Police powers to search and arrest: the *Law Enforcement (Powers & Responsibilities) Act*

Paper presented at Legal Aid Criminal Law Conference, August 2007 by Jane Sanders, Principal Solicitor, Shopfront Youth Legal Centre

Contents

Police powers to search and arrest: the *Law Enforcement (Powers & Responsibilities) Act*

Paper presented at Legal Aid Criminal Law Conference, August 2007 by Jane Sanders, Principal Solicitor, Shopfront Youth Legal Centre

1 Introduction

This paper will focus on the police powers most commonly encountered by Legal Aid lawyers, at least in the Local Courts: powers of search and arrest.

By now most of you will have some familiarity with the *Law Enforcement (Powers and Responsibilities) Act* 2002 (LEPRA or LEPAR, depending on which acronym you prefer), which commenced on 1 December 2005. For more detailed information on LEPRA, see the list of references at the end of this paper.

2 Personal search powers: LEPRA Part 4

The main personal search powers are in Part 4 (ss.20-45).

There are various other search powers scattered throughout LEPRA; these will be discussed in the next section of this paper.

The law on reasonable suspicion, and the safeguard provisions applying to personal searches, will be discussed below in section 5 of this paper: "Safeguards and limitations on search powers".

2.1 Types of personal search

LEPRA provides for three levels of personal searches, which are defined in s.3 as follows:

Frisk search:

> "a search of a person conducted by quickly running the hands over the person's outer clothing or by passing an electronic metal detection device over or in close proximity to the person's outer clothing, and
>
> an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person, including an examination conducted by passing an electronic metal detection device over or in close proximity to that thing."

Ordinary search:

> "a search of a person or of articles in the possession of a person that may include:
>
> requiring the person to remove only his or her overcoat, coat or jacket or similar article of clothing and any gloves, shoes, socks and hat; and
>
> an examination of those items."

Strip search:

> "a search of a person or of articles in the possession of a person that may include:
>
> requiring the person to remove all of his or her clothes; and
>
> an examination of the person's body (but not of the person's body cavities) and of those clothes".

2.2 Stop, search and detain

Section 21 (which re-enacts relevant parts of *Crimes Act* s.357(2)(a) and (3); s.357E(a), and *Drug Misuse and Trafficking Act* s.37(4)) empowers police to stop, search and detain a person (and anything in the person's possession or control), if the police officer suspects on reasonable grounds that the person has:

(a) anything stolen or otherwise unlawfully obtained;

(b) anything used or intended to be used in or in connection with the commission of a relevant offence (s.20 defines "relevant offence" to include indictable offences and certain weapons/firearms offences);

(c) in a public place, a dangerous article that is being or was used in connection with the commission of a relevant offence ("dangerous article" is defined in s.3); or

(d) a prohibited plant or prohibited drug.

Police may seize and detain relevant items found as a result of a search.

2.3 Searches for things concealed in mouth or hair

Section 21A was added by the *Police Powers Legislation Amendment Act 2006*, which commenced on 12 December 2006.

If a police officer suspects on reasonable grounds that a thing referred to in s.21(a) to (d) is concealed in the person's mouth or hair, the police officer may request the person to open his or her mouth or to shake or otherwise move his or her hair. Subs(2) makes it clear that this does not authorise a police officer to forcibly open a person's mouth.

Failure to comply with such a request is an offence (maximum penalty 5 penalty units).

2.4 Searches for knives and dangerous implements

Section 26 provides that police may request a person in a public place or school to submit to a *frisk* search if police suspect on reasonable grounds that the person has a dangerous implement in his or her custody.

In the case of school students, police may also request to search the student's locker (including any bag or other personal effect inside) and/or any bag or other personal effect that is on or with the student (subs(2)). Police must also (if reasonably possible to do so) allow the student to nominate an adult who is on the school premises to be present during the search (subs(4)).

Subs(3) provides that "the 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". *Note, however, that this is only one factor contributing to the formation of reasonable suspicion, and the common law on reasonable suspicion still applies.*

Subs(5) provides that police may request the person to produce anything detected during a search that police have reasonable grounds to suspect is a dangerous implement, or anything indicated by a metal detector to be of a metallic nature.

Subs(6), which provided for police to give a second request and a warning to a person who failed to comply with the initial request, was repealed on 12 December 2006. However, note s.27, which still requires police to comply with s.201. If this has been done, and the person initially refuses to submit to the search, the police may again request the person to submit to the search and must again warn the person that failure to submit to the search may be an offence.

Section 27 further provides that a person who, without reasonable excuse, fails to comply with a request to submit to a search in accordance with ss.26 and 201, or fails or refuses to produce anything detected in such search, is liable to a maximum penalty of 5 penalty units.

Section 28 empowers police to confiscate anything, in a public place or school, that they have reasonable grounds to suspect is a dangerous implement and unlawfully in a person's custody. The section was amended on 12 December 2006 to provide that police may confiscate the item whether or not they have requested the person to produce it under s.26(5). This means that a knife or implement may be forcibly seized by the police.

Note that section 26 empowers police to *request* a person to undergo a search. Although it does allow police to forcibly seize any dangerous item found as a result of such a search, it does not allow police to forcibly search the person. Any search conducted over the person's objection would be an assault. However, failure to comply with a request to be searched is an offence (and may conceivably result in arrest, whereupon police have broad powers to search under ss.23 and 24).

2.5 Searches of persons on arrest or while in custody

Section 23 is similar to, but broader than, the former *Crimes Act* s.353A (which empowered police to search someone only if they are "in lawful custody upon a charge").

Subs(1) provides that police may search a person who is arrested *for an offence or under a warrant* if police suspect on reasonable grounds that "it is prudent to do so in order to ascertain whether the person is carrying anything that:

(a) would present a danger to a person; or

(b) could be used to assist a person to escape from police custody; or

(c) is a thing with respect to which an offence has been committed; or

(d) is a thing that will provide evidence of the commission of an offence; or

(e) was used, or is intended to be used, in or in connection with the commission of an offence."

Subs(2) applies to people who are arrested *for the purpose of taking a person into lawful custody* (eg a re-arrested escapee, a person arrested for breach of bail). In this situation police are only empowered to search for things that would present a danger to a person or that could be used to assist a person to escape from lawful custody.

Section 24 empowers a police officer to search a person who is in lawful custody (whether at a police station or at any other place) and seize and detain anything found on that search. "Lawful custody" is defined in s.3 as police custody.

Police may, of course, seize and detain relevant items found during such a search.

In view of the broad power conferred by s.24, s.23 would at first glance appear redundant. However, given that the power in s.23 may be exercised at the time of arrest, it could possibly apply to people who are in the process of being arrested but who are not yet in police custody, including people who have been arrested by someone other than a police officer.

3 Other personal search powers

3.1 Emergency public disorder powers

Part 6A (ss.87A-P) was introduced by the *Law Enforcement Legislation Amendment (Public Safety) Act* 2005, which commenced on 15 December 2005, following the Cronulla riots.

Powers in Part 6A may be authorised by the Commissioner of Police (or a Deputy or Assistant Commissioner) if:

(a) (s)he has reasonable grounds for believing that there is a large-scale public disorder occurring or a threat of such disorder occurring in the near future; and

(b) is satisfied that the exercise of those powers is reasonably necessary to prevent or control the public disorder (s.87D).

"Public disorder" is defined in s.87A; "large-scale" is not.

There are limits on the purpose, form and duration of the authorisation (ss.87E-G).

The special powers may be exercised by any police officer in a public place for the purposes for which an authorisation is given (s.87H). In limited circumstances, the powers may be used without authorisation (s.87N)

There special powers are listed in ss.87I-MA and include cordoning off areas, establishing road blocks, requesting disclosure of identity, issuing directions, searching people and vehicles, and seizing and detaining things including vehicles and mobile phones.

In relation to search, police have the power, *without any warrant or reasonable suspicion,* to:

- Stop and search any vehicle (and anything in or on the vehicle) in a "target area" or on a "target road", and to detain the vehicle for as long as is reasonably necessary to conduct a search (s.87J).
- Stop and search any person (and anything in the person's possession or control) in a target area or on a target road, and to detain the person for as long as is reasonably necessary to conduct a search (s.87K). Police are not authorised to conduct strip searches under this provision. The safeguards in Division 4 of Part 4 apply, as does s.201.

3.2 Special police powers during APEC meeting

During the APEC meeting from 30 August to 12 September 2007, police will have special powers conferred by the *APEC Meeting (Police Powers) Act* 2007 (to be discussed in more detail in a separate paper).

This will include the power to stop and search people and vehicles inside, or seeking to enter, an APEC security area (which includes a large part of the Sydney CBD). As with the emergency public disorder powers, no warrant or reasonable suspicion will be required.

3.3 Drug detection dogs

Powers to use dogs for drug detection are contained in Part 11 Div 2. While the use of a drug detection dog is not a "search", it is of course the precursor to many searches; a positive indication by a dog gives the police a reasonable suspicion justifying a personal search.

Police are empowered to use drug detection dogs:

- if they are otherwise authorised to search a person or to enter premises for the purpose of detecting a drug offence (s.146)
- without warrant, at a range of places including licensed premises, public entertainment events, and on certain public transport (s.148)
- with a warrant, in other public places (s.149)

Police must:

- keep the dog under control; and
- take all reasonable precautions to prevent the dog touching a person (s.150).

Nothing in Part 11 Division 2 confers on police a power to enter any premises that police are not otherwise authorised to enter, or detain a person who police are not otherwise authorised to detain.

There is no power to stop or detain a person for the purpose of allowing a drug detection dog to sniff them. However, police could presumably give a person a direction under Part 14 (eg to stand still) if they believed on reasonable grounds that the person was in a public place for the purpose of obtaining or supplying drugs.

Police may often assert that walking or running away from a drug detection dog gives them reasonable grounds for suspicion. I would suggest that this is not necessarily the case: as Smart J said in *Streat v Bauer; Streat v Blanco* **(**unreported, NSWSC, 16 March 1998) robust insistence on one's rights does not constitute reasonable grounds for suspicion.

3.4 Searches for internally-concealed drugs

Part 11 Div 3 provides for the use of medical imaging to detect drugs that may have been swallowed or otherwise concealed within a person's body. This Division's predecessor, the *Police Powers (Internally Concealed Drugs) Act 2001,* was reviewed by the NSW Ombudsman, who effectively recommended that it be repealed. At the time of the Ombudsman's review, the Act had only been used once. Apparently it has not been implemented more widely due to cost, industrial issues, and doubts about the capacity of medical imaging to detect drugs.

3.5 Examination of persons in custody

Section 138 empowers a medical practitioner (acting at the request of a police officer of the rank of Sergeant or above) to examine a person in lawful custody for the purpose of obtaining evidence, but only *if the person in custody has been charged with an offence* and there are reasonable grounds for believing that an examination of the person may provide evidence as to the commission of that offence.

4 Power to search vehicles, vessels and premises

4.1 Vehicle and vessel search powers

Vehicle stop, entry, search and roadblock powers are in Part 4 Division 5.

Section 36 is a general power to stop, search and detain vehicles (formerly found in *Crimes Act* s.357 and 357E, *Police Powers (Vehicles) Act* s.10, and *Drug Misuse and Trafficking Act* s.37). This power may be exercised on similar grounds to the power under s.21 to stop and search individuals. Police may also stop and search a vehicle, or a specified class of vehicles, if they suspect on reasonable grounds that:

- the vehicle (or a vehicle of the specified class) is being (or was or may have been) used in connection with the commission of a relevant offence (ie an indictable offence or certain firearms/weapons offences); or
- circumstances exist in a public place or school that are likely to give rise to a serious risk to public safety and that the exercise of the powers may lessen the risk.
- Section 36A (which was added by *Law Enforcement Legislation Amendment (Public Safety) Act* 2005, commencing 15 December 2005) empowers police to stop a vehicle if they suspect on reasonable grounds that the driver or a passenger is a person in respect of whom the police officer has grounds to exercise a power of arrest or detention, or a search power, under LEPRA or any other law.

Section 37 provides for the use of vehicle roadblock powers on any specified class of vehicles, if police suspect on reasonable grounds that the vehicle was (or is being or may have been) used in connection with an indictable offence and the exercise of powers may provide evidence, or that circumstances exist that are likely to give rise to a serious risk to public safety and the exercise of the powers may lessen the risk. Certain procedures must be followed for the authorisation of roadblocks (see ss.37, 40 and 41).

A police officer who exercises a stop, search or detention power in relation to a vehicle, or who is authorised to exercise the roadblock power, has the power to give reasonable directions to any person in/on the vehicle concerned, or on or in the vicinity of a road, road-related area, public place or school (s.8). Failure to comply, without reasonable excuse, is an offence (max penalty 50 penalty units and/or 12 months imprisonment)(s.39). Police must first have followed the procedures in s.201.

4.2 Vessel and aircraft entry and search powers

Part 4 Division 6 contains the powers to stop, search and detain vessels and aircraft. These are similar to their predecessors in the *Crimes Act* (ss.357, 357A, 357C, 357D and 357E) and *Drug Misuse and Trafficking Act* (s.37).

4.3 Search warrants

Search warrants are covered by Part 5 (ss.46-80). Police may also obtain search warrants under the drug premises provisions in Part 11 Div 1. A crime scene warrant under Part 7 may also authorise police to search premises.

This paper will not examine the search warrant provisions in detail. However, it is worth noting that there are some related personal search powers:

- In the course of executing a search warrant, police may search a person on the premises whom they reasonably suspect of having a thing mentioned in the warrant (s.50).
- A police officer executing a search warrant under the drug premises provisions may do various things including search any person on the premises (s.142). It is unclear whether this power is subject to the usual requirements of reasonable suspicion; from the context it would appear that reasonable suspicion is not required.

4.4 Powers of entry and search without warrant

Section 9 confers a power to enter premises to prevent a breach of the peace or to prevent significant physical injury to a person. Section 10 provides that police may enter and stay for a reasonable time on premises to arrest a person or detain a person under an Act. Neither of these sections confer an stand alone power to search the premises or any person.

Part 6 (ss.81-87) provides police with powers of entry in domestic violence situations. Police are empowered to search for firearms and weapons but not to conduct a general search of premises or persons.

5 Safeguards and limitations on search powers

5.1 Reasonable suspicion

The search powers most commonly employed by police against our clients (ie. personal searches under ss.21, 21A and 26) require a reasonable suspicion on the part of the police.

The most helpful formulation of "reasonable suspicion" appears in Smart AJ's judgment in *R v Rondo* [2001] NSWCCA 540, at para 53:

> "(a) A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs […]. A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.
>
> (b) Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.
>
> (c) What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest at the time he did so. Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole of the surrounding circumstances."

Streat v Bauer; Streat v Blanco, unreported, NSWSC, 16 March 1998 (another decision of Smart J) is also instructive. In this case, the defendants were charged with hindering police after their car was pulled over and they were searched by police. As grounds for a reasonable suspicion, police relied on the time and place, the fact that there were three men in the car, and a suggestion received from police radio that it was a "suspect" vehicle that may be involved in offences. Once the car had been stopped the police relied, as a further basis for their suspicion, on the fact that the defendants strongly objected to being searched.

The magistrate dismissed the charges, holding that none of these factors provided reasonable grounds for suspicion and therefore the police were not acting lawfully in the execution of their duty. This was upheld on appeal to the Supreme Court. Smart J said:

> "No adverse inference can be drawn against either accused because they were irate at being wrongly stopped and refused to be compliant. They were entitled to insist on their rights and on the law being strictly followed and to advise each other and their friend of their rights and their exercise. I do not accept the suggestion that the other three matters earlier mentioned [ie the factors which led the police to stop the car] coupled with their robust insistence on their rights constituted reasonable grounds for suspicion on the part of the appellant. Bold and irritating conduct must be distinguished from conduct which might be characterised as suspicious."

5.2 Searches by consent

If a person voluntarily consents to a search, police need not demonstrate reasonable suspicion.

I am sure all of us have acted for clients who have been asked "Would you mind emptying your pockets mate?" or "Have you got anything on you that you shouldn't have?", whereupon they "voluntarily" produce a couple of pills, a pocket knife, or whatever. Unfortunately there is still no adequate legislative safeguard to protect people in this situation, and to ensure the consent is a true one.

In *DPP v Leonard* (2001) 53 NSWLR 227, it was held that a person may validly consent to a search even if not aware of the right to refuse, although it was held that such lack of awareness may be relevant to the issue of consent in come cases.

It will be a question of fact in each case as to whether the defendant actually consented to the search, or submitted to a search because of a perception that (s)he was under compulsion. Children's Court magistrates in particular will often find that a young person's "consent" to a search was not a valid one, because of the power imbalance between the police and the young

person, and the young person's perception that the police were making a demand and not a request.

It is uncertain whether searches by consent are subject to the safeguards in s.201. On one view they are, because s.201 applies to search powers exercised at common law, not just under LEPRA. The counter-argument is that s.201 does not apply, because the voluntary handing over of property on request is not a "search" at all.

5.3 Safeguards applying to personal searches

Division 4 of Part 3 enacts some rules and safeguards which previously did not appear in NSW legislation (although some similar provisions exist in Commonwealth legislation).

Division 4 applies to all personal searches carried out under LEPRA *by a police officer or other person* (other than internal searches under Division 3 of Part 11), except as otherwise provided by the Act or Regulations (s.29).

- A police officer or other person who is authorised to search a person may carry out a *frisk search* or an *ordinary search* (s.30).
- A *strip search* may be conducted if "the police officer or other person suspects on reasonable grounds that it is necessary to conduct a strip search of the person for the purposes of the search and that the seriousness and urgency of the circumstances require the strip search to be carried out" (s.31). A strip search must not be conducted on a person who is under the age of 10 (s.34).

Section 32 sets out procedures which police must, *as far as is reasonably practicable in the circumstances,* comply with during *any personal search*:

- Police must inform the person whether they will be required to remove clothing during the search, and why this is necessary (subs(2)).
- Police must ask for the person's co-operation (subs(3)).
- The search must be conducted in a way that provides reasonable privacy for the person searched, and as quickly as is reasonably practicable (subs(4)).
- Police must conduct the least invasive kind of search practicable in the circumstances (subs(5)).
- Police must not search the person's genital area (or the breasts of a female or a female-identifying trans-gender person) unless the police suspect on reasonable grounds that it is necessary to do for the purpose of the search (subs(6)).
- The search must be conducted by a police officer or other person of the same sex as the person searched (or by a person of the same sex under the direction of the police officer or other person concerned) (subs(7)). *(This would appear to include even a metal detector search or a search of a person's school locker.)*
- A search must not be carried out while the person is being questioned. Any questioning that has commenced must be suspended while the search is carried out (subs(8)).
- A person must be allowed to dress as soon as a search is finished (subs(9)).
- If clothing is seized because of the search, the police officer must ensure the person searched is left with or given reasonably appropriate clothing (subs(10)).

Section 33 sets out additional rules for the conduct of *strip searches*. The following rules must be complied with *as far as is reasonably practicable in the circumstances*.

- A strip search must be conducted in a private area, must not be conducted in the presence or view of a person of the opposite sex and must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the search (apart from a support person as provided by the section) (subs(1)).
- A parent, guardian or personal representative of the person being searched may be present if the person being searched has no objection (subs(2)).
- A strip search of a child (at least 10 but under 18) or a person with impaired intellectual functioning must be conducted in the presence of a parent or guardian (or, if that is not acceptable to the person being searched, in the presence of another person who is capable of representing the interests of the person and who, as far as practicable in the circumstances, is acceptable to the person) (subs(3)). Subs (9) defines "impaired intellectual functioning". It is a broad definition that would include intellectual disability, learning disabilities, acquired brain injury and many types of mental illness.

The following rules in relation to strip searches are *mandatory*:

- A strip search must not involve a search of a person's body cavities or an examination of the body by touch (subs(4)).
- Police must not remove more clothes than they believe on reasonable grounds to be reasonably necessary for the purposes of the search (subs(5)).
- There is a similar restriction on visual inspection (subs(6)).

A strip search may be conducted in the presence of a medical practitioner of the opposite sex if the person being searched has no objection to that person being present (subs(7)).

Subs(8) makes it clear that s.33 applies in addition to other requirements of the Act relating to searches.

5.4 General safeguards applicable to all powers: section 201

Section 201 re-enacts some existing requirements (previously found in *Crimes Act* s.563, *Police Powers (Vehicles) Act* s.6, *Summary Offences Act* s.28F, *Christie v Leachinsky*, etc) but goes further in that it applies these to the exercise of other police powers.

Application

Section 201 applies to the exercise of the following powers (whether or not conferred by LEPAR, but *not* under Acts listed in Schedule 1):

(a) search or arrest;

(b) search of vehicle, vessel or aircraft;

(c) entry of premises (not being a public place);

(d) search of premises (not being a public place);

(e) seizure of property;

(f) stop or detention of a person (other than under Part 16) or a vehicle, vessel or aircraft;

(g) requesting disclosure of identity;

(h) establishing a crime scene;

(i) giving a direction;

(j) requesting a person to open his or her mouth or shake or move his or her hair (under s.21A)

(k) requesting a person to submit to a frisk search or produce a dangerous implement or metallic object (under s.26).

Subs(6) (which was inserted on 12 December 2006) makes it clear that the section does not apply to powers exercised under Acts listed in Schedule 1. This would include, for example, an arrest for breach of bail under the *Bail Act*, the detention of a person under the *Mental Health Act*, a direction given under the Road Transport legislation, or the conducting of a forensic procedure under the *Crimes (Forensic Procedures) Act*.

Information and warnings that must be provided

Until the amendments which commenced on 12 December 2006, police were required to provide the person with:

- evidence that the police officer is a police officer (unless he or she is in uniform);
- the police officer's name and place of duty;
- the reason for the exercise of the power;
- a warning that failure or refusal to comply may be an offence.

Police coined the acronym "WIPE" to help officers remember these four requirements:

- W = warn person that failure to comply may be an offence
- I = inform person of reason for exercise of power
- P = provide name and place of duty
- E = evidence that officer is a police officer

As of 12 December 2006, police are not always required to provide a warning about failure to comply. This amendment was apparently enacted in response to concerns expressed by the police that giving a warning to a person who is already complying is inappropriate and may provoke some hostility.

Subs(2C) now requires that, if exercising a power that involves the making of a request or direction that a person is required to comply with by law, the police officer must, as soon as is reasonably practicable after making the request or direction, provide the person with a warning that the person is required by law to comply with the request or direction. However, this warning need not be given if the person has already complied or is in the process of complying.

If the person does not comply with the request or direction after being given that warning, and the police officer believes that the failure to comply is an offence, police must then warn the person that failure to comply is an offence.

Time at which information and warnings must be provided

When exercising a power to *request identity*, *give a direction to an individual*, or *request a person to open their mouth or shake or move their hair*, police must give this information *before* exercising the power. [Note that, until 12 December 2006 this requirement also applied to a power under s.26 to request a person submit to a frisk search or to produce a dangerous implement or metallic object.]

In relation to all other powers listed *(including giving a direction to a group)*, police must provide the above information *before or at the time of* exercising the power, if it is practicable to do so. Otherwise they must provide it *as soon as reasonably practicable afterwards*.

In relation to warnings that are required to be given, this only applies to powers involving requests or directions (which would include many search powers). The warning(s) must be given as soon as practicable after issuing the request or direction, but not if the person has complied or is complying.

Powers exercised by two or more officers

If two or more officers are exercising a power to which s.201 applies, only one officer is required to comply with the section. However, if a person asks another officer present for their name or place of duty, the officer must give the information requested.

Police exercising more than one power at the same time

If a police officer is exercising more than one power on a single occasion, in relation to the same person, police must only provide name and place of duty, and evidence that they are a police officer, once. However, they must provide the reason for the exercise of each power.

5.5 Limit on detention period for search

Section 204 provides that a police officer who detains a vehicle, vessel or aircraft for a search must not detain it for longer than is reasonably necessary for that purpose.

Curiously, there is no express provision requiring that the detention of a *person* for a search be for no longer than reasonably necessary. This might, however be implied from s.32(4), which requires a search to be conducted as quickly as reasonably practicable.

6 Arrest powers: LEPRA Part 8

Part 8 of LEPRA (ss.99-108) re-enacts the former provisions of the *Crimes Act* in relation to arrest, with some minor changes and some important additions derived from the common law.

6.1 Power of police to arrest without warrant

Section 99(1) and (2) substantially re-enact the arrest powers formerly in *Crimes Act* s.352(1) and (2).

A police officer may arrest a person:

- in the act of, or immediately after, committing an offence under any Act or statutory instrument;
- who has committed a serious indictable offence for which they have not been tried; or
- on reasonable suspicion of having committed an offence under any Act or statutory instrument;

It is pleasing to note that police no longer have the power to arrest someone who is loitering at night and who police suspect may be about to commit an offence.

This is subject to subs(3), which provides that police *must not* arrest a person for an offence *unless* they suspect on reasonable grounds that arrest is necessary to achieve one or more defined purposes. This provision will be discussed in more detail in section 7 of this paper: "Safeguards and limitations on the power to arrest".

Subs(4) provides that a police officer who arrests a person must, as soon as reasonably practicable, take the person and any property found on them before an authorised officer (defined in s.3 to include Registrars and the like) to be dealt with according to law.

Although the objectives of subs(4) are sound (to ensure that police do not detain people for improper purposes or for longer than necessary) it does not reflect current reality and does not sit particularly well with Part 9.

6.2 Citizen's arrest

Section 100 replicates the citizen's arrest power formerly in *Crimes Act* s.352(1). A person other than a police officer may arrest a person:

(a) in the act of committing an offence under any Act or statutory instrument;

(b) who has just committed any such offence; or

(c) who has committed a serious indictable offence for which he or she has not been tried.

A citizen does not have the power to arrest on suspicion (a fact sometimes overlooked by security guards, loss prevention officers and the like). The person making the arrest must have witnessed the offence or be otherwise satisfied that the offence has been committed (*Brown v G J Coles* (1985) 59 ALR 455).

It appears that a citizen also has a common law power to arrest for breach of the peace (see *Albert v Lavin* [1982] AC 546 at 565). While not expressly preserved by LEPRA s.4, this power has not been expressly repealed either.

Although the safeguards in s.201 do not apply to a citizen's arrest, the common law requirements in *Christie v Leachinsky* [1947] 1 All ER 567 do apply.

As with police officers, citizens are empowered to use reasonable force to effect an arrest or to prevent the person's escape (s.231).

As with s.99(4), subs(2) requires the person making the arrest to take the arrestee before an authorised officer to be dealt with according to law. Again, this does not reflect current practice, whereby people under citizen's arrest are usually handed over to the police.

6.3 Warrants, persons unlawfully at large, etc

Sections 101-104 cover the arrest of persons on warrants, unlawfully at large, or for interstate offences.

6.4 Discontinuing arrest and use of alternatives

A police officer may discontinue an arrest at any time(s.105). Without limiting the scope of the section, subs(2) provides that an arrest may be discontinued if the arrested person is no longer a suspect or the reason for the arrest no longer exists, or if it is more appropriate to deal with the matter in some other manner (eg warning, caution, penalty notice, court attendance notice, *Young Offenders Act*).

Nothing in Part 8 broadens the power of police to commence proceedings otherwise than by arresting the person, or to issue a warning or caution or penalty notice (s.107).

Nothing in Part 8 requires a police officer to arrest a person under 18 if it is more appropriate to deal with the matter under the *Young Offenders Act* (s.108).

7 Safeguards and limitations on the power to arrest

Unfortunately for our clients, police don't always understand the limits on their powers of arrest - so it' s vital that you do.

7.1 Reasonable suspicion

Any analysis of whether an arrest was lawful should of course start with this fundamental question: did the arresting police officer know, or suspect on reasonable grounds, that the defendant had committed an offence?

The principles of reasonable suspicion, discussed above in the context of searches, apply equally here.

7.2 Arrest as a last resort: s.99(3)

Reasonable suspicion alone is *not* enough to found a lawful arrest. Police are also subject to s.99(3), which provides:

"A police officer must not arrest a person for the purpose of taking proceedings for an offence against the person unless the police officer suspects on reasonable grounds that it is necessary to arrest the person to achieve one or more of the following purposes:

(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."

This provision is said to codify the common law. In the Attorney-General's Second Reading Speech (NSW Legislative Assembly Hansard, 17 September 2002) it was said:

> "Part 8 of the Bill substantially re-enacts arrest provisions of the *Crimes Act* 1900 and codifies the common law. The provisions of Part 8 reflect that is a measure that it is to be exercised only when necessary. An arrest should only be used as a last resort as it is the strongest measure that may be taken to secure an accused person's attendance at court. Clause 99, for example, clarifies that a police officer should not make an arrest unless it achieves the specified purpose, such as preventing the continuance of the offence."

There is a long line of authority, including *Fleet v District Court of NSW* [1999] NSWCA 363 and *DPP v Carr* (2002) 127 A Crim R 151, to the effect that arrest is a last resort and should not be used for minor offences where the defendant's name and address are known and a summons would suffice.

In *Carr*, Smart AJ said (at 159):

> "This court in its appellate and trial divisions 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 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."

Even in the case of a continuing offence, where the defendant's identity is not known, arrest will not necessarily be the most appropriate option (see the remarks of Smart J in *Lake v Dobson* (1980) 5 Petty Sessions Review 2221, a case involving the arrest of people for nude sunbathing).

Section 99(3) is, I think, my favourite provision of LEPRA. It's a pity that police officers, and Local Court magistrates, have not embraced it with similar enthusiasm! In my experience, magistrates have been reluctant to apply this provision robustly and to find an arrest unlawful. At this stage I do not know of any case law, or matters currently before the Supreme Court, on the application of s.99(3).

In my opinion, s.99(3) does not actually codify the common law, although it is strongly based on common law principles. Importantly, an arrest that does not comply with s.99(3) will be *unlawful*, not merely *improper* as was the arrest in *Carr*.

For a lawful arrest under LEPRA, the police officer must *suspect on reasonable grounds* that arrest is *necessary* to achieve one or more of the purposes listed. There is both a subjective and an objective test that must be satisfied.

To quote from Smart AJ's judgment in *Rondo* (which is equally applicable in this context):

> "What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest at the time he did so. Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole of the surrounding circumstances."

If police make an arrest *without turning their mind to the necessity of arresting the person to achieve one of the purposes in s.99(3),* the arrest is unlawful. It doesn't matter if, in hindsight, the police officer (or the magistrate) thinks of some very good reasons why arrest was necessary or appropriate.

An arrest will also be unlawful if the police officer *did* hold a relevant suspicion but this suspicion was not objectively based on reasonable grounds.

Police will often assert that an arrest was justified because the defendant had no ID on them (s.99(3)(a)) or because they believed arrest was necessary to stop the offence from continuing (s.99(3)(b)).

It has been suggested by some commentators that police may have an implied common law obligation to make reasonable inquiries as to the person's identity before proceeding to arrest them (see Mark Dennis's paper, referred to at the end of this paper).

As to the necessity of arresting to prevent an offence from continuing, there are many situations in which arrest is virtually guaranteed to achieve the opposite! *Carr* is, of course, a case in point.

An arrest which complies with s.99(3) might nevertheless be improper (maybe even unlawful?) because it involves an inappropriate exercise of police discretion. For example, police may suspect on reasonable grounds that arrest is necessary to prevent an offence from continuing. However, if the offence is very minor and non-violent (eg riding a bicycle without a helmet), there is a strong argument that the arrest is improper because it is not the most appropriate alternative and is at odds with the principle of arrest as a last resort. Sections 105-

108 reinforce the principle of arrest as a last resort, and make it clear that arrest is a matter of discretion.

7.3 Detention after arrest: Part 9

Part 9 (formerly *Crimes Act Part* 10A) seems to cause a lot of confusion for police.

Part 9 allows police to detain a suspect for a reasonable period after arrest for the purpose of investigating an alleged offence. It also sets out important rights for suspects in police custody (eg to seek legal advice, to contact a friend or relative and, in the case of a vulnerable person, to have a support person present).

Section 110 deems some people to be under arrest for the purpose of Part 9, even if they have not actually been arrested (eg, if the police officer would arrest the person if they attempted to leave, or has given the person reasonable grounds for believing that the person would not be allowed to leave if they wished to).

This deeming provision is aimed at ensuring that suspects who are being questioned at police stations are accorded the beneficial provisions of Part 9. It must be read subject to s.113, which makes it clear that *Part 9 does not confer any power to arrest a person, or to detain a person who has not been lawfully arrested*. Nor does it affect the right of a person to leave police custody if the person is not under arrest.

Many police officers seem to believe it is necessary to arrest a person to facilitate an interview and to "make sure they get their Part 9 rights". This seems to be especially common when police are considering dealing with a juvenile under the *Young Offenders Act*. An arrest that is made in these circumstances, without regard to the factors in s.99(3), is unlawful even if there is a reasonable suspicion that the person has committed an offence.

7.4 No power to arrest for the purpose of questioning

Even if police have reasonable grounds to suspect that a person has committed an offence, an arrest that is made for the purposes of questioning or investigation, and not for the purpose of bringing the person before a justice, is unlawful. This is despite the provisions of Part 9: see *R v Dungay* [2001] NSWCCA 443.

In *Dungay*, police decided to arrest the appellant so that he could be taken to the police station and asked questions so as to assist the police in their further investigations. Police made no mention in evidence of the appellant being arrested so that he could be taken before a magistrate. Even though it was found that the police had reasonable grounds to suspect that the appellant had committed an offence, the arrest was held to be unlawful because it was solely for investigative purposes.

Zaravinos v State of New South Wales [2004] NSWCA 320 was a civil case in which the plaintiff recovered damages for wrongful arrest. He was asked to come to the police station for an interview. He attended voluntarily and was immediately arrested. As in *Dungay*, there were reasonable grounds to suspect that the plaintiff had committed an offence. However, the arrest was held to be unlawful because it was done for an extraneous purpose (that is, investigation and questioning), and also because it was done in a “high-handed” manner without properly considering an alternative such as a summons.

7.5 Safeguards in s.201

The safeguards in s.201 apply to arrests made under LEPRA or at common law (eg an arrest to prevent a breach of the peace). However it does not apply to arrests made under legislation listed in Schedule 1 (eg the *Bail Act*).

7.6 *Christie v Leachinsky*

Section 201 in part reflects the common law in *Christie v Leachinsky* [1947] 1 All ER 567, which provides that a person who is arrested without warrant is entitled to know why. Police must tell the person the reason for the arrest, unless it is obvious (eg the person is caught red-handed) or the person makes it impossible (eg by forcibly resisting).

Christie v Leachinsky is still good law and it is especially important in the case of citizens' arrests (and probably also arrests for breach of bail), to which s.201 does not apply.

7.7 Use of force

Part 18 (ss.230-231) reflects the pre-existing common law. It provides that reasonable force may be used by police (or other persons where relevant) in exercising their powers and functions, including to effect an arrest or prevent a person's escape.

The case law is not absolutely clear as to whether excessive force invalidates an otherwise lawful arrest (see article by Dan Meagher: *Excessive force used in making an arrest: does it make the arrest ipso facto unlawful?*, (2004) 28 Crim LJ 237). However, excessive force would almost always afford a defence to offences with an execution of duty element.

8 Other powers to arrest or detain

It is worth remembering that police have other legislative and common law powers to arrest and detain people, where it is not suspected that the person has committed an offence. In most cases, the safeguards under LEPRA do not apply. Examples of these powers are:

8.1 Breach of bail

Section 50 of the *Bail Act* provides a power to arrest if a police officer suspects on reasonable grounds that a person has breached (or is about to breach) their bail conditions.

Arrest under the *Bail Act* is not subject to the provisions of *LEPRA* s.99(3) or s.201, but the common law requirements of *Christie v Leachinsky* almost certainly apply. It may also be possible to argue that the common law principle of arrest as a last resort applies to arrests for breach of bail; police have a discretion whether or not to arrest and, even if there has technically been a breach of bail, arrest will not always be appropriate.

8.2 Breach of the peace

LEPRA s.4 expressly preserves the powers conferred by the common law on police officers to deal with breaches of the peace. But what exactly are these powers?

"Breach of the peace" is not defined in LEPRA. The case law demonstrates that it can encompass a wide variety of situations, although it appears well-established that there must be a threat of violence (which may include the provocation of another person to violence).

In *R v Howell* [1982] QB 416 Watkins LJ said (at 427):

> "[T]here is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance."

Noise, argument, loud or offensive language does not of itself constitute a breach of the peace (*Parkin v Norman* [1982] 2 All E.R. 583, *Williams v Pinnuck* (1983) 68 FLR 303, *Beaty v Glenister* (1884) 51 LT (NS) 304, *Neave v Ryan* [1958] Tas SR 58).

However, in *Nicholson v Avon* [1991] 1 VR 212, it was held that a very noisy party, in the early hours of the morning, and incurring complaints from a neighbour, did amount to a breach of the peace. Marks J said (at 221), "In my opinion, there is no conduct more likely to

promote violence than prolonged disturbance of the sleep of neighbours by noise and behaviour of the kind disclosed."

At common law, police (and citizens) have extensive powers to prevent or to stop breaches of the peace. These include powers of entry (*Nicholson v Avon* [1991] 1 VR 212, *Panos v Hayes* (1984) 44 SASR 148, and now enacted into s.9 of LEPRA), dispersing picketers (*Commissioner of Police (Tas); ex parte North Broken Hill Ltd* (1992) 61 A Crim R 390), confiscating items such as protesters' megaphones (*Minot v McKay (Police)* [1987] BCL 722) and arrest or detention (*Albert v Lavin* [1982] AC 546 at 565).

Lord Diplock said in *Albert v Lavin* (at 565):

> "[E]very citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking, or is threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will."

A person using such preventative powers must reasonably anticipate an imminent breach of the peace; it must be a real and not a remote possibility (*Piddington v Bates* [1961] 1 WLR 162; *Forbutt v Blake* (1981) 51 FLR 465).

Detention or arrest is a measure of last resort (*Innes v Weate* (1984) 12 A Crim R 45 at 52; *Commissioner of Police (Tas); ex parte North Broken Hill Ltd* (1992) 61 A Crim R 390).

For a more detailed discussion of this topic, see Mark Dennis's paper (referred to at the end of this paper), the commentary at para [5.14554] in Vol 1 of Watson, Blackmore & Hosking *Criminal Law (NSW)* looseleaf service, and the chapter on "Public Order" in Bronitt & McSherry, *Principles of Criminal Law*, Law Book Co 2001.

8.3 Common law power to restrain persons for safety reasons

The common law also allows police to restrain a person for his or her own (or others') safety. *DPP v Gribble* [2004] NSWSC 926 concerned a man who was standing in the middle of a busy road. He ignored police directions to get off the road, and resisted their attempts to physically move him to the side of the road. When charged with resisting police in the execution of their duty, he argued that the police had no power to restrain him and were not acting in the execution of their duty. The magistrate dismissed the charge, but this decision was reversed on appeal to the Supreme Court.

After reviewing the common law and legislation (including the *Police Act* 1990) concerning the functions and duties of police, Barr J concluded (at para 29):

> "In my opinion those circumstances gave rise to a duty on the part of the officers to do what they reasonably could to remove the defendant and others from the danger to which his action was giving rise. They twice required him to get off the road and he twice refused. His refusal was irrational and he was otherwise behaving inappropriately. In my opinion when the officers laid hands on the defendant they were acting in the course of their duty to protect the defendant and others from the danger which he was presenting."

8.4 Intoxicated persons

The *Intoxicated Persons Act* has been re-enacted as Part 16 of LEPRA (ss.205-210).

Police may apprehend a person who is intoxicated (on alcohol or any other drug) and who:

- is behaving in a disorderly manner;

- is behaving in a manner likely to cause physical injury (to self or others) or damage to property; or
- needs physical protection because of their intoxication (s.206).

Police may take an intoxicated person home or place them in the care of a responsible person (eg friend, relative, refuge). If necessary, police may detain the intoxicated person in a police station (or, if relevant, juvenile detention centre) while finding a responsible person. If no responsible person can be found, the person may be detained until they cease to be intoxicated.

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

Intoxicated persons must be kept separate from people detained for criminal offences, and juveniles must be kept separate from adults. A detained person must be given a reasonable opportunity to contact a support person, and must be given reasonable food, bedding, etc (s.207).

A person detained under these provisions may be searched (s.208).

8.5 *Mental Health Act* 1990

Police are often called upon to assist with the apprehension of mentally ill or mentally disordered persons and to transport them to hospital for assessment or admission.

For example, police may apprehend a person and take them to hospital if an appropriate certificate has been endorsed by a medical practitioner an accredited person. Police may enter premises (if need be by force) for the purpose of apprehending any such person, and may apprehend any such person, without a warrant (s.22).

A police officer may apprehend a person 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
- has recently attempted suicide**,** or that it is probable that the person will attempt to kill or seriously harm him/herself (s.24).

Police may also apprehend a person, and take them to a health care agency or hospital, if notified that the person has breached a community treatment order or community counselling order (ss.130, 140).

Note that the current Act will soon be replaced by the *Mental Health Act* 2007, which contains similar provisions.

8.6 *Children and Young Persons (Care and Protection) Act* 1998

Section 43 empowers an authorised DOCS officer or a police officer to:

- enter, 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 AVO 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.

A child or young person removed under this section must be kept separately from people who are detained for committing offences (s.43(5)). He or she is to be placed in the care and protection of the Director-General of DOCS, who must apply to the Children's Court for a care order at the first available opportunity (s.45).

8.7 *Children (Protection and Parental Responsibility) Act* 1997

Part 3 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 has only ever been declared operational in a few parts of rural and regional NSW; I understand that these declarations have now lapsed and there are currently no operational areas.

9 Consequences of an unlawful or improper search or arrest

9.1 Exclusion of evidence obtained unlawfully or improperly

All Legal Aid lawyers should have a working knowledge of s.138 of the *Evidence Act* 1995, which provides:

> "Evidence that was obtained:
>
> (a) improperly or in contravention of an Australian law, or
>
> (b) in consequence of an impropriety or of a contravention of an Australian law,
>
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained."

The party seeking to have the evidence excluded (usually the defendant) bears the onus of establishing the illegality or impropriety. The onus then shifts to the other party (typically the prosecution) to satisfy the court that the evidence should be admitted. Subs(3) sets out a list of factors for the court to consider.

Evidence obtained in the course of an illegal search is frequently excluded under s.138 (see, for example, *R v Rondo* [2001] NSWCCA 540). Admissions obtained following an unlawful arrest or search are another example; these may also be rendered inadmissible by s.90.

The case of *DPP v Carr* (2002) 127 A Crim R 151 (which is well known but not always well understood) represents a more unusual and innovative application of s.138. Lance Carr was arrested for offensive language in circumstances where a summons would have sufficed. A physical altercation ensued and Mr Carr was charged with resisting, assaulting and

intimidating police. It was held that the arrest was improper and that the evidence of Mr Carr's alleged subsequent conduct was obtained in consequence of an impropriety. Neither the magistrate nor the appellate judge was satisfied that it should be admitted, having regard to s.138.

In reaching this conclusion, Smart J found that the impropriety was serious (s.138(3)(d)):

> "The fact that a police officer has acted lawfully, honestly and with integrity does not prevent the impropriety being serious. In the present case the officer's failure to consider the issue of a summons and his predisposition to FCANs for reasons of expediency was ill-advised and led predictably, to arrest and the deprivation of liberty of Mr Carr. That impropriety was serious."

and that it was reckless (s.138(3)(e)):

> "On the evidence and his findings the magistrate was entitled to hold that the impropriety was reckless. […] Cons Robins carelessly disregarded both the use of the appropriate procedure and the possible consequences of the actions which he proposed to take and took when these were obvious and he must have realised these as an officer of five years experience dealing with a person who was moderately intoxicated."

Subsequent cases such as *DPP v Coe* [2003] NSWSC 363 and *DPP v CAD* [2003] NSWSC 196 have led to a widely-held view that *Carr* is no longer good law, or at least is confined to its own facts. However, the principles in *Carr* are still relevant, although not to every case in which a person is arrested for a minor offence.

In *Coe*, Adams J narrowed down the concept of evidence obtained in consequence of an impropriety, and stated (at para 24):

> "Where, however, the evidence in question is that of offences which have been caused by the impugned conduct, it does not seem to me that the evidence will have been "obtained" unless something more is established than the mere causal link".
>
> and:
>
> "… the circumstances must be such as to fit fairly within the meaning of 'obtained' almost invariably because the conduct was intended or expected (to a greater or lesser extent) to achieve the commission of the offences."
>
> and:
>
> "...in some cases of which *Robinett* and *Carr* may be examples, there could be such an expectation the offences will result from the impugned conduct that it would be reasonable to say, as an objective matter, that they were "obtained" by that conduct but these situations will be rare…".

However, in the more recent case of *DPP v AM* [2006] NSWSC 348, Hall J held that Adams J's reasoning was inappropriately narrow and, as it was obiter dicta, was not binding. Hall J stated (at paras 80-83):

> "With the greatest respect to the view expressed by Adams, J. in *Coe* (supra) at [24], I am unable to agree with all that is therein stated. Before identifying the area of disagreement, I record the following propositions:
>
> > (a) Where a law enforcement officer intentionally engages in purposive action designed or expected to procure or induce the commission of offences, then plainly evidence of those offences will have been "*obtained*" in relation to them.

(b) Where a person is subject to an ill-advised or unnecessary arrest but the suspected offender acts in a way which amounts to a disproportionate reaction, an issue may arise, as it did in *Coe*, as to whether that offence can, as a matter of causation, be said to be a consequence of the arrest.

(c) In other circumstances, however, offences that stem from an ill-advised and unnecessary arrest, may objectively be considered the anticipated or expected outcome and so *"obtained"* for the purposes of s.138. *Carr* is such a case.

"The reservation that I have expressed in the preceding paragraph relates to the observation of Adams, J., that in the context of offences that are said to stem as an unintended consequence from an arrest, that there is a need to establish *"conduct that was intended or expected (to a greater or lesser extent) to achieve the commission of offences"* as a necessary and separate element in order to satisfy the notion of *"obtained"* in that context.

"In the passages quoted from the judgment of Adams, J. set out in paragraphs [77] and [78] above, the proposition is advanced that in cases of the kind referred to in the preceding paragraph, the word *"obtained"* in s.138(1) requires, in addition to a causal nexus, that the impugned conduct must either be *"intended"* or *"expected"* to achieve the commission of offences. However, cases involving an ill-advised or unnecessary arrest which result in unintended consequential offences by definition lack a purposive element. In other words, offences stemming from such an arrest occur without any intention on the part of the arresting officer to provoke such offences. It is, for that reason, that I cannot agree with Adams, J. that in such cases the word *"obtained"* cannot be satisfied unless the causal nexus is also accompanied by *"something more"* in the nature of *"intended"* conduct. I do, however, with respect agree with his Honour's observation that in order in such cases for evidence to be *"obtained"*, it may, in some such cases, be necessary that the conduct (the arrest) be of a kind that could be *"expected"* to give rise to the commission of further offences. The reference to an *"expectation"* by Adams, J. in *Coe* may, in some cases, be a material aspect and *Robinett* and *Carr* could, as his Honour observed, be seen as examples of that proposition.

"However, I should add that in relation to the term *"obtained"* in s.138(1), the reference by Adams, J. to a need in some cases for there to exist circumstances from which the commission of offences may be *expected* seems to me not to involve or require proof of an element additional or separate to the essential causal relationship. Reference to what might be *expected* to follow from certain conduct essentially, in my opinion, relates to the *likelihood* of an event occurring. In other words, whether one thing might be expected to give rise to another is really an aspect that is related to causation – how likely is an arrest, for example, to give rise to particular conduct? This essentially involves questions of predictability and anticipation. I do not, with respect to the observations of Adams, J. on this aspect, see that as a separate or additional matter (the *"something more"*) distinct and separate from the question of causation. Whether one matter can be said to be expected to give rise to or be the cause of another will often depend upon the intensity of the relationship between them or, as Adams, J. observed, whether there was a *"close link"* between them as indeed Beilby, J. was persuaded existed in *Robinett*."

As I have already mentioned, some arrests that were merely *improper* in the pre-LEPRA times of *Carr* would now be *unlawful* under LEPRA, by virtue of s.99(3). It is suggested that illegality, as opposed to impropriety, would weigh more heavily in favour of exclusion of any evidence obtained in consequence.

9.2 Execution of duty

Offences such as resisting, assaulting, hindering, obstructing or intimidating police all contain an execution of duty element. The prosecution must prove beyond reasonable doubt that the police were acting lawfully in the execution of their duty.

If you are confident that the prosecution will be unable to prove that a search or arrest was lawful, you might consider simply putting them to proof on execution of duty, rather than embarking on a Lance Carr-style application.

9.3 Civil remedies

A person who has been unlawfully arrested or searched may be able to recover damages for torts such as wrongful arrest, false imprisonment, assault and battery.

Any further discussion of civil remedies is way beyond my expertise.

Juvenile clients with a potential civil claim should be referred to CiDNAP (Children in Detention Advocacy Project), which is being run by the Public Interest Advocacy Centre in conjunction with Legal Aid NSW and a number of legal centres and firms.

10 References and acknowledgements

For a section-by-section guide to LEPRA, please see my previous paper (last updated in June 2007), available at www.theshopfront.org/26.html.

For an excellent overview of LEPRA and the policy considerations surrounding it, see Andrew Haesler SC's paper, available on the Public Defenders website at www.lawlink.nsw.gov.au/lawlink/pdo/11_pdo.nsf/pages/PDO_papersbypublicdefenders.

I would also commend to you Mark Dennis's paper *Race to Win*, presented at the ALS Conference in 2006. This paper contains a very helpful discussion of arrest powers, breach of the peace, and the trifecta.

I am indebted to both Andrew, Mark and the other lawyers who have shared with me their expertise on police powers.

I am always interested in hearing from other practitioners about your (and your clients') experiences of LEPRA. Any comments, corrections, suggestions, and queries will be happily received (preferably by email at jane.sanders@freehills.com).