsicum spray was first introduced in Australia as a ‘non-lethal’ alternative to firearms following a spate of police shootings in Victoria.
43. However there is evidence that it has been used by police in circumstances where use of firearms would not be contemplated in any instance, such as against political events, strikes, pickets, rallies and demonstrations and in the context of industrial disputation.
44. In 1999, capsicum spray was used by NSW police against a protester who had already been placed under arrest at a protest about the Jabiluka uranium mine. Police used capsicum spray when arresting Jesse Wynhausen, 20, from Paddington. He had already been put in a police van after an altercation with a Westpac security officer over a protest banner. According to a newspaper report “He said police then sprayed him three or four times in about 20 seconds, causing a burning sensation in his eyes and in his throat. A police spokesman refused to reveal guidelines for the use of capsicum, saying the man was warned it would be used.”⁶
45. On 31 March 2004, a group of up to 20 students were sprayed with capsicum spray by police while protesting against university fee increases at Sydney's University of Technology.
46. On election day in October 2004 capsicum spray was used against marchers protesting against car dependence and global warming during an incident at the corner of London Circuit and Northbourne Avenue. Ambulances were called. (see discussion of Manion complaints below)
47. Chilli pepper spray has also been used against political gatherings and events overseas, particularly in the USA.
48. In April 2000, pepper spray was used against nonviolent demonstrators against the International Monetary Fund and World Bank in Washington, D.C.
49. In a notorious incident in 1997 in Northern California
- "The Humboldt authorities arrested peaceful demonstrators, seated, linked and locked into a metal device," Crosby said. "They were dramatizing their

⁶ *Sydney Morning Herald*, 14 April 1999, p3.

commitment to protecting old-growth redwood trees. They were not menacing anyone."

50. The federal civil rights lawsuit claims law enforcement used unlawful excessive force against non-violent forest activists in three incidents in the fall of 1997. The activists were engaged in peaceful sit-ins with their arms locked to one another inside metal sleeves designed to prolong the demonstrations.
51. The incident happened in Humboldt County, California, in the Coast Redwood forest region about 200 miles north of San Francisco. The first incident occurred on September 25, 1997, in the office lobby of Pacific Lumber in Scotia, the second was at a Pacific Lumber logging site in Bear Creek on October 3, 1997, and the third was in the Eureka district office of then-Congressman Frank Riggs on October 16, 1997. Humboldt is where most of the last remaining ancient redwood forests grow.
52. A third trial date of April 11, 2005 was set by Judge Illston after the first two trials involved deadlocked juries.⁷ On 28 April 2005, an eight-person federal jury returned a unanimous verdict for the Q-Tip Pepper Spray Eight activists/plaintiffs, finding the County of Humboldt and City of Eureka liable for excessive force in violation of the 4th Amendment to the U.S. Constitution. Humboldt County Sheriff's Deputies and Eureka Police Officers used unconstitutional excessive force when they applied pepper spray with Q-tips directly to the eyes of the eight nonviolent forest defense protesters in three incidents in 1997. Three of the activists were also sprayed directly in the eyes from inches away. Two of the young women were juveniles, aged 16 and 17.
53. A number of human rights organisations, including Amnesty International, have questioned the use of OC spray. In November 1997 Amnesty International called the use of OC spray by police in the US State of California against peaceful protestors as tantamount to torture.⁽⁵⁾

54. Amnesty's statement read as follows:

"The use of pepper spray by police in California against peaceful protestors, including a 17-year old, is cruel, inhuman and degrading treatment of such deliberateness and severity that it is tantamount to torture, Amnesty International said today following last Friday's videotape showing of Humboldt County Sheriff Department officers swabbing liquid pepper spray directly into the eyes of demonstrators.

The videotape -- made by the sheriff's office and played for reporters on 31 October as lawyers announced a lawsuit -- showed protestors sitting around a tree stump in Representative Frank Riggs' Eureka office on 16 October. The protestors screamed as deputies pulled back their heads, opened their eyes, and "swabbed" the burning liquid to their eyeballs.

⁷ *Lundberg v. County of Humboldt* CV 97-03989 (United States District Court, Northern District of California), originally *Headwaters Forest Defense v. County of Humboldt*, et al.

They were protesting against the destruction of redwood trees in Headwaters Forest in northern California. A 17-year-old protestor, whose eyelids were prised apart to apply the spray, described feeling acute pain and burning in the eyes after the spray was administered.

Video footage of a second incident, which took place at the Pacific Lumber Company headquarters in nearby Scotia on 25 September, showed two women protesters being swabbed in the eyes with liquid pepper spray. Police sprayed a third woman in the eyes at close range.”

Use against persons offering passive resistance or “locked on”

55. Our recommendation is that a product which was approved for use as a “defensive spray” must not be used against by police against persons merely offering passive resistance such as hanging limp or simply refusing to comply with police instructions.

Spoken warnings

56. In Queensland, Police are required to give a spoken warning before spraying a person. The warning has a twofold purpose: to give fair warning to the subject that he/she may be sprayed and to alert other police present that spray may be about to be deployed.⁸

Capacity of AFP to be directed ACT Government

57. AFP documentation suggests the following regarding the legislative and administrative arrangements for ACT policing. The provision of police services within the ACT is undertaken by the AFP pursuant to the *Australian Federal Police Act 1979*, and in relation to community policing services in accordance with the ACT policing arrangement which was signed in 1990. In July 2001, the Chief Police Officer and the ACT Minister entered into a Purchase Agreement for the provision of services to the ACT community by the Australian Federal Police. The Agreement covers all goods and services purchased by the ACT from the AFP.

58. In accordance with the Arrangement, the Chief Police Officer for the ACT, subject to the authority of the AFP Commissioner is responsible to the ACT Minister: for the achievement of the objectives set out in the Purchase Agreement; and, the general management and control of AFP personnel and resources deployed for the purposes of the Arrangement. The ACT Minister may give to the Chief Police Officer general directions in writing as to policy, priorities and goals of Government in relation to the provision of police services under the Arrangement.

⁸ CJC and Queensland Police Service (1999) Trial of Capsicum Spray in Queensland: Evaluation Report, June 1999, <http://www.cmc.qld.gov.au/library/CMCWEBSITE/capsreprt.pdf>

59. The main point is that the ACT Minister for Police may issue general directions to the Chief Police Officer in relation to the use of OC spray.

Specific Recommendations regarding the use of chilli pepper spray

60. The foundation of a police force's less lethal force policy should be a use of force continuum, as set out in the Comments to Article 3 of the United Nations Code of Conduct for Law Enforcement Officials.

61. Our primary recommendations are:

- The amount of force used by a police officer should be proportionate to the threat posed to the police officer or to the public.
- Officers should begin at the lowest levels of force necessary to effect an arrest or to control and contain a threat, and escalation of force to the next level should occur only when the officer has determined that such an escalation is reasonably necessary.
- Officers should not (in any circumstances) use a level of less lethal force that exceeds passive restraints when arresting a subject that is passively resisting.
- Situations in which crowd control will be needed can often be predicted in advance, since certain events will tend to give rise to large crowds (e.g., protests for which permits are required, parades, celebrations following sporting events). Therefore, before the event occurs, a police department should review the types of less lethal weapons that an officer may use for crowd control purposes and authorise the officers assigned to the event to use only those weapons that it deems appropriate.
- The use of "incapacitating agents" should be prohibited when used against a subject who is less than two feet away, who is enclosed in an unventilated area, or who lacks normal reflexes or is otherwise incapacitated.
- A lower level of force should always be used with respect to certain populations.
- Members of these populations often have physiological or mental impairments that render them especially susceptible to permanent injury or death following the use of non-lethal weapons. These populations include pregnant women; children (i.e., persons below the age of sixteen years); the elderly (i.e., persons over the age of fifty years); individuals with mental disabilities or impairments; individuals with altered mental states due to use of narcotics, hallucinogenics, or other drugs; and individuals who appear to be suffering from cardiac or respiratory problems.
- Less lethal weapons carried by an officer should be plainly distinguishable from each other to reduce the risk of confusing the two weapons in a stressful situation.

Follow up policies

62. A police force should also have clear policies regarding the procedures that shall be followed after less lethal force is used.

- First, the policy should contain clear instructions about the medical treatment that an officer should provide to a person upon whom he has used less lethal force.

- Second, the officer who has used less lethal force should be required to complete and submit individual reports before the end of his tour of duty. The individuals reports should include at least the following information:
 - The type of force used
 - The circumstances that gave rise to the use
 - The duration of the use of force
 - The distance between the officer and the victim
 - The name, age, sex, weight, and height of the victim
 - Whether the victim was intoxicated or under the influence of drugs
 - Whether the victim was pregnant
 - Whether the officer informed the victim that less lethal force would be used if the victim did not obey the officer's orders
 - Observations regarding the general physical condition of the victim following the use of force
 - Whether the victim received medical attention following the use of force
 - Photographs of any injuries to the victim following the use of less lethal force

Monitoring the Use of Less Lethal Force

63. Monitoring the use of less lethal force should be an essential part of a police force's policy related to these weapons. The foundation of monitoring is strict reporting requirements.

- Records that indicate the frequency of use of less than lethal weapons by police unit and by the individuals within that unit will provide valuable data indicating whether more restrictive policies should be considered or if a particular individual is abusing the privilege of using less lethal force.
 - Individual and cumulative records of the use of less lethal force should be maintained by the department. As noted above, an officer who has used less lethal force should be required to complete and submit a report before the end of his tour of duty.
 - Statistics regarding the use of less lethal force should be compiled monthly.
64. We recommend that AFP develop a policy and a record keeping system for control and tracking of use of pepper spray by AFP members so that the amount of pepper spray used by the AFP over given time periods and by specific individuals is possible. The AFP training division as well as the unit supplying property and weapons to officers must be involved in development of this tracking system.
65. We submit that implementation of the policy recommendations for controlling the use of pepper spray by police officers will benefit both the police and the general public. The public will receive some measure of protection against the excessive use of pepper spray. The police will be given much-needed guidance regarding the use of the substance. Finally, municipalities may limit the risk of having to compensate those against whom pepper spray was improperly used.

Pepper Spray Projectiles: A Particular Danger

66. Pepper spray projectiles are fired by air pressure launchers and break upon impact to release the pepper spray contained within them. This pepper spray

has the same effect of the hand-held pepper spray canisters described supra, without the risk posed to a police officer by a limited stand-off distance.

67. According to a manufacturer the pepperball system has particular application in civil order situations and can effectively distribute PAVA (Capsaicin II) powder in a riot setting and disperse uncontrolled crowds. The pepperball system consists of a compressed air-powered launcher which projects .68 caliber plastic balls filled with Oleoresin Capsicum (OC) in powder form. This system allows the user to deploy OC in a rapid, accurate manner at increased distances. Suspects can be individually targeted or PAVA powder can be distributed over an entire group by launching a volley of projectiles against a wall, street, or hard object above, near, or upwind of a group of targets from distances up to 150 feet.⁹
68. However, due to the nature of impact projectile weapons, pepper spray projectiles can pose a lethal threat, as evidenced by the death of Ms. Snelgrove in Boston, Mass., USA in October 2004. Following her death, pepper spray projectiles were removed from the Boston Police Department's arsenal. In the past, the American Civil Liberties Union has protested the use of pepper spray as a crowd control device. Following a 1997 incident in which police used pepper spray to disperse protesters in Eugene, Oregon, the ACLU worked with the city's police department to develop a policy that prevents its use to disperse crowds.
69. The employment of various types of projectiles have also led to lawsuits against police officers and municipalities. As discussed supra, Victoria Snelgrove died after she was hit in the eye with a pepper spray projectile fired by a member of the Boston Police Department. The Boston Police Department ultimately settled the case in 2005 for \$5.1 million dollars.¹⁰
70. The Stern Commission, led by former U.S. attorney Donald K. Stern, was set up by Boston Police Department Commissioner Kathleen O'Toole to look at "less lethal" weapons and new methods of crowd control following the death of Emerson College student Victoria Snelgrove, age 21, last October. Snelgrove was killed when she was struck in the eye by a projectile containing pepper spray fired by a Boston police officer using a compressed-air rifle.¹¹
71. The litigation is also likely to have been directed at the company that makes the pellet gun on the basis of that representations of the weapon as "non-lethal" were misleading and deceptive.
72. According the manufacturer, "The projectiles have been specially designed to break up on impact, thereby eliminating any risk of penetration injury."

⁹ PepperBall Technologies, Inc. (PTI) at www.pepperball.com

¹⁰ Donovan Slack (2005) "City settles with family of slain college student" *Boston Globe*, May 2, 2005; Donovan Slack, *Snelgroves Weigh Suit Against Gunmaker: \$5m settlement with Boston says city would aid case*, *Boston Globe*, May 3 2005.

¹¹ Raja Mishra & Julie Polovina "Student remembered as a bright, budding journalist", *Boston Globe*, October 22, 2004, <http://www.boston.com/news>

73. The less lethal weapons in one sense are more dangerous because the erroneous perception that they are "safer" increases the likelihood that police will use them - thereby increasing the amount of force used by police.
74. If the police were carrying only firearms, they would have been forced to show more restraint and that the incident may not have occurred.

Recommendation

75. We call for an immediate moratorium by the AFP on the use of all so-called "non" and "less-lethal" weapons in crowd-control situations,
76. A model is the agreement recently signed in the United States by the Oakland Police Department (California) banning the use of such weapons to control crowds.
77. These weapons should not be used as instruments of physical harm or intimidation at public assemblies as this violates human rights of freedom of assembly and freedom of expression protected by the ACT *Human Rights Act 2004*.
78. These weapons include, but are not limited to, the pepper-ball gun, or FN303, weapons that fire other "less-lethal" projectiles such as beanbags, wooden dowels, rubber/plastic bullets and concussion grenades, as well as other chemical and electronic projectiles such as tear gas and tasers.
79. The use of chilli pepper spray by police offers opportunities for abuse without accountability and as such has been described as 'the chemical equivalent of the phone book'.

Use of Pain compliance techniques

80. The EDO also wishes to draw the attention of the Committee to a collection of material from the Office of the Commonwealth Ombudsman and the Victorian Ombudsman.
81. It relates to the use of pressure point pain compliance techniques (PPCT) by police against political demonstrators. They include the techniques of 'mandibular angle pressure', applying force to the infra-orbital nerve, and the sternal/jugular notch. All are points around the neck.
82. These techniques were applied in Canberra in 1991 against members of the public protesting outside a major international weapons fair (AIDEX). The use of the techniques was subsequently investigated and condemned by the then Commonwealth Ombudsman, Ms Phillipa Smith.

83. The techniques were later applied in 1994 by the Victoria Police against environmentalists who were holding a demonstration in February outside the Department of Natural Resources and Environment in Melbourne. The misuse of the PPCT techniques was similarly condemned by the Victorian Deputy Ombudsman Mr Barry Perry (report attached).¹² Mr Perry suggested that the dangers included serious injury or death resulting from reflex cardiac inhibition. This later led to admissions by Victoria Police that the use of the tactics had been inappropriate, and to a commitment not to use them in crowd control.
84. There is a strong temptation for police to use PPCT as a punishment for politically demonstrating and as a deterrent to future protest activities.
85. The medical evidence available suggests that there is a grave danger with the use of pressure point pain compliance techniques above shoulder level that bring with them a risk of causing serious injury or death.
86. Recommendation is that the ACT Minister direct the AFP not to use PPCT techniques above the line of the shoulder in the context of political events, rallies, demonstrations, strikes, pickets, marches etc.

Conclusion

87. EDO draws your attention to the evidence of the dangers of capsicum gas and certain Pressure Point Pain Compliance Techniques.
88. EDO has commented at length about the temptation for police to use capsicum spray and PPCT as a punishment for politically demonstrating and as a deterrent to future protest activities.
89. We have also drawn to the Committee's attention evidence regarding the dangers of pain compliance techniques that are used above the line of the neck.
90. These weapons and techniques should not be used as instruments of physical harm or intimidation at public assemblies as this violates human rights of freedom of assembly and freedom of expression protected by the ACT Human Rights Act 2004.
91. We express our appreciation for the opportunity to comment on the question of police powers as they relate to the question of political demonstrations and other manifestations.

¹² Report tabled in Victorian Parliament on 28 November 1994.

INDEX TO ATTACHMENTS

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