

Children and Police Powers- A Brief Outline

This paper is intended to be a brief summary of some of the important issues that can arise when children come into contact with the police. The paper looks at police powers in relation to arrest, criminal investigation and bail. The paper is an outline only and where possible directs the reader to more detailed coverage of each of the topics discussed.

The topic is a huge one and the paper can be no more than a sketch of the area. Young people probably have more contact with the police than any other age group and the danger of first contact escalating into criminal charges is well known. In some important respects the law treats children no differently to adults and offers them no extra protection. It is crucial to know where special rights for juveniles exist and to be ready to use them when necessary.

Currently the law as it relates to the police powers is found in various different statutes and in the common law. For a number of years in NSW there has been pressure to consolidate law enforcement powers. In 1998 the New South Wales Government set up a Task Force to review and consolidate law enforcement powers into a single act.

In 2002 the *Law Enforcement (Powers and Responsibilities) Act 2002* was passed. It is yet to come into force, however, it has now been proclaimed to commence on December 1 2005.

It appears that the new Act is more than just a consolidation of the existing law and in some respects will extend police powers. Andrew Haesler's recent paper "Police Powers 2005 – The Law Enforcement (Powers and Responsibilities) Act 2002" is essential reading and an excellent starting point to learning about what is foreshadowed. The paper summarizes the new Act and usefully identifies some of the "hidden extras" or additional powers given to the police.

The new Act was meant to strike a balance between the need for effective law enforcement and respect for individual rights and civil liberties. It is unfortunate that the Act does not more adequately protect and extend the rights of children.

Powers to request a person's name

Police currently have the power to demand a person's name and address in certain circumstances, pursuant to section 563 of the *Crimes Act 1900*. Police also have powers under the *Police Powers (vehicles) Act 1998*. These powers are reproduced in the *Law Enforcement (Powers and Responsibilities) Act 2002*. These powers relate to children as well as adults.

Police powers of arrest

Police have the power to arrest if they are in possession of a valid arrest warrant or without a warrant in certain circumstances.

Children are frequently arrested on Children's Court warrants having failed to previously appear at Court, having breached bail conditions, etc. Warrants should always be closely checked.

Police powers of arrest exist both at common law and subject to legislation. Currently statutory powers of arrest are contained in Part 10 of the *Crimes Act 1900* for any offence against a state statute and in Part 1 AA of the *Crimes Act 1914 (Cth)* for Commonwealth offences. Once the *Law Enforcement (Powers and Responsibilities) Act 2002, (LE (PR) Act)* commences, the powers relating to arrest will be found in Part 8 of that Act. They broadly re-enact the provisions found in the *Crimes Act 1900*.

Currently, the power of arrest most commonly used by police is found in section 352 of the *Crimes Act 1900*. It is a requisite for a valid arrest that the arrest is for the purpose of taking the arrested person before a justice (*R v Dungay* [2001] NSWCCA 443). It is important to note that only a constable may arrest a person in circumstances where there is "reasonable cause for suspecting" that a person has committed an offence under any Act (section 352(2)). A citizen's power of arrest is restricted to circumstances where the person arrested is in "the act of committing or immediately after having committed" an offence under any Act. To justify action under section 352(1) the arresting party must be able to prove that the person arrested was found committing the offence. Under this section if the person making the arrest can only prove reasonable suspicion, but fails to prove the suspect was actually committing the offence then the arrest would be unlawful. (See for example *R v Turner* [1962] VR 30 at 35). A decision to arrest must be made in good faith and for the purpose of bringing the person arrested before a Court and conducting a prosecution and not for some extraneous purpose. (*Zaravinos v the State of NSW* [2004] NSWCA 320)

New provisions set out in the *LE (PR) Act 2002* also differentiate between the powers of police to effect an arrest and the power of a citizen to arrest.

Given the number of children arrested in shopping centres by loss prevention officers this distinction can be an important one.

Notwithstanding the general powers of arrest pursuant to section 352 of the *Crimes Act*, police should not arrest a juvenile without considering all other options. Section 8 of the *Children (Criminal Proceedings) Act 1987* requires police to commence proceedings against children by way of court attendance notice where possible. *The Young Offenders Act 1997* also encourages police to use alternatives to arrest.

Unfortunately, in practice the police frequently arrest children for the same reasons as they arrest adults, without proper consideration of the law in relation to the arrest of juveniles.

Young Offenders Act 1997

It is clear that police should consider all the options under the *Young Offenders Act 1997* prior to deciding to arrest a child. Failure to do so means they have failed to act in accordance with their duties.

Section 7 of the *Young Offenders Act 1997* requires, among other things, that the police use the least restrictive sanction having regard to the matters required to be considered under the Act and that criminal proceedings are not to be instituted if there is an alternative and appropriate means of dealing with the matter. Later sections deal with requirements for police to consider cautions and conferences in appropriate cases.

It should be noted that section 108 of the *LE(PR)Act 2002* states that nothing in the new Act requires to police to arrest a person under the age of 18 years if it is more appropriate to deal with the matter under the *Young Offenders Act 1997*.

Children (Criminal Proceedings) Act 1987

If a decision has been made that it is not appropriate to deal with the matter under the *Young Offenders Act 1997* police are still required to comply with section 8 of the *Children (Criminal Proceedings) Act 1987*.

There is a growing body of case law regarding arrest and the commencement of criminal proceedings which makes it plain that arrest must be reserved for cases where it is clearly necessary. It can be improper and even illegal to arrest for minor offences where the defendant's name and address is known and where there is no risk of him/her departing. In these circumstances a court attendance notice should be sufficient. It has been recognised that these principles "apply all the more when any person suspected of having committed an offence is a child" (*DPP v CAD & Ors* unreported NSW Supreme Court, 26 March 2003 per Barr J at 196)

A very useful discussion of these and related issues by Mark Dennis of Forbes Chambers entitled "Lance Carr for Kids" can be accessed on The NSW Legal Aid Commission website. See also *Police v Brett Lee Nye* [2003] NSWLC 9.

The procedure necessary to affect a lawful arrest is generally provided for by the common law. The person is entitled to know why they are being arrested and must be told the reason unless their behaviour makes it practically impossible. (*Christie v Leachinsky* [1947] AC 573, *Adams v Kennedy* (2000) 49 NSWLR 780). It is not necessary for the exact offence to be nominated and the arrest does not become illegal because some other offence is later charged.

Police powers to use force

Section 352 of the *Crimes Act 1900* is silent on the use of force. It is however an established principle of common law that the section connotes the right to use force, which is such force as is reasonably necessary to apprehend and to take and deliver the arrested person before a Court. (*R v Turner* [1962] VR 30 at 38-39). The use of

excessive or unnecessary force will be unlawful and may amount to an assault (*R v Galvin* [1961] VR 733 at 737).

In relation to Commonwealth offences the person making the arrest must not use more force or subject the person to greater indignity than is necessary and reasonable to make the arrest. (*Crimes Act 1914* (Commonwealth) section 3ZC).

The new *LE (PR) Act 2002* explicitly authorises the use of force in certain circumstances when making an arrest. Section 231 allows “such force as is reasonably necessary to make the arrest or to prevent the escape of the person after arrest”.

Police powers to search children and enter premises

As discussed, section 352 of the *Crimes Act 1900* (NSW) authorises arrest without a warrant in certain circumstances. Police also have common law powers to enter premises to make an arrest if certain pre-conditions are met. They must have a reasonable belief, prior to entry, that the person they are seeking is on the premises, and there must be a proper announcement before entry. (*Lippl v Haines* (1989) 47 A Crim R 148)

At common law, police are trespassers unless they enter premises with consent or to make an arrest, prevent a serious indictable offence (felony), arrest an offender running from an affray or to prevent a murder. (*Plenty v Dillon* (1991) 171 CLR 635)¹

The *Law Enforcement (Powers and Responsibilities) Act 2002* is said to codify the law in this area. However, as Andy Haesler has pointed out sections 9 and 10 of the Act will broaden this power of entry. Section 9 allows police entry if there has been or threatens to be a “breach of the peace” to end or prevent the breach. The term “breach of the peace” is not defined and is open to very broad interpretation. While “breach of the peace” might suggest a public disturbance, the section allows entry to private premises and it is easy to imagine that almost any private disturbance could thus be characterised as a breach of the peace. Once police have entered, a crime scene can be declared giving police considerable new powers over the premises and the occupants.

Personal searches

Prior to arrest there is no common law power for police to search a person, including a child.

Police do not have a general power to stop, search and detain people. However specific powers to do so are contained in various statutes including,

- *Crimes Act 1900*, section 357E - Power to stop, search and detain persons.
There is considerable case law on this section which imports an objective

¹ Police Powers 2005 – The Law Enforcement (Powers and Responsibilities) Act 2002 Andrew Haesler SC. All discussion of the LE (PR) Act 2002 is based on this excellent paper.

requirement that the suspicion is held on reasonable grounds. See *Streat v Bauer* (Supreme Court NSW 16 March 1998 unreported, *R v Rondo* [2001] NSWCCA 540. Many searches on young people have been successfully challenged in criminal proceedings because there was no reasonable suspicion to ground the search.

- *Drug Misuse and Trafficking Act 1985*, section 37 - Power to stop search and detain
- *Summary Offences Act 1988*, section 28A - power to search for knives and other dangerous implements
- *Poisons and Therapeutic Goods Act*, section 43B - Power to stop search and detain persons
- *Children (Protection and Parental responsibility) Act 1997*, section 29
- *Police Powers (Vehicles) Act 1998* section 10
- *Terrorism (Police Powers) Act 2002*

The *LE (PR) Act 2002* will consolidate the powers to search set out currently in the *Crimes Act 1900*, the *Police Powers (Vehicles) Act 1998* and in the *Summary Offences Act 1988*.

After arrest a power to search is currently conferred both by common law (see *Clarke v Bailey* (1933) 33 SR (NSW) 303) and by section 352 of the *Crimes Act 1900*. The words “take him, and any property found upon him, before an authorised justice to be dealt with according to law” imply a power of search by a private person or a police officer on arrest. The power enables search for safety reasons and for the gathering of evidence. It should be noted that it only authorises the person making the arrest, it does not extend to other persons.

Searches after arrest are also routinely conducted pursuant to section 353A of the *Crimes Act 1900*. Currently there are no special legislative requirements which relate to people under the age of 18 with respect to this provision.

The yet to commence *LE (PR) Act 2002* contains new provisions which relate to this area of the law. The Act contains new rules and some specific safeguards for persons subjected to strip searches. A person is to be informed of the nature of the search, their cooperation is to be requested, the search is to be conducted out of public view and as quickly as possible, the person is not to be questioned in relation to the offence at the time of the search.

The new power to search applies to anyone arrested and taken to a police station. This would include children arrested and taken to a police station in relation to a breach of bail where no further charge is laid.

Section 33(3) of the new Act provides for the presence of a support person for children between 10 and 18 whilst being strip searched. This power appears excessive and out of step with laws in relation to children’s forensic procedure which are court monitored. Section 34 states that children under 10 must not be strip searched. Section 153 states that the provisions relating to internal searches do not authorise the internal search of children under 10 years of age.

Police powers to detain children for questioning

Children cannot be arrested purely for the purposes of questioning.

However, like adults, once lawfully arrested they may be detained to enable their involvement in the commission of an offence to be investigated. Under NSW law they may only be detained for 4 hours unless the period is extended by a detention warrant. (See provisions of part 10A of the *Crimes Act 1900*), in Commonwealth matters they may only be detained for two hours without a lawful extension.

With some differences, the *LE (PR) Act 2002* will re-enact section 353AA of the *Crimes Act 1900* which deals with photographing and fingerprinting for the purpose of identifying a child. The new section 136 (5) sets out the matters that a Magistrate must take into account when considering whether or not to make an order that particulars be taken from a child under the age of 14.

The new Act allows for a process whereby children's particulars can be destroyed on acquittal in certain circumstances.

Generally, children should not be questioned without an appropriate support person present.²

Children's rights during questioning are protected and enforced by an evidentiary exclusionary rule. Section 13 of the *Children (Criminal Proceedings) Act 1987* sets out the safeguards which must be in place. Essentially there is a duty imposed upon police to ensure the presence of an adult. There is considerable case law in relation to this duty. See for example *R v Cotton (1990) 19 NSWLR 593 at 595*, *Honan* (unreported, NSW Supreme Court, Hidden J 26 March 1996, *R v Phung and Huynh* [2001] NSWSC 115)

It should also be noted that when a child is arrested and detained under the powers of Part 10A of the *Crimes Act 1900 (NSW)* the child is defined as a "vulnerable person" (*Crimes (Detention After Arrest) Regulations 1998* reg 5) and must be accorded a number of additional protections by the custody manager who must do a number of things, including

- Assist the child to exercise his or her rights (reg 20)
- Inform the child of the right to have a support person present. This right cannot be waived. (regs 21 and 23)
- Contact the person responsible for the welfare of the child and inform him or her of the child's situation (reg 27)

Section 281 of the *Criminal Procedure Act 1986* which regulates the need to video tape interviews in certain circumstances also applies to juveniles.

² See "The Role of the Responsible Adult in Children's Interviews with Police" Lester Fernandez April 2004 available on Legal Aid's website.

Forensic Procedures

The *Crimes (Forensic Procedures) Act 2000* establishes the legislative framework for the taking, testing, destruction and storage of forensic samples.

Children cannot consent to forensic procedures (section 8 of the *Crimes (Forensic Procedures) Act 2000*). There is court supervision of all children's forensic procedures.

Police powers under the *Children (Protection and Parental Responsibility) Act 1997*

The Act sets out a procedure for the Attorney General to declare certain areas "operational areas" for the purposes of the Act. Four operational areas were initially declared, namely Orange, Ballina, Moree and Coonamble. Very few areas have been keen to participate in the scheme and some of the original areas have now lapsed. The overall interest in the Act has been much less than originally foreshadowed.

Part 3 of the Act sets out a number of special powers given to police in relation to children who they believe are under the age of 16 who are in a public place. These powers include

- taking the child home or into the Care of DOCS (section 22) However they cannot leave them at the Police station.(section 23)
- asking for the child's name, age and address (section 27)
- using reasonable force to remove a child from a public place (section 28)
- removing concealed weapons and doing a frisk search (section 29)

Bail

In general the *Bail Act 1978* applies to children in the same way as it does to adults. There is no presumption in favour of bail for children in NSW as there is in some jurisdictions.

However, it should be noted that section 8 of the *Children (Criminal Proceedings) Act 1987* provides that proceedings should normally be commenced by court attendance notice. There are exceptions set out in section 8 (2) including serious children's indictable offences, situations where in the opinion of the person commencing the proceedings the child is unlikely to comply with a court attendance notice or in some circumstances where the child's behaviour is violent.

Police Bail

Anyone arrested and charged by police has a right to apply for bail. A person who is not satisfied with a decision made by an authorised officer can seek review of the original decision by a senior police officer (section 43A *Bail Act 1978*), but a review must not be conducted if it would cause delay in bringing the accused person before a

court. In practice, a child initially refused bail by police would normally be taken to the nearest Children's Court and would apply for bail there.

In practice, police will often refuse to release a child under 16 on bail from a police station unless the child is collected by a parent or responsible adult. There is no particular legislative authority to detain children in this manner.

At the Police station police should allow a child to speak to a lawyer (section 19 *Bail Act 1978*), see also the provisions in relation to vulnerable persons in Part 10A of the *Crimes Act 1900* and *Crimes (Detention after Arrest) Regulation 1998*, and *R v ME, R v LT and R v CE* unreported, NSW Supreme Court (Common Law division) per Dowd J. 3 October 2002) This requirement may include advising children of the Legal Aid youth hotline service.

A child who has been refused bail by the police should be brought before a Court as soon as possible – which should be the day of the arrest or the next morning if arrested after the close of Court.

The police should call the Department of Juvenile Justice as soon as it is clear the child will be refused police bail and arrangements should be made for the child to be transferred to a juvenile detention centre if the child is not being taken directly to Court. In many country towns however, children will usually remain at the police station over night awaiting court the following day.

It should also be remembered that there is a right to be released on bail in relation to certain offences as provided by section 8 of the *Bail Act 1978*.

Bail at Court

Section 32 of the *Bail Act 1978* sets out the general criteria to be applied to a decision to grant bail and is relevant to both adults and children.

Although section 32(4) of the *Bail Act 1978* states that it is not relevant whether or not children under 18 live with their parents or guardians, in practice accommodation is very often a difficult issue with children's bail applications.

Homeless children are at a particular disadvantage. Many Magistrates are reluctant to grant bail where a child does not have stable accommodation or where there has been family violence or discord. A condition is often added that a child must reside "as directed by the Department of Juvenile Justice" or "as approved by the Department of Community Services". While these conditions may sound innocuous they will often have the effect of bail refusal as the relevant Government department is not able to find accommodation it deems suitable.

Breach of bail

If children are found in breach of their bail conditions they can be arrested by police and brought back before a Court. The Court can grant the child bail on fresh

conditions, re-impose the original conditions or bail refuse the child if appropriate. A breach of bail is not an offence in itself.

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September 2005