

The Shopfront

YOUTH LEGAL CENTRE

Police powers and your rights

1 Introduction

This fact sheet summarises the police powers that are most likely to affect young people (under and over 18) in New South Wales.

It does not cover the powers of the Australian Federal Police, powers of police in other states, or special powers relating to terrorism, etc.

Most police powers in NSW are set out in the *Law Enforcement (Powers and Responsibilities) Act 2002* ("LEPRA"). Some other Acts and Regulations which set out police powers are also mentioned in this fact sheet.

2 Powers to demand name & address

In most situations you do not have to tell the police your name and address or show them ID.

You have to tell the police your name and address in some situations, including:

- if police suspect on reasonable grounds that you may be able to **assist them to investigate an indictable offence** because you were at or near the scene of the offence (*LEPRA*, s.11(1)); or
- if police intend to give you a **direction to leave a place** (*LEPRA*, s.11(2)); or
- if police suspect on reasonable grounds that **an apprehended violence order has been made against you** (*LEPRA*, s.13A); or
- if you are **under 18** and police **suspect you** of **carrying or consuming alcohol** in public (*Summary Offences Act 1988*, s.11); or
- if you are **suspected of committing certain types of offences on public transport** (*Passenger Transport Act 2014*, s.162 or *Passenger Transport Act 1990*, s.55); or
- if police or a ranger suspect you have committed an **offence against the law of a specific area**, such as Darling Harbour and its surrounds (*Sydney Harbour Foreshore Regulation 2011*, cl.22), Centennial Park (*Centennial Park And Moore Park Trust Regulation 2014*, cl.43) and Sydney Olympic Park (*Sydney Olympic Park Authority Regulation 2012*, cl.29); or
- if police are trying to serve a **fine default warrant** (*Fines Act 1996*, s.104); or
- if police **have been authorised to use their emergency public disorder powers**, and you are on a **target road** or in a **target area**, and police suspect on reasonable grounds that you have been involved or are likely to be involved in large-scale public disorder (*LEPRA*, s.87L); (see **Part 13 – Emergency public disorder powers**); or
- in many other situations relating to **vehicles and traffic** (see **Part 7 - Powers relating to vehicles and traffic**).

In situations involving **vehicles and traffic**, you usually have to show the police your **licence** if you have one.

In most other situations, even if you have to tell the police your name and address, **you do not have to show ID**.

Sometimes it's a good idea to show ID, even if you don't have to. For example, if the police want to give you a fine or a court attendance notice, but they are not sure who you are, they might arrest you so they can fingerprint you to confirm your identity.

3 Questioning

3.1 The right to silence

The police may ask you questions at any time, but:

- in most situations, **you do not have to answer any police questions**;
- the police have **no power to stop or detain you just to ask questions**;
- in some situations you have to give your name and address (see **Part 2 - Powers to demand name and address**);
- If you have been involved in a traffic offence or accident, you may have to give them further details (see **Part 7 - Powers relating to vehicles and traffic**).

If you are suspected of a crime, it is usually not in your interest to answer police questions, as your answers could be used as evidence against you. Before deciding whether or not to answer police questions, it is always a good idea to get legal advice.

3.2 Special rules for people aged 18 and over

Even though you have a right to silence, if you are 18 or over, **refusing to answer police questions about your involvement in an alleged offence can be used to draw an 'unfavourable inference' against you** (*Evidence Act 1995 s.89A*). The court can't assume you are guilty just because you failed to answer questions – but if you decide to give evidence in court, and this is the first time you have told your side of the story, the court may assume that you are making it up.

If the police want to use this against you, there are a few conditions:

- You must be 18 or over when the police want to interview you;
- The police must give you a "special caution", telling you that you don't have to answer questions but that your failure to answer could be used against you in court;
- Your lawyer must be present when the police give the "special caution"; and
- You must be capable of understanding the "special caution".

3.3 Special protection for under-18s

If you are **under 18** there must be a **responsible adult** (eg parent, guardian, youth worker, solicitor) present when you talk to the police. Otherwise whatever you say to police will probably be **inadmissible** in court, which means it can't be used as evidence against you (*Children (Criminal Proceedings) Act 1987, s.13*).

Young people under 18 may be eligible for a **police caution or youth justice conference** under the *Young Offenders Act* if they admit to the offence in the presence of a responsible adult and consent to a caution or conference. It may be tempting to admit to an offence in the hope of avoiding court proceedings, but young people should be careful of making admissions without receiving legal advice first.

3.4 Getting legal advice

If possible, don't answer questions or sign statements until you get legal advice. Under-18s can get advice from the **Legal Aid Youth Hotline** on **1800 10 18 10**.

3.5 Further information

See our separate documents on *Police Questioning and the Right to Silence*, *Acting as a Support Person at the Police Station*, and *The Young Offenders Act*.

4 Searching

4.1 When can the police search you?

The police can stop and search you (including your car or possessions) if:

- they have a **search warrant**, which they must show you if you ask; or
- **you consent** (*LEPRA*, s.34A); or
- **you have just been arrested or are in police custody** (*LEPRA*, ss.27, 28A); or
- they **suspect on reasonable grounds** that you are carrying **stolen goods, prohibited drugs** or something **about to be used in a serious crime (eg weapon)** (*LEPRA*, ss.21, 36); or
- they **suspect on reasonable grounds** that you have (on you, or in your bag or school locker) a **knife or a “dangerous implement”**. In this situation police may require you to undergo a personal search, or a search of your bag or locker. They can't forcibly search you, but it is an offence to refuse a search for knives (*LEPRA*, ss.23-26); or
- your car belongs to a **“class of vehicle”** that police suspect on reasonable grounds **is, was or may have been used in connection with an indictable offence**, or circumstances exist that might give rise to a **serious risk to public safety** and stopping and searching the car would lessen the risk (*LEPRA*, s.36(2)); or
- they suspect on reasonable grounds that you have something intended to be used to **“lock on”** to something (eg bulldozers, fences, mining equipment) and that is likely to be used in a manner that will give rise to a **serious risk to any person's safety** (*LEPRA*, ss.45A, 45B); or
- police **have been authorised to use their emergency public disorder powers**, and you/your vehicle are on a **target road** or in a **target area**. The police don't need any warrant or reasonable suspicion. They are not allowed to strip search you (*LEPRA*, s.87J-K); (see **Part 13 – Emergency public disorder powers**).

4.2 Reasonable suspicion

In most cases, police can't search you unless they suspect on reasonable grounds that you have something illegal on you. “Reasonable suspicion” is very difficult to define, and it is often left to a court to decide. **A reasonable suspicion is less than a belief but more than just a possibility.** It will usually be based on a number of factors.

For example, the mere fact that you are in an area well-known for drug dealing will not usually be sufficient to raise a reasonable suspicion, but if police see you approaching people or handing something over to another person, they would probably have reasonable grounds to suspect that you were carrying drugs.

Simply objecting to being searched or demanding to know why you are being searched does not give police reasonable grounds for suspicion – insisting on your rights does not mean that you have something to hide.

4.3 Search by consent

Police may search you without any reasonable suspicion if you consent (agree) to being searched.

Be careful! Police often ask “would you mind emptying your pockets, mate?” or “have you got anything on you that you shouldn’t have?”. If you agree to show police what’s in your pocket or bag, it might be hard for you to argue that the search was unlawful. The police will probably say you consented to the search, and therefore they did not need any reasonable grounds to suspect you had anything illegal on you.

From 1 September 2016 onwards, if the police want your consent to carry out a search, they must first ask for your consent. Before searching you they must also provide evidence that they are a police officer (unless they are in uniform) and tell you their name and place of duty (*LEPRA*, s.34A).

However, they don’t have to tell you that the search is voluntary. If you are not sure whether the police are **asking** for your consent or **telling** you they are going to search you, ask politely whether the search is voluntary.

4.4 Sniffer dogs

Police have the power to use **sniffer dogs to find prohibited drugs or plants** but only in **authorised places** such as in or outside a pub or club, sporting event, concert, dance party or other entertainment, on certain public transport vehicles, platforms or stops, or in certain public places if they have a warrant (*LEPRA*, ss.147-149).

Police must **keep the dog under control** and take all reasonable precautions to ensure the dog does not touch you. They have **no power to detain you while the dog sniffs you** (*LEPRA*, s.150).

If a dog sits down next to you, indicating that it has detected the scent of a drug on you, this may give the police reasonable grounds to suspect that you are in possession of a prohibited drug, which gives them the power to search you.

However, sniffer dogs can be quite unreliable and there is a high rate of “false positives” – about two-thirds of people who are “indicated” by sniffer dogs turn out not to have drugs on them. The NSW Ombudsman has recommended that police should not search someone based only on a drug dog indication, unless there are other factors (eg you appear to be stoned, you have a record for drug offences, or you have admitted to using drugs).

4.5 Types of searches

In most situations, police may quickly run their hands over your outer clothing, require you to remove outer clothing (eg jacket, shoes, hat, gloves), examine anything in your possession, and/or run a metal detector over you (*LEPRA*, s.30).

If police suspect on reasonable grounds that you have something illegal (eg drugs) in your **mouth or hair**, they may require you to open your mouth or to move or shake your hair (*LEPRA*, s.21A).

Strip searches must not be performed except when the police officer suspects that it is necessary for the purpose of the search (*LEPRA*, s.31). If you are not at a police station, a strip search must not be performed unless the officer suspects it is necessary *and in serious and urgent circumstances* (*LEPRA*, s.31). When conducting a strip search, **police must not touch the person** and must ensure that the person’s privacy is respected.

A strip search cannot be performed on a child under 10. For a person between 10 and 18, a parent or guardian, or a non-police person acceptable to the young person being searched, should be present (*LEPRA*, ss.33, 34).

Apart from asking you to open your mouth, **police are not allowed to search your body cavities.**

4.6 Rules for conducting searches

When searching you, the police must **ask for your co-operation**, and they must search **as quickly as possible** in the **least invasive way possible**, ensuring reasonable **privacy**. They must not search you and question you at the same time. Where reasonably practicable in the circumstances, the search must be carried out by a **person of the same sex** (*LEPRA*, s.32).

See also **Part 15 – What the police must tell you.**

5 Entering private property

Police can enter your house and other private premises:

- **if you** (or someone living on, or in control of, the premises) **agree**; or
- if they have a **search warrant**, which they must show if you ask (*LEPRA*, Part 5); or
- **to prevent domestic violence** (*LEPRA*, ss. 81-87); or
- **to prevent a “breach of the peace”** (this usually involves a threat of violence or property damage) or to **prevent serious injury** (*LEPRA*, s.9); or
- **to arrest someone. They must have reasonable grounds to arrest the person, and reasonable grounds to believe the person is on the premises** (*LEPRA*, s.10). In this case they can only search an arrested person and their belongings, not the whole building.

6 Move-on powers

6.1 General move-on directions

Police may give a “**reasonable direction**” to a person in a **public place** if they have reasonable grounds to believe that the person's **presence or conduct**:

- is **obstructing** another person or persons or traffic; or
- constitutes **harassment** or **intimidation** of another person or persons ; or
- 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
- is for the purpose of **supplying or obtaining any prohibited drug** (*LEPRA*, s.197).

6.2 Move-on directions for being intoxicated and disorderly

Police may also give you a direction if:

- you are **intoxicated**, and
- you are “**disorderly**”, or police believe on reasonable grounds that you are likely to cause **injury** to anyone else or **damage to property** or a **risk to public safety** (*LEPRA*, s.198).

If you are intoxicated, you could also be detained at a police station or sobering-up centre (See **Part 14.5 - Intoxicated Persons**).

6.3 Demonstrations and protests

Until the end of October 2016, a move-on direction could not be given to anyone taking part in an industrial dispute, a genuine demonstration or protest, a procession or an organised assembly (*LEPRA*, s.200).

From 1 November 2016:

- police still can't give directions to people involved in industrial disputes (*LEPRA*, s.200(1)).
- they **can** give directions in relation to demonstrations, protests etc in some situations (*LEPRA*, s.200(2)), eg:
 - if the police officer believes it is necessary to deal with a serious risk to anyone's safety (*LEPRA*, s.200(3)), or
 - if the protest has not been formally authorised by the Commissioner of Police and the direction is to stop people obstructing traffic (*LEPRA*, s.200(4)).

6.4 What sort of direction can the police give you?

If police are using their **general direction-giving power**, the law does not say exactly what kind of direction the police can and can't give. The direction must simply be **reasonable in the circumstances** to reduce or eliminate the obstruction, harassment, intimidation or fear, or to stop the drug sale/purchase (*LEPRA*, s.197(2)).

Examples of reasonable directions include telling people to stop fighting or to move away from a doorway they are blocking. It is probably not reasonable to tell a person to leave the area and not to come back for 24 hours, 7 days, forever, etc.

If the police are giving you a direction because you are **intoxicated and disorderly**, the direction must be **reasonable in the circumstances** for the purpose of preventing injury or damage, reducing or eliminating the risk you may cause, or preventing you from continuing with disorderly behaviour in a public place. The police can direct you to leave a public place and not return for up to 6 hours (*LEPRA*, s.198(2) and (3)).

6.5 Disobeying a direction

It is an offence to disobey a reasonable direction, but only after the police have identified themselves, told you the reason for the direction and warned you that failure to comply is an offence (*LEPRA*, ss.199, 201, 203, 204B).

If you don't obey the direction, but you have stopped the problem behaviour, you are not guilty of an offence (*LEPRA*, s.199).

The **maximum penalty** for disobeying a direction is \$220. Police usually give people a \$220 infringement notice (on-the-spot fine). If you think you are not guilty (eg because the direction was not reasonable), or the fine is unreasonable, you can choose to take the matter to court.

6.6 Being intoxicated and disorderly in a public place after being given a direction

If you've been given a move-on direction because you are intoxicated and disorderly, then it is an offence for you to be **found in any public place while still intoxicated and disorderly, for up to 6 hours** after you were directed to move on. This applies even if the public place is not near the place where you were given the direction.

The maximum fine the police can issue is \$1,100, but the court can fine you up to \$1,650 (*Summary Offences Act 1988* s.9).

When giving you a move-on direction, **the police must warn you** that you will be committing an offence if you are found intoxicated and disorderly in a public place within 6 hours. This warning must be provided even if you are complying with the direction (*LEPRA*, s. 198(6)).

You are *not* guilty of an offence if the police did not give you a warning, or if you have a reasonable excuse (eg. you are still on your way home, or you are homeless and have nowhere to go).

6.7 Emergency powers to break up groups

Police also have the power to direct groups to break up, if police are authorised to use emergency public disorder powers (see **Part 13 – Emergency public disorder powers**).

7 Powers relating to vehicles and traffic

7.1 Power to stop vehicles

Police can stop your car or motorbike:

- for a **random breath test**. Police do not have to suspect that you have been drinking, and you don't have to be driving badly. They only need to show you were driving a car (or were sitting in the driver's seat and about to start the car) (*Road Transport Act 2013*, Schedule 3, s.3).
- for a **random "oral fluid" drug test**. The rules are similar to random breath tests (*Road Transport Act 2013*, Schedule 3, s.6).
- if they suspect on reasonable grounds that they have a right **to search or arrest someone in the vehicle** (*LEPRA*, s.36A).
- if your vehicle belongs to a **"class of vehicle"** that police suspect on reasonable grounds **is, was or may have been used in connection with an indictable offence** or circumstances exist that might give rise to a **serious risk to public safety** and stopping and searching the vehicle would lessen the risk (*LEPRA*, s.36(2)). Police can set up road blocks to help them do this (*LEPRA*, s.37).
- if police **have been authorised to use their emergency public disorder powers**, and you/your vehicle are on a **target road** or in a **target area** (*LEPRA*, s.87J-K); (see **Part 13 – Emergency public disorder powers**).

7.2 Power to search your vehicle

See **Part 4 – Searching**.

7.3 Power to demand identity and other information

- You have to give the police your name and address, and show your licence, on request if you are **driving a motor vehicle or accompanying a learner driver** (*Road Transport Act 2013* ss.175,176). It is an offence to refuse to disclose your identity or show your licence, or to give false or misleading details.
- If a driver is alleged to have committed a **traffic offence**, the owner or person responsible for the vehicle must provide the name and address of the driver. It is an offence not to provide these details (unless you really don't know) (*Road Transport Act 2013* s.177).
- **Drivers and passengers must provide their own (and each other's) name and address** if police suspect on reasonable grounds that a **vehicle is being (or was, or may have been) used in connection with an indictable offence**. It is an offence to refuse to provide information, or to provide false or misleading

information, but you don't have to show your licence or any other form of ID. A driver may also be required to disclose the identity of a person who was driving the vehicle a short time before (*LEPRA*, ss.14-18).

- If you are **involved in an accident**, you must give your name and contact details to the other driver. You must also tell police your name and address, the name and address of the vehicle's owner, the vehicle's registration number, any other information necessary to identify the vehicle, and a brief explanation of what happened (*Road Rules* 2014, r.287).

7.4 Power to give directions

- Police can **give directions** to drivers when they exercise their powers (*LEPRA*, ss.38, 39).
- A police officer may give **reasonable directions for the safe and efficient regulation of traffic** to any person driving a motor vehicle or riding a motorcycle on or near a road (*Road Transport Act* 2013, s.148A). They may also close roads (s.148B).

Refusing or failing to obey these directions is an offence.

7.5 Power to impound or confiscate vehicles

- If you have committed a drink driving offence, police can **take away your key or immobilise or detain your car** (*Road Transport Act* 2013 s.113).
- If police **have been authorised to use their emergency public disorder powers**, and your vehicle is on a **target road** or in a **target area**, police may **confiscate it for up to 7 days** (or longer if extended by a court order) if this will help prevent or control a public disorder (*LEPRA*, s.87M); (see **Part 13 – Emergency public disorder powers**).
- Police can **seize any unregistered registrable vehicle** being used on a road (*Road Transport Act* 2013 s.79).
- Police can **remove your vehicle** if your **vehicle, that has been involved in an accident** or has broken down, or **anything that has fallen from your vehicle**, causes a **danger or obstruction to traffic on a road** (*Road Transport Act* 2013 s.142).
- Police can also **seize your vehicle that has been abandoned on a road** where there is a **"tow away area"** or **"vehicles impounded"** sign (*Road Transport (General) Regulation* 2013 ss.39-42).
- If you have been caught **drag racing, doing wheelies, burnouts, donuts**, etc, police can impound your vehicle for up to **3 months for a first offence**, or **forever for a second or subsequent offence! You can apply to the Local Court to get it back.** (*Road Transport Act* 2013 ss.115, 116, 239, 241, 243, 245, 246, 248).

7.6 Power to search for stolen vehicles or parts

A police officer authorised by the Commissioner of Police may enter panel beating shops to **trace stolen motor vehicles or trailers or their parts**. It is an offence to wilfully delay or obstruct a police officer in the exercise of this power (*Road Transport Act* 2013, s.148D).

8 Arrest

8.1 When can the police arrest you?

The police may arrest you if:

- they **know** or **suspect on reasonable grounds** that you have **committed an offence** (*LEPRA*, s.99), or
- they believe on reasonable grounds that **you have breached, or are about to breach, a bail condition** (*Bail Act* 2013, s.77); or
- they believe it is necessary to stop a “**breach of the peace**”, or
- there is a **warrant** out for your arrest (eg for failing to appear at court, breaching your parole).

8.2 Arrest for an offence is a last resort

The law says that arrest should be a last resort.

If police wish to deal with you for an offence, it is not always necessary to arrest you. Where possible, police should use alternatives such as a court attendance notice, penalty notice, *Young Offenders Act* caution or youth justice conference.

However, a police officer may arrest you for an offence if he or she is “satisfied that arrest is reasonably necessary” for one or more of the following reasons:

- to stop you committing or repeating the offence or committing another offence;
- to stop you fleeing from the police or the location of the offence;
- to enable enquiries to be made to establish your identity if it cannot be readily established or if the police suspect on reasonable grounds that the identity information you provided is false;
- to ensure that you appear before a court;
- to obtain property in your possession that is connected with the offence;
- to preserve evidence or prevent the fabrication of evidence;
- to prevent the harassment of, or interference with, any witness;
- to protect the safety or welfare of any person; or
- because of the nature and seriousness of the offence.

(*LEPRA* s.99(1)(b)).

8.3 Arrest for breach of bail

If police believe on reasonable grounds that you have breached (or are about to breach) any condition of your bail, they may arrest you and bring you back to court (*Bail Act* 2013, s.77). It will then be up to the court to decide whether to revoke your bail.

However, the police have a few other options for dealing with breaches of bail, including:

- no action;
- a warning;
- a notice requiring you to attend court.

When deciding what action to take, the police must consider things like the seriousness of the breach, whether you have a reasonable excuse for the breach, and your personal circumstances (eg your age, health, any work or child care responsibilities).

8.4 Arrest for breach of peace

A “breach of the peace” refers to a wide range of situations that usually involve a threat of violence. Noise, argument or offensive language does not itself amount to a breach of the peace.

The police have a range of powers to deal with a breach of the peace. They may only use these powers if the breach of the peace is actually happening, or they believe it is imminent (about to happen any moment). Arresting or detaining someone is a last resort.

8.5 Citizen’s arrest

Everyone has the right to make a “citizen’s arrest” if they are satisfied that an offence has been committed.

People like security guards, store detectives and transit officers don’t have special arrest powers. They use the citizen’s arrest power.

Unlike a police officer, a citizen has no power to arrest a person on mere suspicion (*LEPRA* s.100). Usually this means they can’t arrest you unless they have actually witnessed the offence.

8.6 Use of force

Police and citizens may use **reasonable force** to arrest you (*LEPRA*, s.231). Unreasonable force is **assault** and you have a right to defend yourself, but it’s best to stay as calm as possible.

The more you struggle, the more force they may use and you could be charged with **resisting** or **assaulting** police in the execution of duty. If you swear or use threatening language, you might be charged with **offensive language** or even **intimidating police** in the execution of duty.

9 After arrest

9.1 At the police station

After arrest, you will probably be taken to a police station.

If you are under arrest for an offence, **police must allow you to speak with a relative or a friend, and a lawyer, and to ask them to come to be with you** (*LEPRA*, s.123).

9.2 Special rights for vulnerable persons

“**Vulnerable persons**” are defined as **children (under 18)**, Aboriginal or Torres Strait Islanders, persons from non-English speaking backgrounds, or those with impaired physical or intellectual functioning (*Law Enforcement (Powers and Responsibilities) Regulation* 2016, cl. 28).

The **custody manager at the police station must help a vulnerable person exercise their rights** (*Law Enforcement (Powers and Responsibilities) Regulation* 2016, cl.29).

Vulnerable persons have the **right to have a support person present at police station**, and a child cannot waive their right to a support person (*Law Enforcement (Powers and Responsibilities) Regulation* 2016, cl.30, 31, 33).

If a **child** is in police custody, police must notify the child’s parent or guardian (*Law Enforcement (Powers and Responsibilities) Regulation* 2016, cl. 36). If the person in police custody is **Aboriginal**, police must contact the closest Aboriginal legal aid organisation (*Law Enforcement (Powers and Responsibilities) Regulation* 2016, cl. 37).

9.3 Interviews

See **Part 3 - Questioning**.

In most situations, you do not have to answer police questions. If possible, you should get **legal advice** before deciding whether to answer questions.

Sometimes the police will ask you to go into an interview room so that they can record you (on audio and video) saying you do not wish to be interviewed. It is usually better to offer to sign the police officer's notebook instead. **The police can't make you go into an interview room**, or go on tape, or sign anything.

9.4 How long can the police detain you?

Police can **detain you for up to 6 hours** after arrest for investigation and questioning. **You still don't have to answer questions.**

These 6 hours may be extended by "**time out**" periods, eg waiting for people to arrive, for phone calls, or for talking with your lawyer. Most people are in fact held by police for much longer than 6 hours.

Also, police can apply for a court order to extend detention time for another 6 hours, to a total of 12 hours (*LEPRA*, ss.114-121).

At the end of this period, police must let you go (with or without charging you) or take you to court to apply for bail.

9.5 Further information

For more detail about your rights and how a support person can help you, see our separate document on **Acting as a Support Person at the Police Station**.

10 Fingerprints and photos

10.1 Generally – can the police take your photo?

In general, **anyone (including a police officer) is allowed to take your photo** without your consent, especially if you are in a public place. They would also be allowed to film you, as long as they are not audio-recording your private conversations without your consent.

However, **in most situations you do not have to co-operate** with a police officer who wishes to photograph or film you – for example, you can hide your face or walk away.

There are some situations when you have to co-operate with the police taking your photo. These are outlined below.

10.2 Taking of fingerprints and photos when arrested

Fingerprints and photographs of people under arrest may be taken for identification only (*LEPRA*, s.133). This includes ensuring that the police have a correct, up-to-date criminal record to hand up in court. In practice, this seems to be a routine police procedure carried out when a person is arrested.

10.3 Children under 14

If you are **under 14**, the police must have an order from the Children's Court to take fingerprints and photographs (*LEPRA*, s. 136).

10.4 Destruction of fingerprints and photos

You may later be able to have fingerprints and photographs destroyed if you are let off without being charged or if you are found not guilty (*LEPRA*, ss. 137, 137A).

If you are dealt with by the Children's Court and found not guilty, or if you are found guilty but your charge is dismissed without a conviction under (*Children (Criminal Proceedings) Act 1987*, s.33(1)(a)(i)), the court must order any fingerprints, palm prints and photos to be destroyed (*Children (Criminal Proceedings) Act 1987*, s.38).

11 Forensic procedures

11.1 Power to carry out forensic procedures

The *Crimes (Forensic Procedures) Act 2000* allows police to carry out **forensic procedures** (eg taking a strand of hair, a saliva swab from inside the mouth, a blood test, a photograph). These are usually used to help police solve crimes, most commonly by matching a suspect's DNA against DNA found at a crime scene or on a victim.

A forensic procedure may be carried out on a **suspect**, a **convicted indictable offender** or **untested former offender** (someone who has served a prison term for a serious offence but who wasn't tested while they were in prison) a **volunteer** (eg someone who is not a suspect but wants to take a DNA test to establish their innocence), or a **victim**.

DNA samples taken from suspects, convicted indictable offenders and untested former offenders will be used to create **DNA profiles** which will be stored on a **database** and may be matched up with DNA found at scenes of unsolved crimes (often called a "cold hit"). DNA profiles from volunteers and victims do not go on this database.

11.2 Suspects

To carry out a forensic procedure on a suspect aged **over 18** who is capable of understanding the procedure, police must have the person's **informed consent** or else must get an **order from either a court or a senior police officer** (depending on the type of offence alleged and the invasiveness of the forensic procedure).

Suspects who are children or incapable persons (eg people with intellectual disabilities who cannot understand the procedure or its implications) are deemed to be unable to give informed consent. To carry out a forensic procedure on a suspect who is a child or incapable person, there must be a **court order**.

(*Crimes (Forensic Procedures) Act 2000* Parts 3 to 6)

11.3 Convicted offenders, untested former offenders and untested registrable persons

If a person who has been **convicted of a serious offence** (defined as an offence with a maximum penalty of 5 years imprisonment or more) and is currently **servicing a sentence of imprisonment** for that offence, police may conduct a forensic procedure to take a DNA sample.

Taking a forensic procedure in this situation requires the informed consent of the offender, or otherwise an order from a senior police officer or a court (*Crimes (Forensic Procedures) Act 2000* Part 7).

Note that a **control order imposed by the Children's Court is not a sentence of imprisonment**.

DNA samples may also be taken from "**untested former offenders**", ie, people who have been in prison for a serious offence but who were not tested while they were in prison and whose DNA profile is not on the database. However, a person in this situation can't be asked to undergo a forensic procedure unless they have been charged with a fresh offence. Again, a forensic procedure can't be taken without the person's informed consent, an order of a senior police officer or a court order (*Crimes (Forensic Procedures) Act 2000* Part 7A).

There are also similar powers to carry out forensic procedures on “**untested registrable persons**”, that is, people who are on the child protection register as a result of offences they have committed against children (*Crimes (Forensic Procedures) Act 2000 Part 7B*).

11.4 Volunteers

Police can conduct forensic procedures on **volunteers**, eg. people who agree to provide their DNA to eliminate them from suspicion. If the volunteer is a child, the police also need a parent or guardian’s consent or a court order (*Crimes (Forensic Procedures) Act 2000 Part 8*).

Children under 10 cannot be volunteers, but there are special provisions for carrying out forensic procedures on children under 10 in limited circumstances (*Crimes (Forensic Procedures) Act 2000 Part 8A*).

11.5 Victims

Police can also take DNA samples from **victims** with their consent. If the victim is a child under 10, police will instead need a parent or guardian’s consent. If the victim is a child aged between 10 and 14, they will need both the child and a parent’s consent.

Victims are not covered by the *Crimes (Forensic Procedures) Act* but are covered by a “Victims Protocol”.

12 Photographing and filming police

12.1 Can you photograph or film police?

As set out in **Part 10.1** of this fact sheet, people are generally allowed to photograph and film other people, at least in public places.

Just as police are allowed to photograph or film you, **you are also allowed to photograph or film the police in most situations**, as long as you are not unreasonably interfering with what they are doing. If you are filming the police performing a search or an arrest, for example, the police might ask you to step back a bit so as not to get in their way, but in general they cannot stop you from filming them.

Recording sound is usually OK as long as you are not recording a private conversation without consent.

12.2 Can police confiscate your phone, camera or other device?

The police can’t confiscate your phone (or camera or other device) just because they are unhappy about you filming them.

If they believe it is necessary to take your phone to stop a “**breach of the peace**” (eg, if they think you are about to call your friends and get them to come over and start a violent incident), that might be a reason for confiscating it.

If you are moving in so close that you are **hindering or obstructing** them, and you keep ignoring their requests to move back, you could be arrested for hindering or obstructing police and your phone or camera could be confiscated.

More recently, police officers have been confiscating phones and similar devices from bystanders who are filming incidents and who are not suspected of doing anything wrong. **Whether they have the power to seize phones or cameras from bystanders in this situation is uncertain.**

Police officers do have power to seize items that may provide **evidence of an offence**. If you are filming something that might amount to an assault on police, the police may say that your phone contains evidence and that they have the power to seize it. However, if the police want the evidence that is on your phone, they have other ways of getting it

from you (eg, they could ask you to give them a copy of the footage, or they could issue a subpoena for you to produce it at court). Confiscating your phone or camera is an extreme measure and it is not clear whether the law allows this.

13 Emergency public disorder powers

13.1 Introduction

After the “Cronulla riots” in December 2005, the NSW Parliament enacted emergency legislation giving police special powers to deal with “large-scale public disorder”.

These powers are in Part 6A of the *LEPRA*. The powers came into force on 15 December 2005 and were supposed to lapse on 15 December 2007, but have been extended indefinitely.

13.2 Authorisation

To use the emergency powers, the Commissioner of Police (or a Deputy or Assistant Commissioner) must issue an **authorisation** for a certain **target area**. The authorisation can only last for 48 hours unless it is extended by the Supreme Court (*LEPRA*, ss.87D-H).

A **target area** could consist of a few blocks, a whole suburb or maybe an even larger area. A **target road** means a road leading to a target area.

Police may use the special powers **without authorisation** if they suspect on reasonable grounds that the occupants of a vehicle are (or are about to be) involved in a large-scale public disorder, and they are satisfied that the situation is urgent enough to require the special powers to be used without authorisation (*LEPRA*, ss.87N).

13.3 Special powers

- Police may cordon off a target area or any part of it, or put up a road block on a target road (including any road in a target area). Police must not refuse permission for a person to leave the area unless it is reasonably necessary to do so to avoid a risk to public safety or to the person’s own safety (*LEPRA*, s.87I).
- Police may stop and search any vehicle (and anything in or on the vehicle) in a target area or on a target road, and detain the vehicle for as long as is reasonably necessary to conduct the search (*LEPRA*, s.87J). **No warrant or reasonable suspicion is required.**
- Police may stop and search any person (and anything in the person’s possession or control) in a target area or on a target road, and detain the person for as long as is reasonably necessary to conduct the search (*LEPRA*, s.87K). **No warrant or reasonable suspicion is required. Police are not allowed to do a strip search, and all the other rules relating to searches apply.**
- Police may request a person in a target area, or in or on a vehicle on a target road, to disclose their identity and to produce proof of identity (but only if the person’s identity is unknown to the police officer, and if the police officer reasonably suspects that the person has been involved or is likely to be involved in a public disorder). It is an offence not to disclose your identity, or to provide false details (*LEPRA*, s.87L), but only if the police have first identified themselves, told you the reason for the request, and warned you that failure to comply may be an offence (*LEPRA*, Part 15).
- Police may confiscate a vehicle, mobile phone or any other item if this will assist in preventing or controlling a public disorder. Police may keep these items for up to 7 days, but this can be extended by the Local Court for up to 14 days at a time. (*LEPRA*, s.87M).

- Police also have the power to direct a group in a target area to break up. Police must give information and warnings similar to those required for ordinary move-on directions. Failure to follow one of these directions, without a reasonable excuse, is an offence. The maximum penalty is 50 penalty units (\$5,500) (*LEPRA*, s.87MA).

13.4 Liquor restrictions

Police also have the power to close licensed premises, to stop the sale of alcohol, or to impose alcohol-free zones for up to 48 hours (*LEPRA*, ss.87B-C).

14 Other powers

14.1 Powers relating to Apprehended Violence Orders

Police have special powers if they need to serve an apprehended violence order (AVO) on you, or make and serve an AVO application (*Crimes (Domestic and Personal Violence) Act 2007*, ss. 89, 89A, 90).

The police may **direct** you to stay where you are or to go to some other place (including a police station).

If you don't obey their directions, they may **detain** you for as long as it takes to make the AVO application and/or serve the papers on you.

If the police detain you, they also have the power to **search** you (mainly to ensure you don't have anything on you that could be used to harm yourself or anyone else).

See also the document on ***Apprehended Violence Orders***.

14.2 Children and Young Persons (Care and Protection) Act

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

- enter in, search and remove a child (under 16) or young person (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 apprehended violence order would amount to insufficient protection.
- 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
- remove a child (under 16) or young person (16 or 17) 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 (ie next door) if they suspect on reasonable grounds that the person is there.

14.3 Children (Protection and Parental Responsibility) Act

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; and
- not supervised by a responsible adult; and

- in danger of being abused or injured, or about to break the law.

Police can then take the young person home, or to the home of a relative or an “approved person”.

This law, however, only applies in certain areas declared “operational” by the Attorney-General (after an application from the local council). The Act was only ever operational in a few parts of NSW, and currently it seems that there are no longer *any* operational areas.

14.4 Mental Health Act

Under section 22 of the *Mental Health Act 2007*, a police officer may **apprehend someone and take them to a hospital**, 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 they person will attempt to kill or seriously harm themselves.

14.5 Intoxicated persons

Police have the power to pick up people 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.

Police may take an intoxicated person home or place them in the care of a **responsible person** (eg friend, relative, welfare worker, refuge). If necessary, police may **detain the intoxicated person in a police station** while finding a responsible person. If no responsible person can be found, police may detain the intoxicated person until they cease to be intoxicated (*LEPRA*, s.206(4)).

Reasonable restraint may be used to ensure that the intoxicated person does not injure anyone (including himself or herself) or damage property (*LEPRA*, s.206(5)).

Intoxicated persons **are not charged** with an offence, nor are they fingerprinted. They should be **kept separate from people detained for criminal offences**, and juveniles must be kept separate from adults (*LEPRA*, s.207).

15 What the police must tell you

Part 15 of *LEPRA* (ss. 201-204B) sets out some information that the police must give you when they are using certain powers.

15.1 What powers it applies to

Part 15 applies to most powers under *LEPRA* including stop, search, arrest, entering private premises, issuing directions, and requiring a person to disclose their identity.

It also applies to powers under some other Acts and laws (for example, an arrest to stop a breach of the peace, or a requirement to provide your name and address under the *Passenger Transport Act*).

It does *not* apply to powers under some other Acts including the *Bail Act*, the *Road Transport Act*, the *Mental Health Act*, and the *Children and Young Persons (Care and Protection) Act*.

15.2 What the police must tell you

When exercising any of the powers covered by Part 15, a police officer must:

1. provide **evidence that they are a police officer** (unless they are in uniform);
2. provide their **name and place of duty**; and
3. tell you the **reason for the exercise of the power** (eg “I’m going to search you because I suspect that you have drugs on you”).

Also, in some situations:

4. if the power involves a **requirement or direction** which you have to comply with, and you do not comply (eg refusing to give your name and address in situations when you have to provide this information; or failing to move on when directed), **the police must warn you** that you are required by law to comply.

In some cases (eg giving you a move-on direction, or requiring you to provide your name and address) they must give you the information **before** they exercise the power.

In other situations, the police must provide this information **as soon as it is reasonably practicable to do so**. If it is not practical to give you the information while they are exercising the power (eg you are struggling and shouting while they are trying to arrest you), they must do it as soon as possible afterwards.

15.3 Failure to provide the required information

If the police do not give you the above information when exercising their powers, **this may make their conduct unlawful**. It may mean that you are not guilty of offences such as failing to comply with a direction or resisting police in the execution of their duty.

The only exception is a police officer’s **failure to tell you their name and place of duty**: this does not usually make their conduct unlawful, unless you have asked for this information and they fail to provide it.

16 Mistreatment by police

16.1 What the police can and can’t do

Remember that the police have the right to **search you** or move you on (with reasonable grounds), to **touch** you when arresting you, and to use **reasonable force**.

They **do not** have the right to use **excessive force**, to **intimidate** you, to **assault** you, or to **vilify** you because of your race, gender, sexuality, etc.

If a police officer mistreats you, try to get his or her **name** and/or **badge number**. Remember that, when police officers are exercising most types of powers, they have to give you their names.

16.2 Effect of police misconduct on your criminal charges

If you have been charged with any criminal offences as a result of your interaction with the police, misconduct might make it difficult for them to prove the charges against you.

For example, an illegal search might lead the court to exclude any evidence found in that search. Or if you are charged with an offence like “resisting police in the execution of their duty”, unlawful conduct means that the police are acting outside the execution of their duty and you will not be guilty of the offence.

16.3 Compensation

If you have been unlawfully arrested, detained or assaulted by police, you may be entitled to **financial compensation**. You should see a lawyer about this.

16.4 Complaints

If you feel you have a justified complaint against the police, you can contact the **Local Area Commander** of your local police station or the **Commissioner of Police**. You can also contact the **Police Customer Assistance Unit** on **1800 622 571** to make police inquiries, concerns, compliments and complaints.

For more serious types of misconduct (assault, corruption, etc) you may wish to complain to the **Law Enforcement Conduct Commission (LECC)**. The LECC is a new independent statutory body responsible for investigating complaints against the police. It has taken over police complaints from the Ombudsman from 1 July 2017.

The LECC has its own investigators to deal with complaints about serious misconduct. Some less serious complaints will be referred back to the police for investigation, but these will be monitored by LECC staff to make sure the police are investigating them properly.

The LECC website has information about what you can complain about, how to make a complaint, and other agencies that you may be able to complain to in different situations.

The LECC can be contacted at:

Street address: Level 3, 111 Elizabeth Street, Sydney NSW 2001
 Mailing address: GPO Box 3880 Sydney NSW 2001
 Ph: (02) 9321 6700, 1800 657 079 (toll free)
 Fax: (02) 9321 6799
 Website: www.lecc.nsw.gov.au
 Email: contactus@lecc.nsw.gov.au

It usually takes a long time to process a complaint and it often gets nowhere, but sometimes it does result in action being taken against police officers. In any case, it's good to have it on record that you've complained in case similar things happen again.

The Shopfront Youth Legal Centre Updated September 2017

The Shopfront Youth Legal Centre
 356 Victoria Street
 Darlinghurst NSW 2010
 Tel: 02 9322 4808
 Fax: 02 9331 3287
www.theshopfront.org
shopfront@theshopfront.org

The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills, in association with Mission Australia and The Salvation Army.

This document was last updated in September 2017 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.

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