

The Shopfront

YOUTH LEGAL CENTRE

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Doc no Sydney\005298840

10 August 2007

LEPRA review
NSW Ombudsman
Level 24, 580 George Street
SYDNEY NSW 2000

Review of certain functions conferred on police under the *Law Enforcement (Powers and Responsibilities) Act 2002*

Thank you for sending us a copy of your discussion paper on the *Review of Certain Functions conferred on Police under the Law Enforcement (Powers and Responsibilities) Act 2002*. We welcome the opportunity to provide a submission to the review of the Act.

The Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. The Shopfront has been operating since 1993 and is a joint project of Freehills, Mission Australia's Sydney City Mission and the Salvation Army.

The Shopfront represents and advises young people on a range of legal issues, with a particular emphasis on criminal law. The Shopfront is located in Darlinghurst and our primary client base is in the inner city area. However, we also act for young people in other parts of metropolitan Sydney and occasionally in regional areas.

Most of the Shopfront's clients are homeless or otherwise seriously disadvantaged. They have very high levels of contact with police, most of which takes place on the street or in other public areas. The most common police interventions include stop and search, questioning and asking for identification, issuing move-on directions, and arrest.

Scope of this submission

This submission will focus on personal searches. As we have had no practical experience with crime scene powers and notices to produce, we do not propose to address these issues.

We note with some concern that the scope of your review is very limited. It only covers the power to search persons on arrest or in custody, and the safeguards that apply. It does not specifically address the power to stop, search and detain under

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section 21, or the search powers under section 21A and 26. These are the search powers that are most often used against our clients and are the most problematic because of differing concepts of “reasonable suspicion”.

We are also disappointed that there are some important new provisions in LEPR which are outside the scope of this review. We refer in particular to section 99(3), which limits the power of police to arrest a suspect, and section 201, which requires police to give certain information and warnings when exercising most types of powers under LEPR.

Although it is not strictly within the terms of the review, we propose to include some discussion about the power to arrest and the principle of arrest as a last resort. This is because the power to search a person on arrest or when in police custody depends upon an arrest having been made. In our view, many arrests ostensibly made under LEPR are in fact unlawful and therefore people are being searched without justification.

Searches on arrest or in custody – the scope of sections 23 and 24

We note the comments in your discussion paper and we agree that there is a need for further clarification as to the application of these sections, particularly section 24. In view of the broad power provided by section 24 (to search a person who is in police custody), section 23 would appear redundant. If, as is suggested in the discussion paper, section 24 is only intended to apply to people in custody at a police station, and not out in the field, we think that the section should specify this.

We note that the discussion paper refers to a deemed arrest for the purposes of LEPR Part 9. Without explicitly saying so, the discussion paper seems to be suggesting that a person who is deemed to be under arrest for the purpose of Part 9 is under arrest for the purposes of section 23 or is in lawful custody for the purpose of section 24. If this is the Ombudsman’s view, we strongly disagree. A person who is deemed to be under arrest for the purposes of Part 9 is not actually under arrest and is not deemed to be under arrest for the purpose of any other provision of LEPR. In this regard, see further discussion of Part 9 below.

Grounds for a search on arrest under section 23

The experience of our clients suggests that a search is a procedure routinely conducted by police upon arrest. We have read numerous police Fact Sheets that state “the accused was arrested and searched” (sometimes followed by “safeguards were applied as per LEPR”).

The language used in these Fact Sheets, together with the absence of any explanation as to why it was thought “prudent” to conduct a search under section 23, suggests that searches are carried out as a matter of course upon arrest.

In some cases these searches uncover items (eg. drugs, knives) which result in the laying of charges. In many of these cases, we suggest that police would not have had the relevant reasonable suspicion to justify a stop and search under section 21.

<p>Chad, an 18-year-old with no criminal history, had just stolen some cigarettes from a shop. The shopkeeper, who had witnessed the incident, gave police a description of the offender and showed them CCTV footage.</p>
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Police saw Chad nearby a short time later, and recognised him from the description and the CCTV footage.

Chad was sitting in a park and did not attempt to flee from the police as they approached. The police asked Chad his name, which he told them. They immediately arrested him, apparently without making any attempts to verify his identity or to consider alternative ways of commencing proceedings for the offence. We believe the arrest may have been unlawful because it did not comply with section 99(3).

The police then put Chad up against a wall and searched him. Police found a small amount of cannabis and charged Chad with possess prohibited drug.

No reason for the search was given to Chad at the time (which is a breach of section 201), and no reason is given in the fact sheet. It is probable that the police were conducting a search under section 23 (in which case the search may be open to challenge, having been performed in consequence of an unlawful arrest). However it is possible that the police were searching Chad under section 21, based on a suspicion that he was in possession of stolen items.

Types of personal searches

It is suggested in the discussion paper that consideration may be given to abolishing the distinction between frisk searches and ordinary searches. We see some merit in this suggestion, as they are very similar types of searches, but do not hold strong views about it.

In relation to strip searches, we have already made comments on this which have been summarised in your discussion paper. We are of the view that section 31, which restricts the circumstances in which strip searches can be performed, is appropriate. However, it appears to us that this section is not being observed strictly by the police. Strip searches still seem to be a fairly routine procedure, especially where it is suspected that a person is in possession of drugs.

We accept that a strip search may be “necessary ... for the purposes of the search” (to discover small quantities of drugs that may be hidden in the person’s underwear, for example). However, we think it is rare that the seriousness *and* urgency of the circumstances require a strip search, particularly where police suspect that the person is in possession of a relatively small amount of drugs. We do not think that police are adequately turning their minds to the requirements of section 31.

We believe that the safeguards in sections 32 and 33 are commendable, but perhaps are not strong enough. Most of these safeguards only apply as far as is reasonably practicable in the circumstances, which means that they can be fairly easily dispensed with.

We are particularly concerned about the high rate of strip searches being conducted by police officers of the opposite sex to the person being searched (as reported in your discussion paper). While we accept that there may be difficulties in sparsely-populated rural and remote areas, we do not think there is any

justification for this in more densely-populated areas where there are adequate numbers of both male and female police officers available.

Safeguards under section 201

The Shopfront Youth Legal Centre has already provided some comments in relation to this issue; these comments are summarised in your discussion paper.

We are strongly of the view that police should be required to provide their name and place of duty when exercising their powers. Police have wide-ranging powers which can constitute a significant intrusion into the lives of citizens. It is important that they are accountable and therefore it is essential that they be readily identifiable.

We note the comments of certain police officers that providing their name may expose them to the risk of harassment. We suggest that this would be a concern in a very small minority of cases and that police have the powers and resources to deal with such harassment if it occurs. If there are good reasons why the officer's name should not be provided, the officer should be required to provide his or her badge number (in writing, because most people would have difficulty remembering a number unless it is written down).

We note the comments of one police officer, reported in the discussion paper, to the effect that if a person wants to complain they can get the officers' names. We have attempted to do this on behalf of our clients on numerous occasions, and have found it extremely difficult to obtain this information after the event.

As to the warnings that must be provided under section 201, we note that a police officer is no longer required to warn the person that failure to comply may be an offence if the person has complied, or is complying, with the exercise of the power.

We understand the rationale for this change; we accept that giving a warning to a person who is already compliant may be unduly confusing and may potentially inflame a situation. However, we are concerned that the absence of any up-front warning may leave a person in the dark about whether or not they are lawfully required to comply with a police officer's request or direction. For example, police officers commonly ask a person to provide their name and address and to produce ID. In most cases, this is merely a request without any legal force, as the power of police to demand a person's name and address only applies to a limited range of situations.

In our view, a person should not be required to provide their name and address (or submit to a search, or comply with a move-on direction, etc) unless they have been told at the outset whether or not they are legally required to comply.

The problem of searches by "consent"

Searches by "consent" are a problem area, especially where young people are concerned. There is no safeguard in LEPR to protect people in this situation.

Troy, aged in his early 20s, was standing by the side of the road waiting for a lift home, when a marked police car made a u-turn and pulled up beside him. Two police officers got out of the car, approached Troy and asked "Have you got anything on you that you shouldn't have?"

Troy, who was understandably nervous due to prior police contact, said no and, when asked by police if they could look in his bag, complied. Police found and confiscated various items which he had just bought (including socks and dog food) and a small bottle opener with a blade. He was charged with goods in custody and custody of a knife in a public place.

According to the Fact Sheet, police decided to search Troy because he looked nervous. At the court, the police prosecutor conceded that there were no reasonable grounds for suspicion to justify a search under the predecessor to section 21. However, he argued that no reasonable suspicion was required because Troy consented to the search. Although Troy gave evidence that he thought he would be arrested or forcibly searched if he did not allow police to search his bags, the magistrate found that the search was voluntary and was therefore lawful.

Troy was ultimately found not guilty on other grounds – he was found to have a lawful excuse for possessing the blade, and the police were unable to prove that the other items were reasonably suspected of being stolen or unlawfully obtained.

This case study illustrates the problem of people “consenting” to a search, but only because they believe they are under compulsion. Fortunately, we have been involved in other hearings (most commonly in the Children’s Court) where magistrates have ruled searches of this type unlawful because the “consent” was not free and voluntary.

We believe that, when requesting a person to undergo a search or to reveal anything in their possession (including their bag, vehicle, etc), police should be required to tell the person whether or not the person is required by law to submit to the search.

Unlawful or unwarranted arrests

Of great concern is the fact that many arrests appear to be unlawful or at least unjustified. Under LEPR, a reasonable suspicion that a person has committed an offence is *not* sufficient for police to make a lawful arrest. Section 99(3) 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.”

It is our experience that police often arrest suspects without turning their mind to the necessity of arrest to achieve the purposes listed in section 99(3). This is of concern for several reasons.

Firstly, arrest is a deprivation of liberty. It is a fundamental and long-held principle of our legal system that a person should not be deprived of their liberty without good cause.

Secondly, arrest sometimes leads to searches being conducted in circumstances where police do not hold a reasonable suspicion that would justify a stop and search pursuant to section 21. This represents a further incursion on the privacy and bodily integrity of young people.

Thirdly, arrest can also lead to the escalation of an already volatile situation. The case of *DPP v Carr* (2002) 127 A Crim R 151, which is well-known to police as well as criminal lawyers, is a good example of the consequences of an ill-advised arrest. As Smart AJ said:

“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 is no reason to believe that a summons will not be effective. Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear. The consequences of the employment of the power of arrest unnecessarily and inappropriately and instead of issuing a summons are often anger on the part of the person arrested and an escalation of the situation leading to the person resisting arrest and assaulting police. The pattern in this case is all too familiar. It is time that the statements of this court were heeded.”

Renata (18) was homeless and had been sleeping on the train. Police approached her on a railway platform and asked to see her ticket, which she did not have. She looked drowsy and, when asked if she had taken drugs, admitted that she had smoked a couple of cones. The police then searched her and found a small amount of cannabis.

For reasons which are not explained in the police fact sheet, she was arrested and taken back to the police station, instead of being issued with a field court attendance notice.

We regard this arrest as inappropriate and possibly unlawful. The charges were very minor and there was no apparent risk of flight, continuation of any offence, interference with evidence, etc. Although Renata did not have a fixed address, police were apparently satisfied as to her identity and a quick police radio check would have revealed that she did not have a record of failing to appear at court.

Jamie, aged 18, attempted to return a stolen handbag to its owner, who turned out to be an off-duty police officer. Suspecting that Jamie was associated with the thief and was seeking to corruptly obtain a reward for the return of the bag, the officer arrested Jamie for receiving/disposing of stolen goods.

While there may have been reasonable grounds to suspect that Jamie had committed an offence, there appear to have been no reasonable grounds to suspect that arrest was necessary for any of the purposes in section 99(3).

Jamie (who did not believe the person was a police officer) struggled and resisted the arrest. He was then charged with a series of offences including resist police and assault police. He has pleaded not guilty and is awaiting a hearing date.

Part 9 of LEPR and arrest for the purpose of questioning

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

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

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

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

Many police officers seem to believe it is necessary to arrest a person to facilitate an interview and to "make sure they get their Part 9 rights". This seems to be especially common when police are considering dealing with a juvenile under the *Young Offenders Act*. This is an erroneous view which is based on a fundamental misunderstanding of Part 9 and the law in relation to arrest.

Not only is arrest *unnecessary* in order to facilitate an interview or to ensure a suspect is accorded their rights, it is *unlawful* to arrest for such a purpose without regard to the factors in section 99(3).

In *R v Dungay* [2001] NSWCCA 443, it was held that an arrest made for the purposes of questioning or investigation (and not for the purpose of bringing the person before a justice) is unlawful. The court considered the provisions of Part 9 and confirmed that nothing in Part 9 authorises police to arrest for the purpose of questioning.

The Young Offenders Act and the arrest of juveniles

The incidence of unlawful or improper arrest appears to be particularly high in relation to juveniles. Ironically, the *Young Offenders Act 1997*, which aims to divert young people away from the criminal justice system, appears to have had the unintended consequence of causing police to employ the power of arrest more often.

To be eligible for a caution or youth justice conference under the *Young Offenders Act*, a young person must admit the offence in the presence of a responsible adult. A young person has a right to legal advice before deciding whether to make an admission; the Legal Aid Hotline for under-18s is provided for this purpose. Many police officers appear to believe that the only way to facilitate this is to arrest the young person and place them in custody at the police station. We disagree with this view. As discussed above, facilitating an interview or investigation is not a legitimate purpose for arrest.

Simon (16) was on remand in a juvenile detention centre. A staff member discovered that he had a very small amount of cannabis in his possession, and called the police.

When the police arrived, they immediately arrested Simon, placed him in a caged truck and took him to the nearest police station. Simon spat in the rear of the police vehicle and also in the cell at the police station; as a result he was charged with malicious damage.

At court, Simon's solicitor argued that the evidence of the alleged malicious damage was inadmissible under s.138 of the *Evidence Act*, because it had been obtained in consequence of an unlawful arrest.

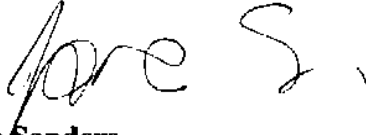
At the hearing, the arresting officer said he had arrested Simon because he wanted to give Simon the opportunity to be interviewed and to have the drug weighed in front of him, and this could only be done at the police station. The magistrate did not accept that these were legitimate reasons for arrest as they were not directed at any of the purposes listed in s.99(3). His Honour refused to admit the evidence and the malicious damage charges were dismissed.

Conclusion

We would be happy to expand upon the matters raised in this submission, or to discuss other aspects of LEPR with you.

In this regard, please feel free to contact us on 9322 4808 or at jane.sanders@freehills.com.

Yours faithfully



Jane Sanders
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