

Children and the *Law Enforcement (Powers & Responsibilities) Act* (the more things change, the more they stay the same?)

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1 Introduction

The *Law Enforcement (Powers and Responsibilities) Act* 2002 (LEPAR or LEPR, depending on which acronym you prefer) commenced on 1 December 2005.

This paper will focus on the aspects of LEPAR that involve changes to the law and that are most likely to affect young people. I hope that it will provoke discussion and encourage practitioners to share examples of how the LEPAR provisions are being applied in court.

For a section-by-section guide to LEPAR, please see my previous paper (last updated in March 2006), available at www.theshopfront.org/26.html.

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

2 LEPAR: a quick overview

- LEPAR is a commendable attempt to consolidate NSW police powers into a single piece of legislation. It is mostly a cut-and-paste job, transferring existing provisions from other Acts.
- There is also some attempt to enact the common law (eg powers of entry to prevent breach of the peace; use of force to effect arrest; the principle of arrest as a last resort).
- Some new powers have also been created (eg crime scene powers; and the public disorder powers enacted following the "Cronulla riots").
- There are some new safeguards and guidelines (eg the requirement for police to provide information ("WIPE") when exercising certain powers; and rules that must be followed when conducting personal searches).
- It is important to note that not all police powers have been transferred to LEPAR (eg forensic procedures, listening devices, and some traffic-related powers).

There is no doubt that LEPAR is much better-organised and more accessible than the patchwork of legislation that preceded it. It will hopefully assist police to better understand their powers (and members of the public to better understand their rights, and lawyers to find that section that they know exists somewhere!). In my view, however, LEPAR still lacks coherence and has failed to address some of the more problematic aspects of police powers in NSW.

Given some more time, will the operation of LEPAR bring about a shift in police practice and culture? Or will it be a case of "the more things change, the more they stay the same?"

Will LEPAR give police a better understanding of their powers (and their limitations)? Will the safeguard provisions cause police to think more carefully (and to communicate better with suspects) before exercising their powers? Or will they merely give defence lawyers more fertile ground for arguments about unlawful arrest, search, entry, etc? With cases involving

the exercise of powers under LEPAR now reaching the hearing stage, we can soon expect some tentative answers to these questions.

We can also expect to see some amendments in the near future. At the Police Association conference on 21 May 2006, the Premier foreshadowed some changes to LEPAR, ostensibly aimed at making it easier for police officers to do their jobs. It appears that this will involve modifying the “WIPE” procedure and changing the manner in which police are able to perform personal searches.

3 Power of entry

Part 2 (ss9-10) purports to re-enact the common law.

Section 9 confers a power to enter premises to prevent a breach of the peace or to prevent significant physical injury to a person. *“Breach of the peace” is not defined in LEPAR, nor is its scope clearly defined by the relevant case law.*

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. They may do so only if they believe on reasonable grounds that the person is in the dwelling. A police officer who enters premises under this section may search the premises for the relevant person.

These provisions arguably broaden the common law, rather than simply enact it. For a discussion of the relevant law, see Andrew Haesler’s paper and my previous paper on LEPAR.

4 Power to demand name and address

Part 3 (ss11-19) contains the powers formerly in *Crimes Act* s563 (to demand the name and address of a person reasonably suspected of being a witness to a serious indictable offence) and in the *Police Powers (Vehicles) Act* (to demand details from an owner, driver, or passenger of a vehicle reasonably suspected to have been used in connection with an indictable offence).

The information and warnings that must be provided when exercising these powers are substantially the same as before, and are now set out in s201.

Note that powers to demand name and address also exist in other legislation (eg *Fines Act* s104, *Rail Safety Act* s96, *Summary Offences Act* s11). These provisions also require information and warnings to be given.

5 Personal searches

Part 4 (ss20-45) provides for searches without warrant. *Note that Part 6A (see below) also confers search powers – in some cases with no requirement for reasonable suspicion.*

5.1 General personal search and seizure powers (Division 1)

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

- (a) anything stolen or otherwise unlawfully obtained;
- (b) anything used or intended to be used in or in connection with the commission of a relevant offence (s20 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 22 replicates *Crimes Act* s.357(3). A police officer who is lawfully on any premises may seize and detain any dangerous article found on the premises, if the officer suspects on reasonable grounds that the article is being or was used in or in connection with a relevant offence.

As we all know, the concept of “reasonable suspicion” is difficult to define with any precision. In my view, the most helpful case on this issue is R v Rondo [2001] NSWCCA 540, especially the following extract from para 53 of Smart AJ’s judgment:

“(a) A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs [...]. A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.

(b) Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.

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

5.2 Searches of persons on arrest or while in custody (Division 2)

Section 23 is similar to, but broader than, the current *Crimes Act* s.353A, which empowers police to search someone only if they are “in lawful custody upon a charge”.

Subs(1) provides that a person who is arrested *for an offence or under a warrant* may be searched 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 this would apply to someone 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 s3 as police custody.

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

In view of the broad power conferred by s.24, s.23 would appear redundant. However, given that the power in s.23 may be exercised at the time of arrest, it could possibly apply to people who are in the process of being arrested but who are not yet in lawful custody.

5.3 Additional personal search & seizure powers in public places & schools (Division 3)

This replicates (with some minor changes) *Summary Offences Act* s.28A and related provisions concerning searching for knives and other dangerous implements.

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

“Frisk search” is a term not used in previous legislation (see discussion of Division 4 below). Although slightly different in wording, it is broadly similar to the type of search currently permissible under Summary Offences Act s.28A.

“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.

In the case of school students, police may also request to search the student’s locker. 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.

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.

Police must comply with the safeguards in s.201. If this has been done, and the person initially refuses to submit to the search, the police may again request the person to submit to the search and must again warn them 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 ss26 and 201, or fails or refuses to produce anything detected in such search, is liable to a maximum penalty of 5 penalty units (s27).

Police may confiscate anything, in a public place or school, that they have reasonable grounds to suspect is a dangerous implement that is unlawfully in a person’s custody (s28).

Summary Offences Act ss11B and 11C create offences of having custody of offensive implements and knives in public places/schools.

Note that s26 empowers police to request a person to undergo 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 ss23 and 24).

5.4 Provisions relating generally to personal searches (Division 4)

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

LEPAR provides for three levels of personal searches, which are defined in s3 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 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”.

Division 4 applies to all searches carried out under LEPAR *by a police officer or other person* (other than internal searches under Division 3 of Part 11), except as otherwise provided by the Act or Regulations (s29).

A police officer or other person who is authorised to search a person may carry out a *frisk search* or an *ordinary search* (s30).

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” (s31).

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

- Police must inform the person whether they will be required to remove clothing during the search, and why this is necessary (subs(2)).
- Police must ask for the person’s co-operation (subs(3)).
- The search must be conducted in a way that provides reasonable privacy for the person searched, and as quickly as is reasonably practicable (subs(4)).
- Police must conduct the least invasive kind of search practicable in the circumstances (subs(5)).
- Police must not search the person’s genital area (or the breasts of a female or a female-identifying trans-gender person) unless the police suspect on reasonable grounds that it is necessary to do for the purpose of the search (subs(6)).
- The search must be conducted by a police officer or other person of the same sex as the person searched (or by a person of the same sex under the direction of the police officer or other person concerned) (subs(7)). (*This would appear to include even a metal detector search or a search of a person’s school locker.*)

- A search must not be carried out while the person is being questioned. Any questioning that has commenced must be suspended while the search is carried out (subs(8)).
- A person must be allowed to dress as soon as a search is finished (subs(9)).
- If clothing is seized because of the search, the police officer must ensure the person searched is left with or given reasonably appropriate clothing (subs(10)).

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

- A strip search must be conducted in a private area, must not be conducted in the presence or view of a person of the opposite sex and must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the search (apart from a support person as provided by the section) (subs(1)).
- A parent, guardian or personal representative of the person being searched may be present if the person being searched has no objection (subs(2)).
- A strip search of a child (at least 10 but under 18) or a person with impaired intellectual functioning must be conducted in the presence of a parent or guardian (or, if that is not acceptable to the person being searched, in the presence of another person who is capable of representing the interests of the person and who, as far as practicable in the circumstances, is acceptable to the person) (subs(3)).

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 s33 applies in addition to other requirements of the Act relating to searches.

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.

A strip search must not be conducted on a person who is under the age of 10 years (s34). *This implies that other searches may be conducted on persons under 10, which is disturbing, given that a child under 10 cannot be criminally responsible for any offence.*

The new provisions in Division 4 are encouraging, but will probably do little to ensure that police conduct searches in an appropriate manner. Many of the rules apply only if reasonably practicable in the circumstances, and police are empowered to do almost anything if they believe on reasonable grounds that it is necessary.

Police were previously subject to guidelines in relation to searches, mostly contained in the Police Code of Practice for Custody, Rights, Investigation, Management and Evidence (CRIME) (available at http://www.police.nsw.gov.au/about_us/acts_and_legislations/legislation_list/code_of_practice_for_crime).

For example, the Code of Practice for CRIME provides that strip searches must not be carried out unless “the seriousness and urgency of the circumstances require and justify such an intrusive search of the body”. If my clients’ accounts are anything to go by, it appears that strip searches are often carried out as a matter of routine.

The safeguards in s201 (which requires police to provide information such as their name and place of duty, and the reason for the search) are also a positive development. However, it remains to be seen whether LEPAR will bring about a change in police searching practices.

Unfortunately there is still no legislative safeguard to protect people who are searched by “consent” (eg “would you mind emptying your pockets mate?” or “have you got anything on you that you shouldn’t have?” whereupon the young person “voluntarily” produces a bag of pot, pocket knife, etc). If a person voluntarily consents to a search, police need not demonstrate reasonable suspicion. 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).

Will the new provisions apply to searches by consent? Or will a search by consent be deemed not to be a search under LEPAR or, worse still (especially in the “have you got anything on you that you shouldn’t have?” situation), not even a search at all?

5.5 Vehicle stop, entry, search and roadblock powers (Division 5)

This Division replicates certain powers authorising police to stop and search vehicles, erect roadblocks, etc.

Section 36 is a general power to stop, search and detain vehicles, formerly found in *Crimes Act* s.357 and 357E, *Police Powers (Vehicles) Act* s.10, and *Drug Misuse and Trafficking Act* s.37.

This power may be exercised on similar grounds to the power to stop and search individuals.

Police may also stop and search a vehicle, or a specified class of vehicles, if they suspect on reasonable grounds that:

- the vehicle (or a vehicle of the specified class) is being (or was or may have been) used in connection with the commission of a relevant offence (ie an indictable offence or certain firearms/weapons offences); or
- circumstances exist in a public place or school that are likely to give rise to a serious risk to public safety and that the exercise of the powers may lessen the risk.

Section 36A was added by *Law Enforcement Legislation Amendment (Public Safety) Act* 2005 (commencing 15 December 2005). It empowers police to stop a vehicle if they suspect on reasonable grounds that the driver or a passenger is a person in respect of whom the police officer has grounds to exercise a power of arrest or detention, or a search power, under LEPAR or any other law.

Section 37 replicates *Police Powers (Vehicles) Act* s.10 (1) and (2). It provides for the use of vehicle roadblock powers on any specified class of vehicles, if police suspect on reasonable grounds that the vehicle was (or is being or may have been) used in connection with an indictable offence and the exercise of powers may provide evidence, or that circumstances exist that are likely to give rise to a serious risk to public safety and the exercise of the powers may lessen the risk. There are procedures that must be followed for the authorisation of roadblocks (see ss37, 40 and 41).

A police officer who exercises a stop, search or detention power in relation to a vehicle, or who is authorised to exercise the roadblock power, has the power to give reasonable directions to any person in/on the vehicle concerned, or on or in the vicinity of a road, road-related area, public place or school (s38). Failure to comply, without reasonable excuse, is an offence (max penalty 50 penalty units and/or 12 months imprisonment) (s39). *Police must first have followed the procedures in s201.*

5.6 Vessel and aircraft entry and search powers (Division 6)

The powers to stop, search and detain vessels and aircraft are similar to their predecessors in the *Crimes Act* (ss 357, 357A, 357C, 357D and 357E) and *Drug Misuse and Trafficking Act* (s37).

6 Other search and entry powers

Search warrants are covered by Part 5 (ss46-80), and powers of entry and search in domestic violence situations are contained in Part 6 (ss81-87). These do not involve substantive changes to the law, and do not affect children as much as personal stop and search powers, and therefore will not be discussed in this paper.

7 Emergency powers: public disorder (the “Cronulla riot” amendments)

Part 6A (ss87A-P) was introduced by the *Law Enforcement Legislation Amendment (Public Safety) Act 2005*, which commenced on 15 December 2005.

7.1 Definitions etc (Division 1)

Section 87A defines “public disorder” to mean “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 location”.

Although Part 6A contains references to “large-scale public disorder” there is no definition of “large-scale”.

7.2 Liquor restrictions (Division 2)

A police officer of or above the rank of Superintendent may authorise the closure of any licensed premises (or the prohibition of the supply of liquor on such premises) (s87B) or establish an emergency alcohol-free zone (s87C) if the police officer:

- (a) has reasonable grounds for believing that there is a large-scale public disorder occurring in the vicinity (or there is a threat of such a disorder occurring in the near future), and
- (b) is satisfied that the closure or prohibition (or creation of alcohol-free zone) will reasonably assist in preventing or controlling the public disorder.

Sections 87B and 87C set out procedures for exercising these powers. In each case, an authorisation may be given for as long as reasonably necessary, but may not exceed 48 hours. It may be revoked at any time by a police officer of or above the rank of Inspector if he or she is satisfied that it is no longer necessary.

These sections also create powers (and offences) relating to giving directions to persons in charge of licensed venues, and to persons who are drinking or in possession of alcohol in alcohol-free zones.

7.3 Special powers to prevent or control public disorders (Division 3)

Division 3 allows the Commissioner of Police (or a Deputy or Assistant Commissioner) to authorise the exercise of special powers in public places.

An authorisation may be given if the officer giving the authorisation:

- (a) has reasonable grounds for believing that there is a large-scale public disorder occurring or a threat of such disorder occurring in the near future; and
- (b) is satisfied that the exercise of those powers is reasonably necessary to prevent or control the public disorder (s87D).

An authorisation may authorise the exercise of special powers in a public place:

- (a) for the purpose of preventing or controlling a public disorder in a particular area described in the authorisation (“target area”); or
- (b) for the purpose of preventing persons travelling by a road specified in the authorisation (“target road”) to an area to create or participate in a public disorder (s87E).

The authorisation may be given orally or in writing (if given orally, must be confirmed in writing as soon as reasonably practicable), and must include certain details including the general nature of the public disorder to which it applies (including the day or days it occurs or is likely to occur), the target area and/or road, and the time it ceases to have effect (s87F).

An authorisation may be given for a period considered reasonably necessary, up to 48 hours (but may be extended beyond 48 hours upon application to the Supreme Court). The Commissioner (or a Deputy or Assistant Commissioner) may revoke the authorisation at any time, and must revoke it if so directed by the Supreme Court (s87G).

The special powers may be exercised by any police officer in a public place for the purposes for which an authorisation is given (whether or not the police officer has been provided with or notified of the terms of the authorisation) (s87H).

The special powers are:

- Cordoning off a target area or any part of it, or establishing a road block on a target road (including any road in a target area). Police must not refuse permission for a person to leave the area unless it is reasonably necessary to do so to avoid a risk to public safety or to the person’s own safety (s87I).
- Stopping and searching any vehicle (and anything in or on the vehicle) in a target area or on a target road, and detaining the vehicle for as long as is reasonably necessary to conduct a search (s87J). *No warrant or reasonable suspicion is required.*
- Stopping and searching any person (and anything in the person’s possession or control) in a target area or on a target road, and detaining the person for as long as is reasonably necessary to conduct a search (s87K). *No warrant or reasonable suspicion is required. The search safeguards in Division 4 of Part 4 apply to a search under this section (except to the extent that it authorises strip searches).*
- Requesting a person in a target area, or in or on a vehicle on a target road, to disclose their identity and to produce proof of identity (but only if the person’s identity is unknown to the police officer, and if the police officer reasonably suspects that the person has been involved or is likely to be involved in a public disorder). Failure to disclose identity, or providing false details, is an offence (s87L). *Police must first follow the procedures set out in s.201.*

- Seizing and detaining a vehicle, mobile phone or other communication device if the seizure or detention will assist in preventing or controlling a public disorder (*this is a curiously drafted provision; it would appear to require the police officer to be certain, rather than merely to have a reasonable suspicion or belief, that the seizure will achieve its intended purpose*). Items seized may be detained for up to 7 days. This period may be extended by the Local Court for an additional period not exceeding 14 days. The Local Court may order more than one extension, so long as each extension does not exceed 14 days. Police may also seize and detain anything, including a vehicle, that they reasonably suspect may provide evidence of a serious indictable offence (whether or not related to a public disorder) (s87M).

If a police officer stops a vehicle on a road *that is not a target road or not in a target area*, (pursuant to a power conferred by LEPAR or any other Act), s87N allows the special powers conferred by Division 3 to be *exercised without authorisation* if the police officer:

- (a) has reasonable grounds for believing that there is a large scale public disorder occurring or a threat of such disorder occurring in the near future, and
- (b) suspects on reasonable grounds that the occupants of the vehicle have participated or intend to participate in the public disorder, and
- (c) is satisfied that the exercise of those powers is reasonably necessary to prevent or control the public disorder, and
- (d) is satisfied that the urgency of the circumstances require the powers to be exercised without an authorisation.

7.4 Monitoring, repeal, etc (Division 4)

Section 87O provides for the Ombudsman to monitor the powers conferred by Part 6A.

Section 87P is a sunset clause, which provides that Part 6A is repealed two years after its commencement (ie. 15 December 2007).

8 Crime scene powers

Part 7 gives legislative backing to what police have been doing informally for some years. Crime scene powers will not be discussed in this paper because they are unlikely to have a huge impact on children (although young people should be aware that police do have the power to issue directions in relation to crime scenes, and that failure to comply is an offence).

9 Arrest

Part 8 (ss99-108) re-enacts the former provisions of the *Crimes Act* in relation to arrest, with some minor changes and some additions derived from the common law.

9.1 Power of police to arrest without warrant

Section 99 substantially replicates the existing police power in *Crimes Act* s.352(1) and (2).

A police officer may arrest a person:

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

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

It is important to note that police still have power under Bail Act s50 to arrest for breach of bail, and a common law power (preserved by LEPAR s4) to arrest for breach of the peace. For helpful commentary on common law powers of arrest, see paras [2.33470] and [2.33510] in Vol 1 of Watson, Blackmore & Hosking Criminal Law (NSW) looseleaf service.

Section 99(3) introduces some important principles to be taken into account in deciding whether to make an arrest. Police must not arrest unless they suspect on reasonable grounds that it is necessary to arrest to achieve one or more of the following purposes:

- (a) to ensure the appearance of someone before court;
- (b) to prevent repetition or continuation of the offence or the commission of another offence;
- (c) to prevent the concealment, loss or destruction of evidence;
- (d) to prevent harassment of, or interference with, any potential witness;
- (e) to prevent the fabrication of evidence; and
- (f) to preserve the safety or welfare of the person.

This ostensibly reflects the common law position (enunciated in many cases including DPP v Carr (2002) 127 A Crim R 151, per Smart J at 159) that arrest should be used as a last resort. Note also that s8 of the Children (Criminal Proceedings) Act creates a presumption that children should not be arrested (although in my experience this seems to be honoured more in the breach than in the observance).

If police arrest a person without being able to justify it under s99(3), this will presumably make the arrest unlawful and not merely improper. This means that people in Lance Carr type situations may be able to rely on an “execution of duty” argument (apart from s138 of the Evidence Act) to defend charges of assaulting/resisting/etc police.

The safeguards in s201 apply to arrest. Some of these safeguards already exist at common law (eg being entitled to know the reason for the arrest - *Christie v Leachinsky* [1947] 1 All ER 567).

Police are empowered to use reasonable force to effect an arrest or to prevent the person’s escape (s231).

9.2 Citizen’s arrest

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

- (a) in the act of committing an offence under any Act or statutory instrument;
- (b) who has just committed any such offence; or
- (c) who has committed a serious indictable offence for which he or she has not been tried.

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

A citizen also has a common law power to arrest for breach of the peace (while not expressly preserved by LEPAR s4, it has not been expressly repealed either).

Although the safeguards in s201 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 (s231).

9.3 Warrants, persons unlawfully at large, etc

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

9.4 Discontinuing arrest and use of alternatives

A police officer may discontinue an arrest at any time(s105). Without limiting the scope of the section, subs(2) provides that an arrest may be discontinued if the arrested person is no longer a suspect or the reason for the arrest no longer exists, or if it is more appropriate to deal with the matter in some other manner (eg warning, caution, penalty notice, court attendance notice, *Young Offenders Act*).

Nothing in Part 8 affects the power of police to commence proceedings otherwise than by arresting the person, or to issue a warning or caution or penalty notice (s107).

Nothing in Part 8 requires a police officer to arrest a person under the age of 18 if it is more appropriate to deal with the matter under the *Young Offenders Act* (s108).

This provision is commendable but, in my view, it does not go far enough. For a child to be diverted to a caution or conference under the Young Offenders Act, he or she must admit the offence in the presence of a responsible adult. To facilitate this, police commonly arrest the young person, based on the rationale that this is necessary to ensure that the young person is accorded their Part 9 (formerly Part 10A) rights and has access to legal advice, support people, etc. In my view this reasoning is spurious; a young person can be accorded these rights without being arrested.

10 In-car video equipment

Part 8A (ss108A-H) commenced on 23 December 2004, almost a year before the rest of LEPAR. It covers the use of in-car video equipment to record roadside conversations between police and vehicle drivers or passengers. Although some young people will no doubt be affected by these provisions, Part 8A will not be discussed in this paper.

11 Detention after arrest

Part 10A of the *Crimes Act* has been re-enacted as Part 9 of LEPAR (ss109-132). Because there is already a fair bit of commentary available on the old Part 10A, and there have been no substantive changes, Part 9 will not be discussed in this paper.

12 Other powers relating to people in custody

Part 10 (ss133-138) re-enacts certain sections of the *Crimes Act* relating to taking of identification particulars such as fingerprints and photographs.

Crimes Act ss353AC-AD, which allow police to take fingerprints etc from adults served with penalty notices or CANs, have not been moved to LEPAR. It appears they will remain in the Crimes Act.

12.1 Taking of particulars for identification

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 (s33, formerly *Crimes Act* s.353A(3)).

It is well-established that this provision empowers police to take such particulars only for the purpose of ensuring that he or she can be identified to the court (see, for example, R v G [2005] NSWCCA 291, per Grove, Bell & Hidden JJ at para 8; R v Knight (aka Black) [2001] NSWCCA 114, per Greg James J at paras 59-72; R v Carr [1972] 1 NSWLR 608 at 610). It is not permissible to use a photograph taken under s353A for the purpose of showing it to a

witness in a photo array; in this case an application would need to be made under the Crimes (Forensic Procedures) Act.

A court may order a person to attend a police station for the taking of identification particulars, once an offence has been proved against a person. This applies to indictable offences and certain traffic offences (s134, formerly *Crimes Act* s.353A(4)).

If a person is in lawful custody in a place other than a police station, police powers under s133 or 134 may be exercised by the person in charge of that place or a person normally under their supervision (s135).

12.2 Children under 14

Children under 14 are dealt with by s136 (which replicates *Crimes Act* s.353AA with some changes). 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) is a *new provision* which 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.

12.3 Destruction

Section 137 (which replicates *Crimes Act* s.353AB) provides that 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*).

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, s137 is redundant. However, it has application to other courts dealing with children.

This provision does not extend to adults who are acquitted. Instead, destruction of fingerprints etc remains within the discretion of the Commissioner for Police.

12.4 Examination of persons in custody

A medical practitioner acting at the request of a police officer of the rank of Sergeant or above may examine a person in lawful custody for the purpose of obtaining evidence *if the person in custody has been charged with the offence*, and there are reasonable grounds for believing that an examination of the person may provide evidence as to the commission of the offence (s138, which replicates *Crimes Act* s.353A(2) with some changes in wording).

In this section a reference to “lawful custody” is a reference to lawful custody of the police or other authority. If the person is in custody in a place other than the police station, the powers of a police officer may be exercised by the person who is normally supervised by that person.

It is unclear how this provision interacts with the provisions of the Crimes (Forensic Procedures) Act. Certainly such an examination would fall within the definition of “forensic procedure” (and in many cases would constitute an intimate forensic procedure) and would be subject to the safeguards provided by that Act. However, it seems that LEPAR authorises such an examination without the safeguards required by the Crimes (Forensic Procedures) Act.

13 Drug detection powers

Part 11 (ss139-184) substantially re-enacts existing legislation in relation to drug premises (Div 1), drug detection dogs (Div 2) and internally concealed drugs (Div 3).

14 Powers in relation to vehicles and traffic

Part 12 (ss185-192) contains a mixture of traffic-related powers including the use of tyre deflation devices, confiscation of keys and cars from drunk drivers, etc. Most police powers in relation to traffic (eg accidents, random breath testing, speed measuring devices) remain in the *Road Transport (Safety and Traffic Management) Act 1999* and the *Road Transport (General) Act 2005*. LEPAR Part 3 Div 2, Part 4 Div 5, Part 6A and Part 8A also contain traffic-related powers.

15 Firearms and explosives detection dogs

Part 13 (ss193-196) re-enacts existing law in relation to the use of firearms and explosives detection dogs. It will not be discussed in this paper as it does not involve substantive changes to the law and is unlikely to affect most children.

16 Power to issue directions

Section 28F of the *Summary Offences Act* has been re-enacted as Part 14 of LEPAR (ss197-200).

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 (s197).

This does not authorise police to give directions in relation to an industrial dispute, an apparently genuine demonstration or protest, a procession or organised assembly (s200).

Before the direction is given, s201 requires the police to provide identifying information, the reason for a direction, and a warning that failure to comply may be an offence.

The direction must be reasonable in the circumstances for the purpose of stopping or reducing the relevant conduct (s198). *There is nothing to specify the nature and duration of direction that may be given, and there is no appellate authority on what is “reasonable”.* However, 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, SCNSW, Greg James J, 13 November 2002*).

If the person fails or refuses to comply with the direction, police may again give the direction and must again warn the person that failure to comply may be an offence (s198).

Refusal or failure to comply with the *second* direction, 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 (s199).

LEPAR Regulation cl. 40 provides that this offence may be dealt with by penalty notice (prescribed penalty \$220). Cl. 22 of the Young Offenders Regulation 2004 provides that, before issuing an infringement notice for this offence, police must consider alternatives under the *Young Offenders Act*.

17 Safeguards to be applied when exercising powers

Part 15 consists of ss201 and 204 (ss202 and 203 having been repealed before commencement).

Section 201 re-enacts some pre-existing requirements (previously found in *Crimes Act* s.563, *Police Powers (Vehicles) Act* s.6, *Summary Offences Act* s28F, etc) but goes further in that it applies these requirements to the exercise of other police powers.

The section applies to the exercise of the following powers (whether or not conferred by LEPAR):

- (a) search or arrest;
- (b) search of vehicle, vessel or aircraft;
- (c) entry of premises (not being a public place);
- (d) search of premises (not being a public place);
- (e) seizure of property;
- (f) stop or detention of a person (other than under Part 16) or a vehicle, vessel or aircraft;
- (g) requesting disclosure of identity;
- (h) establishing a crime scene;
- (i) giving a direction;
- (j) requesting a person to submit to a frisk search or produce a dangerous implement or metallic object (under s.26).

Police must 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 have 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

When exercising powers to *request identity*, to *give a direction*, or to *request a person to submit to a search or produce an object under s.26*, police must give this information *before* exercising the power.

In relation to all other powers listed, 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.

If two or more officers are exercising a power to *search or enter premises* or to *establish a crime scene*, only one officer is required to comply with this section. However, if a person asks another officer present for their name or place of duty, the officer must give the information requested.

Section 204 simply 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.

18 Intoxicated persons

The *Intoxicated Persons Act* has been re-enacted as Part 16 of LEPAR (ss205-210).

Section 206 allows police to 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 (s206).

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

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

Intoxicated persons must be kept separate from people detained for criminal offences, and juveniles must be kept separate from adults. A detained person must be given a reasonable opportunity to contact a support person, and must be given reasonable food, bedding, etc (s207).

A person detained under these provisions may be searched (s208).

It is odd that these powers have been included in LEPAR, because these are not really law enforcement powers. In my view they are more akin to police powers under the Mental Health Act, Children & Young Persons (Care & Protection) Act, etc.

19 Property in police custody

Part 17 (ss211-229) provides for the storage, return, disposal, etc of property in police custody. Division 1 (which substantially replicates *Summary Offences Act* ss28B-E, and relates to knives and dangerous implements) is likely to be the most relevant to children.

20 Use of force

Part 18 (ss230-231) reflects the pre-existing common law. It provides that reasonable force may be used by police (or other persons where relevant) in exercising their powers and functions.

21 Powers to detain under other legislation and common law

It is worth remembering that police have other legislative and common law powers to detain people, especially children. These include the following:

21.1 Children and Young Persons (Care and Protection) Act 1999

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

- enter, search and remove a child (under 16) or young person (16 or 17) from, any premises when satisfied on reasonable grounds that the child or young person is at immediate risk of serious harm and that the making of an AVO would amount to insufficient protection.
- remove a child (under 16) from any public place where it is suspected on reasonable grounds that the child is in need of care and protection and that they are not subject to the supervision or control of a responsible adult and that they are living in or habitually frequenting a public place; or
- remove a child (under 16) or young person (16 or 17) from any premises if it is suspected on reasonable grounds that the child is in need of care and protection and is or has recently been on any premises where prostitution or pornography takes place or if the child or young person has been participating in an act of child prostitution or pornography.

A child or young person removed under this section must be kept separately from people who are detained for committing offences (s43(5)). He or she is to be placed in the care and protection of the Director-General of DOCS, who must apply to the Children's Court for a care order at the first available opportunity (s45).

21.2 Children (Protection and Parental Responsibility) Act 1997

Part 3 allows police to "safely escort" a young person from a public place, if police reasonably believe the young person is:

- under 16 years of age; and
- not supervised by a responsible adult; and
- in danger of being abused or injured, or about to break the law.

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

This law, however, only applies in certain areas declared "operational" by the Attorney-General (after an application from the local council). The Act has only ever been declared operational in a few parts of rural and regional NSW, and I understand that most of these declarations have now lapsed.

21.3 Mental Health Act 1990

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

For example, police may apprehend a person and take them to hospital if an appropriate certificate has been endorsed by a medical practitioner or an accredited person. Police may enter premises (if need be by force) for the purpose of apprehending any such person, and may apprehend any such person, without a warrant (s22).

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

- is committing or has recently committed an offence and that it would be beneficial to the welfare of the person that s/he be dealt with according to the *Mental Health Act* rather than in accordance with law; or
- has recently attempted suicide, or that it is probable that the person will attempt to kill or seriously harm him/herself (s24).

Police may also apprehend a person, and take them to a health care agency or hospital, if notified that the person has breached a community treatment order or community counselling order (ss130, 140).

21.4 Common law

As mentioned above, LEPAR s4 preserves the common law power to arrest to prevent a breach of the peace. "*Breach of the peace*" is not defined in LEPAR. The case law (discussed briefly in my previous paper on LEPAR) demonstrates that it is difficult to define and can encompass a variety of situations.

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

22 A final word

Contrary to popular belief, having written a paper or two does not make me an expert on police powers! I am indebted to those practitioners and students (you know who you are) whose expertise and research have helped me get my head around LEPAR and to prepare this paper.

I look forward to hearing from other practitioners about your (and your clients') experiences of LEPAR. Any comments, corrections, suggestions, and queries will be gratefully received (preferably by email at jane.sanders@freehills.com).