

Police Powers Update April 2012

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1 Introduction

As you know, most police powers in NSW are set out in the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA). LEPRA was introduced into Parliament in 2001, in response to a Wood Royal Commission recommendation that NSW police powers be consolidated into one piece of legislation. It finally commenced on 1 December 2005.

LEPRA can be best described a cut-and-paste job, taking powers from other legislation, and adding and deleting a few bits along the way. Although one of the aims of LEPRA was to consolidate police powers, there are still various powers to be found in other legislation and at common law. For example, police have the power to arrest for breach of bail under the *Bail Act*, a range of powers under the Road Transport legislation, and a common law power to deal with breach of the peace.

This paper will focus on certain aspects of police powers (mostly found in LEPRA but sometimes elsewhere) including:

- stop and search;
- entry;
- arrest and detention;
- identity;
- directions.

Since the this paper was last updated in June 2011, there have been several new developments including:

- case law on personal search powers under s.21A (see part 2.1 of this paper) and searches for persons in custody under s.24 (see part 2.4);
- case law on the power to arrest and s.99(3) (see part 6.8);
- identity powers (see parts 9.2 and 9.6);
- the power to give directions, particularly to intoxicated persons, and related offence provisions (see parts 9.2, 11.2 and 11.4);
- new case law on the admissibility of evidence obtained in consequence of an unlawful arrest (see parts 8.4 and 14.1).

2 Personal search powers

2.1 Stop, search and detain (LEPRA Part 4 Div 1)

Section 21 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.

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)-(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).

Section 21A was recently considered by North DCJ in the unreported decision of *Castillo v R* (2009/327995, 4 August 2011 – this judgment does not appear to be available on line but I am aware there are copies in circulation). His Honour overturned a Local Court conviction for resist police officer in execution of duty.

The defendant was seen by police talking to another man in Kings Cross, an area said to be well-known for the use and distribution of prohibited drugs. Police asked him to stop but he kept walking. He also appeared to take something from his pocket and put it in his mouth and chew. Police approached him, asked him what was in his mouth (to which he did not respond) and told him twice to spit it out, but he continued chewing. The police officer said he could see some plastic which he believed contained a prohibited drug. He grabbed the accused under his jaw and tilted his head backwards, saying "spit it out, you'll choke". The other officer became involved. It is alleged that the accused pushed both officers in the chest and a struggle followed.

His Honour found that the police had decided to stop and search the accused, and therefore the relevant sections of LEPR came into play. His Honour noted that s.21A permits police to request a person to open his or her mouth, but subs(2) specifically does *not* authorise them to forcibly open a person's mouth.

The prosecution submitted that the police officer's actions were justified under s.6(3)(b) of the *Police Act*, to protect a person from injury or death. His Honour found this implausible, finding that there appeared to be no imminent danger of choking, and that the police were instead trying to stop him from destroying evidence.

Towards the end of the judgment, His Honour said;

"The law is clear that police officers in the execution of their duty should be given some real latitude as there is such a wide variety of circumstances that can arise. However, here, section 21A of LEPR specifically deals with a situation where police believe somebody has secreted something inside their mouth. As set out above it clearly prohibits police from trying to force someone's mouth open. I do not accept that there was any other explanation for Constable Lowe's conduct, other than that he was trying stop the appellant from swallowing, and therefore disposing of possible evidence. Section 6 of the *Police Act* does not allow someone in Constable Lowe's position to do something that is specifically excluded by section 21A of LEPR."

2.2 Searches for knives and dangerous implements (LEPR Part 4 Div 3)

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.

Section 27 requires police to comply with s.201 when making a request under s.26 (see discussion of s.201 towards the end of this paper). 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.

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, commits an offence (the maximum penalty is 50 penalty units, increased from 5 penalty units in 2009 by the *Crimes Legislation Amendment (Possession of Knives in Public) Act 2009*).

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 s.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.

2.3 No power to search for identification documents

It is worth noting that, while police have the power to demand a person’s name and address in certain circumstances (see section on identity powers further on in this paper), in most situations they do not have the power to compel a person to produce documentary identification. Nor do police have a power to search a person for identification documents.

I have read far too many police fact sheets and statements containing something along the lines of: “The accused was asked to provide identification to which he refused. The accused and his backpack were then searched for ID”.

Of course, if police have grounds to proceed against a person for an offence, and are not reasonably satisfied as to his or her identity, s.99(3)(a) may provide the police with grounds to arrest the person. Once in police custody, the person may be searched under s.23. or 24.

2.4 Searches of persons on arrest or while in custody (LEPRA Part 4 Div 2)

Section 23(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.

In a previous version of this paper I commented “in view of the broad power conferred by s.24, s.23 would at first glance appear redundant”. However, a recent District Court decision suggests that s.24 may be subject to a common law requirement that there must be a reasonable suspicion.

In *R v Boekeman* [2011] NSWDC 126, 29 August 2011, the appellant successfully appealed against a conviction for assault police in execution of duty. Ms Boekeman intervened in the arrest of another person and was arrested for assault and resist police (she was ultimately convicted of these charges and the convictions were upheld on appeal). While at the police station she was searched, apparently as a matter of routine. Police relied on s.24.

Toner DCJ, found that the search was unlawful for a number of reasons, including:

- the search was not carried out in a manner consistent with preserving the defendant’s privacy and dignity and was therefore in breach of s.32;
- it was in breach of s.201, in that the reason given for the search was either not a lawful reason or not the true reason for the search;
- there was excessive force used; and
- that it was not justified under s.23 or s.24 due to an absence of relevant reasonable suspicion.

His Honour discussed the legislative history of s.24 and its predecessor in the *Crimes Act*. He cited *Clarke v Bailey* [1933] 33 SRNSW 303, in which it was said that to exercise a right of search, police would have establish that it was “reasonably necessary”. His Honour said, at para 93:

“That case was somewhat different to this but, nevertheless, it amplifies a common law proposition in interpreting the predecessor to s.24 of the Act that it was circumscribed by an obligation that before such a search could be undertaken there had to be reasonable cause to effect it.

It seems to me that even though the rights of the police are tempered to some extent by s.201 and s.230 of the Act and by the Commissioner’s Instruction there remains a requirement that the police have to have at least a reasonable suspicion before they are entitled to exercise this power. It is not and can not be unfettered.”

His Honour went on note that both s.23 and s.24 provide that police *may* search. He went on to discuss some other authorities and concluded that the search was not justified by either s.23 or s.24.

2.5 Emergency public disorder powers (LEPRA Part 6A)

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. There was originally a sunset clause which would have seen the repeal of Part 6A after two years, but the sunset clause was itself repealed and Part 6A remains.

The special powers in Part 6A may be authorised by the Commissioner of Police (or a Deputy or Assistant Commissioner) in situations of large-scale public disorder (s.87D).

“Public disorder” is defined in s.87A as “a riot or other civil disturbance that gives rise to a serious risk to public safety, whether at a single location or resulting from a series of incidents in the same or different locations”. There is no definition of “large-scale”.

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)

The special powers are set out 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.

Section 87K empowers police, without any warrant or reasonable suspicion, to 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. Police are not authorised to conduct strip searches under this provision.

The safeguards in Division 4 of Part 4 apply, as does s.201.

2.6 Reasonable suspicion

The personal search powers discussed above (with the exception of the power to search a person in lawful custody and the emergency public disorder power) 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 covered by s.357E [the section of the *Crimes Act* that was then relevant]. 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.”

In *NSW v Zreika* [2012] NSWCA 37, Sackville AJA (Macfarlan & Whealy JJA agreeing) endorsed the definition of suspicion given by the High Court in *George v Rockett* (1970) 170 CLR 104 as a “state of conjecture or surmise where proof is lacking: ‘I suspect but I cannot prove’” (at 115-116). His Honour also endorsed Lord Devlin’s judgment in *Hussien v Chong Fook Kam* [1970] AC 942 at 948-949, where his Lordship said that suspicion can take into account matters that cannot be put into evidence.

For a recent example of what *does not* amount to reasonable suspicion, see *R v Yana Orm* [2011] NSWDC 26, a judgment of Lakatos SC DCJ on a voir dire relating to evidence of drugs found during a search of the defendant’s vehicle. The vehicle was stopped for a breath test after a police officer formed the view that the driver appeared to be trying to avoid the RBT site. The breath test was negative. The defendant had a South Australian licence that was cancelled; he told the officer something about going to court to get a point back on his licence. He told the officer he was staying with relatives in Liverpool. At some point he got out of the car and smoked a cigarette.

The police officer formed a suspicion that the accused may have drugs in his car and asked: “When I search your vehicle, I won’t find anything illegal in there will I, like drugs?” The accused answered, “No.” The officer then said, “So can I search your vehicle?”. The accused answered, “Yeah.” Drugs and cash were found in the car.

The grounds for the police officer’s suspicion were said to be: that the accused avoided eye contact with him; that the accused stayed at Liverpool at the Formule 1 Hotel; that the accused did not stay at the home of his cousins for whom he could not nominate an address; that the accused attempted to avoid the random breath test (although the officer conceded that that could have been due to his cancelled licence); and that the accused got out of the car and smoked a cigarette (“which”, the officer claimed, “in my experience shows nerves”).

His Honour said (at Para 55):

“I pause to note that it is one thing for a police officer to use his commonsense and experience to seek out and investigate leads in relation to an offence. In my view, it is quite another for an officer to make value judgments about the actions of a suspect and to translate those value judgments to the level of a reasonable suspicion of offending. This is especially so when the officer appears to make little effort to consider any innocent explanation for such actions. This approach may indicate a closed rather than an open and inquiring mind and may suggest that the officer’s intention was to gain evidence inculcating the accused.”

However, His Honour ultimately found the search to be lawful because it was conducted with the defendant’s consent (see discussion of searches by consent below).

2.7 Searches by consent

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

It is common for young people in particular to be asked “Would you mind if I look in your bag 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 some cases.

In *Leonard*, James J referred to *R v Azar* (1991) 56 A.Crim R 414, in which Gleeson CJ stated: “It is also important to note that what is involved was an inquiry as to the accused’s will rather than as to the accused’s state of knowledge.”

James J also referred to the New Zealand authority of *Meates v Attorney General (Customs Department)* [1981] 2 NZLR 335 in which it was said that consent may include acquiescence but it must be genuine consent and not a mere acquiescence to what a person believes to be another's lawful rights.

In *R v Yana Orm* [2011] NSWDC 26 (discussed above) Lakatos SC DCJ discussed the above authorities. His Honour admitted evidence of drugs found in the defendant's car. He held that, while the search was not justified by reasonable suspicion, it was lawful because it was conducted with the defendant's consent.

The police officer asked: "When I search your vehicle, I won't find anything illegal in there will I, like drugs?" The accused answered, "No." The officer then said, "So can I search your vehicle?". The accused answered, "Yeah."

It was argued on behalf of the accused that the officer had made up his mind to search the car anyway, and the accused was merely acquiescing to a demand. However, the accused later participated in an ERISP in which he was asked questions about the circumstances of the search. While strongly critical of the manner of the police questioning, His Honour held (at para 39):

"The statement of the accused ... appears to disclose that he interpreted the officer's statement as a request rather than a direction. Absent evidence from him on the voir dire, that is the best evidence of his thinking. It is, in my view, not evidence that his will was overborne or that his consent was extracted by improper means."

His Honour said (at para 35):

"As the authorities to which I have been referred indicate, the critical question in relation to whether the accused consented to the search is not the intention of the officer who conducts the search, it is whether the will of the accused has been overborne, that is, that he was caused to consent to the search by a direction or command or by any representation or trick or improper behaviour."

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. However, it could be argued that a voluntary handing over of property on request is not a "search" at all, and therefore s.201 does not apply.

2.8 Types of personal search (LEPRA Part 4 Div 4)

The three levels of personal searches are defined in LEPRA 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”.

Section 30 provides that, generally, 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).

Section 31 provides that 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”.

A strip search must not be conducted on a person under the age of 10 (s.34). Nor may a strip search be carried out under the emergency public disorder powers (s.87K(2)).

2.9 Safeguards applying to personal searches (LEPRA Part 4 Div 4)

Division 4 of Part 4 enacts some rules and safeguards which previously did not appear in NSW legislation (although some similar provisions exist in Commonwealth legislation). These provisions apply to all personal searches carried out under LEPRA *by a police officer or other person*, except as otherwise provided by the Act or Regulations (**s.29**).

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 transgender 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.

Of course the s201 safeguards also apply (see discussion of s.201 further on in this paper).

3 Other provisions relevant to personal searches

When considering the power of police to conduct personal searches, it is also worth bearing in mind the following provisions.

3.1 Drug detection dogs (LEPRA 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 may give 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); or
- 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 “general drug detection”, although there is of course a power to stop and detain a person for a search if a the dog has indicated the person and the police officer has consequently developed a reasonable suspicion.

Police may assert that walking or running away from a drug detection dog gives them reasonable grounds to suspect they are in possession of drugs. 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.

3.2 Internal searches (LEPRA Part 11 Div 3, now repealed)

Following the repeal of Part 11 Division 3 on 17 December 2007, there is no longer any power to conduct "internal searches", ie. to make a person submit to an x-ray, MRI, etc to detect suspected internally-concealed drugs.

3.3 Examination of persons in custody (LEPRA Part 10 Div 2)

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.

This is the power that police would rely on to conduct a body cavity search.

4 Powers to stop, search and detain vehicles, vessels and aircraft

4.1 Powers to stop, search and detain vehicles (LEPRA Part 4 Div 5)

Section 36 is a general power to stop, search and detain vehicles. This power may be exercised on similar grounds to the power under s.21 to stop and search individuals.

This Division also contains powers to:

- stop and search vehicles suspected of being used in connection with certain offences (s.36)
- stop vehicles if police have grounds to arrest or search an occupant (s.36A)
- erect roadblocks (s.37)
- give reasonable directions in connection with the exercise of these powers(s.38).

4.2 Powers to stop, search and detain vessels and aircraft (LEPRA Part 4 Div 6)

Section 42 provides a general power to stop, search and detain vessels and aircraft in similar terms to the vehicle search power in s.36.

Section 43 empowers an "authorised officer" of the rank of sergeant or above to board a vessel in certain circumstances.

Section 44 empowers an "authorised person" to search an aircraft (including passengers, luggage and freight) if the person suspects on reasonable grounds that an offence involving the safety of the aircraft is being (or was, or may have been) committed.

Section 45 provides a specific power to search vessels and aircraft for prohibited plants or drugs; this can only be exercised by an "authorised officer" of the rank of sergeant or above.

4.3 Emergency public disorder powers (LEPRA Part 6A)

The emergency public disorder powers are outlined above in the section on personal search powers.

Section 87J empowers police 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. No warrant or reasonable suspicion is required, but the search is subject to the s.201 safeguards.

4.4 Limit on detention of vehicle, vessel or aircraft

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.]

4.5 Other vehicle powers (LEPRA and Road Transport legislation)

It is also worth being aware of LEPRA **Part 8A** (In-car video) and **Part 12** (which contains miscellaneous powers relating to vehicles and traffic). Some of these provisions empower police to give directions, although not to stop and search vehicles.

Under the Road Transport legislation, police have powers to stop vehicles for various purposes including random breath tests and random “oral fluid” drug tests (*Road Transport (Safety and Management) Act* 1999 ss.13, 18B).

There was some discussion of vehicle stop powers in *Police v Thao Phuon Nguyen* [2010] NSWLC 15. The defendant applied for the exclusion of certain evidence following what she asserted was an unlawful stopping of her boyfriend’s car. The police evidence was conflicting as to whether the car was stopped for a random breath test, due to its manner of driving, or due to intelligence received by police about the car. It was submitted there was no reliable explanation for the stop of the car and thus it was unlawful. O’Brien LCM held that, no matter which of the explanations was true, each would have given the police lawful grounds to stop the vehicle and in these circumstances the vehicle stop was not unlawful or improper. His Honour said (at para 22), “In my view the community accepts and expects that police have a wide general power to stop vehicles whether that be because a traffic offence has occurred or because police have determined to conduct a random breath test”.

This judgment also contains a detailed discussion of the principles concerning evidence obtained in consequence of unlawfully or improper police conduct. His Honour also briefly discussed s.99(3)(a) of LEPRA and held that the fact that the defendant’s boyfriend gave police a false name justified them arresting him to ensure his appearance before court.

The Road Transport legislation also empowers police to inspect vehicles. Under s.26 of the *Road Transport (Vehicle Registration) Act* a police officer may inspect a registrable vehicle (whether or not on a road or road-related area) for the purpose of deciding its identity, condition or the status of any registration or permit relating to the vehicle. This may be used by unscrupulous police officers as a back-door way of searching a vehicle.

5 Powers to enter and search premises

5.1 Power of entry to prevent injury or breach of peace (LEPRA Part 2)

Section 9 provides that police may enter premises if they believe on reasonable grounds that a breach of the peace is being or is likely to be committed and it is necessary to enter immediately to end or prevent this. The section also empowers police to enter to prevent significant physical injury to a person. Police are empowered to remain on the premises only as long as reasonably necessary in the circumstances.

This section has its basis in common law. *It does not confer a stand-alone power to arrest, detain or search any person, or to search premises.*

In relation to breach of the peace, it is uncertain whether this provision merely reflects the common law or extends it. There appears to be no High Court or NSW appellate court authority that clearly establishes a power of entry to prevent a breach of the peace.

In *Lippl v Haines* (1989) 18 NSWLR 620, the issue for consideration was the power of entry to effect an arrest. Hope AJA (at 630, citing *Swales v Cox* [1981] QB 849) enumerated the circumstances in which police had power of entry. This did not include breach of the peace.

In *Plenty v Dillon* (1991) 171 CLR 635, the High Court held that police do not have power of entry merely to serve a summons. Gaudron and McHugh JJ (at 647) again listed the circumstances in which police had power of entry, and again, breach of the peace was not included.

This issue was most recently considered by the High Court in *Kuru v State of New South Wales* [2008] HCA 26 but the Court declined to deal with the matter definitively as it found there was no breach of peace anyway. The court left open the possibility of there being a common law power.

There is appellate court authority from other Australian jurisdictions (eg *Panos v Haynes* (1987) 44 SASR 148, *Nicholson v Avon* [1991] 1 VR 212, *Cintana v Burgoyne* [2003] NTSC 106) that police do have power to enter premises to prevent a breach of the peace.

“Breach of the peace” is not defined in LEPRA, nor is its scope clearly defined by the relevant case law.

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.”

For examples of conduct that has been held to constitute a breach of the peace, see *R v Van Bao Nguyen* [2002] NTSC 38, per Angel J at paras 10-12.

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, *Nilsson v McDonald* (2009) TASSC 66).

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.”

For further discussion of breach of the peace, see Mark Dennis’ papers, referred to at the end of this paper.

5.2 Power of entry to arrest or detain a person (LEPRA Part 2)

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, or arrest a person named in a warrant.

A police officer may enter a *dwelling* to arrest or detain a person only if the police officer *believes* on reasonable grounds that the person is in the dwelling (s.10(2)).

A police officer who enters premises under this section may search the premises for the relevant person (s.10(3)).

The section does not authorise a police officer to enter premises to detain a person under an Act if the police officer has not complied with any requirement imposed on the police under that Act for entry to premises for that purpose (s.10(4)).

Like s.9, this section has its basis in common law. It does not confer a stand-alone power to arrest, detain or search any person, or to search premises.

The section appears to extend the common law powers of entry for effecting arrest without warrant, in that it relaxes both of the conditions to entry enunciated in *Lippl v Haines* (1989) 18 NSWLR 620, per Gleeson J at 622. The first condition of “reasonable and probable grounds” for believing that the person sought for arrest is on the premises, has been softened so that “reasonableness” alone is sufficient. The second condition is set aside altogether so that there is no requirement of proper announcement to permit the occupier the opportunity to consent to entry. However, LEPRA s.201 requires police to announce their

office and the reason for the exercise of the power, if reasonably practicable, before or at the time of entry.

I am not sure what, if any, restrictions on entry apply if the premises are not a dwelling. Had Parliament intended that a police officer be empowered to enter non-residential private property based on mere speculation that a person to be arrested might be inside, I would suggest that the legislation would have clearly expressed this. I would suggest that either “dwelling” in subs(2) should be read to include premises generally, or that the common law still applies in relation to entering non-residential premises.

5.3 Search warrants (LEPRA Part 5)

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 enter and search premises.

This paper will not examine the search warrant provisions in detail. However, it is worth noting that, 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).

5.4 Power of entry in domestic violence situations (LEPRA Part 6)

Section 82 provides that a police officer who believes on reasonable grounds that a domestic violence offence is being (or may have been recently, or is likely to be) committed in any dwelling may enter if invited to do so by any person who apparently resides there. Even if refused entry by another occupier, police may enter if invited to do so by the apparent victim of the offence.

Police may enter and remain for the purpose of investigating whether a domestic violence offence has been committed, and/or to take action to prevent the commission of a domestic violence offence.

Section 83 provides that, if entry is refused, police may apply for a warrant. Part 5 Div 4 applies, except that no occupier’s notice is required. **Section 84** creates an offence of obstructing or hindering the execution of a warrant.

Section 85 provides that police may take *only* the action in the dwelling that is necessary to: investigate whether a domestic violence offence has been committed; render aid; exercise any lawful power to arrest; prevent the commission of a domestic violence offence.

Police must enquire whether firearms are present in the dwelling, and if informed that there are firearms, take such action as is reasonably practicable to search for, seize and detain them.

Police must remain in the dwelling *only* as long as necessary to take the actions required.

Sections 86 and 87 provide powers to search for firearms and weapons (in some circumstances a warrant is necessary).

Part 6 does not confer a general power to search premises or persons.

The High Court judgment in *Kuru v State of New South Wales* [2008] HCA 26 provides a good analysis of these powers. In that case, police had lawfully entered the plaintiff’s home but were found to have unlawfully *remained* on the premises after the plaintiff repeatedly asked them to leave. The court was dealing with the powers as set out in the *Crimes Act* before the enactment of LEPRA; however, these powers have been transferred to LEPRA without significant amendments.

5.5 Crime scene powers (LEPRA Part 7)

The crime scene powers do not confer an independent power of entry. Police may apply for a crime scene warrant to allow them to enter and search premises (ss. 94, 95).

5.6 Drug premises (LEPRA Part 11 Div 1)

Section 140 provides that a police officer in charge of an investigation into the suspected use of premises as drug premises may apply for a search warrant if the officer has reasonable grounds for believing that the premises are being used for the unlawful supply or manufacture of any prohibited drug or the unlawful cultivation of prohibited plants by enhanced indoor means. Part 5 Division 4 applies to warrants issued under this Division.

Section 141 authorises police to do certain things (including passing through other land or buildings, breaking open doors, etc) for the purpose of executing a search warrant.

Section 142 provides that a police officer executing a search warrant under the drug premises provisions may do various things, including search any person on the premises or request a person to disclose their identity. *It is unclear whether the search power is subject to the usual requirements of reasonable suspicion; I would argue that it is.*

Section 143 creates offences of obstructing the execution of a search warrant, and failure to disclose correct identity on request.

Section 144 provides that Division 1 does not limit the operation of the *Disorderly Houses Act 1943* or any other State law relating to the entry and searching of premises. [Note that, although still referred to in LEPRA as the “*Disorderly Houses Act*”, this Act is now called the *Restricted Premises Act*.]

5.7 Bail checks

It has become common practice for police in some areas to perform “bail checks” on people (especially juveniles) who are subject to residential and curfew conditions. Typically this involves turning up at the person’s home in the middle of the night, knocking on the door and asking the person to come to the front door to prove they are at home. Some officers have been known to ask a parent to let them into the house and escort them to the child’s bedroom.

While there may be an implied licence for police to come to the front door without the express consent of the occupier, there is no power to enter premises for the purposes of checking that someone is at home, and there is no obligation for an occupier to consent to them entering.

To get around this legal impediment, police often seek the defendant’s agreement, as a condition of their bail undertaking, to allow entry and/or to present themselves at the front door if requested to do so by police at any time. However, the legality of these conditions is questionable following the recent decision of *Lawson v Dunlevy* [2012] NSWSC 48. This case concerned a bail condition requiring the defendant to submit to random breath testing at the request of the police. This condition was held to be invalid primarily on the ground that a condition that merely allows proof or enforcement of another condition (i.e. to abstain from alcohol) does not directly achieve any of the purposes in s.37(1) of the *Bail Act 1978* and is thus invalid. In what was essentially *obiter*, His Honour also held that the condition would have been invalid because of its vagueness, lack of objective standard to measure compliance, and that in the circumstances it was more onerous than required (s.37(2) of the *Bail Act*).

6 Powers of arrest (LEPRA Part 8)

Part 8 of LEPRA (ss.99-108) substantially re-enacted the former provisions of the *Crimes Act* in relation to arrest, with some important additions derived from the common law. The most significant provision is s.99, especially subs.(3).

6.1 Power to arrest with warrant

The power to arrest with a warrant is covered by **s.101**. This power is relatively uncontroversial and does not seem to cause significant problems (except of course when there is an error on the COPS system and a person is arrested on a defunct warrant!).

6.2 Power to arrest person unlawfully at large

Section 102 empowers a police officer, with or without warrant, to arrest a person reasonably suspected to be unlawfully at large. This means a person at large (other than because of escape from police custody) at a time when the person is required to be in custody at a correctional centre.

6.3 Power of police to arrest without warrant for an offence

Subsection 99(1) provides that a police officer may arrest a person who:

- is in the act of committing, or who has just committed, an offence under any Act or statutory instrument; or
- has committed a serious indictable offence for which they have not been tried.

Subsection 99(2) provides that a police officer may arrest a person if the police officer suspects on reasonable grounds that the person has committed an offence under any Act or statutory instrument.

Reasonable suspicion alone (or even catching someone in the act) is not enough to found a lawful arrest. Subsections (1) and (2) are subject to s.99(3), which is discussed below.

Interestingly, s.99 does not allow police to arrest a person on reasonable suspicion of having committed a common law offence such as escaping lawful (ie. police) custody. They must either be satisfied that the person has committed the offence (if it is a serious indictable offence) or obtain a warrant.

6.4 Reasonable suspicion

As discussed in section 2.6 of this paper, a helpful formulation of “reasonable suspicion” appears in Smart AJ’s judgment in *R v Rondo* [2001] NSWCCA 540, at para 53. *Rondo* was a case involving the exclusion of evidence obtained following an illegal search. However, its principles are equally applicable in the context of arrest.

Reasonable suspicion is relevant to both s.99(2) (that the person has committed an offence) and s.99(3) (that arrest is necessary to achieve one of the listed purposes).

6.5 Purpose of arrest

An arrest under s.99 must be *for the purpose of taking proceedings in relation to the offence*, and not for some extraneous purpose.

Section 99(4) requires the person under arrest to be brought before an authorised officer (this is defined in s.3 and essentially means a magistrate, registrar or bail justice) as soon as practicable. While the wording of this subsection is a bit outdated, and does not sit very well with Part 9 (see below), I think it is intended to reflect the common law and to make it clear that the purpose of an arrest is to commence proceedings.

Although Part 9 of LEPR empowers police to detain a person for a limited period after arrest in order to investigate the offence, *there is no power to arrest merely for the purpose of questioning or investigation*.

In *R v Dungay* [2001] NSWCCA 443, 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 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.

In *Zaravinos v State of New South Wales* [2004] NSWCA 320, 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.

The Local Court decision of *McClellan* [2008] NSWLC 11 (discussed below) and the District Court case of *R v Powell* [2010] NSWDC 84 (discussed in Part 7.5 of this paper) also concern arrests that were held to be unlawful because they were for the purpose of investigation.

The recent Supreme Court case of *Williams v DPP* [2011] NSWSC 1085 (discussed below) also supports the interpretation that an arrest under subs.99(1) or (2) must be for the purpose of commencing criminal proceedings.

6.6 Arrest as a last resort: common law pre-LEPRA

There is a long line of pre-LEPRA 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.

Carr involved a man who was arrested for offensive language after swearing at police. While the arrest was technically lawful, it was held to be *improper* because it was inappropriate in the circumstances. Mr Carr was accused of a minor summary offence, the police knew his name and address, and there was no reason to believe that a summons would not be effective in bringing him to court.

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.”

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

The principle of arrest as a last resort was given statutory basis with the enactment of LEPRA 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.”

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 it 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.”

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 (see quote from Smart AJ’s judgment in *Rondo*).

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 judicial officer hearing the subsequent proceedings) thinks of some good reasons why arrest may have been 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.

Common reasons advanced by police for arrest being “necessary” include:

- Because the defendant had no ID on them (s.99(3)(a)). 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’ paper on arrest, referred to at the end of this paper).
- To stop the offence from continuing (s.99(3)(b)). However, there are many situations in which arrest is virtually guaranteed to achieve the opposite! *Carr* is a case in point.
- Because of the need to impose bail conditions to ensure the defendant’s attendance at court (s.99(3)(a)), to minimise the likelihood of the person re-offending (s.99(3)(b)), or to prevent tampering with witnesses (s.99(3)(d)). However, s.15 of the *Bail Act* provides that bail may be granted or refused even if the defendant is not in custody. This would suggest that if a suspect attends the police station voluntarily and is co-operative, he or she could be granted conditional bail without having to be arrested.
- To “give the person their rights” under Part 9. This is a spurious reason which appears to be based on a misunderstanding of the difference between actual and deemed arrest under Part 9.
- To enable them to question a young person with a view to obtaining admissions and thus deal with them under the *Young Offenders Act*. Again, this seems to be based on a misunderstanding. It is clear (from ss.107 and 108, for example) that a young person does not need to be arrested to be dealt with under the *Young Offenders Act*.

6.8 Case law on arrest powers under LEPR s.99

Williams

There is now some appellate authority from the Supreme Court in relation to s.99(3). In *Williams v DPP* [2011] NSWSC 1085, Associate Justice Harrison confirmed that the power to arrest in subs(2) is subject to subs(3).

Police attended a local Masonic hall, where a community function was taking place, to arrest the appellant's brother, Joel Williams, for a shoplifting offence allegedly committed three weeks earlier. The appellant and his mother both attempted to interfere with the arrest and were charged with hindering police in the execution of their duty. It was conceded that they were hindering; the issue was whether the police were acting lawfully in the execution of their duty.

At first instance, the magistrate held the arrest was lawful because it complied with s.99(2), that is, the police officer suspected on reasonable grounds that Joel had committed an offence. There was no evidence that the police, when they arrested Joel Williams, were concerned about any of the matters listed in s.99(3)(a)-(f).

Despite the submissions put to him by the defence, the magistrate apparently ignored subs(3). The appellant and his mother were both found guilty of hindering police and appealed to the Supreme Court on a point of law.

On appeal, the DPP submitted that an arrest under s.99(2) need not always be for the purpose of commencing criminal proceedings; therefore the power is not always constrained by subs(3) (which provides "police must not arrest a person for the purpose of commencing criminal proceedings unless..."). Her Honour did not accept this submission.

However, the DPP conceded that the purpose of arresting Joel Williams was for the purpose of commencing criminal proceedings and therefore s.99(3) was applicable.

Her Honour found that the arrest was unlawful as it did not comply with s.99(3) and set aside the conviction.

Hage-Ali

The decision of Elkaim DCJ in *Hage-Ali v State of New South Wales* [2009] NSWDC 266 is also helpful. This was a civil case in which the plaintiff was awarded damages for wrongful arrest.

The plaintiff was arrested, along with three others, as part of a police operation in relation to the supply of cocaine. There was evidence from lawfully-intercepted telephone conversations and SMS messages to suggest that the plaintiff was buying cocaine from a supplier, apparently to on-supply to others.

When arrested, the plaintiff nominated her drug supplier and told police that she would be prepared to co-operate in their investigation. She was taken to the police station, where she was interviewed and provided an exculpatory statement regarding her apparent supply of cocaine. After agreeing to give a statement against her supplier, she was released without charge.

It was conceded that s.99(2) of LEPR was satisfied, as the police officers suspected on reasonable grounds that the plaintiff had committed an offence. However, the plaintiff submitted that the arresting officers were merely ordered to arrest her, and did not have any information specific to her circumstances that would have allowed them to form a reasonable suspicion that arrest was necessary for one of the purposes listed in s.99(3).

The defendant submitted that the arresting police officers had considered s.99(3) at the time of her arrest. The arresting officers gave evidence that, as the plaintiff was part of a group of apparently connected drug suppliers, if she was not arrested at the same time as the others, there was a risk that she could flee the jurisdiction, that evidence could be lost and that offences could continue.

His Honour was not satisfied that the arrest was justified by s.99(3). He summarised his reasons as follows (at para 211):

“(a) I do not accept that [the arresting officers] gave individual consideration to the justification for the arrest against the background of [written operational orders] and the plain direction from [a senior officer]. ...

(b) There was no consideration of matters personal to the plaintiff as opposed to a general conclusion to this effect: if she has been supplying drugs then there must be a risk of flight, reoffending or destruction of evidence.

(c) In any event there were not reasonable grounds to suspect any of the purposes in Section 99(3) needed to be achieved.”

His Honour said (at para 202):

"[T]here must be, in my view, a deliberate addressing of the purposes in Section 99(3) by the police officer concerning the particular person to be arrested. This is not to say that a 'ticking off of a checklist' exercise must be undertaken but rather that the facts personal to the person to be arrested must be considered".

The plaintiff also pleaded that her arrest was for a collateral purpose, namely to obtain evidence against her supplier. However, His Honour held (at para 213):

“Although there is a strong flavour of the arrest being made for the purpose of obtaining evidence against Mr B I do not think there is enough evidence to make a positive finding to this effect.”

Leave to appeal the decision to the Court of Appeal was denied on the grounds that the application demonstrated no question of law that warranted consideration by the Court: *State of New South Wales v Hage-Ali* [2011] NSWCA 31.

McClellan

The decision of Heilpern LCM in *R v McClellan* [2008] NSWLC 11 highlights some problems that have been encountered with the interpretation of s.99 (at least on the part of the police).

The defendant was approached by police who were making inquiries into a suspected break and enter. She provided her name and produced her driving licence on request, and her licence details were entered in one of the officers' notebooks.

After some further conversation, she was told that she was suspected of trying to break into someone's unit, and, “At this point you have to wait here until we make further inquiries about what has happened. We will get some details from you and carry out some checks. Failure to comply and you may be committing an offence.”

The defendant said, “We don't have to stay here”. Police again told her she was required to stay. She repeated that she didn't have to stay, and attempted to leave. Police physically restrained her and a struggle ensued. She was eventually handcuffed and told she was under arrest for assault.

The defendant was charged with assaulting and resisting police in the execution of their duty. She successfully argued that the police were not acting lawfully in the execution of their duty.

Although the police did not use the word “arrest” when refusing to allow the defendant to leave, it was agreed by both prosecution and defence that she was in fact placed under arrest. The defendant submitted the arrest was unlawful because it was for the purpose of investigation and not for the purpose of commencing proceedings for an offence. Further, even if it was for the purpose of commencing proceedings, there was nothing in s99(3) that justified the use of arrest.

The prosecution submitted that it was lawful to arrest the defendant because she was reasonably suspected of having committed an offence. They submitted (using a curiously-framed argument which I will not go into here) that once she was under arrest they had the power to detain her to confirm her identity. They claimed the arrest was justified under

s99(3)(a), for the purpose of ensuring her identity could be confirmed so she could be brought before a court.

The Magistrate rejected the prosecution submissions, and held that the arrest was not justified under s99(3)(a). He noted that the police had the defendant's name, address and licence details, and there was no evidence that there was anything suspicious about these details. His Honour also found the arrest unlawful on the separate ground that it was carried out for the improper purpose of investigation.

His Honour said, at paras 25-26:

“It is my view of s99 of LEPR that subsection (2) states a general power, and then subsection (3) qualifies that power. The words “must not arrest” in subsection (3) are an unambiguous representation of parliamentary intent creating preconditions for a lawful arrest. Indeed, it is hard to imagine a clearer statement of parliamentary intent. Investigation is not one of these preconditions.

It is arguable that subsection (3) limits those preconditions to circumstances of arrest by the words “for the purpose of taking proceedings”. Thus, the argument goes, police need only have a reasonable suspicion to arrest, and then can detain for the purposes of investigation without concern for s99(3). Sections 109 to 114 of LEPR do provide powers for detention after arrest for the purposes of investigation, however it was not submitted by the prosecution that these sections were relied upon. It is clear that those sections do not confer any power to detain a person who has not been lawfully arrested – see s 113(1)(a) of LEPR. Further, such an interpretation would represent such a significant departure from the common law prohibition regarding arrest for investigation that it could not be said to represent a codification of the common law.”

At para 31:

“The courts and the parliament have spoken loudly, clearly and repeatedly – it is not enough to arrest a person simply because there is a reasonable suspicion that they have committed an offence. Arrest will be unlawful unless it is necessary to achieve one of the purposes set out in s99(3). It is not one of those purposes that further investigation needs to take place. Arrest is a last resort.”

At para 33:

“[I]n my view if the initial arrest was for the purpose of investigation, and that was unlawful, it does not matter that the purpose of the detention then changed to something else – McHugh J makes this clear in *Coleman v Power*. The poisoned root affects the entire tree.”

6.9 Discontinuing arrest and use of alternatives

Other provisions of Part 8 reinforce the principle of arrest as a last resort.

Section 105 provides that a police officer may discontinue an arrest at any time. 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*).

Section 107 provides that nothing in Part 8 affects the power of police to commence proceedings otherwise than by arresting the person, or to issue a warning or caution or penalty notice.

Section 108 provides that 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*.

6.10 Other factors that may make an arrest unlawful

As discussed above, an arrest purportedly made under s99 will be unlawful if it is made without reasonable suspicion of an offence having been committed, without complying with s99(3), or for an improper purpose such as questioning.

An arrest may also be unlawful if:

It is not discontinued after it becomes clear that the reason for arrest no longer exists: see, for example, the decision of Gibson DCJ in the civil case of *Moses v State of New South Wales* (No. 3) [2010] NSWDC 243. In finding for the plaintiff on a false imprisonment claim, Her Honour held that, while police had sufficient grounds to warrant the arrest of the plaintiff, “they very rapidly realised that they had not only been overhasty ... but they had made a serious error of mistaken identity” yet they continued to detain him for several hours.

The police officer does not provide the information required by s.201: see discussion of s.201 at the end of this paper.

Excessive force is used: s.231 empowers police to use “such force as is reasonably necessary” to make the arrest or to prevent the person’s escape.

According to some commentators, the law is not clear as to whether excessive force necessarily 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 (see discussion at the end of this paper). In *NSW v Radford* [2010] NSWCA 276, the plaintiff alleged he was falsely imprisoned on the basis that the use of excessive force rendered the arrest unlawful. Unfortunately, whether this claim is good in law was not determined as the statement of claim was dismissed for procedural reasons.

R v Ali Alkan [2010] NSWLC 1 Heilpern LCM held that the arrest of the defendant was unlawful, firstly because it was not necessary, and secondly because the police had used excessive force. The defendant in this case had been Tasered several times after being asked by police to get off the road. The case is worth reading for its discussion of the Public Order and Riot Squad Standard Operating Procedures and the factors that must be considered when assessing the reasonableness of Taser use.

6.11 Citizen’s arrest

Section 100 provides that 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). Although this power has not been expressly preserved by LEPRA s4 (which provides that LEPRA does not affect the common law powers of *police* to deal with a breach of the peace), nor has this power been expressly legislated away.

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).

7 Detention after arrest (LEPRA Part 9)

At common law, a person arrested for an offence had to be brought before a justice without delay. There is no common law power to hold the person at the police station to conduct interviews or other investigative procedures (*Williams v R* [1986] HCA 88; (1986) 161 CLR 278).

Part 9 (formerly *Crimes Act Part 10A*) modifies the common law by allowing 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.

I presume the provisions of Part 9 are well known to all of you, and will not discuss them in detail.

7.1 Application of Part 9

Section 111 provides that Part 9 applies to a person who is under arrest by a police officer for an offence.

Subs (2) specifies that it does not apply to a person detained under Part 16 (as an intoxicated person).

Part 9 does not apply to people arrested for breach of bail or on bench warrants. Although police will usually allow the arrestee to contact a lawyer or support person in this situation, this is a discretionary matter and not a right.

7.2 Deemed arrest

Section 110 deems some people to be under arrest for the purpose of Part 9, even if they have not actually been arrested.

A person is deemed to be under arrest if he or she is in the company of a police officer for the purpose of participating in an investigative procedure, if the police officer:

- believes there is sufficient evidence to establish that the person has committed the offence that is the subject of the investigation;
- would arrest the person if the person attempted to leave; or
- has given the person reasonable grounds for believing they 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.

7.3 Detention after arrest for purpose of investigation

Section 114 empowers police to detain a person after arrest for the purpose of investigating whether the person committed the offence for which they are under arrest. The length of the “investigation period” is regulated by ss. 115-120.

At first glance this would appear to apply to (and therefore authorise the detention of) a person who is not actually under arrest but is deemed to be under arrest by s.110. However, this must be read subject to s.113.

7.4 Rights of persons detained under Part 9

Division 3 (ss 122-131) sets out the rights of persons under arrest (or deemed arrest) and detained under Part 9.

Section 112 and the Regulations provide additional safeguards for “vulnerable persons” including Aboriginal persons and Torres Strait Islanders.

Importantly, the custody manager must, as far as practicable, assist a vulnerable person to exercise their rights under Part 9 (LEPRA Reg cl. 25). Where the person is a child, the custody manager must assist them to contact the Legal Aid hotline (see *R v Cortez, CE, ME, Ika & LT*, unreported, NSWSC, Dowd J, 3 October 2002)

In the case of an Aboriginal person or Torres Strait Islander, police must call the ALS custody hotline, unless the custody manager is aware that the person has already arranged for a legal practitioner to be present during questioning (LEPRA Reg cl. 33).

7.5 Part 9 does not confer a power of arrest

It is important to understand (and many police officers don't!) that Part 9 does not itself confer any powers of arrest, and does not empower police to arrest a person for the purpose of questioning.

Section 113 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 think 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.

In *R v Powell* [2010] NSWDC 84, a 19-year-old Aboriginal man was on remand in Wellington Correctional Centre after having been charged with some vehicle and break and enter offences. Police wished to interview him about the alleged offences, and obtained an order under s25 of the *Crimes (Administration of Sentences) Act* to have him taken to the Wellington Police Control Area (inside the correctional centre) for questioning. Police placed him under arrest and took him to the police control area where he participated in an ERISP.

Nicholson DCJ excluded the ERISP on the basis that it was unlawfully obtained. The arrest was unlawful, firstly because the defendant had already been arrested and charged with the offence, and secondly because it was solely for the purpose of questioning.

His Honour said:

“92. In fairness, I cannot be satisfied [the police officer's] conduct was undertaken knowing it was a serious breach of the power to arrest, but if it was unknowing then her ignorance was inexcusable and dangerous; dangerous because the liberty of citizens and residents should be secure from mistakes based upon ignorance of a power daily used by this officer.

93. The arrest for purposes of questioning of the accused came in circumstances where he had previously indicated he did not wish to participate in an interview. This arrest came because he had (earlier) exercised his right to be silent. Such arrest could be rightly seen as an harassment of him for so exercising his right to silence.

94. For any Court to readily or easily excuse an unlawful arrest in such circumstances - mid-sized country town, close knit police community, large Aboriginal population and frequent advice from Aboriginal Legal Services not to say anything - would signal to police that if Aboriginal or other suspects refused on the occasion of their original arrest to participate in an ERISP, a second arrest for the purposes of questioning would be likely to be excused and permitted by a Court in the face of defence objection.”

His Honour also said (at para 115):

“Does the fact that the accused was already in custody reduce the seriousness of the breach? No! It does not diminish the arbitrary nature of the arrest.”

His Honour made some comments about Part 9 which, although not strictly relevant to his decision, are interesting. Although the defendant was under arrest, and that this was for the

purpose of investigation, Part 9 did not apply, as s.110(4) provides that a person ceases to be under arrest for the purpose of Part 9 if the person is remanded in respect of the offence. His Honour was also very critical of the Caution and Summary of Part 9 document, which he viewed as confusing and misleading. (see paras 33-39).

His Honour also made some comments about the vulnerability of Aboriginal persons (see paras 102-104).

At the time of updating this paper in April 2012, I understand that there may soon be a summons filed in the Supreme Court concerning the arrest of prison inmates and the use of orders under s.25 of the *Crimes (Administration of Sentences) Act*.

8 Other powers of police 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 many of these situations, the safeguards under LEPR s.201 do not apply (see discussion of s.201 towards the end of this paper). Some 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 LEPR s.99(3) so there is no statutory obligation for police to consider more appropriate ways to deal with breaches of bail. However, it may be argued that the common law principle of arrest as a last resort applies to arrests for breach of bail. The section provides that police “may” arrest; this means 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. Firstly, the police have a discretion whether to take any action at all; if they decide to place the defendant before the court for an alleged breach of bail, there is a discretion to have a summon issued instead of arresting the defendant.

Arrests under the *Bail Act* are exempt from the s.201 safeguards, but the common law requirements of *Christie v Leachinsky* almost certainly apply.

Where a defendant is charged with trifecta-type offences following an improper arrest for breach of bail, a *Lance Carr* type application may meet with some success. This was successfully employed by the Aboriginal Legal Service in 2010 in a District Court appeal concerning a 14-year-old girl arrested at her own home for an alleged breach of a curfew condition the previous night. The judgment is not in circulation; it is subject to a non-publication order because of the defendant’s age.

8.2 Breach of the peace

LEPR s.4 expressly preserves the powers conferred by the common law on police officers to deal with breaches of the peace.

“Breach of the peace” is not defined in LEPR. 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).

See the discussion of breach of the peace above in the context of powers of entry; see also Mark Dennis’ papers, referred to at the end of this paper.

At common law, police (and citizens) have extensive powers to prevent or to stop breaches of the peace. These include powers of entry, at least in some jurisdictions (*Nicholson v Avon* [1991] 1 VR 212, *Panos v Hayes* (1984) 44 SASR 148, and now enacted into s.9 of LEPR), 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).

The recent case of *DPP v Armstrong* [2010] NSWSC 885 did not break any new ground but confirmed that police in NSW have a common law power to arrest for breach of the peace.

The safeguards in LEPR s.201 apply to arrests at common law and would therefore apply here. So, presumably, would *Christie v Leachinsky*.

8.3 Power to restrain persons for safety reasons (*Police Act* and common law)

Police are also powered 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.”

In *R v McLeay* [2009] NSWLC 29, Curran LCM commented (at para 106):

“[A]s a consequence of the implementation of LEPR, and since *Gribble* was decided, the following subsection (6) was added to s.6 of the *Police Act*:

“Nothing in this section confers on the NSW Police Force a power to provide a police service in a way that is inconsistent with any provisions applicable to police officers under the Law Enforcement (Powers and Responsibilities) Act 2002.”

“It would seem to me that given this amendment, s.6 would now be considerably limited, and in any event it could not be relied upon to expand powers not allowed for in LEPR.[I]n this regard, I note that my view accords with that of Heilpern LCM in *Police v Randle* (decision of Local Court 21/10/2008 – unreported – at paragraph 70-71).”

In *R v Ali Alkan* [2010] NSWLC 1 (at paras 42-52) Heilpern LCM discussed *Gribble* and the effect of the enactment of LEPR and the amendment of the *Police Act*. His Honour said “I note that there is a debate relating to the existence of any common law or general power of arrest since the introduction of [LEPR]”. His view was that there probably still is a residual power to arrest to stop danger or injury in *Gribble*-type situations where an offence has not

been committed. However, he did not need to resolve the issue as the case was decided on other grounds (see discussion above in the context of excessive force).

See also the discussion of *Castillo v R* (District Court NSW, North DCJ, 4 August 2011, 2009/327995) in part 2.1 of this paper. In this case police unsuccessfully argued that grabbing the accused by the jaw and attempting to retrieve something from his mouth was justified in accordance with the *Police Act* and the principle in *Gribble*.

8.4 Arrest under Road Transport legislation

Police have powers to arrest persons without warrant for the purpose of taking blood and urine samples in some situations, for example where the person has failed a breath or oral fluid test, has failed a sobriety assessment, or has been involved in a fatal accident (*Road Transport (Safety and Traffic Management) Act* ss.14, 18C, 214A, 26).

Section 201 does not apply, nor do there appear to be any safeguards built in to the *Road Transport (Safety and Traffic Management) Act*. In the absence of any other safeguards, and in the absence of any provision purporting to oust the common law, I would suggest *Christie v Leachinsky* applies.

The arrest power under s.26 was examined in 2011 by Magistrate Tsavdaridis in *Police v Murray* [2011] NSWLC 1. His Honour excluded evidence because police had not complied with the procedural requirements under the Act.

However, see the recent Supreme Court decision of *DPP v Langford* [2012] NSWSC 310 in which Fullerton J held that a magistrate had erred in excluding unlawfully-obtained evidence because, in performing the balancing exercise under s.138 of the *Evidence Act*, she failed to properly assess the gravity of the illegality. Fullerton J remarked that the police appeared to have been acting under a “genuine but mistaken belief” that they were authorised to arrest the defendant and take her to hospital, and that this did not amount to a grave breach of the law.

In coming to her decision in *Langford*, Fullerton J had close regard to *R v Camilleri* [2007] NSWCCA 36, in which McClellan J held that, in the case of an innocent but mistaken belief that a person’s actions were authorised by law, “only a minimal level of impropriety was involved”.

In neither case did the court refer to Smart AJ’s discussion of gravity of impropriety in *DPP v Carr* (2002) 127 A Crim R 152 (see further discussion in part 14.1 of this paper).

8.5 Intoxicated persons (LEPRA Part 16)

Part 16 (ss.205-210) contains the provisions from the old *Intoxicated Persons Act*.

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.

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

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).

8.6 Mental Health Act 2007

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 a mental health facility if an appropriate certificate has been endorsed by a medical practitioner or an accredited person (ss.19(3), 21). Police may enter premises without a warrant for the purpose of apprehending the person (s.21).

A police officer may apprehend a person and take them to a mental health facility, if the officer has reasonable grounds for believing that the person:

- has recently attempted suicide, or that it is probable that the person will attempt to kill or seriously harm him/herself; or
- 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 (s.22).

Police may also apprehend a person, and take them to a mental health facility, if notified that the person has breached a community treatment order. Police have the power to enter premises without a warrant for the purpose of apprehending the person (s.59).

8.7 Children and Young Persons (Care and Protection) Act 1998

Section 43 empowers an authorised Family and Community Services (FaCS, formerly known as 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 FaCS, who must apply to the Children's Court for a care order at the first available opportunity (s.45).

9 Powers to request or demand identity

9.1 Investigation of indictable offences (LEPRA Part 3 Division 1)

Section 11(1) provides that police may request a person to disclose their identity if the person's identity is unknown to the officer and if the officer suspects on reasonable grounds that the person may be able to assist in the investigation of an alleged indictable offence

because the person was at or near the place where the alleged offence occurred either before, when or soon after it occurred.

“Identity” is defined in s3 as a person’s name or residential address (or both).

Section 12 makes it an offence to fail to comply with such a request, or to provide false or misleading information, without reasonable excuse. However, police must first have complied with s. 201.

In *DPP v Horwood* [2009] NSWSC 1447, Fullerton J held that this power applies not just to potential witnesses but also to suspects. Her Honour said (at para 34):

“I am satisfied that by the passage of the *Crimes Legislation Amendment (Police and Public Safety) Act* 1998, and the incorporation of the equivalent provision into LEPR in 2002, Parliament intended to abrogate the right to silence to the extent that a person is required to provide their identification details to police in the circumstances provided for the section.”

9.2 Persons given move-on directions (LEPRA Part 3 Division 1)

Section 11(2) was inserted by the *Identification Legislation Amendment Act 2011*, which commenced on 1 November 2011.

Police are now empowered to demand the name and address of a person to whom they intend to give a direction to leave a public place in accordance with Part 14 (if the person’s identity is unknown to the police officer).

The offence provision in **Section 12** applies to subs(2) as it does to subs(1).

The *Identification Legislation Amendment Act* also introduced provisions requiring people to remove face coverings in certain circumstances (see discussion at Part 9.6 of this paper).

9.3 AVO defendants (LEPRA Part 3 Div 1A)

This Division was inserted by the *Crimes (Domestic and Personal Violence) Act 2007* and commenced on 10 March 2008.

Section 13A provides that a police officer may request a person whose identity is unknown to the officer to disclose their identity if the police suspect on reasonable grounds that an apprehended violence order has been made against that person.

Sections 13B makes it an offence to fail to comply with such a request; **s13C** makes it an offence to provide a false name or address. Police must first have complied with s. 201.

9.4 Drivers and passengers (LEPRA Part 3 Division 2)

This Division replicates certain provisions formerly in the *Police Powers (Vehicles) Act* 1998.

Section 14 provides that a police officer who suspects on reasonable grounds that a vehicle is being, or was, or may have been used in or in connection with an indictable offence may request drivers and passengers to disclose their own or each other’s identity. They may also request a vehicle’s owner to disclose the identity of the driver and any passengers. Police may also require the person to disclose the identity of a person who was driving the vehicle a short time before.

Sections 15, 16 and 17 apply to drivers, passengers and owners respectively. Each of these sections makes it an offence to fail, without reasonable excuse, to disclose identity details on request. **Section 18** creates an offence of providing false or misleading information about identity. An offence will not be committed unless police have complied with s.201.

In *Police v Amanda Barber* [2011] NSWLC 12, Magistrate Brown confirmed that a vehicle’s owner may be required to disclose the identity of a person who they merely suspected to have been driving, but no offence is made out for failure to disclose unless the police make sufficiently clear that they are asking for details of people *suspected* of driving (as opposed to who the owner might have *known* was driving).

9.5 Proof of identity (LEPRA Part 3 Division 3)

Section 19 empowers police to request a person to provide proof of his or her identity.

However, *failure or refusal to provide proof of identity is not an offence, nor do police have a power to search a person for identification documents.*

Of course, if police have grounds to proceed against a person for an offence, and are not reasonably satisfied as to his or her identity, s.99(3)(a) may provide the police with grounds to arrest the person.

9.6 Removal of face covering (LEPRA Part 3 Division 4)

This division was inserted by the *Identification Legislation Amendment Act 2011*, which commenced on 1 November 2011.

Section 19A provides that a police officer may require a person to remove any face covering so as to enable police to see the person's face if:

- the person has been lawfully required (whether under LEPRA or any other Act or statutory instrument) by the police officer to provide photographic identification, or
- the person has otherwise been lawfully required (whether under LEPRA or any other Act or statutory instrument) by the officer to identify himself or herself or provide other identification particulars.

This provision would therefore apply to persons who are required to disclose their name and address under any of the powers discussed in this paper.

Subs(3) provides that the police must ask for the person's co-operation, and that the viewing of the person's face must be conducted as quickly as reasonably practicable and in a way that provides reasonable privacy (if the person requests privacy).

It is worth noting there is no specific requirement that the removal of the face covering be done in the presence of a police officer of the same sex. Subs(5) specifically provides that removal of face covering does not constitute a search.

Police must also comply with Section 201.

Section 19B creates an offence of failing to remove a face covering when required.

In the case of a person required to remove a face covering following a request made under LEPRA Section 14 (disclosure of driver or passenger identity if vehicle suspected of being used in connection with indictable offence) the maximum penalty is 50 penalty units and/or 12 months' imprisonment. In any other case, the maximum penalty is 2 penalty units.

There is a defence of "special justification", the onus of proof of which lies on the defendant.

Subs(2) provides that a person has a special justification if, and only if:

- the person has a legitimate medical reason for not removing the face covering, or
- the person has any other excuse of a kind prescribed by the Regulations (currently, nothing has been prescribed by the Regulations).

It is clear that religious reasons are not a special justification.

Section 242B has been inserted into LEPRA, providing for the operation of Division 4 of Part 3 to be monitored by the Ombudsman.

9.7 Emergency public disorder powers (LEPRA Part 6A)

The emergency public disorder powers are outlined above in the section on personal search powers.

Section 87L allows police to demand the identity of a person who is in a "target area" or on a "target road". Subsections (2) and (3) create offences for failure to comply and providing

false name/address respectively. As with other identity powers, police must comply with s.201.

9.8 Drug premises (LEPRA Part 11 Div 1)

Section 142 provides that police who are executing a search warrant under this Division (see discussion on powers of entry above) may request any person on the premises to disclose his or her identity. It is an offence under **s.143** to fail to do so, or to provide false or misleading information. Police must comply with s.201.

9.9 Other non-LEPRA powers to demand name and address

Police (or, in some cases, other authorised officers) have the power to demand a person's name and address in a range of other situations. Examples which may affect our clients include:

- if police suspect on reasonable grounds that a person is under 18 and is carrying or consuming alcohol in public (in this case police may also require the person to provide documentary evidence of age within a reasonable time) (*Summary Offences Act* s.11);
- when a Sheriff or other person is executing a fine default warrant (*Fines Act* s.104);
- when a person is reasonably suspected of having committed an offence under the *Rail Safety Act* or Regulations (*Rail Safety Act* s.104) or the *Public Transport Act* or Regulations (*Public Transport Act* s. 55);
- in a range of situations involving vehicles and traffic (see, for example, *Road Transport (General) Act* ss.171, 172, 173; *Road Rules* r.287). In some of these situations a person can be required to produce their licence – an exception to the general rule that people cannot be compelled to provide documentary ID.
- in precincts covered by their own legislation, police and authorised officers (such as Rangers) have powers to demand identity of persons reasonably suspected to have committed offences under the relevant legislation (see, for example, *Sydney Harbour Foreshore Authority Regulation* 2006 cl.22; *Centennial Park And Moore Park Trust Regulation* 2009 cl. 43; *Sydney Olympic Park Authority Regulation* 2007 cl. 29).

10 Power to take identification particulars

10.1 Taking identification particulars from persons in custody (LEPRA Part 10 Div 1)

Section 133 provides that police may take all particulars necessary to identify a person who is in lawful custody for any offence. If the person is over 14 (*this presumably means 14 or over*) this may include the person's photograph, fingerprints and palm prints (see s136 for procedures applicable to children under 14).

As to what is "necessary to identify a person", it has been suggested that this is confined to ensuring that the person is who she or he purports to be, and to ensure there is an accurate criminal record to hand up in court.

However, the authorities do not support this view. This section's predecessor (s353A(3) of the *Crimes Act*) was considered in *R v McPhail* (1988) 36 A Crim R 390, Lee CJ at CL (Hunt and Campbell JJ agreeing) held (at 398-399):

"The section in defining the power of the officer to take finger prints etc, uses the expression 'all such particulars as may be deemed necessary for the identification of such person' and it is plain that this gives an officer a very wide discretion as to when particulars of identification can be required. The power of the police officer under the section is not limited to cases where he might suspect that identification will be in dispute at the trial but is available in every case where it is considered by him to be

necessary for the identification of the accused in court in whatever circumstances that may arise."

In *Carr v The Queen* (1973) 172 CLR 662 (at 663) the High Court said, in refusing an application for special leave:

"The second limitation that is sought depends upon the same notion, namely, that the identification is for the purpose of identifying the person fingerprinted as a person who has been convicted and not for the purpose of identifying him with the offence. The Court of Criminal Appeal correctly rejected these contentions."

The recent case of *R v SA, DD and ES* [2011] NSWCCA 60 confirms that the power of police to take identification particulars, and the use to which these particulars may be put, is broad.

While the three defendants (all of them young people) were in police custody after arrest, police took photographs of each of them and used those photographs in a photoboard array which was shown to other witnesses for identification purposes. The police also took fingerprints of ES and DD which were subsequently used by the police to compare with fingerprints taken from the victim's apartment.

At trial in the District Court, the defendants argued that s133 of LEPPRA did not allow photographs and fingerprints to be taken and used in such a manner, and that the taking of fingerprints and photographs in such circumstances was subject to the procedures in the *Crimes (Forensic Procedures) Act* (which, among other things, requires a court order to be obtained before conducting a forensic procedure on a suspect who is a child). The trial judge ruled that the evidence was not admissible.

The Crown appealed to the CCA under section 5F of the Criminal Appeal Act. In upholding the appeal, Blanch J (with whom McClellan CJ at CL and Hoeben J agreed) held that there was no material difference between LEPPRA s133 and its predecessor.

His Honour discussed *McPhail* and *Carr* (referred to above) as well as some authorities from other jurisdictions, and said (at para 33):

"It is quite clear from these authorities that a broad interpretation was accepted in New South Wales of police powers under s353A(3) of the *Crimes Act* 1900. It allowed the police to take fingerprints and photographs not only to establish the identity of a suspect but to use that evidence to prove the suspect had committed the crime."

Blanch J also discussed the interaction between LEPPRA and the *Crimes (Forensic Procedures) Act*.

He referred to *Crimes (Forensic Procedures) Act* s.3, which defines "forensic procedure" and excludes "(e) the taking of any sample for the sole purpose of establishing the identity of the person from whom the sample is taken."

He also referred to *Crimes (Forensic Procedures) Act* s.112, which provides:

"This Act does not apply to the taking of photographs, hand prints, finger prints, foot prints or toe prints:

(a) from a suspect who is under 14 years of age if the suspect is in lawful custody as mentioned in section 136 of the *Law Enforcement (Powers and Responsibilities) Act* 2002, or

(b) from a suspect who is at least 14 years of age, if the suspect is in lawful custody as mentioned in section 133 of the *Law Enforcement (Powers and Responsibilities) Act* 2002, or..."

Blanch J concluded (at para 43):

"In this case the taking of the photographs and fingerprints of each of the respondents was done in accordance with the powers conferred on the police by s133 of the LEPPRA and those powers are excluded from the provisions of the CFPA by s112 of the LEPPRA. There was no illegality or improper conduct by the police."

Section 134 allows a court to order a person to attend a police station for the taking of identification particulars, once an offence has been proved against a person. The section applies to indictable offences and certain traffic offences.

The order must contain a warning that the person is liable to be arrested if he or she does not comply with the order. Subs (4) provides that a person who does not attend the police station in compliance with the order may, at the direction of the officer in charge of the station, be arrested and taken into custody for such time as is reasonably necessary for the taking of the identification particulars.

Section 135 provides that a reference in Division 1 to “lawful custody” is a reference to lawful custody of the police or other authority (cf s.3, which defines “lawful custody” as police custody). If a person is in lawful custody in a place other than a police station, police powers under s.133 or 134 may be exercised by the person in charge of that place or a person normally under their supervision.

Section 136 provides that if police wish to take a photograph, fingerprint or palm print of a child under 14 who is in lawful custody for an offence, an officer of or above the rank of Sergeant must apply to the Children’s Court (or, if not possible to apply to the Children’s Court within 72 hours of the child being taken into custody, to an authorised officer).

Subs(5) sets out the following matters which the court must take into account in deciding whether to make an order:

- (a) the seriousness of the circumstances surrounding the offence;
- (b) the best interests of the child;
- (c) the child’s ethnic and cultural origins;
- (d) so far as they can be ascertained, any wishes of the child;
- (e) any wishes expressed by the parent or guardian of the child.

Subs(6) provides that a child must not be held in custody for the purpose only of an application being made under this section.

Section 137 provides for the destruction of children’s identification particulars.

If a court finds an offence against a child not proved, the court must give the child (and the child’s parents or guardian if practicable, and any other person who has the care of the child) a notice stating that if they wish, the court will order the destruction of any photographs, fingerprints, palm prints, and any other prescribed records, and the court may make the order accordingly.

“Prescribed records” means records of the kind prescribed for the purposes of s.38(1) of the *Children (Criminal Proceedings) Act 1987* (there appears to be nothing so prescribed by the *Children (Criminal Proceedings) Regulation*).

The *Children (Criminal Proceedings) Act* s38 requires the Children’s Court to order the destruction of photographs, fingerprints, palm prints and other prescribed records if the child has been found not guilty or if the matter is dismissed under s33(1)(a) of the Act. The court may order the destruction of such records in other cases where the court believes the circumstances justify it.

Therefore, insofar as the Children’s Court is concerned, s.137 is redundant. However, it has application to other courts dealing with children.

Section 137A applies to both adults and children, and provides for the destruction of fingerprints and palm prints.

A person from whom any fingerprints or palm prints are taken under Part 10 Division 1 in relation to an offence may request the Commissioner to destroy the prints if the offence is not proven. “Not proven” includes being found not guilty, acquitted, or having a conviction quashed and an acquittal entered on appeal. It also includes the situation where proceedings

have not been commenced, or have been discontinued, 12 months after the prints were taken (but see s.137B). Although the definition of “not proven” does not specifically include a discharge under s.32 or s.33 of the *Mental Health (Forensic Provisions) Act*, we have successfully applied for destruction of prints in these circumstances.

A request must be made in writing and, in the case of a child, may be made by a parent or guardian on the child’s behalf.

The Commissioner must destroy the prints as soon as reasonably practicable after receiving the application.

This section does not entitle a person to have their charge photographs destroyed. See *ACP v Commissioner of Police, NSW Police Force* [2011] NSWADT 24, in which the applicant’s request to have her charge photograph destroyed was refused. It was held that the taking of charge photographs is part of the core functions of the NSW police, and not its administrative or educative functions, and therefore the information protection principles in the *Privacy and Personal Information Protection Act 1998* (NSW) do not apply.

Section 137B allows the police or DPP to request an extension to the 12-month period provided for in s.137A. A Magistrate may grant the extension if satisfied there are special reasons for doing so.

10.2 Taking of identification particulars from other offenders (LEPRA Part 10 Div 3)

Section 138A applies to people issued with penalty notices under the *Criminal Procedure Act*. Note that this includes only criminal infringement notices and not general penalty notices for traffic, parking, railway offences, etc.

A police officer who serves such a penalty notice may require the person to submit to having his or her fingerprints and/or palm prints taken and may, *with the person’s consent*, take the person’s prints.

A requirement under this section must not be made of a person aged under 18.

The Commissioner must ensure that prints taken under this section are destroyed on payment of the penalty notice, if the penalty notice is withdrawn, or if the offence is dealt with by a court and the person is found not guilty or the charge is dismissed.

The transitional provisions make it clear that the requirements for destruction extend to prints taken under the old *Crimes Act* s.353A(c).

Section 138B provides that a police officer who serves a court attendance notice personally on a person who is not in lawful custody for an offence may require the person to submit to having his or her fingerprints and/or palm prints taken and may, *with the person’s consent*, take the person’s prints.

Such a requirement must not be made of a person under 18.

Section 138C provides that, when exercising a power to require prints to be taken under section 138A or 138B, a police officer must provide the person with:

- evidence that they are a police officer (unless they are in uniform);
- name and place of duty;
- the reason for the exercise of the power; and
- a warning that, if the person fails to comply with the requirement, the person may be arrested for the offence concerned and that, while in custody, the person’s fingerprints and palm prints may be taken without the person’s consent.

There is no separate power to arrest for the purpose of taking fingerprints and palm prints. To justify arresting the person for the offence, police would have to suspect on reasonable grounds that it is necessary to arrest the person for one of the purposes listed in section 99(3).

11 Powers to give directions

11.1 General direction-giving power (LEPRA Part 14)

Section 197(1) provides that a police officer may give a direction to a person in a public place if they have *reasonable grounds to believe* that the person's *conduct or presence* is:

- harassing or intimidating persons;
- obstructing people or traffic;
- likely to cause fear to a person of reasonable firmness; or
- for the purpose of obtaining or supplying prohibited drugs.

There is nothing to specify the nature and duration of direction that may be given. However, **s197(2)** provides that the direction must be reasonable in the circumstances for the purpose of stopping or reducing the relevant conduct.

There is no appellate authority on this point, but a 7-day direction was held by a Local Court Magistrate to be unreasonable because of its arbitrary nature (*Police v SAYSOUTHINH*, Brydon LCM, Liverpool Local Court, 24 May 2002).

In the context of a bail decision, Greg James J of the Supreme Court also commented about the inappropriateness of a direction which required a person not to go within 2km of Cabramatta (*R v Truong*, NSWSC, Greg James J, 13 November 2002).

In the recent decision of *Police v Joshua William McMillan* [2010] NSWLC 9, Magistrate Lerve considered the reasonableness of a direction to leave “the [Wagga Wagga] CBD, which is the main street and all off streets”.

His Honour referred to an ACT decision *Spatolisano v Hyde* [2008] ACTSC 161, where a defendant was given a move-on from the “area of the Kingston shops”. In that case, it was held that the ACT legislation did not require the area to be accurately specified, but an inadequate description may go to reasonable excuse.

Lerve LCM found that, while the direction was very broad, it was not too broad for the purposes of the legislation (His Honour suggested the legislation may “need some attention” in this respect). He held that the defendant did not have a reasonable excuse for breaching the direction, as he was found well within the CBD and there was no suggestion he did not understand the direction.

11.2 Power to give directions to intoxicated persons (LEPRA Part 14)

Section 198(1) allows a police officer to give a direction to a person who is:

- an intoxicated person (defined as a person who appears to be seriously affected by alcohol or any drug); and
- in a public place.

When this section commenced on 21 December 2007, it only applied to a person in a group of 3 or more intoxicated persons. However, following amendments which took effect on 7 June 2011, a direction may be given to an intoxicated person who is not part of a group.

Such a direction may be given if the police officer believes on reasonable grounds that the person's behaviour in the place as a result of the intoxication is likely to cause injury to any other person or persons or damage to property, or otherwise gives rise to a risk to public safety.

Police may direct the person to leave the public place and not return for a specified period not exceeding 6 hours (**s198(1), (3)**).

The direction must be reasonable in the circumstances for the purpose of preventing the injury or damage or reducing or eliminating the risk (**s198(2)**).

11.3 Limits, safeguards and offences applying to directions under ss.197 and 198

Section 200 provides that Part 14 does not authorise police to give directions in relation to an industrial dispute, an apparently genuine demonstration or protest, a procession or an organised assembly.

Section 201 requires police to provide identifying information and the reason for the direction (see discussion of s.201 towards the end of this paper).

If police are giving a direction to an individual, the information required by s.201 must be given before issuing the direction.

In the case of a direction given to a group, if it is not reasonably practicable to give this information before or during the issuing of the direction, it must be given as soon as practicable afterwards (see s.201(2B)).

Until 12 December 2006, s201 required police to warn the person that failure to comply may be an offence, before giving the direction. The former s.198(2) required the police to give another direction and warning if the person failed or refused to comply; however, this subsection was repealed.

Police are now required to comply with s.201(2C), which requires police to provide a warning that the person is required by law to comply with the direction, unless the person has already complied or is in the process of complying with it. If the person still does not comply, and the police officer believes that the failure to comply is an offence, police must then give a warning that failure to comply with the direction is an offence.

In addition, if police are giving a direction to a person to leave a place on the grounds that they are intoxicated and disorderly, they must provide a warning that it is an offence to be intoxicated and disorderly in any public place within six hours after the direction is given (s201(D)).

Section 198A provides that, when giving a direction to a group, the police officer is not required to repeat the direction, information and warnings to each person in the group. However, this does not give rise to any presumption that each person in the group has received the direction, information or warning.

The application of s.201 to the direction-giving power was discussed by Curran LCM in *R v McLeay* [2009] NSWLC 29 (discussed in the context of “execution of duty” in section 14.2 of this paper).

11.4 Offences relating to directions under Sections 197 and 198

Section 199 provides that refusal or failure to comply with a direction under s.197 or 198, without reasonable excuse, is an offence (max penalty 2 penalty units).

A person is not guilty of an offence unless it is established that he or she persisted, after the direction was given, to engage in the relevant conduct or any other relevant conduct (s.199(2)).

In relation to reasonable excuse, it has been suggested that the vagueness of a direction may in some cases afford a reasonable excuse for failure to comply (see discussion at Part 11.1 of this paper).

Section 9 of the Summary Offences Act (which commenced on 30 September 2011) makes it an offence for a person to be found intoxicated and disorderly in any public place, within 6 hours of being given a direction under LEPRA s.198.

The maximum penalty is 6 penalty units. There is a defence of reasonable excuse, proof of which lies on the defendant.

Subs. 9(4) provides that a person cannot be charged both with this offence and an offence under LEPRA s.199 of failing to comply with a direction.

11.5 Emergency public disorder powers (LEPRA Part 6A)

The emergency public disorder powers are outlined above in the section on personal search powers.

Section 87MA commenced on 15 December 2006 (a year after the rest of Part 6A). It allows police to give a direction to any group of persons (or any members of that group) within a “target area” to disperse immediately.

It appears that the police officer does not have to suspect or believe that dispersing the group is necessary to prevent or control the public disorder.

Police must give the direction in a manner that is likely to be audible to all members of the group (or to as many of them as practicable) but it is not necessary to repeat the direction to each person in the group.

The police officer giving the direction must warn the person that the direction is given for the purpose of preventing or controlling a public disorder. Police must also comply with s201.

Failure to comply with such a direction, without reasonable excuse, is an offence. The maximum penalty is 50 penalty units (which is significantly greater than the penalty for disobeying a direction under Part 14).

11.6 Crime scenes (LEPRA Part 7)

If a crime scene has been established, police may exercise various powers under **s95(1)**. These include:

- (a) directing a person to leave the crime scene or to remove a vehicle, vessel or aircraft from the crime scene;
- (b) removing from the crime scene a person who fails to comply with a direction to leave the crime scene or a vehicle, vessel or aircraft a person fails to remove from the crime scene;
- (c) directing a person not to enter the crime scene;
- (d) preventing a person from entering the crime scene.

Section 96 makes it an offence to, without reasonable excuse:

- hinder or obstruct the execution of a crime scene warrant (maximum penalty 100 penalty units and/or 2 years’ imprisonment); or
- fail or refuse to comply with a request or direction made by a police officer exercising crime scene powers (maximum penalty 10 penalty units).

Police must comply with s.201 when establishing a crime scene or when exercising direction-giving powers.

11.7 Directions for the regulation of traffic (LEPRA Part 12)

Section 185 provides that a police officer may give reasonable directions for the safe and efficient regulation of traffic to any driver or motorcycle rider on or near a road or road-related area. Police must comply with s.201 when giving a direction under this section.

There does not appear to be any offence under LEPRA for failure to comply; however, it is an offence under the Australian Road Rules to fail to obey a reasonable direction for the regulation of traffic (maximum penalty 20 penalty units).

12 General safeguards applicable to police powers (section 201)

12.1 Introduction

Section 201 contains some useful safeguards, in the form of information and warnings that police must provide.

The section, in its original form, was quite clear and relatively well-understood by police. However, it has undergone some amendments which make it quite difficult to understand.

12.2 Application

Sub-section 3 provides that Section 201 applies to the exercise of the following powers (whether or not conferred by LEPR, 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) (note that Sub-section 3AA provides that Section 201 does not apply to certain search and entry powers conferred by covert search warrants);
- (e) seizure of property;
- (f) stop or detention of a person (other than under Part 16) or a vehicle, vessel or aircraft;
- (g) requesting a person to disclose his or her identity or the identity of another person (including a power to require the removal of a face covering for identification purposes);
- (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).

12.3 Exclusions

Subs(6) (which was inserted on 12 December 2006) makes it clear that s.201 does not apply to powers exercised under the 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;
- the conducting of a forensic procedure under the *Crimes (Forensic Procedures) Act*.

12.4 Information and warnings that must be provided

When LEPR was originally enacted, 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

Police are still required to provide the “I”, “P”, and “E” but, following amendments that commenced on 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.

In the case of a direction given to a person under s.198, on the grounds that they are intoxicated and disorderly in a public place, subs(2D) requires a warning to be given regardless of whether the person is complying with the direction. The police must warn the person that it is an offence to be intoxicated and disorderly in that or any other public place at any time within 6 hours after the direction is given.

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.

12.5 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 the required information (ie. evidence that they are a police officer, name and place of duty, and reason for exercise of power) *before* exercising the power (s.201(2A)).

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*. (s.201(2) and (2B)).

The requirement to give warnings 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 (s.201(2C)).

If police are directing the person to leave a public place on the grounds that they are intoxicated and disorderly, police must provide a warning that it is an offence to be intoxicated and disorderly in that or any other public place within 6 hours after the direction is given (Section 201(2D)).

12.6 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.

12.7 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 their 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.

12.8 Application of s.201 to arrests

Section 201 applies to arrests made by police under:

- LEPR s99 (arrest for an offence);
- LEPR s101 (with a warrant);
- Common law (eg for breach of peace).

Section 201 does *not* apply to:

- arrests made under legislation listed in Schedule 1 (most notably the *Bail Act*);
- a citizen's arrest under LEPR s100 ;
- a common law citizen's arrest for breach of the peace.

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 arrests for breach of bail, and citizens' arrests, to which s.201 does not apply.

12.9 Application of s.201 to directions

In relation to directions, the requirements of s.201 vary depending on whether the direction is given to an individual or a group, or whether or not the person is compliant. See discussion in Part 11 of this paper under "Powers to give directions".

13 Use of force (Part 18)

Part 18 reflects the pre-existing common law.

Section 230 provides that it is lawful for a police officer exercising a function under LEPR (or any other Act or law), and anyone helping the police officer, to use such force as is reasonably necessary to exercise the function.

Section 231 provides that a police officer or other person who exercises a power of arrest may use such force as is reasonably necessary to make the arrest or to prevent the escape of the person after arrest.

14 Consequences of unlawful or improper use of police powers

14.1 Exclusion of evidence obtained unlawfully or improperly

All criminal lawyers should have a working knowledge of s.138 of the *Evidence Act* 1995, as well as provisions concerning the admissibility of admissions (such as ss. 84, 85 and 90).

Much has been written about the exclusion of illegally and improperly obtained evidence and I will not attempt to repeat it here. I will simply encourage you to think broadly about the potential for exclusion of evidence.

Types of unlawful or improper conduct that may lead to the exclusion of evidence include:

- A search conducted without reasonable suspicion and without consent
- A strip search conducted in circumstances where such action is not justified

- The detention of a person for the purpose of using a dog for “general drug detention”
- Entry onto premises without lawful authority
- An arrest made without reasonable suspicion that the person had committed an offence
- An arrest that is not justified by s.99(3)
- An arrest or detention for the purpose of questioning or investigation
- Detention after arrest for longer than the period permitted by Part 9
- Failure to accord a detained person their rights under Part 9
- An arrest for breach of bail under the *Bail Act* without appropriate exercise of discretion
- The use of excessive force
- Non-compliance with s.201

There is quite a variety of evidence that could potentially be excluded, for example:

- Items found during an illegal search; sometimes also admissions and other things obtained in consequence of the initial illegality (see *R v Rondo* [2001] NSWCCA 540).
- Evidence obtained following an unlawful or improper arrest: for example admissions, anything found during a search, evidence obtained from forensic procedures or breath/blood tests, evidence obtained as a consequence of the person’s fingerprints or photograph having been taken.
- Evidence of conduct amounting to offensive language, resisting/assaulting/intimidating police, following an unlawful or improper arrest (*DPP v Carr* (2002) 127 A Crim R 151; see also *DPP v Coe* [2003] NSWSC 363, *DPP v CAD* [2003] NSWSC 196, *DPP v AM* [2006] NSWSC 348).

In the recent Supreme Court case of *DPP v Langford* [2012] NSWSC 310, Fullerton J followed McClellan J in *R v Camilleri* [2007] NSWCCA 36 and held that in a case where police were acting under a “genuine but mistaken belief” that their unlawful conduct was lawful, this did not amount to a grave contravention of the law for the purpose of s.138 of the *Evidence Act* (see part also 8.4 of this paper).

This could potentially cause problems for advocates seeking to have evidence excluded as a consequence of unlawful or improper conduct by poorly-trained police officers who genuinely believe they are acting lawfully and appropriately (for example, arresting for the purpose of questioning, or arresting for breach of bail without understanding that there is a discretion to be exercised). However, in neither *Langford* nor *Camilleri* did the court refer to Smart AJ’s discussion of gravity of impropriety in *DPP v Carr* (2002) 127 A Crim R 152, and I would suggest that these cases can be distinguished.

In *Carr* the magistrate at first instance held that, although the officer who arrested Mr Carr “had not read the handbook and clearly believed he had acted properly”, the impropriety was reckless and it was grave. Smart AJ agreed (see paras 73-82).

At para [79], Smart AJ said:

On the evidence and his findings the magistrate was entitled to hold that the impropriety was reckless. Without traversing all the materials Cons Robins did not consider a summons when that was the course which should have been taken. That was time consuming and troublesome. It was far quicker to issue an FCAN. 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.

and at para [82]:

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.

In coming to his finding that the impropriety was serious, the magistrate at first instance quoted from the judgment of Mason CJ, Deane and Dawson JJ in *Ridgeway v The Queen* (1994-1995) 184 CLR 19 (at 38) to the effect that the public interest in ensuring minimum standards of propriety by those entrusted with powers of law enforcement "will vary according to other factors of which the most important will ordinarily be the nature, the seriousness and the effect of the ... improper conduct engaged in by the law enforcement officers and whether such conduct is encouraged or tolerated by those in higher authority in the police force."

Magistrate Heilpern also had regard to crime statistics and concluded that: "On a micro and macro level, arrest for offensive language is the norm, it is tolerated by senior members of the police..." (para [84]). The magistrate's use of these statistics, without first giving the prosecution the opportunity to make submissions on them, was held by Smart AJ to amount to a denial of procedural fairness to the prosecution. However, this does not undermine the principle that illegal or improper police conduct may be grave because, although it may be "innocent" on the part of the individual police officer, it is systemic and is tolerated at a senior level.

14.2 Offences with an "execution of duty" or "lawful custody" element

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.

There are also offences with a "lawful custody" element (eg, escape lawful custody, carry cutting weapon) which the prosecution will fail to establish unless they can prove that the defendant was lawfully arrested.

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. I have found this to be a successful strategy in many cases. Of course, if the client is charged with the trifecta, this will not get rid of the offensive language charge, but these charges are often defensible on other grounds anyway (see Mark Dennis' papers for further discussion).

In *R v K* (1993) 46 FCR 336, the Full Court of the Federal Court held:

"A police officer acts in the execution of his duty from the moment he embarks upon a lawful task connected with his functions as a police officer, and continues to act in the execution of that duty for as long as he is engaged in pursuing the task and until it is completed, provided that he does not in the course of the task do anything outside the ambit of his duty so as to cease to be acting therein."

A very useful case on execution of duty is *Nguyen v Elliott*, unreported; SC Vic; No 7540 of 1994; 6 February 1995, a decision of Hedigan J in the Supreme Court of Victoria.

The effect of *Nguyen v Elliott* was summed up by McHugh J in *Coleman v Power* [2004] HCA 39 (at paras 118-120):

"An officer who unlawfully arrests a person is not acting in the execution of his or her duty. In *Nguyen v Elliott*, the Supreme Court of Victoria set aside convictions for assaulting and resisting an officer in the execution of his duty when the arrest was unlawful and therefore not made in the execution of the officer's duty. The accused was approached by two constables who believed that he might have been involved in drug dealing. The accused attempted to walk away but was detained by the first

officer who wished to search him. The accused became aggressive and kicked the first officer. The second officer crossed the street to assist the first officer to control the accused. The accused was forced into the police vehicle and continued to protest. He was then taken out and handcuffed during which the accused bit the second officer on the hand. Before the magistrate, the first officer acknowledged that he did not reasonably suspect that the accused was in possession of drugs but was merely curious about whether the accused possessed drugs. The charges relating to the first officer were dismissed. The prosecution claimed the second officer's position was different because he had good reason to believe he was lawfully assisting his partner to effect an arrest for what the second officer assumed was an assault on the first officer. Hedigan J held that the conviction for resisting arrest could not stand. His Honour said:

"... it cannot be said that a police officer is acting in the execution of his duty to facilitate an unlawful search and arrest. The right of citizens to resist unlawful search and arrest is as old as their inclination to do so. The role of the courts in balancing the exercise of police powers conferred by the State and the rights of citizens to be free from unlawful search and seizure may be traced through centuries of cases."

"In setting aside the conviction, Hedigan J applied the decision of the Full Court of the Supreme Court of Victoria in *McLiney v Minster* [1911] VLR 347 where Madden CJ said:

"... it is an important principle of law that no man has the right to deprive another of his liberty except according to law, and if he does so the person so unlawfully deprived has a perfect right to use reasonable efforts to beat him off and get out of his custody."

"Hedigan J held that, although the second officer acted in good faith, his conduct was also unlawful and he was not acting in the execution of his duty when assisting the first officer to effect an unlawful arrest."

The cases of *Williams* [2011] NSWSC 1085 and *McClellan* [2008] NSWLC 11 (discussed in section 6.8 of this paper) are examples of NSW cases where the prosecution has failed to prove the "execution of duty" element.

Another example is *R v McLeay* [2009] NSWLC 29, in which a charge of assaulting police was dismissed on the basis that the police officer was not acting in the execution of his duty.

The case concerned a widely-publicised incident when a man was arrested after crossing a city street during the APEC conference in 2007. In a nutshell, a police officer directed the defendant not to cross the road; when he continued to cross the road he was detained by police and a struggle ensued. Curran LCM held that the defendant had been placed under arrest from this point, although the basis for this arrest was unclear.

The police had purported to issue the direction under a power provided by the special APEC legislation. This power was subject to s.201. His Honour found that s.201 had not been complied with and that the defendant had not breached a lawful direction.

His Honour said (at para 105):

"The only conceivable situation allowing for arrest that could have arisen was potentially a failure to comply with a direction, but for the reasons that I have given earlier, as a matter of fact that the situation did not, and could not arise. I therefore conclude that there was no basis under s.99 for [the police officer] to have arrested Mr McLeay".

14.3 Self-defence

It is worth noting that, if police fail to prove the execution of duty element of an assault police charge, the defendant may still be guilty of common assault (or AOABH, as the case may be). However, in many cases the conduct of the police will amount to an assault or an unlawful detention, and the defendant's actions may be justified in self-defence.

It is clear that a person is entitled to do what is reasonable to defend himself or herself against unlawful deprivation of liberty (*Crimes Act* s.418(2)(b)). Further, self-defence is not excluded merely because the conduct to which the defendant responds is lawful (s.422).

Where a defendant honestly believes he or she is being unlawfully arrested or detained, I would argue that self-defence is available even if the detention is in fact lawful. The decision of *Crawford* [2008] NSWCCA 166 appears to support this view, although it is not directly on point as it deals with a situation where the defendant perceived that he was being assaulted (as opposed to unlawfully detained) by the police.

More recently in *Colosimo v DPP* [2006] NSWCA 293, Hodgson JA (with whom Handley and Ipp JJA agreed) held:

The defence may succeed even though the conduct to which the accused responds is lawful (s 422); but if the conduct is lawful, then this is relevant to whether the accused could have believed it was conduct in respect of which defence was necessary, or which threatened an unlawful deprivation of liberty; and relevant also to whether the accused's conduct could have been a reasonable response in the circumstances as the accused perceived them (at [19]).

On the other hand, in *obiter* in *R v Burgess and Saunders* [2005] NSWCCA 52, Adams J considered that:

The statutory defence, however, is qualified in that the specific terms of paras 418(2)(b)(c) and (d) require that the conduct sought to be resisted by the use of otherwise unlawful conduct must itself be unlawful and that s 422 applies only to conduct undertaken for the reason specified in para 418(2)(a) (at [15]).

Similarly, Hulme SC DCJ in *R v Murray* [2008] NSWDC 226 considered that "s 422 applies only to conduct undertaken for the reason specified in para 418(2)(a) (at [6])."

To draw the distinction suggested by Hulme SC DCJ seems artificial. There seems to be no reason why a person resisting an arrest they thought was unlawful could not rely on s.418(2)(a) as well as (c), for they are not only seeking to terminate the unlawful deprivation of their liberty, but also defending themselves against what they perceive to be an unlawful battery. The comments of Adams J in *Burgess* are not relevant to the issues in dispute in that case and the Court did not appear to have the benefit of argument on the matter.

14.4 Civil remedies

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

Any further discussion of civil remedies is way beyond my expertise but has been well covered by other commentators.

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.

14.5 Private prosecutions

Under ss.14 and 49 of the *Criminal Procedure Act 1986* (NSW), any private person may commence a criminal prosecution against a person for an offence. The proceedings may be commenced by issuing a Court Attendance Notice signed by a Registrar.

The greatest risk to a person commencing a private prosecution is an adverse costs order in the event that the prosecution does not succeed. The DPP also retains the power to take over most prosecutions under s.9 of the *Director of Public Prosecutions Act 1986* (NSW), and may discontinue a prosecution after taking it over.

14.6 Remedies under the *Anti-Discrimination Act*

A person who has been treated unfairly by the police on a ground such as race, sex, homosexuality, transgender status, age or disability may have a remedy under the *Anti-Discrimination Act 1977* (NSW). The existence of such a remedy turns on whether police are providing a “service” for the purposes of the Act.

In *Commissioner of Police v Mohamed* [2009] NSWCA 432, the Court of Appeal held that conduct of police officers with respect to a request for assistance in relation to possible criminal activity, as well as the detection and prevention of crime, can constitute a “service” for the purposes of the *Anti-Discrimination Act 1977* (NSW). That case concerned a family who alleged their reports of criminal conduct were not taken seriously because of their race.

In *Commissioner of Police v Estate of Russell* [2002] NSWCA 272, Sully J held that the pursuit and arrest of Mr Russell did not constitute services for the purposes of the *Anti-Discrimination Act* but that once he was in custody, the police officers involved were providing him with a service.

Those decisions were applied by a three-member bench of the ADT, including Deputy President Magistrate Hennessy, in *Whitfield v State of NSW (NSW Police Force)* [2011] NSWADT 265, where the Tribunal held that the police, who knocked on Mr Whitfield’s door and demanded he leave his flat for the evening because the neighbours complained he was abusing him, had provided him a “service” for the purpose of the Act. They went on to hold that he was discriminated against because of his age. The Tribunal subsequently ordered the Police to pay Mr Whitfield \$10,000 in damages.

15 References and acknowledgements

For an excellent overview of LEPR and the policy considerations surrounding it, see the paper by Andrew Haesler SC (as he then was), available on the Public Defenders website at http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_policepowers

I would also commend to you Mark Dennis’ various papers on arrest, breach of the peace, and the “trifecta”, including *The Measure of Last Resort* (June 2011), *Arrest Hypotheticals* (March 2011) and “*Dog Arse Cunts*” – a discussion paper on the law of offensive language and offensive manner (June 2011), all of which are available at www.criminalcle.net.au.

In relation to Part 9 and admissibility issues, see Stephen Lawrence’s paper, *Admissibility Issues Arising From the Detention of Suspects for Investigation under Part 9 of the Law Enforcement (Powers and Responsibilities) Act 2002* (March 2012), available at www.criminalcle.net.au

In relation to civil remedies, see *Actions Against Police* (June 2011) by Peter O’Brien and Adrian Canceri, also available at www.criminalcle.net.au. I would also commend to you Miranda Nagy’s papers, presented at the Legal Aid civil law conference in 2009 and at a CIDnAP training session in 2011.

Finally, thanks to all the practitioners, judicial officers and student volunteers who have shared their views on LEPR and helped me with the preparation of this paper.

Any errors or omissions are my responsibility. Questions, corrections, suggestions, and ideas will be gratefully received (preferably by email at jane.sanders@freehills.com).

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