CHILDREN AND POLICE POWERS

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1 Introduction

The way in which police use their powers has a significant impact on young people's daily lives. It also has a bearing on the outcome of criminal prosecutions. A children's lawyer should always be alert to the improper use of police powers, and be ready to challenge the admissibility of evidence obtained as a result.

This paper does not aim to cover the full gamut of police powers. Instead I will focus on those powers most frequently used (and dare I say abused?) in relation to children and young people.

2 The policing of young people

A detailed analysis of the difficult relationship between young people and police is beyond the scope of this paper. However, it is worth pointing out that young people are frequent users of public space and tend to be targeted by police at a higher rate than older people.

In recent years there have been various additions and enhancements to police powers. Much of this legislation has been targeted at young people. An example is the *Crimes Amendment (Police and Public Safety Act)* 1998, which gave police powers to search for knives and implements, and to issue "move-on" directions, in public places.

The Ombudsman reviewed the operation of the Act and published its *Policing Public Safety* report in November 1999. Among the findings were:

- 42% of knife searches were carried out on people aged under 18. The age group most frequently searched was 16 and 17 year olds.
- The percentage of successful searches (ie searches where a knife or dangerous implement was found) of young people was very low, while the percentage of successful searches among people aged 25 and over was a lot higher. This would suggest that police are searching many young people without reasonable grounds.
- On some occasions police conducted strip searches, purportedly using their powers under the *Summary Offences Act* 1988, which does not authorise strip searches. People were often searched without being told why.
- 48% of all directions were issued to people under 18, with the peak age being 16.

- 22% of all directions were issued to Aboriginal and Torres Strait Islander people. Use of the directions power was much higher in western and north-western New South Wales than in other parts of the state.
- According to narratives from the COPS system, directions were given for a variety of reasons, including that people were begging, intoxicated, in a high crime area, or merely had no reason to be there. Young people in groups were often thought to be intimidating, or likely to cause fear, by their mere presence. In the Ombudsman's opinion, about 50% of the directions analysed were issued without a valid reason.

3 New police powers legislation

Following the recommendations of the Wood Royal Commission and the Ombudsman's *Policing Public Safety* report, the NSW government decided to consolidate police powers into one Act. The result was the *Law Enforcement (Powers and Responsibilities) Bill* 2001, which was released as an exposure draft in 2001.

A substantially revised version of the Bill (the *Law Enforcement (Powers and Responsibilities) Bill* 2002) has recently been introduced into Parliament. At the time of writing it had not been voted on, and amendments were still being proposed. The Bill can be downloaded from the NSW Parliament website.[1] The Attorney-General's Second Reading Speech can be accessed via the same site.[2] It is expected that the Bill will be passed before the end of the year and will commence operation approximately 12 months later.

The Bill is basically a consolidation of powers which are currently found in various different Acts. Some police powers (for example, those in the *Bail Act* and *Crimes (Forensic Procedures) Act*) will remain as they are and will not be transferred to the new Bill.

In general, the Bill does not increase police powers, nor does it water them down. However, some safeguards have been introduced. An important one to note is clause 201(1) which sets out the information and warnings a police officer must provide before, while or immediately after exercising certain powers. These powers are set out in clause 201(3):

(a) a power to search or arrest a person

(b) a power to search a vehicle, vessel or aircraft

(c) a power to enter premises (not being a public place)

(d) a power to search premises (not being a public place)

(e) a power to seize any property

[1] www.parliament.nsw.gov.au - go to "Bills", Current session Bills by title

[2] www.parliament.nsw.gov.au - go to "Hansard", Legislative Assembly, 17/9/02

(f) a power to stop or detain a person (other than a person under Part 16) or a vehicle, vessel or aircraft

(g) a power to request a person to disclose his or her identity or the identity of another person

(h) a power to establish a crime scene at premises (not being a public place)

(i) a power to give a direction to a person

(j) a power under section 26 to request a person to submit to a frisk search or to produce a dangerous implement or a metallic object

In the case of paragraphs (g), (i) and (j), police must comply with subs(1) before exercising the power.

Relevant parts of the Bill will be discussed further on in this paper.

4 Power to demand name and address

4.1 Existing powers

Police have the power to demand a person's name and name and address, and to require the person to produce identification, in a variety of situations, including:

(a) **Witness to indictable offence:** Police may demand a person's name and address "if the officer believes on reasonable grounds that the person may be able to assist in the investigation of an alleged indictable offence because the person was at or near the place where the alleged offence occurred, whether before, when, or soon after it occurred." (*Crimes Act* 1900, s563)

(b) **Children with alcohol in public place:** A police officer who reasonably suspects that a person is under 18 and is carrying or consuming alcohol in public (without adult supervision or a reasonable excuse) may require the person to state his or her full name and address. Police may also require the person to produce (either on the spot or at a police station within a reasonable time) documentary evidence to show the person is aged 18 or over. (*Summary Offences Act* 1988, ss 11(5A))

(c) **Road transport:** Police may demand the name and address of a person who: is driving a vehicle or accompanying a learner driver, (*Road Transport (General) Act* 1999 ss 19, 20), unreasonably refuses a breath test (*Road Transport (Safety and Traffic Management) Act* 1999 s13), or is suspected of involvement in a traffic offence (*Road Transport (General) Act* 1999 s21).

(d) **Vehicle used in connection with an indictable offence:** "A police officer who reasonably suspects that a vehicle was or may have been used in or in connection with the commission of an indictable offence" may request the driver, passenger or owner to disclose the identity of the driver or any passenger (*Police Powers(Vehicles) Act* 1998 s6(1)). Police may also request proof of identity (s9A).

(e) **Railways:** "A person reasonably suspected by a police officer or authorised officer" to be committing or to have committed an offence against the *Rail Safety* Act or Regulations may be required to state his or her name and address. (*Rail Safety Act* 1993 s80). Note that an "authorised officer" must be appointed as such by the Director-General of the Department of Transport (see Schedule 2 to the Act).

(f) **Fine defaulters:** The Sheriff or other person executing a fine default order or warrant may demand the name and address, and evidence of identity, of a person reasonably suspected of being the fine defaulter (*Fines Act* 1996, s104).

4.2 Offences and safeguards

The provisions described above also create offences of failure to provide name and address (or providing a false name and address):

(a) **Witness to indictable offence:** Under s563 of the *Crimes Act* 1900, failure to provide name and address, or providing a false name and/or address, is an offence with a maximum penalty of 2 penalty units (subs(3)). However, before a person can be guilty of such an offence, a police officer must: provide evidence that he or she is a police officer (unless in uniform), provide name and place of duty, inform the person of the reason for the request, and warn that failure to comply may be an offence (subs(2)).

(b) **Children with alcohol in public place:** Under s11 of the *Summary Offences Act* 1988, the maximum penalty for failing to provide name and address, or providing a false name or address, is $20.

(c) **Road transport:** Under the road transport legislation, failure to provide name and address, or providing false details, is an offence carrying a maximum penalty of 20 penalty units (*Road Transport (General) Act* 1999 ss 19(2) and 20(2), *Road Transport (Safety and Traffic Management) Act* 1999 s13, *Road Transport (General) Act* 1999 s21(1)).

(d) **Vehicle used in connection with an indictable offence:** Failure by the driver, passenger or owner to provide the details requested (or such details as are known), or providing false or misleading details, is an offence with a maximum penalty of 50 penalty units, 12 months' imprisonment or both (*Police Powers(Vehicles) Act* 1998 ss7, 7A, 8, 9). However, before a person can be guilty of such an offence, a police officer must: provide evidence that he or she is a police officer (unless in uniform), provide name and place of duty, inform the person of the reason for the request, and warn that failure to comply may be an offence (s6(2)).

(e) **Railways:** Under s80(2) of the *Rail Safety Act* 1993, failure to provide name and address, or providing false details, is an offence with a maximum penalty of 5 penalty units. However, the officer must identify themselves as a police officer or authorised officer, and warn the person that failure to comply may be an offence (s80(3)).

(f) **Fine defaulters:** Under s104 of the *Fines Act* 1996, failure to provide name and address is an offence with a maximum penalty of 10 penalty units (s104(3)).

However, police must warn the person that not giving their name and address is an offence (s104(2)).

4.3 Changes to powers under *Law Enforcement (Powers and Responsibilities) Bill*

Part 3 of the *Law Enforcement (Powers and Responsibilities) Bill* 2002 deals with powers to require identity to be disclosed.

Div 1 (clauses 11-13) restate the provisions of the *Crimes Act* 1900, in respect of witnesses to indictable offences.

Div 2 (clauses 14-18) restate the powers in the *Police Powers (Vehicles) Act* 1998 to demand the identity of the owner, driver and any passengers of a vehicle which police suspect has been used in connection with an indictable offence.

Note the general requirements in cl.201 for police to identify themselves, give a warning, etc.

It is expected that the other powers to demand identity in the *Rail Safety Act*, *Summary Offences Act*, *Fines Act* and the Road Transport legislation will remain unchanged and will not be transferred to the new Bill.

5 Stop and search

5.1 Stolen or unlawfully obtained goods

"A member of the police force may stop, search and detain:

(a) any person whom he or she reasonably suspects of having or conveying any thing stolen or otherwise unlawfully obtained or any thing used or intended to be used in the commission of an indictable offence; or

(b) any vehicle in which he or she reasonably suspects there is any thing stolen or otherwise unlawfully obtained or any thing used or intended to be used in the commission of an indictable offence."

(*Crimes Act* 1900, s357E)

5.2 Prohibited drugs

"A member of the police force may stop, search and detain:

(a) any person in whose possession or under whose control the member reasonably suspects there is, in contravention of this Act, any prohibited plant or prohibited drug; or

(b) any vehicle in which the member reasonably suspects there is any prohibited plant or prohibited drug which is, in contravention of this Act, in the possession or under the control of any person."

(*Drug Misuse and Trafficking Act* 1985, s37(4)).

5.3 Drug detection dogs

The police practice of using sniffer dogs in public places to detect prohibited drugs has attracted much controversy in recent times.

In late 2001, the case of *Darby* was heard by Deputy Chief Magistrate Jerram in the Downing Centre Local Court. Mr Darby had been charged with possession of cannabis, which had been detected by a police sniffer dog.

The prosecution argued that the use of a dog does not amount to a search and that no reasonable suspicion was required. The defendant argued that the use of the dog constituted a search, which was conducted without reasonable suspicion and was therefore unlawful. The defendant further argued that the evidence obtained from the search should be excluded pursuant to s138 of the *Evidence Act* 1995

The magistrate accepted the defence submissions, holding that the manner in which the dog was used (touching the defendant, sniffing his pockets, etc) amounted to a search. She held that the search was unlawful as it was conducted without reasonable grounds. After weighing up competing factors referred to in s138(3) of the *Evidence Act* (including breach of the International Covenant on Civil and Political Rights) the magistrate excluded the evidence under s138.[3]

The prosecution appealed to the Supreme Court and, at the time of writing, judgment is still reserved.

To attempt to overcome the magistrate's decision in *Darby*, the *Police Powers (Drug Detection Dogs) Act* 2001 was enacted, and commenced on 22 February 2002.

Section 7 allows the police to use dogs for "general drug detection" in designated public places including pubs, nightclubs, dance parties, sporting events, railway stations, or public passenger vehicles travelling on any route prescribed by the regulations. In addition, police may apply for warrants to use dogs in other public areas such as streets.

Section 5 defines "general drug detection" as:

> "the detection of prohibited drugs or plants in the possession or control of a person, except during a search of a person that is carried out after a police officer reasonably suspects that the person is committing a drug offence."

Section 9 provides that police shall take all reasonable precautions to prevent the dog touching the person.

It is arguable that the use of a dog in a manner similar to that described in *Darby* (bringing the dog close to, or touching, the person) may still amount to a search and may not be authorised by the Act.

Importantly, the Act does not give police the power to detain any person while using drug detection dogs (s10). This means that obstructing the door of premises, and not allowing anyone to leave while a sniffer dog does the rounds, would be unlawful.

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[3] *Police v Glen Paul Darby*, Downing Centre Local Court, Deputy Chief Magistrate Jerram, transcripts dated 31 October, 16 November and 21 November 2001

5.4 Internally concealed drugs

The *Police Powers (Internally Concealed Drugs) Act* 2001 was proclaimed to commence on 1 July 2002.

The Act does not apply to children under 10 (s6).

Section 8 provides:

> "A police officer may detain a person for the purpose of requesting the person to consent to, or for the purpose of making an application for an order for, an internal search of the person, if the police officer:
>
> (a) is satisfied that the person in a suspect; and
>
> (b) has reasonable grounds to believe that the internal search is likely to produce evidence confirming that the person has committed or is committing an offence under the *Drug Misuse and Trafficking Act* 1985 involving the supply of a prohibited drug; and
>
> (c) is satisfied that the detention is justified in all the circumstances."

A "suspect" is defined in s3 as "a person whom a police officer suspects on reasonable grounds has swallowed or is internally concealing a prohibited drug that the suspect has in his or her possession for the purpose of committing an offence under the *Drug Misuse and Trafficking Act* 1985 involving the supply of a prohibited drug".

A person aged under 18 is presumed to be incapable of consenting to an internal search, and an order must be made by an "eligible judicial officer" (s7(b)). An "eligible judicial officer" is a judge or magistrate who has been nominated by the Attorney-General pursuant to s4.

An "internal search" is defined in s3 as "any search of a person's body involving an ultrasound, MRI, x-ray, Cat scan or other form of medical imaging, but does not include a search of a person involving an intrusion into the person's body cavities."

Section 7 provides that an internal search is to be carried out by a medical practitioner or "appropriately qualified person" (which is defined in s3 as a person with "suitable qualifications to carry out the internal search, or qualified under the regulations to carry out the internal search").

If an internal search does not reveal the presence of anything that, in the opinion of the person carrying out the search, could be drugs, the suspect must be released immediately (s11(1)). If something is detected, the suspect may be detained for up to 48 hours in a hospital, surgery, etc (s11(2)). This period may be extended by a detention warrant under s38.

5.5 Knives and dangerous implements

Section 28A of the *Summary Offences Act* 1988 was added by the *Crimes Legislation Amendment (Police and Public Safety) Act* 1998. It reads in part:

> "If a police officer suspects on reasonable grounds that a person who is in a public place or school has a dangerous implement in his or her custody, the police officer may request the person to submit to a search ...." (subs(1))

A "dangerous implement" is defined in s28 as a knife, firearm, prohibited weapon or offensive implement.

As to reasonable suspicion:

> "[T]he fact that a person is present in a location with a high incidence of violent crime may be taken into account in determining whether there are reasonable grounds to suspect that the person has a dangerous implement in his or her custody." (subs(4)).

It is important to remember that the location is not the *only* consideration to be taken into account.

5.6 Other weapons and implements

(a) **Firearms/explosives:** If police suspect on reasonable grounds that a dangerous article (a firearm, prohibited weapon, speargun, etc) is in the possession of a person in a public place, and is being or has been used in the commission of certain offences (eg indictable offences, firearms offences), police may detain and search the person. The power also extends to vehicles and vessels (*Crimes Act* 1900 s357).

If a police officer is authorised to search a person for the purpose of detecting a relevant firearms or explosives offence, the officer is entitled to use a dog for that purpose (*Firearms Act* 1996, s72C). Police may also use dogs for "general firearms detection" (s72D). These provisions were recently added by the *Firearms Amendment (Public Safety) Act* 2002.

(b) **Thing used in commission of indictable offence:** Police may stop, search and detain a person whom they reasonably suspect is carrying anything used, or about to be used, in the commission of an indictable offence (*Crimes Act* 1900, s357E).

5.7 Search after arrest

Crimes Act 1900 s353A(1) allows police to search a person "in lawful custody upon a charge of committing any crime or offence".

The subsection provides that a female must be searched by a female police officer (or a civilian if no police officer is available).

If "there are reasonable grounds for believing that an examination of his or her person will afford evidence as to the commission of the crime or offence" such an examination must be performed by a medical practitioner (subs(2)).[4]

The expression "in lawful custody upon a charge ..." is ambiguous, and it is arguable that this search power only applies after a charge has been laid.[5] However, in practice, police routinely exercise this power after arrest before any charges are laid.

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[4] It appears that there is no authority to conduct a body cavity search under New South Wales law; however, such a power exists in the Commonwealth *Customs Act*.

[5] See discussion in Schurr, *Criminal Procedure*, para [9.540].

5.8 Safeguards

In general, there are no legislative safeguards or restrictions on the manner in which a person may be searched. There are a few exceptions, such as the procedures for internal searches, and the restrictions in s353A of the *Crimes Act* 1900, summarised above. The most important exception, as far as young people are concerned, is s28A of the *Summary Offences Act* 1988.

(a) *Summary Offences Act*

When searching for dangerous implements under s28A of the *Summary Offences Act* 1988, there are some limits on the type of search that may be performed. These are set out in subs(1) and are:

(a) "a search of the person conducted by passing an electronic metal detection device over or in close proximity to the person's outer garments and to any bag or other personal effect that the person has with him or her and is within view;

(b) a search of the person conducted by quickly running the hands over the person's outer garments;

(c) the examination of any bag or other personal effect that the person has with him or her and is within view, so long as it can be examined with reasonable convenience to the person;

(d) in the case of a person who is in a school and is a student at the school, a search of the person's locker at the school and an examination of any bag or other personal effect that is inside the locker."

Subs(3) provides that police: must not request the person to remove any item of clothing apart from hat, gloves, coat or jacket; should, if reasonably possible, carry out a bag search by allowing the person to hold the bag open and move its contents; must, in the case of a search of a student in a school, if reasonably possible, allow the student to nominate an adult who is on the school premises to be present during the search.

It is important to note that the section gives the police power to *request* a person to submit to a search. If the person does not consent, there is no power to conduct the search by force.

Police may request the person to submit to a search only if the police officer: provides evidence that he or she is a police officer (unless in uniform); provides his or her name and place of duty, informs the person of the reason for the search, and warns the person that failure to comply may be an offence (subs(4)).

If police have followed correct procedures, failure to comply with a search, without reasonable excuse, is an offence with a maximum penalty of 5 penalty units (subs(7)).

(b) Police Service Handbook and Code of Practice for CRIME

The Police Service Handbook[6] and the Code of Practice for CRIME (Custody, Rights, Investigation. Management, Evidence)[7] provide guidance for police on correct

[6] This can be obtained for the NSW Police in loose-leaf form and is updated regularly. It replaces the old Commissioner's Instructions.

procedures to follow in various situations. Although they do not have the status of legislation, failure to adhere to them is arguably improper and could be grounds for the exclusion of evidence.

Every criminal defence lawyer should be armed with a copy of the Police Code of Practice for CRIME.

In the section on "Stop Search and Detain"[8], police are reminded not to search without "reasonable suspicion", and are provided with guidelines on the factors to consider. Police are told to ensure that the person understands why they have been detained; to avoid forcible searches where possible; and to make reasonable efforts to reduce embarrassment or loss of dignity.

Importantly, "A strip search cannot be conducted unless clearly justified, taking into account the object you are searching for". Police are referred to Annexure A for guidance on strip searches.

In the section on "Custody", under the sub-heading "Searching",[9] there are guidelines for custody managers on authorising and conducting searches. A search will not always be necessary or appropriate. A search must be carried out by an officer of the same sex (except in exceptional circumstances). A strip search may be made only in accordance with Annexure A. Police must record reasons for conducting a strip search or a search by someone of the opposite sex.

Annexure A includes the following:

> "Do not strip search as a matter of policy. You must be able to justify your decision, with reasonable grounds, in every case."

It goes on to say that a strip search is only justified when police reasonably suspect that critical evidence relating to the offence might be lost, or that the suspect has on them something that could present a real danger to themselves or others or help them escape. Strip searches should not be done unless "the seriousness and urgency of the circumstances require and justify such an intrusive search of the body."

In relation to children:

> "If you are going to strip search a child and a parent or guardian is immediately available you might consider allowing that person to be present during the strip search. Remember, if your search is being conducted as an investigative procedure under Part 10A of the *Crimes Act* the child cannot waive their right to have a support person present."

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[7] This can be downloaded from the NSW Police website at www.police.nsw.gov.au - go to "Campaigns" and then "Acts and Legislations" (sic)

[8] Police Code of Practice for CRIME, p76

[9] Police Code of Practice for CRIME, p30

5.9 Changes to powers under *Law Enforcement (Powers and Responsibilities) Bill*

Part 4 of the new Bill contains provisions relating to searches without warrant. As well as replicating most of the current powers, the Bill introduces some important safeguards.

Division 1 contains powers to stop, search and detain. It replicates the existing provisions from the *Crimes Act* and *Drug Misuse and Trafficking Act*.

Division 2 provides for searches of people under arrest or in custody. Clause 23 is broader than the existing s353A. It allows police to search a person who is under arrest for an offence, and also someone who is under arrest for another purpose (eg breach of bail, to take a further breath test, etc).

Division 3 replicates *Summary Offences Act* s28A, in relation to knives and other dangerous implements.

Division 4 contains safeguards relating to personal searches. Three types of body searches are specified - ordinary, frisk and strip searches (these are defined in Part 4, Clauses 30(1), 30(2) and 31 of the Bill). Police must conduct the least invasive search practicable in the circumstances and a person is not to be questioned while being searched (cl.32). Strip searches are to be used as an extreme measure in serious and urgent circumstances (cl.31). Strip searches are to be conducted with regard for privacy, and are a visual examination, not an examination by touch (cl.33). Children under 10 cannot be strip searched (cl.34).

Part 11 basically replicates current drug detection powers, including internal searches, sniffer dogs and drug premises.

Other search powers are contained elsewhere in the Bill (eg Part 4 Div 5: vehicle entry, search and roadblock powers; Part 4 Div 6: vessel and aircraft entry and search powers; Part 5: search with warrant; Part 6: search and seizure powers relating to domestic violence offences; Part 13: use of dogs to detect firearms and explosives).

Note that cl. 201 of the Bill requires police to identify themselves, give a reason, a warning, etc, when conducting any type of search.

6 "Move-on" directions

Section 28F of the *Summary Offences Act* 1988 was introduced by the *Crimes Legislation Amendment (Police and Public Safety) Act* 1998, and amended by the *Police Powers (Drug Premises) Act* 2001 and the *Summary Offences Amendment (Public Safety) Act* 2002.

The legislation is extremely broad and has a significant impact on the civil liberties of young people (and other marginalised groups such as drug users and indigenous people) in public places. It is used by police quite broadly and often arbitrarily. In some areas police use the power systematically to get rid of particular types of people (eg drug users in Cabramatta, young Kooris in country towns).

6.1 Police may give directions to person in public place

Subs(1) sets out the range of situations in which police may give directions:

> "(1) A police officer may give a direction to a person in a public place if the police officer has reasonable grounds to believe that the person's behaviour or presence in the place (referred to in this section as "relevant conduct"):
>
> (a) is obstructing another person or persons or traffic, or
>
> (b) constitutes harassment or intimidation of another person or persons, or
>
> (c) is causing or likely to cause fear to another person or persons, so long as the relevant conduct would be such as to cause fear to a person of reasonable firmness, or
>
> (d) is for the purpose of unlawfully supplying, or intending to unlawfully supply, or soliciting another person or persons to unlawfully supply, any prohibited drug, or
>
> (e) is for the purpose of obtaining, procuring or purchasing any prohibited drug that it would be unlawful for the person to possess."
>
> "(2) The other person or persons referred to in subsection (1) need not be in the public place but must be near that place at the time the relevant conduct is being engaged in."
>
> "(8) For the purposes of subsection (1) (c), no person of reasonable firmness need actually be, or be likely to be, present at the scene."

Section 28G provides that the section does not authorise a police officer to give directions in relation to an industrial dispute, an apparently genuine demonstration or protest, a procession, or an organised assembly.

There is a real problem with the "presence" element of the legislation, and the hypothetical "person of reasonable firmness". Police often move children on because their mere presence is thought to be intimidating, even if no-one has actually complained about their conduct.

6.2 Direction must be reasonable

The section does not specify what sort of direction the police may give, only that:

> "(3) Such a direction must be reasonable in the circumstances for the purpose of:
>
> (a) reducing or eliminating the obstruction, harassment, intimidation or fear, or
>
> (b) stopping the supply, or soliciting to supply, of the prohibited drug, or
>
> (c) stopping the obtaining, procuring or purchasing of the prohibited drug."

Police in some areas give out standard directions to certain classes of people (eg sex workers, suspected illicit drug users), telling them to leave an entire area (eg a 2km radius of a certain railway station) for a specified period (eg 24 hours or 7 days).

At least one magistrate[10] has expressed the view that the practice of issuing the same standard direction to everyone, regardless of their circumstances, is arbitrary and is therefore unreasonable - unless the police can demonstrate reasonable grounds for issuing the particular direction to the particular person in the particular circumstances.

In my view this type of direction is also unreasonable because it is contrary to the legislative intention of the section, which was not designed to provide police with long-term injunctive relief against certain types of conduct.

In the second reading speech to the *Crimes Amendment (Police and Public Safety) Act* 1998, the then Attorney-General, Mr Shaw, said "The key purpose of this provision is to enable police to disperse persons acting in a disruptive manner before a situation gets out of hand."[11]

6.3 Procedural requirements

Lawyers acting for young people alleged to have breached directions should carefully check that police have followed correct procedures (very often police fail to do so):

> "(4) A police officer may give a direction under subsection (1) only if before giving the direction the police officer:
>
> (a) provides evidence to the person that he or she is a police officer (unless the police officer is in uniform), and
>
> (b) provides his or her name and place of duty, and
>
> (c) informs the person of the reason for the direction, and
>
> (d) warns the person that failure to comply with the direction may be an offence."
>
> "(5) If a police officer has complied with subsection (4) in giving a direction to a person and the person fails to comply with the direction, the police officer may again give the direction and, in that case, must again warn the person that failure to comply with the direction may be an offence."

6.4 Directions to people in groups

The following subsections were inserted by the *Summary Offences Amendment (Public Safety) Act* 2002, operative 15 July 2002:

> "(7A) A police officer may give a direction under this section to persons comprising a group.

[10] See decision of Magistrate Brydon in *Police v Saysouthinh*, Liverpool Local Court, 24 May 2002.

[11] Hansard, Legislative Council , p4277, 5 May 1998

(7B) In the case of a direction that is given to a group of persons under subsection (1), the police officer is not required to repeat the direction, or to repeat the information and warning referred to in subsection (4), to each person in the group.

(7C) In the case of a direction that is given to a group of persons in accordance with subsection (5), the police officer is not required to repeat the direction, or to repeat the warning referred to in that subsection, to each person in the group.

(7D) However, just because the police officer is not required to repeat any such direction, information or warning does not in itself give rise to any presumption that each person in the group has received the direction, information or warning."

6.5 Offence of failure to comply with direction

A person can only be guilty of an offence under the section if police have followed correct procedure, and given the direction twice with a warning each time:

"(6) A person must not, without reasonable excuse (proof of which lies on the person), fail to comply with a direction given in accordance with subsection (5).

Maximum penalty: 2 penalty units."

"(8A) For the purposes of this section, a reference to failing to comply with a direction includes a reference to refusing to comply with the direction."

It is important to note that:

"(7) A person is not guilty of an offence under subsection (6) unless it is established that the person persisted, after the direction concerned was made, to engage in the relevant conduct."

In some cases it can be difficult to pinpoint exactly what the "relevant conduct" is. Police often give directions based on a young person's mere presence being intimidating, obstructive, etc. In this case, it is arguable that the "relevant conduct" would be the young person's presence, so the young person would be persisting "to engage in the relevant conduct" merely by remaining at the scene.

6.6 Changes to powers under *Law Enforcement (Powers and Responsibilities) Bill*

Part 14 of the Bill (clauses 197-200) replicates the existing provisions. Note that the requirement for police to identify themselves, give warnings, etc, is now replicated in cl. 201 of the Bill, which provides some general safeguards.

7 Arrest

7.1 Police power to arrest

Crimes Act 1900 s352 gives a police officer the power to arrest a person:

- caught in the act of, or immediately after, committing an offence (subs(1));

- reasonably suspected of having committed an offence (subs(2));
- "lying or loitering .... during the night", reasonably suspected of being about to commit a serious indictable offence (subs(2)); or
- pursuant to an arrest warrant (subss(3), (4)).

Section 352AA empowers a police officer to arrest a person reasonably suspected to be a prisoner unlawfully at large. Section 352A allows police to arrest a person for certain offences committed interstate.

Police also have power to arrest someone reasonably suspected of failed (or being about to fail) to comply with their bail undertaking (*Bail Act* 1978 s50).

The citizen's arrest power to arrest someone caught in the act of committing an offence is contained in s352(1). Note that security guards and others involved in quasi-police activities do not have power to arrest on mere suspicion.

7.2 Appropriateness of arrest

The fact that police are *lawfully empowered* to arrest someone does not necessarily mean that arrest is *appropriate.*

The Police Code of Practice for CRIME contains guidelines on when and how to arrest, including a reminder that arrest is an "extreme action" and should not be used "for a minor offence when it is clear a summons or court attendance notice will ensure attendance at court."[12]

Most practitioners will be aware of the case of *DPP v Lance Carr*, which was decided by Smart AJ in the Supreme Court on 25 January 2002, on appeal from Magistrate Heilpern in the Local Court.[13]

Lance Carr, an Aboriginal man, was charged with offensive language, resist arrest, assault police and intimidate police. Police saw rocks being thrown onto a roadway. Carr, who was near the scene, was asked who threw the rocks. He would not tell the police and used the word "fucking" a number of times. He then attempted to walk away. The police attempted to arrest him for offensive language. A struggle ensued and Carr was charged with the "trifecta" plus intimidate police.

The magistrate at first instance decided that an arrest for offensive language, while not unlawful, was improper. In this case - where the police knew the defendant's name and address, and had no fear of him absconding - a Field Court Attendance Notice or a summons would have sufficed. The fact that the police were apparently not motivated by malice, and were not conscious that their action was contrary to police guidelines, did not prevent the arrest from being improper.

The magistrate further held that any prosecution evidence obtained thereafter (including any evidence concerning the allegations of resist, assault and intimidate police) was evidence obtained in consequence of the impropriety, and was inadmissible pursuant to s138 of the *Evidence Act* 1995.

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[12] Police Code of Practice for CRIME, p9

[13] For a summary of this case, see Mark Dennis, *Is this the Death of the Trifecta?*, Law Society Journal, April 2002

Smart J in the Supreme Court upheld the magistrate's decision in all but one respect (he ruled that the magistrate had denied the prosecution procedural fairness by taking into account certain matters, such as statistics, without giving the prosecution an opportunity to make submissions on these). His Honour emphasised that arrest should be a last resort:

> "This Court ... has been emphasising for many years that it is inappropriate for powers of arrest to be used for minor offences where the defendant's name and address are known, there is no risk of him departing and there is no reason to believe that a summons will not be effective. Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear. The consequences of the employment of the power of arrest unnecessarily and inappropriately and instead of issuing a summons are often anger on the part of the person arrested and an escalation of the situation leading to the person resisting arrest and assaulting police. The pattern in this case is all too familiar. It is time that the statements of this Court were heeded."

7.3 Alternatives to arrest for children

Section 8 of the *Children (Criminal Proceedings) Act* 1987 requires police to proceed by way of summons or CAN instead of arrest and charge. There are some exceptions (eg serious children's indictable offences, violence, fears that the child may not comply with a summons or CAN), but in most cases police should have no need to arrest the child.

The introduction of the *Young Offenders Act* 1997 has complicated matters somewhat. Under ss13 and 14, children are entitled to a warning for summary offences which do not involve violence. Where a warning is not appropriate, the police must consider a caution (or, where this is inappropriate, a conference) before commencing criminal proceedings (s9(2)).

Apart from police warnings, which are generally given on the spot and do not necessitate an arrest or admission, diversionary procedures under the *Young Offenders Act* require the child to admit the offence in the presence of a responsible adult. There is nothing in the Act that requires police to arrest a child for the purpose of obtaining admissions; however, it appears to be common practice for police to do so. In fact, many police appear to think it necessary to arrest the child in order for the child to be accorded their Part 10A rights (to communicate with a lawyer, have a support person present, etc). This is problematic and is presumably not what was intended when the *Young Offenders Act* was introduced.

Another alternative to arrest is the use of infringement notices for certain offences. The Police Service Handbook[14] specifies that police should issue penalty notices only to people 14 and over.

The *Young Offenders Regulation* 1997 cl.21 provides that police must consider dealing with a child under the *Young Offenders Act* 1997 before issuing a penalty

[14] page B-16

notice for an offence under *Summary Offences Act* 1988 s11C (custody of knife) or 28F (fail to comply with direction).

7.4 Changes to powers under *Law Enforcement (Powers and Responsibilities) Bill*

Part 8 of the Bill replicates the existing powers of arrest, but also emphasises that arrest shall be a last resort.

Clause 99 preserves the police power to arrest in *Crimes Act* s352 although the power is slightly restricted by s99(3) which sets out 6 criteria, at least one of which *must* be met for a person to be arrested for an offence against the person. The criteria are purposes which the police must believe will be achieved by arresting the person and are:

(a) to ensure the appearance of the person before a court in respect of the offence,

(b) to prevent a repetition or continuation of the offence or the commission of another offence,

(c) to prevent the concealment, loss or destruction of evidence relating to the offence,

(d) to prevent harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence,

(e) to prevent the fabrication of evidence in respect of the offence,

(f) to preserve the safety or welfare of the person.

Clause 100 replicates the citizens' arrest power in *Crimes Act* s352(1).

Clause 101 details power to arrest with warrant.

Clauses 102 and 103 deals with powers to arrest persons who are unlawfully at large, and warrant for arrest of person unlawfully at large, respectively.

Clause 104 concerns powers to arrest for interstate offences.

Clause 105 provides that a police officer may discontinue an arrest at any time.

Clause 106 provides that persons helping in covert operations cease to be under arrest for the offence.

Clause 107 provides that the Part does not affect alternatives to arrest.

Clause 108 provides that nothing in this Part will affect the *Young Offenders Act* 1997.

Note that cl. 201 of the Bill requires police to identify themselves, give reasons, warnings, etc, when arresting a person.

8 Detention After Arrest

Part 10A of the *Crimes Act* 1900 was enacted to overcome the common law, [15] to allow police to detain a person after arrest for the purpose of investigating the alleged offence.

The case of *R v Dungay*[16] emphasised that Part 10A does not give police the power to arrest a person for the purposes of investigation. Before arresting a person, police must have a reasonable suspicion that the person has committed an offence.

Section 356D(2) of the *Crimes Act* 1900 states that police may detain a person for a reasonable period not exceeding four hours, which is subject to various "time out" periods and may be extended by a detention warrant (ss356G and 356F).

Children, like adults, are subject to the same four-hour maximum detention period. However, police may only detain a person for a *reasonable* period, and it could be argued that this period would be shorter in the case of a child.

A person under arrest has the right to communicate with a relative or friend, and a legal practitioner, and to have either of these people attend the police station (s356N).

Part 10A and the *Crimes (Detention After Arrest) Regulation* 1998 make special provision for "vulnerable persons", who include children, Aboriginal or Torres Strait Islanders, persons from non-English speaking backgrounds, or those with "impaired physical or intellectual functioning" (Reg 5).

Vulnerable persons have the right to have a support person present at the police station during any investigative procedure (Reg 20). A child cannot waive their right to have a support person present (Reg 23). The custody manager must help a "vulnerable person" exercise their rights (Reg 20).

If a child in is police custody, police must notify a parent or guardian (Reg 27). If the person in police custody is Aboriginal, police must contact the closest Aboriginal legal aid organisation (Reg 28).

It is often said that the right to legal advice is illusory if the police do not actually assist the suspect to obtain it. According to the Code of Practice for CRIME, "A poster advertising the right to obtain legal advice must be prominently displayed in the charging area of every police station" and, "When you have a child in custody, advise the child of the availability of the Legal Aid Hotline ...."[17]

Whether a person has been accorded their Part 10A rights may affect the admissibility of evidence, particularly admissions.[18]

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[15] *Williams v The Queen* (1986) 161 CLR 278

[16] [2001] NSWCCA 443, 1/10/01

[17] Police Code of Practice for CRIME, pp22, 23

[18] I understand that a judgment was recently delivered by Dowd J in the Supreme Court, to the effect that admissions made by a child are not admissible unless police have allowed the child to call the Legal Aid Hotline. A copy of this case is not yet available.

8.1 Changes to powers under *Law Enforcement (Powers and Responsibilities) Bill*

Part 9 of the Bill deals with detention and powers relating to detention. It substantially replicates the current Part 10A *Crimes Act* 1900. Sections 354-356B which state the objects of the part and who it relates to are replicated in Clauses 109 and 111-113. Sections 356C-356I of the Act, which deal with detention after arrest, time limits on detention and exceptions from and extensions of the time limit are replicated in Clauses 114-120 of the new Bill. Section 356W, which gives courts the power to count time spent in detention after arrest when sentencing, is restated by Clause 121. Sections 356M-356V, which set out safeguards relating to persons in custody for questioning, are reflected in Clauses 122-123 (Div 3) of the new Bill.

It should be Noted that Part 10A of the *Crimes Act* 1900 is currently being reviewed by the Attorney-General's Department[19] and it is possible that there may be some amendments to this Part before the new Bill is enacted.

9 Fingerprints and Photos

Fingerprints, palm prints and photographs may be taken for identification only (s353A (3)).

Police must obtain an order from the Children's Court to take fingerprints, palm prints or photographs of a person under 14 (s353AA).

If a penalty notice is issued, a police officer cannot take the palm prints of fingerprints of a person under 18 years of age (s353AC(2)).

The finger prints and palm prints of persons under 18 years of age cannot be taken by a police officer who serves a court attendance notice personally on a person who is not in lawful custody (s353AD(2)).

The court must order the destruction of a fingerprints, palm prints or photographs taken from a child if the offence is not proved and the child wishes them to be destroyed (s353AB).

Additionally, s38 of the *Children (Criminal Proceedings) Act 1987* provides that the court must order the destruction of fingerprints etc if the child is found not guilty or the charge not proved or is dismissed under s33(1)(a). The court may order destruction in other circumstances if appropriate, where the matter has been dealt with under s33(1)(b)-(g).

The position of children who are charged, but then dealt with under the *Young Offenders Act* 1997, is not clear.

[19] I am the Law Society representative on the working party convened by the Attorney-General's Department to assist with the evaluation of Part 10A. Anyone with comments or concerns is welcome to bring them to my attention.

9.1 Changes to powers under *Law Enforcement (Powers and Responsibilities) Bill*

Powers relating to this are located in Part 10. Clauses 136 and 137 deal with children and replicate the powers in the *Crimes Act* 1900.

10 Forensic Procedures

A detailed discussion of the *Crimes* (*Forensic Procedures) Act* 2000 is beyond the scope of this paper.

A forensic procedure may be carried out on a suspect, a "serious indictable offender" (someone serving a term of imprisonment prison sentence for an offence carrying a maximum penalty of 5 years or more), or a volunteer.

Children are deemed incapable of giving informed consent. A court order is required to carry out a forensic procedure on a child who is a suspect or a serious indictable offender (note that a child must be serving a term of imprisonment, not a control order, to fall within the definition of "serious indictable offender").

A court order is not needed in the case of a child "volunteer", as long as a parent consents on the child's behalf. There is a real problem with the definition of "volunteer" as it applies to children - a child "volunteer" is defined as a child whose parent has volunteered on their behalf. There is no requirement for the child to consent, although a procedure may not be carried out if the child physically resists or objects.

10.1 Changes to powers under *Law Enforcement (Powers and Responsibilities) Bill*

The *Crimes (Forensic Procedures) Act* is expected to remain as it is; the powers have not been transferred to the new Bill.

11 Questioning

A paper on police powers would be incomplete without some reference to police interviewing children. However, much has already been written elsewhere about police interviews and the admissibility of admissions made by children.

All children's lawyers would be familiar with 13 of the *Children (Criminal Proceedings) Act* 1987 and the relevant case law.

Sections 19 and 36 of the *Young Offenders Act* 1997 require admissions to be made in the presence of an adult (the categories of appropriate adults are set out in s10) in order for the child to be eligible for a caution or conference.

12 Other powers

The following powers, which do not generally relate to criminal proceedings, may also be exercised by police in relation to children.

12.1 *Children and Young Persons (Care and Protection) Act*

Section 43 of the *Children and Young Persons (Care and Protection) Act* 1998 enables an authorised DOCS officer or a police officer to:

(a) enter in, search and remove a child (aged under 16) or young person (aged 16 or 17) from any premises when satisfied on reasonable grounds that the child or young person is at immediate risk of serious harm and that the making of an AVO would amount to insufficient protection.

(b) remove a child (under 16) from any public place where it is suspected on reasonable grounds that the child is in need of care and protection and that they are not subject to the supervision or control of a responsible adult and that they are living in or habitually frequenting a public place; or

(c) remove a child or young person from any premises if it is suspected on reasonable grounds that the child is in need of care and protection and is or has recently been on any premises where prostitution or pornography takes place or if the child or young person has been participating in an act of child prostitution or pornography.

Police officers may also enter any adjacent place if it is suspected on reasonable grounds that the person is in the adjacent place. Entry, search and removal may be conducted without a warrant if acted in accordance with the provisions of s43.

12.2 *Children (Protection and Parental Responsibility) Act*

Part 3 of the *Children (Protection and Parental Responsibility) Act* 1997 allows police to "safely escort" a young person from a public place, if police reasonably believe the young person is:

- under 16 years of age;
- not supervised by a responsible adult; and
- in danger of being abused or injured; or
- about to commit an offence.

Police can then take he young person home or to the home of a relative or an "approved person" (ss18, 19, 22).

However, Part 3 only applies in certain areas declared "operational" by the Attorney-General after an application from the Local Government authority (s14). Currently, these areas include Orange, Ballina and Moree.

12.3 *Mental Health Act*

Under s24 of the *Mental Health Act* 1990, police officers may apprehend a person (of any age) and take them to a hospital, without a warrant, if the officer has "reasonable grounds" for believing:

- that the person is committing or has recently committed an offence and that it would be beneficial to the welfare of the person that s/he be dealt with according to the *Mental Health Act* rather than in accordance with law; or

- that the person has recently attempted suicide, or that it is probable that the person will attempt to kill, or attempt to cause serious bodily harm to, themselves.

Procedures may then be taken for involuntary admission to hospital.

12.4 *Intoxicated Persons Act*

The *Intoxicated Persons Act* 1979 applies to people (of any age) who are intoxicated (on alcohol or any other drug) and who are behaving in a disorderly manner or who need physical protection because of their intoxication.

The Act was amended as of 16 March 2001, to abolish "proclaimed places". Police are now to take an intoxicated person home or place them in the care of a responsible person (eg friend, relative, welfare worker, refuge). If necessary, they may detain the intoxicated person in a police station while finding a responsible person or, if no-one can be found, until they cease to be intoxicated (ss5(4) - 5(6)).

Reasonable restraint may be used to ensure that the intoxicated person does not injure anyone (including himself or herself) or damage property (s5(7)).

People detained under the *Intoxicated Persons Act* are not charged and their details are not entered in the COPS database or a charge book, nor are they fingerprinted. They should be kept separate from people detained for criminal offences, and juveniles must be kept separate from adults.

12.5 Changes to powers under *Law Enforcement (Powers and Responsibilities) Bill*

The powers relating to intoxicated persons are replicated in Part 16 of the new Bill. However, the other powers discussed in this section are expected to remain in existing legislation.

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