

Prior v Mole – Background Information

1. Summary

This case is about the legal threshold that needs to be satisfied before Northern Territory police can detain a drunk person in protective custody. The High Court will consider the extent to which a police officer's general prior experience and assumptions are relevant, as opposed to their actual knowledge and observation of the person who they propose to detain.

The case is an appeal against convictions that the appellant, Anthony Prior, received after he was apprehended by police under their protective custody powers on New Year's Eve 2013. The case seeks to ensure that police protective custody powers are only used when necessary and aren't used in racially discriminatory ways. Allowing police to rely on assumptions when exercising these powers, creates risks that police will, consciously or unconsciously, act on racial stereotypes rather than responding to the particular circumstances of each incident.

The case will be heard on 6 December 2016 at 10am before the High Court of Australia in Canberra. This case is an appeal from a decision of the Northern Territory Court of Appeal. More details about the case, including all relevant submissions, can be found [here](#).

2. How do the Northern Territory's protective custody powers work?

The Northern Territory's protective custody laws enable police to take a person into custody for up to ten hours where a police officer has reasonable grounds for believing:

- that the person is intoxicated in a public place; and
- that, *because of the intoxication*, the person:
 - can't adequately care for themselves and it isn't practicable for someone else to care for them;
 - may cause harm to themselves or someone else;
 - may intimidate, alarm or cause substantial annoyance to people; or
 - is likely to commit an offence.

The power is contained in section 128 of the *Police Administration Act* (NT).

According to Northern Territory Police Annual Reports, these laws were used 9,449 times in 2015-16 and 11,347 times in 2014-15. The Northern Territory has a population of around 245,000 people. While direct comparison is not possible, similar powers in Victoria are used around 8,000 times per year on a population of six million people, highlighting the extraordinarily high usage of the powers in the Northern Territory.

The laws disproportionately impact on Aboriginal people. Between 2007 and 2015, 92 per cent of people taken into protective custody in the Northern Territory were Aboriginal. Aboriginal people in the Northern Territory have died in police protective custody.

3. The facts in the case

On New Year's Eve, 2013, Anthony Prior, the appellant, and two other Aboriginal men were drinking in a public place. This was an offence under the *Liquor Act* (NT). Police had the power to seize and empty or destroy the alcohol and issue an infringement notice.

Two police officers drove by Mr Prior who raised the middle finger of his right hand and shouted at them. The police officers approached Mr Prior, emptied his alcohol and destroyed the unopened bottles. Mr Prior swore at the police and was then apprehended and placed in custody under the protective custody powers. One of the police officers said that based on his brief interaction with Mr Prior, the proximity of licensed premises, his experience as a police officer and an 'educated assumption', he reasonably believed that if police left Mr Prior where he was, he was likely to commit another offence – being to purchase more alcohol and continue drinking – or he would intimidate, alarm or cause substantial annoyance to people.

When giving evidence, the police officers accepted that they did not know Mr Prior – they had had no previous dealings with him, knew nothing of his background and did not ask him any questions about his background or his drinking. The Northern Territory Court of Appeal found that the police 'acted to a certain degree on stereotyping' Mr Prior but ultimately found that their actions were lawful.

4. Why this case is important

This case represents an important opportunity for the High Court to clarify when protective custody powers may be used by police. Strong safeguards on the use of the powers are vital because the powers involve removing people's liberty and are disproportionately used on Aboriginal people.

5. Do other jurisdictions have protective custody powers?

Most jurisdictions have protective custody laws. However:

- all other jurisdictions with protective custody laws require police, or give police the discretion, to consider alternatives to detention, such as taking someone home or to a sobering up shelter;
- no other jurisdiction gives police the discretion to lock someone up because they are drunk and police believe they are likely to commit *any* offence (however trivial) or *may* alarm or cause substantial annoyance to people; and
- in most other jurisdictions the person must be *seriously* intoxicated (rather than just intoxicated) to fall under the protective custody powers held by police.

6. How the Northern Territory's protective custody laws should be changed

The Northern Territory's protective custody laws are the most punitive in Australia and the Northern Territory has some of the highest protective custody rates in the country.

The threshold for using the protective custody laws should be raised. Protective custody powers should only be able to be used where the person is likely to cause harm to themselves or others, or damage to property.

As in other jurisdictions, police should be required to consider all other alternatives to locking people up, for example taking them home or to another safe place, or to an appropriate facility such as a sobering up shelter.

In essence, instead of locking up high numbers of problem drinkers in police cells, more effective, evidence-based health responses should be adopted.