

New Police Powers: The *Law Enforcement (Powers and Responsibilities) Act*

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Introduction

The *Law Enforcement (Powers and Responsibilities) Act* 2002 (which rejoices in the acronym LEPAR) was introduced in 2001, in response to a Wood Royal Commission recommendation that NSW police powers be consolidated. Its commencement has been delayed for various reasons which need not be discussed in this paper.

LEPAR has now been proclaimed to commence on **1 December 2005** (except the in-car video provisions in Part 8A, which commenced on 23 December 2004).

- Most of the Act is essentially a cut-and-paste job, transferring existing provisions from various 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 Act also creates some new powers (eg crime scene powers).
- There are some new safeguards, especially in relation to personal searches.
- Some existing police powers (eg forensic procedures, listening devices, some traffic-related powers) have not been incorporated into the new Act.
- There are also some LEPAR Regulations, currently in draft form. These are mainly concerned with search warrants and detention after arrest, and will be referred to in this paper where relevant.

This paper aims to provide a section-by-section guide to LEPAR – its structure, which existing legislative provisions have been replicated, and what has changed.

Part 1: Preliminary

This contains all the usual preliminaries, including:

Section 3 – Definitions

Section 4 – Relationship to common law and other matters

Unless the Act “otherwise provides expressly or by implication”, the Act does not limit the functions, obligations and liabilities that police officers have at common law. Subject to s9, the Act does not affect common law powers to deal with breaches of the peace.

Section 5 - Relationship to other Acts

The Act does not limit the functions that a police officer has under an Act or regulation specified in Schedule 1.

Section 6 – Inconsistency

Where there is any inconsistency between a provision of LEPAR and a provision of another Act or regulation conferring functions on police (other than those listed in Schedule 1) LEPAR prevails to the extent of any inconsistency.

Part 2: Powers of entry

Section 9 - Power to enter in emergencies

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

It is uncertain whether this provision merely reflects the common law or extends it. There appears to be no High Court or NSW appellate court authority on power of entry to prevent a breach of the peace. In Lippel v Haines (1989) 18 NSWLR 620, the issue for consideration was the power of entry to effect an arrest. Hope AJA (at 630, citing Swales v Cox [1981] QB 849) enumerated the circumstances in which police had power of entry. This did not include breach of the peace. In Plenty v Dillon (1991) 171 CLR 635, the High Court held that police do not have power of entry merely to serve a summons. Gaudron and McHugh JJ (at 647) again listed the circumstances in which police had power of entry, and again, breach of the peace was not included. However, given that neither of these cases concerned an alleged breach of the peace, I would not interpret either case as authority that police do not have such a power.

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

“Breach of the peace” is not defined in LEPAR, nor is its scope clearly defined by the relevant case law. For examples of conduct that has been held to constitute a breach of the peace, see R v Van Bao Nguyen [2002] NTSC 38, per Angel J at paras 10-12, and the commentary at para [2.33470] in Vol 1 of Watson, Blackmore & Hosking Criminal Law (NSW) looseleaf service.

Section 10 – Power to enter to arrest or detain someone or execute warrant

Police may enter and stay for a reasonable time on premises to arrest a person, or detain a person under an Act, or arrest a person named in a warrant. They may only do so if they believe on reasonable grounds that the person is in the dwelling (*curiously, the word “dwelling” is used here, whereas all other references are to “premises”*). A police officer who enters premises under this section may search the premises for the relevant person.

This section extends the common law powers of entry for effecting arrest without warrant, in that it relaxes both of the conditions to entry enunciated in Lippel v Haines (1989) 18 NSWLR 620, per Gleeson J at 622. The first condition of “reasonable and probable grounds” for believing, prior to entry, that the person sought for arrest is on the premises, has been softened so that “reasonableness” alone is sufficient. The second condition is set aside altogether so that there is no requirement of proper announcement to permit the occupier the opportunity to consent to entry. However, LEPAR s201 (see Part 15 – Safeguards) requires police to announce their office and the reason for the exercise of the power, if reasonably practicable, before or at the time of entry.

Part 3: Powers to require identity to be disclosed

Division 1 – General power to require identity to be disclosed

Division 1 essentially replicates *Crimes Act* s.563.

Section 11 – Identity may be required to be disclosed

Police may request a person to disclose his or her identity if the officer suspects on reasonable grounds that the person may be able to assist in the investigation of an alleged indictable offence, by virtue of being at or near the scene of the alleged offence.

The procedural requirements that must be observed by police are the same as in former *Crimes Act* s.563, but are now set out in LEPAR s.201 (see Part 15 – Safeguards).

Section 12 – Failure of person to disclose identity on request

Replicates the offence provision formerly in *Crimes Act* s.563(3)(a). Failure or refusal to disclose identity, without reasonable excuse, attracts a maximum penalty of 2 penalty units. *Police must first have followed the requirements in s.201.*

Section 13 – False or misleading information about identity

Replicates another aspect of the offence provision currently contained in *Crimes Act* s.563(3)(b) and (c). Providing a name that is false in a material particular, or an address other than the person's full and correct address, attracts a maximum penalty of 2 penalty units. *Police must first have followed the requirements in s.201.*

Division 2 – Powers to require identity of drivers and passengers to be disclosed

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

Section 14 – Power of police officer to request disclosure of driver or passenger identity

Replicates *Police Powers (Vehicles) Act* s.6(1). A police officer who suspects on reasonable grounds that a vehicle is being, or was, or may have been used in or in connection with an indictable offence may request drivers and passengers to disclose their own or each other's identity. They may also request a vehicle's owner to disclose the identity of the driver and any passengers. *Police must comply with the safeguards set out in s.201 (if not, the person cannot be guilty of an offence relating to failure to disclose identity).*

Section 15 – Failure of driver to disclose identity

Replicates *Police Powers (Vehicles) Act* s.7. A driver who is requested to disclose his or her identity, or the identity of any passenger must not, without reasonable excuse, fail or refuse to comply with the request. A driver who does not know the full and correct identity of any passenger must disclose as much information as is known to him or her (maximum penalty: 50 penalty units and/or 12 months' imprisonment).

Section 16 – Failure of passenger to disclose identity

Replicates *Police Powers (Vehicles) Act* s.7A. This is a parallel provision creating offences for passengers who fail or refuse to disclose their own identity, or that of the driver or any other passenger (max penalty: 50 penalty units and/or 12 months' imprisonment).

Section 17 – Failure of owner to disclose identity

Replicates *Police Powers (Vehicles) Act* s.8. Creates an offence for an owner of a vehicle not to disclose the identity of any person the owner knows or has reason to suspect was the driver or a passenger (max penalty: 50 penalty units and/or 12 months' imprisonment).

Section 18 – False or misleading information about identity

Replicates *Police Powers (Vehicles) Act* s.9. Creates an offence of providing a false name or address (max penalty: 50 penalty units and/or 12 months' imprisonment).

Division 3 – Proof of identity

Section 19 – Power of police officer to request proof of identity

When requesting a person to disclose their identity under Part 2, police may also request proof of identity.

It is not an offence under LEPAR to fail to provide proof of one's identity. However, this would of course be subject to provisions in other Acts, such as the requirement for a driver to produce their licence in accordance with Road Transport (General) Act 1999 s. 58(1)(a), or the requirements for young people in possession of alcohol to produce identity under Summary Offences Act s11.

Part 4: Search and seizure powers without warrant

Division 1 – General personal search and seizure powers

Section 20 – Relevant offences

For the purposes of Division 1, “relevant offences” are defined to include indictable offences and certain firearms/weapons offences.

Section 21 – Power to search persons and seize and detain things without warrant

Replicates *Crimes Act* s 357(2)(a) and (3) and s.357E(a), and *Drug Misuse and Trafficking Act* s.37(4).

Police may stop, search and detain a person (and anything in the possession of or under the control of the person), 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;
- (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.

Note that Part 4 Division 4 and Part 15 contain safeguards in relation to the exercise of search powers. These will be discussed below.

Section 22 – Power to seize and detain dangerous articles on premises

This 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.

Division 2 – Searches of persons on arrest or while in custody

Section 23 – Power to carry out search on arrest

This 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.

Subs(3) provides that police may seize and detain relevant items found during the search.

Subs(4) specifies that nothing in this section limits s.24.

Section 24 – Power to carry out search of person in custody

A police officer may 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.

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.

Division 3 – Additional personal search and seizure powers in public places and schools

This replicates *Summary Offences Act* s.28A and related provisions concerning searching for knives and other dangerous implements.

Section 25 – Definitions

Defines “dangerous implement”, “dangerous article”, “knife” and “locker”.

There is provision for regulations to exclude classes of items from the definition of “dangerous article” or “knife”, however there appear to be no relevant regulations at this stage.

Section 26 – Power to search for knives and other dangerous implements

This replicates *Summary Offences Act* s.28A, with minor changes.

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

In the case of school students, police may also request to search the student’s locker (subs.(2)). Police must also (if reasonably possible to do so) allow the student to nominate an adult who is on the school premises to be present during the search (subs(4)).

Subs(3) provides that “the fact that a person is present in a location with a high incidence of violent crime may be taken into account in determining whether there are reasonable grounds to suspect that the person has a dangerous implement in his or her custody”. *Note, however, that*

this is only one factor contributing to the formation of reasonable suspicion, and the common law on reasonable suspicion still applies.

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

Subs(6) requires the police to 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 the person that failure to submit to the search may be an offence.

The section refers to a “frisk search”, 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.

Note that this section 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).

Section 27 – Failure to comply with requests relating to search and dangerous implements

Replicates *Summary Offences Act* s.28A(7). 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.

Section 28 – Power to confiscate knives or other dangerous implements

Replicates *Summary Offences Act* s.28B. 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. (Note that *Summary Offences Act* ss11B and 11C create offences of having custody of offensive implements and knives in public places/schools).

Anything confiscated under this provision is to be dealt with in accordance with Division 1 of Part 17 (see below).

Division 4 – Provisions relating generally to personal searches

This Division enacts some rules and safeguards which currently do 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) “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
- (b) 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 or a person or of articles in the possession of a person that may include:

- (a) 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

- (b) an examination of those items.”

Strip search:

“a search of a person or of articles in the possession of a person that may include:

- (a) requiring the person to remove all of his or her clothes; and
- (b) an examination of the person’s body (but not of the person’s body cavities) and of those clothes”.

Section 29 – Application of Division

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.

Section 30 – Frisk searches and ordinary searches

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

Section 31 – Strip searches

A police officer (or other person authorised to perform a search) may conduct a strip search 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”.

Section 32 – Preservation of privacy and dignity during search

This section sets out procedures which police must, as far as is reasonably practicable in the circumstances, comply with.

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 – Rules for conduct of strip searches

Subs (1) – (3) provide further rules that 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 subs (4) – (6) 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.

Section 34 – No strip searches of children under 10 years

A strip search must not be conducted on a person who is under the age of 10 years. *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.*

Comments on new search provisions

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 and safeguards 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 are already 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 safeguards 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?

Division 5 – Vehicle entry, search and roadblock powers

Section 35 – Relevant offences

For the purposes of this Division, relevant offences are defined in identical terms to s.20.

Section 36 – Power to search vehicles and seize things without warrant

Replicates parts of *Crimes Act* s.357 and 357E, *Police Powers (Vehicles) Act* s.10, and *Drug Misuse and Trafficking Act* s.37.

The power to stop, search and detain vehicles 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; 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.

As with other search powers, police may seize and detain certain types of items found as a result of the search.

Section 37 – Powers to stop vehicles and erect roadblocks

Replicates *Police Powers (Vehicles) Act* s.10 (1) and (2).

Subs(1) defines “vehicle roadblock powers”.

Subs(2) provides that a senior police officer may authorise a police officer to use vehicle roadblock powers on any specified class of vehicles, provided he or she suspects 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.

Subs(3) provides that powers may be exercised without authorisation where the seriousness and urgency of the circumstances require the powers to be exercised without obtaining the authorisation. Subs(4) requires the police officer to notify a senior police officer as soon as practicable and to obtain an authorisation for any ongoing action.

Section 38 – Power to give reasonable directions

Replicates *Police Powers (Vehicles) Act* s.10(3).

A police officer who exercises a search power under this Division, 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.

Section 39 – Failure to comply with directions

Replicates *Police Powers (Vehicles) Act* s.10(5).

A person must not, without reasonable excuse, fail or refuse to stop the vehicle they are driving or to comply with any other direction given by a police officer (max penalty 50 penalty units and/or 12 months imprisonment). *Police must first have followed the procedures set out in s201.*

Section 40 – Duration and form of roadblock authorisation

Replicates *Police Powers (Vehicles) Act* s.11.

A roadblock authorisation may be given verbally or in writing, and is in effect for 6 hours (or a lesser period if specified by the senior police officer). Nothing prevents a further authorisation for the same vehicle.

Section 41 – Record of roadblock authorisation

Replicates *Police Powers (Vehicles) Act* s.12.

Provides the details that must be included in a written roadblock authorisation. If the authorisation is made verbally, a record should be made as soon as practically possible.

Division 6 – Vessel and aircraft entry and search powers

Section 42 – Power to search vessels and aircraft and seize things without warrant

Replicates parts of *Crimes Act* sections 357, 357D and 357E.

A police officer may stop, search and detain a vessel or aircraft if he or she suspects on reasonable grounds that the vessel or aircraft:

- (a) contains (or a person inside possesses) anything stolen or unlawfully obtained,
- (b) was (or is being or may have been) used in connection with a relevant offence (“relevant offence” is defined in terms identical to ss20 and 35),
- (c) contains anything used (or intended to be used) in connection with a relevant offence, or
- (d) is in a public place or school and contains a dangerous article was used (or may have been used) in connection with a relevant offence.

As with other search powers, police may seize and detain certain types of items found as a result of the search.

Section 43 – Power to board vessels

Replicates *Crimes Act* s.357C.

Provides for an authorised police officer (of or above the rank of Sergeant, in charge of a police station, or in charge of a police vessel) to take certain actions if he or she suspects on reasonable grounds that action is necessary to:

- (a) prevent, on a vessel, injury to people or damage to property by fire or otherwise, or
- (b) preserve peace and good order on a vessel, or

- (c) prevent, detect or investigate any offence that may be (or may have been) committed on a vessel.

Such actions include entering any part of the vessel, searching, and taking all necessary measures for preventing injury to persons or damage to property, and for preserving peace and good order or for preventing, detecting or investigating any offences that may have been committed on the vessel.

Section 44 – Power to search aircraft for safety reasons

Replicates *Crimes Act* s.357A.

An authorised person (the commander of an aircraft, or a person authorised in writing by an authorised officer) may search an aircraft, or anyone on board or about to board, and any luggage or freight, if the person suspects on reasonable grounds that an offence involving the safety of the aircraft is being (or was, or may have been) committed on board or in relation to the aircraft.

A search of a person must be conducted by a person of the same sex as the person being searched.

Section 45 – Search powers relating to prohibited plants and prohibited drugs

Replicates *Drug Misuse and Trafficking Act* s.37(4)

An authorised police officer (of or above the rank of Sergeant, in charge of a police station, or in charge of a police vessel) may stop and detain, enter any part, and search and inspect a vessel or aircraft, if the police officer reasonably suspects that there is in a vessel or aircraft a prohibited plant or prohibited drug that is, in contravention of the *Drug Misuse and Trafficking Act 1985*, in the possession or under the control of any person.

Part 5: Search and seizure powers with warrant or other authority

This part substantially replicates the *Search Warrants Act 1985*. *It also creates a new procedure for a notice to produce to be served on a financial institution instead of a search warrant being executed. Part 2 of the LEPAR Regulations essentially re-enacts the Search Warrants Regulations, with the addition of provisions relating to notices to produce.*

For a very helpful discussion of search warrants, please see the paper by Richard Wilson of Garfield Barwick Chambers (latest version September 2005).

Division 1 - Definitions

Section 46 - Definitions

Defines “occupier’s notice”, “telephone warrant” and “thing connected with an offence”.

Division 2 – police powers relating to warrants

Section 47 – Power to apply for warrant for particular offences

Substantially replicates *Search Warrants Act* s5(1).

An police officer may apply to an authorised officer for a search warrant if he or she suspects on reasonable grounds that there is (or will be within 72 hours) on the premises a thing connected with a particular type of offence.

The new section includes a power to apply for warrants in connection with child pornography and child prostitution offences (formerly in Crimes Act s357EA).

Section 48 – Issue of warrant

Replicates *Search Warrants Act* s6.

An authorised officer may issue a warrant, conferring a power to enter and search premises, if satisfied that there are reasonable grounds for doing so.

Section 49 – Seizure of things pursuant to warrant

Replicates *Search Warrants Act* s7.

Allows police to seize and detain things found pursuant to the warrant (or other things found in the course of execution the warrant that police believe on reasonable grounds to be connected with any offence).

Section 50 - Search of persons pursuant to warrant

Replicates *Search Warrants Act* s8(a).

A police officer may search a person on the premises whom he or she reasonably suspects of having a thing mentioned in the warrant.

The power to arrest a person, formerly in Search Warrants Act s8(b), is now in LEPAR s99.

Section 51 – Inquiries pursuant to warrant related to child prostitution offences

A police officer executing a search warrant in relation a child prostitution offence may, in the subject premises, make inquiries relating to any such offence.

Section 52 – Obstruction or hindrance of person executing warrant

Replicates *Search Warrants Act* s9.

A person must not, without reasonable excuse, obstruct or hinder the execution of a warrant (maximum penalty 100 penalty units and/or 2 years' imprisonment).

Division 3 – Notices to produce documents

Section 53 – Notices to produce documents

A police officer who believes on reasonable grounds that an authorised deposit-taking institution (*I cannot find a definition of this term anywhere in the Act or Regulations*) holds documents that may be connected with an offence committed by someone else, may apply to an authorised officer for a notice to produce. The option of applying for a search warrant remains.

Section 54 – Issue of notice to produce documents

An authorised officer may issue a notice to produce a document if satisfied there are reasonable grounds to suspect that the authorised deposit-taking institution holds documents that may be connected with an offence, and the institution is not a party to the offence. The notice may state the time, place and form of production of the documents. A police officer must give notice to the institution as soon as reasonably practicable after it is issued.

Section 55 – Information in application for notice to produce documents

An application for a notice to produce must state the name of institution.

Section 56 – Claims of privilege

If privilege is claimed over the documents, police may apply to a Magistrate for an order for access.

Section 57 – Obligations and liability of authorised deposit-taking institution

An authorised deposit-taking institution is not subject to any action, liability, claim, or demand for complying with the notice to produce. Failure or refusal to comply, without reasonable excuse, is an offence (maximum penalty 100 penalty units and/or 2 years' imprisonment).

Section 58 – Produced document taken to be seized

A document produced under a notice to produce is deemed to have been seized under LEPAR.

Division 4 – Provisions relating generally to warrants and notices to produce documents

Section 59 – Application of Division

This Division also applies to warrants issued under other parts of LEPAR (in the case of some types of warrants, eg drug detection, detention warrants, certain provisions do not apply) and to warrants issued under certain other Acts (see Schedule 2).

Section 60 – Application for warrant in person

Replicates *Search Warrants Act* s11.

An application must be made in person (subject of course to s12), in the form prescribed by the Regulations.

Section 61 – Telephone warrant

Replicates *Search Warrants Act* s12.

Provides that an application may be made by telephone (which is defined in s3 to include “radio, facsimile and any other communication device”) in urgent cases.

Section 62 – Information in application for warrant

Replicates *Search Warrants Act* s12A.

List the information that must be included in a warrant application.

Section 63 – False or misleading information in applications

Replicates *Search Warrants Act* s12B.

It is an offence to knowingly provide false or misleading information in a warrant application (maximum penalty 100 penalty units and/or 2 years' imprisonment).

Section 64 – Further application for warrant after refusal

Replicates *Search Warrants Act* s12C.

Provides limits on further warrant applications if the first application is refused.

Section 65 – Record of proceedings before authorised officer

Replicates *Search Warrants Act* s13.

A record must be made of all relevant particulars of the grounds relied on by the authorised officer to justify the issue of the warrant.

Section 66 – Form of warrant

Replicates *Search Warrants Act* s14.

A warrant is to be in the form prescribed by the Regulations.

Section 67 – Notice to occupier of premises entered pursuant to warrant

Replicates *Search Warrants Act* s15.

Provides for an occupier's notice to be served on entry or as soon as practicable after entry. However, service may be postponed for up to 6 months if the authorised officer who issued the warrant is satisfied that there are reasonable grounds for postponement.

Section 68 – Announcement before entry

Replicates *Search Warrants Act* s15A.

Police must make an announcement before entry into the premises, and give the occupier the opportunity to allow entry, unless there are reasonable grounds to believe that immediate entry is required to ensure a person's safety or effective execution of the warrant.

Section 69 – Duty to show warrant

Replicates *Search Warrants Act* s16.

The warrant must be produced for inspection if requested by the occupier.

Section 70 – Use of force to enter premises

Replicates *Search Warrants Act* s17.

Force may be used to enter the premises (or to break open any receptacle inside) if it is reasonably necessary to do so.

Section 71 – Use of assistants to execute warrant

Replicates *Search Warrants Act* s18.

Assistants may be used to execute a warrant if considered necessary.

Section 72 – Execution of warrant by day or night

Replicates *Search Warrants Act* s19.

A search warrant must be executed by day (6am-9pm), unless the authorised officer allows it to be executed by night. The section provides factors to be taken into account in deciding whether to authorise execution by night.

Section 73 – Expiry of warrant

Substantially replicates *Search Warrants Act* s20.

A telephone warrant expires upon execution, or 24 hours after issue, whichever occurs first. Other warrants must specify an expiry time (no later than 72 hours after issue, although this may be extended up to a maximum of 144 hours).

Note that s73 has been amended by the Crimes Legislation (Further Amendment) Act 2005, which has also proclaimed to commence on 1 December 2005. I understand that there are some problems with the way the amendment has been drafted (which could arguably pose problems in relation to crime scene and drug detection warrants) and that some further amendments may be enacted to overcome this.

Section 74 – Report to authorised officer on execution of warrant

Replicates *Search Warrants Act* s21.

A report must be given to the authorised officer within 10 days of the warrant's execution or expiry.

Section 75 – Death, absence of authorised officer who issued warrant

Replicates *Search Warrants Act* s22.

If the authorised officer who issued the warrant has died, ceased to be an authorised officer or is absent, the report may be furnished to any other authorised officer.

Section 76 – Defects in warrants

Replicates *Search Warrants Act* s23.

A defect in the warrant (other than a defect that affects the substance of the warrant) does not make it invalid.

Division 5 - Miscellaneous

Section 77 – Abolition of common law search warrants

Replicates *Search Warrants Act* s24.

Provides that common law search warrants are abolished.

Section 78 – Ministerial arrangements for things seized in connection with extra-territorial offences

Replicates *Search Warrants Act* s24A.

Ministerial arrangements may be made for things seized in connection with offences against the law of another Australian state or territory.

Section 79 – References in other Acts to “authorised justice” or “authorised officer”

Replicates *Search Warrants Act* s25B.

Any reference in any other Act to “authorised justice” or “authorised officer”, in relation to a warrant to which Division 4 applies, is to be read as a reference to an authorised officer within the meaning of LEPAR.

Section 80 – Application of warrant provisions

Replicates *Search Warrants Act* s26(4) and (5).

The Regulations may apply to search warrants issued under the *National Electricity (NSW) Law* and *Gas Pipeline Access (NSW) Law*.

Part 6: Search, entry and seizure powers relating to domestic violence offences

Section 81 - Definitions

Defines various terms concerned with domestic relationships and domestic violence offences.

Section 82 – Entry by invitation

Substantially replicates *Crimes Act* s357F.

A police officer who believes on reasonable grounds that a domestic violence offence is being (or may have been recently, or is likely to be) committed in any dwelling (defined in s3) may enter if invited to do so by any person who apparently resides there. Even if refused entry by the occupier, police may enter if invited to do so by the apparent victim of the offence.

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

Section 83 – Entry by warrant where entry denied

Replicates *Crimes Act* s357G(3).

If entry has been denied, and a police officer suspects that a domestic violence offence is being (or may have been recently, or is likely to be) committed in the dwelling, *and* that immediate entry is necessary to investigate or prevent the commission of a domestic violence offence, police may apply for a warrant. Part 5 Division 4 applies to warrants under this section (except an occupier’s notice is not required).

Section 84 – Obstruction or hindrance of person executing warrant

Replicates *Search Warrants Act* s9.

It is an offence to obstruct or hinder execution of a warrant, without reasonable excuse (maximum penalty 100 penalty units and/or 2 years’ imprisonment).

Section 85 – Powers that may be exercised on entry into premises

Replicates *Crimes Act* s357H.

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

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

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

Section 86 – Police may enter and search for firearms

Replicates *Crimes Act* s357I.

Where on inquiry a police officer is informed there are no firearms in the dwelling, but believes on reasonable grounds there are firearms present, he or she may apply for a search warrant.

Police *must* apply for a search warrant if they believe on reasonable grounds that a domestic violence offence is being (or may have been recently, or is likely to be) committed *otherwise than in a dwelling*, and any of the persons concerned may have a firearm in a dwelling.

Section 87 – Search and seizure powers

Substantially replicates *Crimes Act* s357 (4).

The new section, which provides for the search and seizure of a “dangerous article” (defined in s3), is broader than its predecessor, which referred only to firearms and spear guns.

Part 7: Crime scenes

Part 7 introduces a new regime of crime scene powers.

Police may establish a crime scene in a public place, and exercise crime scene powers (listed in s95) without a crime scene warrant. Note that “public place” is defined very broadly in s3, and could conceivably include a range of privately-owned premises.

For premises that are not a public place, a warrant will be required to effect entry (unless police already have lawful power of entry), to exercise certain crime scene powers, to maintain a crime scene for more than 3 hours, or to establish a crime scene more than once in a 24-hour period.

Section 88 – Crime scene powers may be exercised if police officer lawfully on premises

A police officer lawfully on premises (whether by a crime scene warrant or otherwise) may establish a crime scene, exercise crime scene powers in accordance with this Part, and stay on the premises for those purposes. *Note that “premises” is defined in s3 to include “any place, whether built on or not”.*

Section 89 – Application of Part to premises

Part 7 applies to any kind of premises, whether public or not.

Despite any other provision of Part 7, a police officer *may exercise crime scene powers at a crime scene in a public place without obtaining a crime scene warrant* and the provisions of this Part apply accordingly.

Section 90 - When crime scene may be established

Subs(1) provides that a crime scene may be established on premises if a police officer suspects on reasonable grounds that:

- (a) an offence committed in connection with a traffic accident that has resulted in the death of or serious injury to a person is being (or was, or may have been) committed on the premises, or
- (b) a serious indictable offence is being, (or was, or may have been) committed on the premises, or
- (c) there may be in or on the premises evidence of the commission of a serious indictable offence that may have been committed elsewhere (subs(2) provides for the establishment of a crime scene in respect of acts or omissions occurring outside NSW).

and that it is reasonably necessary to establish a crime scene in or on the premises to preserve, or search for and gather, evidence of the commission of that offence.

Section 91 - Establishment of crime scene

A police officer may establish a crime scene on premises in any way appropriate in the circumstances, and must (if reasonably appropriate in the circumstances) give the public notice that the premises are a crime scene.

Clause 37 of the draft LEPAR Regulation provides that a crime scene is established whenever a police officer declares it to be established. *There appears to be no provision specifying how the police officer is to notify the public, or when premises cease to be a crime scene.*

Section 92 - Exercise of powers at crime scene

A police officer may exercise the powers in s95(1)(a)-(f) if he or she suspects on reasonable grounds that it is necessary to preserve evidence of the commission of an offence in relation to which the crime scene was established.

Other powers in s95(1) may be exercised provided there is an application for a crime scene warrant, or of the police officer suspects on reasonable grounds that it is necessary to immediately exercise the power to preserve evidence.

A crime scene may not be maintained for more than 3 hours without a crime scene warrant.

A crime scene may not be established at the same premises more than once within a 24-hour period, unless a crime scene warrant is obtained for the second or subsequent occasion

By virtue of s89, it appears that the above requirements for warrants do not apply to a crime scene in a public place.

Section 93 - Notice to senior police officer where warrant not required

If the crime scene is established for 3 hours or less, a senior police officer must be notified.

Section 94 - Crime scene warrants

Provides for the issue of a crime scene warrant where a police officer suspects on reasonable grounds that it is necessary to exercise crime scene powers for the purpose of preserving, or searching for and gathering, evidence of a serious indictable offence, or an offence that was (or may have been) committed in connection with a traffic accident resulting in death or serious injury.

Part 5 Division 4 applies to applications for crime scene warrants.

A crime scene warrant authorises police to enter premises and exercise all necessary crime scene powers at a specified crime scene.

Section 95 - Crime scene powers

Subs(1) lists crime scene powers (see s92 for circumstances under which they may be used):

- (a) direct a person to leave the crime scene or to remove a vehicle, vessel or aircraft from the crime scene,
- (b) remove from the crime scene a person who fails to comply with a direction to leave the crime scene or a vehicle, vessel or aircraft a person fails to remove from the crime scene,
- (c) direct a person not to enter the crime scene,
- (d) prevent a person from entering the crime scene,
- (e) prevent a person from removing evidence from or otherwise interfering with the crime scene or anything in it and, for that purpose, detain and search the person,
- (f) remove or cause to be removed an obstruction from the crime scene,
- (g) perform any necessary investigation, including, for example, search the crime scene and inspect anything in it to obtain evidence of the commission of an offence,
- (h) for the purpose of performing any necessary investigation, conduct any examination or process,
- (i) open anything at the crime scene that is locked,
- (j) take electricity, gas or any other utility, for use at the crime scene,
- (k) direct the occupier of the premises or a person apparently involved in the management or control of the premises to maintain a continuous supply of electricity at the premises,
- (l) photograph or otherwise record the crime scene and anything in it,
- (m) seize and detain all or part of a thing that might provide evidence of the commission of an offence (this includes removing the thing or guarding it at the crime scene – subs(2))
- (n) dig up anything at the crime scene,
- (o) remove wall or ceiling linings or floors of a building, or panels of a vehicle,
- (p) any other function reasonably necessary or incidental to a function conferred by this subsection.

Subs(3) provides that nothing in Part 7 prevents a police officer who is lawfully on premises from exercising a crime scene power or doing any other thing, if the occupier of the premises consents.

The above powers are draconian and could potentially be used without a warrant in “public places” (such as business premises, common areas of blocks of flats) which are actually privately-owned premises. There is no provision for compensation for people whose property is damaged or interfered with in the course of exercising crime scene powers.

Section 96 - Obstruction or hindrance of person executing crime scene warrant

A person must not, without reasonable excuse, hinder or obstruct the execution of a crime scene warrant (maximum penalty 100 penalty units and/or 2 years’ imprisonment).

A person must not, without reasonable excuse, fail or refuse to comply with a request or direction made by a police officer exercising crime scene powers (maximum penalty 10 penalty units).

There appears to be no threshold requirement that the police action or direction must be reasonable in the circumstances. However, a person who fails to comply with an unreasonable direction may be able to rely on a reasonable excuse defence. Police must also follow the safeguards in s201.

Section 97 - Search warrants not affected

Nothing in Part 7 prevents police from applying for a search warrant under Part 5, or exercising any other function under LEPAR.

Section 98 - Part does not confer additional entry powers

Part 7 does not provide any additional power, or limit any existing power, to enter premises.

Part 8: Powers relating to arrest

Section 99 – Power of police officers to arrest without warrant

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

Subs(1) provides that a police officer may arrest a person:

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

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.

Subs(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 basically 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).

The safeguards in Part 15 (s.201) apply to arrest. Some of these safeguards already exist at common law (eg being told the reason for the arrest - Christie v Leachinsky [1947] 1 All ER 567).

Subs(4) provides that a police officer who arrests a person must, as soon as reasonably practicable, take the person and any property found on them before an authorised officer (defined in s3) to be dealt with according to law.

Although the objectives of subs(4) are sound (to ensure that police do not detain people for improper purposes or for longer than necessary) it does not reflect current reality. Nor does it sit well with other provisions of the Act, especially Part 9 (formerly Crimes Act Part 10A) and s.105 (which gives police the power to discontinue an arrest).

Section 100 – Power of other persons to arrest without warrant

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 (*therefore not common law offences*); or
- (b) who has just committed any such offence (*therefore not common law offences*); 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). 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.

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

Section 101 – Power to arrest with warrant

This simply confirms that police may arrest a person upon a warrant, even if the warrant is not in the police officer's possession.

Section 102 – Power to arrest persons who are unlawfully at large

Replicates *Crimes Act* s.352AA.

A police officer may arrest a person if he or she suspects on reasonable grounds that the person is unlawfully at large. Police must take the person before an authorised officer as soon as practicable. The authorised officer may, by warrant, commit the person to a correctional centre.

Subs(4) makes it clear that this provision does not apply to escapees from police custody but rather to people who are unlawfully absent from a correctional centre or juvenile detention centre.

Inmates of correctional centres or juvenile detention centres who are unlawfully at large may also be arrested under *Crimes (Administration of Sentences) Act* s.39 or *Children (Detention Centres) Act* s38.

Section 103 – Warrant for arrest of person unlawfully at large

Replicates power from *Crimes Act* s.352AA(7) for police to apply for a warrant to arrest a person unlawfully at large.

Section 104 – Power to arrest for interstate offences

Replicates *Crimes Act* s.352A.

Police may arrest a person if they suspect on reasonable grounds that the person has committed an interstate offence (which, if it occurred in NSW, would be an indictable offence or an offence punishable by imprisonment for 2 years or more). The section also deals with the court's power to deal with persons so arrested, and procedures for persons granted bail or held in custody after being arrested for interstate offences.

Section 105 – Arrest may be discontinued

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

Section 106 – Person helping in covert operations not under arrest

If a person in custody following an arrest agrees voluntarily to take part in a covert investigation, the person ceases to be under arrest for the offence (*this means, among other things, that police are not subject to the time limits set by the detention after arrest provisions in Part 9*). This does not prevent the person from being re-arrested for the offence.

Section 107 – Part does not affect alternatives to arrest

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

Section 108 – Part does not affect *Young Offenders Act 1997*

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

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 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.

Part 8A: Use of police in-car video equipment

Part 8A is already in force, having commenced on 23 December 2004.

Section 108A – Definitions

"ICV equipment" means in-car video equipment, being equipment installed in a vehicle and capable of recording visual images and sound outside the vehicle (including by means of a microphone that is separate from the equipment and vehicle).

"Police activities" means activities engaged in by a police officer while exercising any functions of a police officer.

"Police vehicle" means a vehicle used or operated for the purposes of police activities.

"Vehicle" includes a motorcycle or other cycle, and "driver" includes the rider of a motorcycle or other cycle.

A reference in Part 8A to the "driver" of a police vehicle includes, in the case of a police vehicle that is not being driven, a reference to the police officer responsible for the use and operation of the vehicle as driver.

Section 108B - Police activities requiring use of ICV equipment

- (a) the pursuing or following of a vehicle with the intention to stop or detain the vehicle, or
- (b) activities in relation to a vehicle that has been stopped or detained, or in relation to the driver or any occupant while in or about the vehicle (whether or not this follows a stop or detention pursuant to s108B(a)).

Section 108C - Mandatory use of ICV equipment

If a police vehicle is fitted with ICV equipment, police must ensure that, while the vehicle is being used in the course of police activities that require the use of ICV equipment:

- (a) ICV equipment is used for recording a view from the police vehicle of those activities, and
- (b) ICV equipment is used to record a conversation between the police officer and the driver (or occupant) of a vehicle that is stopped or detained.

The authority to record a conversation ("primary conversation") extends to conversations inadvertently or unexpectedly recorded in the course of recording the primary conversation.

Failure to operate ICV equipment or to record a conversation does not of itself limit or affect the admissibility of evidence, and does not of itself result in the evidence being improperly or unlawfully obtained.

Section 108D - Person to be informed that conversation will be recorded

Persons must be informed that their conversation is to be recorded using ICV equipment, either immediately before, or as soon as practicable after, the recording commences. *Recording of a conversation does not require the person's consent.*

This section does not extend to conversations recorded inadvertently, unexpectedly or incidentally to the recording of another conversation.

Section 108E - Recording not authorised after arrest

A conversation must not be recorded under Part 8A after the person's arrest (except for conversations inadvertently or unexpectedly recorded during the time between person's arrest and the first reasonably practicable opportunity to discontinue recording of the conversation).

This section only applies to sounds, not the recording of visual images of the conversation.

Section 108F –Operation of Listening Devices Act 1984

Recording of conversations via ICV equipment does not constitute the use of a listening device under the *Listening Devices Act 1984*.

Section 108G - ICV recordings to be kept for 2 years

The Commissioner of Police must ensure recordings made are kept for 2 years.

Section 108H - Corrupt disclosure and use of ICV recordings

ICV recording constitutes personal information about another person for the purposes of ss62 and 63 of the *Privacy and Personal Information Protection Act 1998*. This ensures that the protections against corrupt disclosure and use of personal information under the *Privacy and Personal Information Protection Act 1998* will apply to ICV recordings. The maximum penalty for offences under those provisions is 100 penalty units and/or 2 years' imprisonment.

Part 9: Investigations and questioning

This substantially replicates Part 10A of the *Crimes Act*. *Part 10A has been reviewed by an Attorney-General's Department working party and this may ultimately result in some amendments to LEPAR Part 9.*

Division 1 – Preliminary**Section 109 – Objects of Part**

Replicates the objects currently contained in *Crimes Act* s.354.

Section 110 – Definitions

Replicates the definitions currently in *Crimes Act* s.355.

Defines “detention warrant”, “investigation period”, and “permanent Australian resident”. Lists the circumstances under which a person is deemed to be under arrest for the purpose of Part 9.

Section 111 – Persons to whom part applies

Replicates *Crimes Act* s.356.

Part 9 applies to any person (including a juvenile) who is under arrest by a police officer for an offence, but does not apply to a person detained under Part 16 (the intoxicated persons provisions).

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

Section 112 – Modification of application of part to certain persons

Replicates *Crimes Act* s.356A.

Provides that regulations may modify the application of Part 9 in relation to children, Aboriginal persons or Torres Strait Islanders, persons of non-English speaking background, or persons with

a disability (whether physical, intellectual or otherwise) (*note that this is different to the old term “persons with impaired physical or intellectual functioning”*). The regulations may provide for a shorter investigation period for these classes of persons.

The draft LEPAR Regulations substantially replicate the current Crimes (Detention After Arrest) Regulations insofar as they provide additional protection for “vulnerable persons”. However, there is no provision for a shorter investigation period.

Section 113 – Effect of part on other powers and duties

Replicates *Crimes Act* s.356B.

Clarifies 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 independently confer power to carry out an investigative procedure.

Part 9 does not prevent a police officer from asking or causing a person to do a particular thing that the police officer is authorised by law to ask or cause the person to do (eg requiring a driver to submit to a breath analysis).

Part 9 does not affect the operation of other laws including the *Evidence Act*, any law that permits or requires a person to be present at the questioning of another person (eg *Children (Criminal Proceedings) Act* s13), the right to silence, the right to leave police custody if not under arrest, and the rights of a person under the *Bail Act*.

Division 2 – Investigation and questioning powers

Section 114 – Detention after arrest for purposes of investigation

Replicates *Crimes Act* s.356C.

A police officer may detain a person under arrest for the investigation period provided for by s.115, for the purpose of investigating whether the person committed the offence for which they are under arrest.

If, while the person is detained, the police form a reasonable suspicion about the person’s involvement in any other offence, police may also investigate the person’s involvement in that other offence.

The person must be released (unconditionally or on bail) before the end of the investigation period, or brought before an authorised officer or court (before, or as soon as practicable after, the end of the investigation period).

There are limits on the investigation period where a person is arrested more than once within 48 hours.

Section 115 – Investigation period

Replicates *Crimes Act* s.356D.

The investigation period must be “reasonable having regard to all the circumstances”, and must not exceed four hours (or a longer period if extended by a detention warrant).

Section 116 – Determining reasonable time

Replicates *Crimes Act* s.356E.

Provides that all relevant circumstances of the particular case must be taken into account. Subs(2) provides a non-exhaustive list of factors.

In any criminal proceedings in which the reasonableness of the detention period is in issue, the burden lies on the prosecution to prove on the balance of probabilities that the period was reasonable.

Section 117 – Certain times to be disregarded in calculating investigation period

Replicates *Crimes Act* s.356F.

Provides a list of time out periods. Note that these are not unlimited; most are subject to a reasonableness requirement. In any criminal proceedings in which there is an issue as to whether a certain period should be regarded as time out, the burden of proof is on the prosecution on the balance of probabilities.

Section 118 – Detention warrant to extend investigation period

Replicates *Crimes Act* s.356G.

Before the end of the investigation period, police may apply to an authorised officer for a warrant to extend the investigation period. A detention warrant may extend the maximum investigation period by up to 8 hours; it cannot be extended more than once. Subs(5) provides a list of factors of which the authorised officer must be satisfied.

Subs(6) is a new provision requiring the custody manager to give the person a copy of the warrant, and inform the person of its nature and effect, as soon as reasonably practicable.

Section 119 – Detention warrants

Replicates *Crimes Act* s.356H.

Provides that an application for a detention warrant may be made in person or by telephone. Division 4 of Part 5 sets out warrant application procedures.

In any criminal proceedings where the existence of a detention warrant is in issue, the burden lies on the prosecution to prove on the balance of probabilities that a warrant was issued.

Section 120 – Information and application for detention warrant

Replicates *Crimes Act* s.356I.

Specifies the information that must be included in an application for a detention warrant. *Cl.36 of the LEPAR Regulations requires further information to be included in the case of a vulnerable person.*

Section 121 – Detention after arrest for purposes of investigation may count towards sentence

Replicates *Crimes Act* s.356W.

Allows a court to take into account any period of detention and to reduce the sentence it would otherwise have passed.

Division 3 – Safeguards relating to persons in custody for questioning

Section 122 – Custody manager to caution and give summary of Part to detained person

Replicates *Crimes Act* s.356M.

As soon as practicable after a person comes in to custody, the custody manager (defined in s.3) must, orally and in writing:

- (a) caution the person that they do not have to say or do anything but that anything they say or do may be used in evidence; and

- (b) give the person a summary of the provisions of Part 9, including information about detention warrants.

The person is to be requested to sign an acknowledgement that the information has been so given.

Section 123 – Right to communicate with friend, relative, guardian or independent person and legal practitioner

Replicates *Crimes Act* s.356N.

A person under arrest may communicate (or attempt to communicate) with a friend, relative, guardian or independent person *and* a legal practitioner of the person's choice, and ask these persons to attend the police station.

The custody manager must inform the person of this right (orally and in writing).

The custody manager must, as soon as practicable, allow the person reasonable facilities to make such a communication and, as far as is practicable, provide facilities where the communication will not be overheard. If a friend, relative, etc or legal practitioner attends the police station, police must provide facilities for the detainee to communicate with them in private.

The custody manager must defer for a reasonable period any investigative procedure to allow the person to make, or attempt to make, contact with a friend, relative, legal practitioner etc, and to allow the person to attend the police station and speak with the detainee. However, the investigation period is not required to be deferred for more than 2 hours.

A legal practitioner may be present during any investigative procedure if the detainee requests.

As with the current Regulations, the draft LEPAR Regulations provide protection for "vulnerable persons" (children, ATSI, NESB and people with impaired physical or intellectual functioning).

A vulnerable person may have a support person present (as well as a lawyer) during any investigative procedure (LEPAR Reg cl. 27). Note that this is instead of, not in addition to, the right to contact a friend or relative under s123. The support person would presumably also be expected to fulfil the role of independent adult during any police interview with a child under Children (Criminal Proceedings) Act s13 or Young Offenders Act s10.

The custody manager must, as far as practicable, assist a vulnerable person to exercise their rights under Part 9 (LEPAR Reg cl. 25).

In the context of Crimes Act Part 10A and the Crimes (Detention After Arrest) Regulations, it has been held that the right of a person under 18 to seek legal advice has not been accorded unless the police have informed the child about the Legal Aid Hotline for Under-18s and have given the child a reasonable opportunity to call it (R v Cortez, CE, ME, Ika & LT, unreported, NSWSC, Dowd J, 3 October 2002)

In the case of ATSI detainees, police must contact an ATSI legal service (LEPAR Regulation cl. 33). Most Aboriginal Legal Services in NSW have custody hotlines.

Vulnerable persons who are non-indigenous adults do not generally have the benefit of a free, after-hours legal advice hotline. It is unclear how far the custody manager's obligation extends in terms of assisting such people to obtain legal advice.

Section 124 – Right of foreign national to communicate with consular official

Replicates *Crimes Act* s.356O.

Applies to a detained person who is not an Australian citizen or a permanent Australian resident, and is in addition to the rights conferred by s123.

Section 125 – Circumstances in which certain requirements need not be complied with

Replicates *Crimes Act* s.356P.

The custody manager may refuse to allow the detainee to communicate with a friend, relative, guardian or independent person if the custody manager believes on reasonable grounds that doing so is likely to result in destruction of evidence, physical harm to any person, an accomplice avoiding arrest, etc. *Note that nothing authorises police to refuse access to a legal practitioner.*

Section 126 – Provision of information to friend, relative or guardian

Replicates *Crimes Act* s.356Q.

If a person claiming to be a friend, relative or guardian contacts the police station enquiring as to the whereabouts of the detained person, the custody manager must tell the detained person. The custody manager must provide information to the friend, relative or guardian if the detained person consents (subject to exceptions similar to those in s125).

Section 127 – Provision of information to certain other persons

Replicates *Crimes Act* s.356R.

Imposes similar requirements if the police are contacted by a person claiming to be the detainee's lawyer, a consular official or someone who in a professional capacity is concerned with the welfare of the detained person.

Section 128 – Provision of interpreter

Replicates *Crimes Act* s.356S.

Requires the provision of interpreters for detainees who are not fluent in English or who have a disability which impairs their communication. However, this requirement need not be complied with if not reasonably practicable.

Section 129 – Right to medical attention

Replicates *Crimes Act* s.356T.

The custody manager must arrange immediately for medical attention if it appears that the person requires medical attention or if the person requests it on grounds that appear reasonable to the custody manager.

Section 130 – Right to reasonable refreshments and facilities

Replicates *Crimes Act* s.356U.

The custody manager must ensure that the person is provided with reasonable refreshments and access to toilet facilities. They may also provide washing/shaving facilities if it is reasonably practicable and if the custody manager is satisfied that the investigation will not be hindered.

Section 131 – Custody records to be maintained

Replicates *Crimes Act* s.356V.

Specifies the details must be included in custody records. *Division 2 (cll. 19-22) of the LEPAR Regulations impose further requirements in relation to custody records.*

Division 4 – Regulations

Section 132 – Regulations

Replicates *Crimes Act* s.356X.

Provides that Regulations may make provision for the exercise of functions and record-keeping under Part 9. *Part 3 of the draft LEPAR Regulations substantially replicate the Crimes (Detention After Arrest) Regulations.*

Part 10: Other powers relating to persons in custody

Division 1 – Taking of identification particulars

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

Section 133 – Power to take identification particulars

Replicates *Crimes Act* s.353A(3).

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

Section 134 – Orders for the taking of identification particulars

Replicates *Crimes Act* s.353A(4).

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

Section 135 – Lawful custody of persons other than police officers

Replicates *Crimes Act* s.353A(3C)

Provides that a reference in Division 1 to "lawful custody" is a reference to lawful custody of the police or other authority (cf s.3, which defines "lawful custody" as police custody).

If a person is in lawful custody in a place other than a police station, police powers under s.133 or 134 may be exercised by the person in charge of that place or a person normally under their supervision.

Section 136 – Identification particulars of children under 14 years

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.

Section 137 – Destruction of certain identification particulars relating to children

Replicates *Crimes Act* s.353AB.

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.

It is unfortunate that this provision does not extend to adults who are acquitted. Instead, destruction of fingerprints etc remains within the discretion of the Commissioner for Police.

Division 2 – Examination of persons in custody

Section 138 – Power to examine person in custody

Replicates *Crimes Act* s.353A(2) (with some changes in wording).

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.

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.

Part 11: Drug detection powers

Division 1 – Drug premises

Division 1 replicates the drug premises powers in the *Police Powers (Drug Premises) Act* without any substantive amendments. *Note that it is only the provisions on police powers that*

are replicated in LEPAR. The offence provisions (being on drug premises, etc) have been transferred to the Drug Misuse and Trafficking Act as Part 2B (ss36V-36ZC).

The *Police Powers (Drug Premises) Act* has recently been reviewed by the NSW Ombudsman, who has made some recommendations for amendments to the Act. The Ombudsman's report is available at <http://www.nswombudsman.nsw.gov.au/publication/otherreports.asp>.

Section 139 – Definitions

Replicates *Police Powers (Drug Premises) Act* s.3.

Defines various terms including “drug premises”, which means any premises used for the unlawful supply or manufacture of prohibited drugs. Note that, for the purposes of this Division, “prohibited drug” does not include cannabis leaf, oil or resin.

Section 140 – Issue of search warrant – suspected drug premises

Replicates *Police Powers (Drug Premises) Act* s.5.

A police officer of or above the rank of Sergeant who has reasonable grounds for believing that premises are being used for the unlawful supply or manufacture of any prohibited drug may apply to an authorised officer for a search warrant. The authorised officer may issue a warrant if satisfied there are reasonable grounds for doing so. Part 5 Division 4 applies to warrants issued under this Division.

Section 141 – Execution of search warrant

Replicates *Police Powers (Drug Premises) Act* s.6.

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

Section 142 – Search and arrest of persons pursuant to search warrant

Replicates *Police Powers (Drug Premises) Act* s.7.

A police officer executing a search warrant under this Division may:

- (a) search any person on the premises;
- (b) arrest or otherwise proceed against any person on the premises (note that it is an offence to be upon drug premises);
- (c) seize and detain any firearm or other thing found on the premises that police have reasonable grounds for believing is connected with an offence;
- (d) without limiting (c) seize any prohibited drug and money found on the premises and any syringe or other thing kept or used in connection with any activity prohibited by the *Drug Misuse and Trafficking Act*; and
- (e) require any person on the premises to disclose his or her identity.

It is unclear whether the powers to search a person, to seize money, and to demand identity are subject to the usual requirements of reasonable suspicion. From the context it would appear that reasonable suspicion is not required.

Section 143 – Obstructing police officer executing search warrant

Replicates *Police Powers (Drug Premises) Act* s.9.

It is an offence to wilfully prevent, obstruct or delay an officer executing a search warrant. This includes alerting other persons to the presence of police (maximum penalty 50 penalty units and/or 12 months' imprisonment).

It is also an offence to fail to disclose identity, or to give a false name or address, in accordance with a request in accordance with this Division and s.201 (maximum penalty 50 penalty units).

Section 144 – Application of other laws

Replicates *Police Powers (Drug Premises) Act* s.18.

Provides that Division 1 does not limit the operation of the *Disorderly Houses Act* 1943 or any other State law relating to the entry and searching of premises.

Division 2 – Use of drug detection dogs

This Division replicates the *Police Powers (Drug Detection Dogs) Act* 2001 without any substantive amendments.

This Act has also recently been reviewed by the NSW Ombudsman. The final report has not been released, but the Discussion Paper (which highlights some significant problems with the Act's operation) is at <http://www.nswombudsman.nsw.gov.au/publication/discussion.asp>.

Section 145 – Meaning of “General Drug Detection”

Replicates *Police Powers (Drug Detection Dogs) Act* s.5.

Defines “general drug detection” as the detection of prohibited drugs or plants in the possession or control of a person, except during a search of the person that is carried out after a police officer reasonably suspects that the person is committing a drug offence.

Section 146 – General authority to use drug detection dogs

Replicates *Police Powers (Drug Detection Dogs) Act* s.4.

Provides that, if police are otherwise authorised to search a person or to enter premises for the purpose of detecting a drug offence, they are entitled to use a dog. The mere entry or presence of a dog on premises under this section does not give rise to liability on the part of the State or the police officer.

Section 147 – Use of dogs for general drug detection authorised

Replicates *Police Powers (Drug Detection Dogs) Act* s.6.

Police are authorised to use dogs for general drug detection, but only as provided by Division 2.

Section 148 – General drug detection with dogs in authorised places

Replicates *Police Powers (Drug Detection Dogs) Act* s.7.

Police may, without warrant, use dogs for general drug detection in relation to persons at, or seeking to enter or leave:

- (a) any part of premises being used for the consumption of liquor that is sold at the premises (other than any part of the premises being used primarily as a restaurant or other dining place);
- (b) a public place at which a sporting event, concert or other artistic performance, dance party, parade or other entertainment is being held;
- (c) a public passenger vehicle (including train, light rail or bus) travelling on a route prescribed by the regulations, or a station, platform or stopping place on any such route.
Note that cll. 38 and 39 of the LEPAR Regulation replicate the current Police Powers (Drug Detection Dogs) Regulation, prescribing certain public transport routes.

Section 149 – General drug detection with dogs by warrant

Replicates *Police Powers (Drug Detection Dogs) Act* s.8, replacing “authorised justice” with “authorised officer” as the person to whom a police officer must apply for a warrant.

Police may use dogs for drug detection in other public places if authorised to do so by a warrant. This section provides for the application for, and issue of, warrants. Part 5 Division 4 applies to drug detection warrants (except that no occupier’s notice is required).

Section 150 – Provisions relating to general drug detection

Replicates *Police Powers (Drug Detection Dogs) Act* s.9.

When using a dog to carry out general drug detection, police must keep the dog under control and *take all reasonable precautions to prevent the dog touching a person*.

General drug detection may be carried out as part of a covert operation, but only if specifically authorised by a warrant.

The provisions of this Division do not affect other powers to search persons or premises.

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

Division 3 – Use of medical imaging to search for internally concealed drugs

This Division substantially replicates the *Police Powers (Internally Concealed Drugs) Act 2001*.

This Act has also recently been reviewed by the NSW Ombudsman. The final report has just been released; see <http://www.nswombudsman.nsw.gov.au/publication/otherreports.asp>.

At the time of the Ombudsman’s review, the Act had only been used once. The suspect was x-rayed and no drugs were detected. Apparently it has not been implemented more widely due to cost, industrial issues, and doubts about the capacity of medical imaging to detect drugs. *The Ombudsman’s principal recommendation is that Parliament consider whether the provisions should remain in force.*

Section 151 – Definitions

Replicates *Police Powers (Internally Concealed Drugs) Act* s.3.

Defines various terms, including “internal search” which means a search of a person’s body involving medical imaging (eg x-ray, ultrasound) but does not include a body cavity search.

The definition of “suspect” makes it clear that the Division only applies to people suspected to be in possession of drugs for the purpose of supply.

Section 152 – Eligible judicial officers

Replicates *Police Powers (Internally Concealed Drugs) Act* s.4.

Provides the types of judicial officers who may make orders for the carrying out of internal searches.

Section 153 – Division does not apply to persons under 10

Replicates *Police Powers (Internally Concealed Drugs) Act* s.6.

An internal search may not be carried out on a person under 10.

Section 154 – When may an internal search be carried out?

Replicates *Police Powers (Internally Concealed Drugs) Act* s.7.

A medical practitioner or appropriately qualified person may carry out an internal search with the informed consent of the suspect. If the suspect is a child or incapable person (defined in s.151) or refuses consent, an eligible judicial officer may make an order.

Section 155 – Police officer may detain suspect to request consent, or apply for order for, an internal search

Replicates *Police Powers (Internally Concealed Drugs) Act* s.8.

Police may detain a person to request their consent to (or seek an order for) an internal search, if the police officer: is satisfied that the person is a suspect; has reasonable grounds to believe the search is likely to produce evidence of a supply offence under the *Drug Misuse and Trafficking Act*; and is satisfied the detention is justified in all the circumstances. The section provides for time limits and time out periods.

Section 156 – Police officer may request consent of certain suspects for internal search

Replicates *Police Powers (Internally Concealed Drugs) Act* s.9.

Sets out procedures for seeking and obtaining consent to an internal search. Aboriginal or Torres Strait Islander persons must have a search friend present (or have expressly waived this right) when consent is being requested.

Section 157 – Matters that suspect must be informed of before giving consent to an internal search

Replicates *Police Powers (Internally Concealed Drugs) Act* s.10.

Sets out a list of matters that police must tell the suspect, including the kinds of procedures that may be used, the suspect's rights, and the fact that the suspect may be detained for up to 48 hours if the internal search reveals the presence of matter that could be drugs.

Section 158 – Procedure after the carrying out of an internal search

Replicates *Police Powers (Internally Concealed Drugs) Act* s.11.

If an internal search reveals the presence of any matter that (in the opinion of the person carrying out the search) could be drugs, the suspect may be detained at a hospital or doctor's surgery for up to 48 hours (this may be extended by a detention order under s.182). Otherwise the suspect must be released immediately (unless otherwise in custody).

Section 159 – Application for order for internal search

Replicates *Police Powers (Internally Concealed Drugs) Act* s.12.

Provides for the form of application, which may be made by a police officer to an eligible judicial officer.

Section 160 – Procedure at hearing of application for order

Replicates *Police Powers (Internally Concealed Drugs) Act* s.13.

An order may be made only in the presence of the suspect (subject to any contrary order made by the judicial officer). Children, incapable persons and ATSI persons must have a search friend present (ATSI suspects may waive their right to a search friend). Any suspect may be represented by a legal practitioner.

Section 161 – Orders for internal search

Replicates *Police Powers (Internally Concealed Drugs) Act* s.14.

Sets out the criteria for making of an order. The judicial officer must be satisfied that the person is a suspect, that there are reasonable grounds to believe that the internal search is likely to

produce evidence confirming the condition of a drug supply offence, and that the making of the order is justified in all the circumstances.

There are some limits on making orders if an internal search may endanger the suspect's physical health, or if the suspect is a child and the search involves electromagnetic radiation or radiography.

A judicial officer who orders an internal search may also authorise the detention of the suspect for up to 24 hours for the search to be carried out.

Section 162 – Internal search

Replicates *Police Powers (Internally Concealed Drugs) Act* s.15.

An internal search is to be carried out by a medical practitioner or appropriately qualified person at a hospital, surgery or medical practitioner's practising rooms. There is provision for a search friend for children, incapable persons and ATSI persons.

Section 163 – Conduct of internal search

Replicates *Police Powers (Internally Concealed Drugs) Act* s.16.

The person carrying out the search may use any medical procedure or apparatus that they consider to be reasonably safe in the circumstances.

Section 164 – Medical practitioner may take action to preserve suspect's life

Replicates *Police Powers (Internally Concealed Drugs) Act* s.17.

The medical practitioner may take measures that he or she considers necessary because the suspect's life is at risk. If this involves the suspect being removed to another place, the time taken in doing so is regarded as time out for the purpose of calculating the detention period.

Section 165 – General rules for carrying out internal search

Replicates *Police Powers (Internally Concealed Drugs) Act* s.18.

Provides that the internal search must be conducted in circumstances affording reasonable privacy, etc.

Section 166 – No questioning during internal search

Replicates *Police Powers (Internally Concealed Drugs) Act* s.19.

An internal search must not be carried out while a suspect is being questioned, and any questioning must be suspended while the search is carried out.

Section 167 – Suspect must be cautioned before internal search

Replicates *Police Powers (Internally Concealed Drugs) Act* s.20.

Before an internal search commences, a police officer must caution the suspect about the right to silence.

Section 168 – Internal searches not to be carried out in cruel, inhuman or degrading manner

Replicates *Police Powers (Internally Concealed Drugs) Act* s.21.

Provides that nothing in this Division authorises the carrying out of an internal search in a cruel, inhuman or degrading manner, but that the carrying out of an internal search is not of itself taken to be cruel, inhuman or degrading.

Section 169 – Medical practitioner or appropriately qualified person to prepare report

Replicates *Police Powers (Internally Concealed Drugs) Act* s.22.

The person who performs the internal search must, as soon as practicable after completing it, provide a written report to the Commissioner of Police. This section is not limited by any law relating to privilege or confidentiality.

Section 170 – Suspect’s rights during detention

Replicates *Police Powers (Internally Concealed Drugs) Act* s.23.

A person detained under this Division may at any time consult a legal practitioner or communicate with another person (in the latter case, this communication may be stopped if police believe on reasonable grounds that it should be stopped in order to safeguard the processes of law enforcement or protect the life and safety of any person).

Section 171 – Interpreters

Replicates *Police Powers (Internally Concealed Drugs) Act* s.24.

Requires police to arrange an interpreter for a suspect who is unable to communicate with reasonable fluency in English.

Section 172 – Withdrawal of consent

Replicates *Police Powers (Internally Concealed Drugs) Act* s.25.

If a person expressly withdraws consent to the carrying out of an internal search before or during a search, a search is not to proceed except by order of an eligible judicial officer.

Section 173 – Powers and entitlements of legal representatives and search friends

Replicates *Police Powers (Internally Concealed Drugs) Act* s.26.

A request or objection that may be made by a suspect under this Division may instead be made on their behalf by a legal practitioner or search friend. If a provision requires a suspect to be informed of a matter, any legal representative or search friend who is present must also be informed.

Section 174 – Recording or giving of information and suspect’s responses

Replicates *Police Powers (Internally Concealed Drugs) Act* s.27.

If practicable, police must electronically record the giving of information about the proposed internal search and the suspect’s responses. If this is not practicable, a written record must be made and a copy made available to the suspect.

Section 175 – Obligation of police officers relating to recordings

Replicates *Police Powers (Internally Concealed Drugs) Act* s.28.

Requires police to afford the suspect, search friend and legal representative the opportunity to view/listen to electronic recordings.

Section 176 – Material required to be made available to suspect

Replicates *Police Powers (Internally Concealed Drugs) Act* s.29.

Provides ways in which material must be made available to a suspect.

Section 177 – No charge for material

Replicates *Police Powers (Internally Concealed Drugs) Act* s.30.

Confirms that material required to be provided under the Division must be provided free of charge.

Section 178 – Burden of proof

Replicates *Police Powers (Internally Concealed Drugs) Act* ss.31-34.

The onus lies on the prosecution to prove, on the balance of probabilities, factors such as reasonable suspicion, waiver of right to search friend, that it was not practicable to do something required by the Division, etc.

Section 179 – Liability of medical practitioners and appropriately qualified persons

Replicates *Police Powers (Internally Concealed Drugs) Act* s.35.

Exempts persons carrying out internal searches from liability if they have acted in good faith and believe on reasonable grounds that consent or a court order has been obtained.

Section 180 – Medical practitioners and appropriately qualified not obliged to carry out internal searches

Replicates *Police Powers (Internally Concealed Drugs) Act* s.36.

Nothing in this Division *requires* a medical practitioner or appropriately qualified person to carry out an internal search.

Section 181 – Relationship to Part 9

Replicates *Police Powers (Internally Concealed Drugs) Act* s.37.

Confirms that nothing in this Division is intended to limit the rights and protections provided by Part 9, and that the rights and protections conferred by this Division are in addition to those conferred by Part 9. The section also provides for the maximum period for which a person may be detained under this Division.

Section 182 – Detention orders

Police may apply to a judicial officer to extend the maximum period for which a suspect may be detained. The period of extension must not exceed 48 hours and the period may not be extended more than twice.

Section 183 – Restrictions on publication

Replicates *Police Powers (Internally Concealed Drugs) Act* s.39.

Creates an offence of publishing the name or identifying information of a suspect subject to an internal search, unless the suspect has been charged with a relevant offence or a judicial officer has authorised such publication (maximum penalty 50 penalty units and/or 12 months imprisonment).

Section 184 – Lists of search friends

Replicates *Police Powers (Internally Concealed Drugs) Act* s.40.

Requires the Minister for Police to establish and maintain lists of appropriate search friends for ATSI detainees (but not for children or incapable persons).

Part 12: Powers relating to vehicles and traffic

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* 1999. LEPAR Part 3 Div 2, Part 4 Div 5 and Part 8A also contain traffic-related powers.

Division 1 – Regulation of traffic

Section 185 - Police may give reasonable directions for traffic regulation

Provides that a police officer may give reasonable directions for the safe and efficient regulation of traffic to any driver or motorcycle rider on or near a road or road related area. *Note that it is an offence under the Australian Road Rules to fail to obey a reasonable direction for the regulation of traffic (maximum penalty 20 penalty units).*

Section 186 – Police may temporarily close road or road related area to traffic

Replicates *Road Transport (Safety and Traffic Management) Act* s.74.

Police may close any road or road-related area to traffic during any temporary obstruction or danger to traffic or for any temporary purpose. It is an offence to fail or refuse to comply (without reasonable excuse) with a direction of a police officer given in pursuance of a power conferred by this section (maximum penalty 20 penalty units). *Police must first follow the procedures set out in s201.*

Division 2 – Other police powers relating to vehicles**Section 187 – Use of tyre deflation devices in police pursuits**

Replicates *Road Transport (General) Act* 2005 s.267 (formerly *Road Transport (General) Act* 1999 s.51).

The Commissioner for Police may authorise the use of tyre deflation devices in a police pursuit.

Section 188 – Power of entry for tracing stolen motor vehicles or trailers or their parts

Replicates *Road Transport (General) Act* 2005 s.266 (formerly *Road Transport (General) Act* s.50)

A police officer authorised to do so by the Commissioner may enter vehicle repair (panel beating) premises and inspect any motor vehicle, trailer or parts for the purposes of ascertaining whether it is stolen. It is an offence to wilfully delay or obstruct a police officer in the exercise of this authority (maximum penalty 20 penalty units).

Division 3 – Powers to prevent intoxicated drivers from driving**Section 189 – Power to prevent driving by persons who are under the influence of alcohol or other drugs**

Replicates *Road Transport (Safety and Traffic Management) Act* s.30(1)-(3), with one addition.

Police may take certain measures to prohibit intoxicated persons from driving, including confiscating keys, immobilising the vehicle or removing and detaining the vehicle. They are not authorised to do so for a period that is longer than necessary in the circumstances.

If the police officer suspects that the person is under the influence of alcohol, the person may request to undergo a breath test. In this situation the police officer may not take any of the above measures before the person undergoes a breath test. The new subs(3) provides that this requirement is waived if the police officer reasonably suspects that the person is likely to abscond before undergoing the breath test.

Section 190 – Detention of keys or vehicles may be continued

Replicates *Road Transport (Safety and Traffic Management) Act* s.30(4) and (5).

Sets out the circumstances in which police are required to return the keys or vehicle.

Section 191 – Offence to contravene prohibition or requirement

Replicates *Road Transport (Safety and Traffic Management) Act* s.30(6) and (7).

It is an offence to fail or refuse to comply with a prohibition or requirement made by a police officer, or to attempt to obstruct a police officer in the exercise of any power, under this Division (maximum penalty 10 penalty units). The court must be satisfied that the police officer had reasonable grounds for believing that, in the circumstances, the action taken was necessary in the interests of the person or of any other person or of the public.

Section 192 – Expenses incurred in connection with Division

Replicates *Road Transport (Safety and Traffic Management) Act* s.30(9).

Expenses incurred in connection with the immobilisation, removal or detention of the motor vehicle may be recovered from the driver or owner as a debt in a court of competent jurisdiction.

Part 13: Use of dogs to detect firearms and explosives

This replicates Part 6A of the *Firearms Act*, which was required to be monitored by the Ombudsman. It appears the Ombudsman's review is still ongoing. A Discussion Paper is available at <http://www.nswombudsman.nsw.gov.au/publication/discussion.asp>.

Section 193 – Definitions

Maintains the definition of “relevant firearms or explosives offence” as contained in *Firearms Act* s.72A, and the definition of “general firearms or explosives detection” as contained in *Firearms Act* s.72D.

Section 194 – Part does not confer the power of entry or detention

Replicates *Firearms Act* s.72B.

Confirms that Part 13 does not confer powers to enter or detain.

Section 195 – General authority to use dogs for detecting firearms or explosives

Replicates *Firearms Act* s.72C.

This is in similar terms to s.146 (which relates to use of drug detection dogs).

Section 196 – General firearms or explosives detection using dogs

Replicates *Firearms Act* s.72D.

Police may use dogs to carry out general firearms or explosives detection without warrant. Police must keep the dog under control, and take all reasonable precautions to prevent the dog from touching a person. This section does not affect the search of a person whom police reasonably suspect is committing a firearms or explosives offence.

Part 14: Powers to give directions

Replicates *Summary Offences Act* s28F.

The direction-giving power was reviewed by the NSW Ombudsman in 1999 (“Policing Public Safety” report published November 1999). The power to give directions to persons in relation to drug activity was introduced in 2001 by the *Police Powers (Drug Premises) Act*, which has recently been reviewed by the Ombudsman. Copies of both review reports are available at www.nswombudsman.nsw.gov.au/publication/otherreports.asp.

Unfortunately the legislature has done nothing to address most of the problems identified by the Ombudsman, and there is still a significant problem with police giving inappropriate directions, especially to young people, indigenous people and drug users. However, the provisions do contain some safeguards and there are a number of elements which the police must prove in order to successfully prosecute a person for failure to comply. Unfortunately most allegations of disobeying police directions are dealt with by infringement notice and are rarely contested.

Section 197 – Power to give reasonable directions in public places

Replicates *Summary Offences Act* s.28F (1)-(7A) and (8).

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.

Section 198 – Requirements relating to direction

Replicates *Summary Offences Act* s.28F (3),(5), (7B), (7C) and (7D).

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 (this was formerly required by s28F(6)).

There is nothing to specify the nature and duration of direction that may be given. However, the direction must be reasonable in the circumstances for the purpose of stopping or reducing the relevant conduct. *There is no appellate authority on this point, but a 7-day direction was held by a Local Court Magistrate to be unreasonable because of its arbitrary nature (Police v Saysouthinh, Brydon LCM, Liverpool Local Court, 24 May 2002). In the context of a bail decision, Greg James J of the Supreme Court also commented about the inappropriateness of a direction which required a person not to go within 2km of Cabramatta (R v Truong, 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.

This section also set out the procedures to be followed when directions are given to groups of people.

Section 199 – Failure to comply with direction

Replicates *Summary Offences Act* s.28F (6) and (7).

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.

LEPAR Regulations cl. 40 provides that this offence may be dealt with by penalty notice (prescribed penalty \$220), and this is usually what occurs, although police in some areas (eg Cabramatta) have at times adopted a practice of arresting and charging people for this offence.

Section 200 – Limitation on exercise of police powers

Replicates *Summary Offences Act* s.28G.

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

Part 15: Safeguards relating to powers

Section 201 – Supplying police officers’ details and giving warnings

This re-enacts some existing requirements (currently 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:

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

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.

Note that s201 has been amended by the Crimes Legislation (Further Amendment) Act 2003, which is also proclaimed to commence on 1 December 2005. These amendments serve to clarify the time at which the relevant information must be provided by the police.

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 – Detention period for search limited

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.

Part 16: Powers relating to intoxicated persons

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

It is strange 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.

Section 205 – Definitions

Replicates *Intoxicated Persons Act* s.3.

Defines various terms, including “intoxicated person”. This definition reflects amendments made to the *Intoxicated Persons Act* in recent years. It means a person who appears to be seriously affected by alcohol or another drug or a combination of drugs.

Section 206 – Detention of intoxicated persons

Replicates *Intoxicated Persons Act* s.5(1), (2), (3), (4), (7) and (8).

Police may detain an intoxicated person found in a public place who is behaving in a disorderly manner or in a manner likely to cause injury to him/herself or another person or damage to property, or who is in need of physical protection because of their intoxication. A person is not to be detained under this section because of behaviour that constitutes an offence.

An intoxicated person must be taken to, and released into the care of, a responsible person (such as a friend, family member or staff member at a welfare or drug rehabilitation service) who is willing immediately to undertake the care of the person.

An intoxicated person may instead be detained in a police station (or, if relevant, juvenile detention centre) if it is necessary to do so temporarily for the purpose of finding a responsible person, if a responsible person cannot be found, or if the intoxicated person is behaving so violently that a responsible person would not be capable of taking care of and controlling the person.

The intoxicated person may be detained under such reasonable restraint as is necessary to protect the person and others from injury and to protect property from damage.

The section does not authorise a responsible person into whose care an intoxicated person is released to detain the intoxicated person.

Section 207 – Detention of persons in authorised places of detention

Replicates *Intoxicated Persons Act* s.5(5) and (6).

Sets out the rights of intoxicated persons who are detained in police stations or detention centres. These include being given a reasonable opportunity to contact a responsible person, being kept separately from persons in custody for offences, and for adults to be kept separately from children.

Section 208 – Searching detained persons

Replicates *Intoxicated Persons Act* s.6.

A police officer or other detention officer may search the intoxicated person. They may take possession of the person’s personal belongings, which must be returned when the person ceases to be detained.

Section 209 – Records

Replicates *Intoxicated Persons Act* s.7.

If a person is detained in a police station or detention centre, or is searched, under Part 16, records must be kept in accordance with the Regulations (*at this stage there appears to be nothing relevant in the LEPAR Regulations*).

Section 210 – Police officers and others not liable for certain acts or omissions

Replicates *Intoxicated Persons Act* s.8.

Provides that no action lies against any police officer, detention officer or other person for acts or omissions done in good faith in the execution or purported execution of Part 16.

Part 17: Property in police custody**Division 1 – Confiscated knives and other dangerous articles and implements**

Division 1 (ss211-214) deals with knives and dangerous articles seized or confiscated under s28. It substantially replicates *Summary Offences Act* ss28B-E.

The owner of such an article may apply in writing to the relevant Local Area Commander for its return (if under 18, a parent or guardian must apply on their behalf). There is provision for the owner to appeal to the Local Court if the property is not returned by police. Items may be forfeited to the Crown if a court so orders, or if the owner has not applied for the return of the items within a certain period.

Division 2 – Other property in police custody

Division 2 (ss215-229) substantially re-enacts the provisions currently found in *Criminal Procedure Act* Chapter 7 Part 2 (ss318-331).

s 216 provides that Division 2 applies to property in police custody (whether or not in connection with an offence), other than articles to which Division 1 applies and livestock to which the *Stock Diseases Act* applies.

s217 provides a right to inspect seized things.

s218 provides that police may return property to its owner (or the person from whom it was seized) if the property is not needed as evidence and if it is lawful for the owner to possess it.

s219 empowers courts to make orders for the return of property to its owner (or if the owner cannot be ascertained, for forfeiture to the Crown).

s220 provides for the disposal of property not returned to its owner within one month after any relevant criminal proceedings are finalised.

s221 provides for the disposal of unclaimed property not connected with an offence.

ss222-227 replicate *Criminal Procedure Act* ss325-330 and provide procedures for dealing with livestock in police custody (s227 provides that these provisions are in addition to the other provisions of Division 2).

s228 provides that a person lawfully entitled to property which has already been disposed of may apply to the Treasurer for any proceeds of sale, etc.

s229 provides that an application for return of property may be made to the Local, District or Supreme Court, depending on the value of the property. An application may also be made to the court dealing with an offence relating to the property (regardless of its value).

Part 18: Use of force

Section 230 – Use of force generally by police officers

It is lawful for a police officer exercising a function under LEPAR (or any other Act or law) and anyone helping the police officer, to use such force as is reasonably necessary to exercise the function.

Section 231 – Use of force in making an arrest

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

This power reflects the existing common law.

Part 19: Miscellaneous

Section 232 – Protection of police acting in execution of warrant

Replicates *Police Act* 1990 s.215.

Protects police from liability if acting in good faith in execution of a defective warrant.

Section 233 – Admissibility of evidence of searches

Replicates *Summary Offences Act* s.28H.

Provides that evidence of a thing found in a search is not inadmissible merely because it is a dangerous article or implement different to that referred to in the reason given for the search. *This appears to relate only to searches under s26.*

Section 234 – Proceedings for offences

Provides that offences under LEPAR are to be dealt with summarily.

Section 235 – Penalty notices

Provides that the Regulations may make provision for offences under LEPAR to be dealt with by penalty notice. *So far the only offence that appears to be so prescribed by the Regulations is the offence of disobeying a police direction under s199.*

Section 236 – Onus of proof of reasonable excuse

Most of the offences under LEPAR have a reasonable excuse defence. This section provides that the onus lies on the defendant to prove reasonable excuse (*presumably on the balance of probabilities*).

Section 237 – Commissioner's Instructions

Provides that the Commissioner for Police may issue instructions relating to powers under LEPAR, but they may not be inconsistent with the Act.

Section 238 – Regulations

Provides a regulation-making power and sets an upper limit on the maximum penalty for any offences created by the Regulations.

Section 242 – Monitoring of operation of certain provisions of Act by Ombudsman

Provides for the Ombudsman to review Part 4 Division 2 (search of persons on arrest or in custody), Part 5 Division 3 (notices to produce), Part 7 (crime scenes), and any associated safeguards. *It is unfortunate that the review is so limited in scope.*

Section 243 – Review of Act

The Minister for Police and the Attorney-General are to review the entire Act to ascertain whether its policy objectives remain valid and whether the terms of Act remain appropriate for securing those objectives. The review is to take place as soon as possible after 3 years from the date of assent (*this is now meaningless, given that assent took place on 29 November 2002, over 3 years before commencement*).

Schedules

Schedule 1 lists 25 Acts which are not affected by LEPAR (although some of them have had some sections transferred into LEPAR).

Schedule 2 lists numerous other Acts under which search warrants may be issued. *Note that more will be added when the Crimes Legislation (Further Amendment) Act 2003 commences on 1 December 2005.*

Schedule 3 lists the Acts which have been repealed by LEPAR.

Schedule 4 provides for amendment of various Acts and statutory instruments.

Schedule 5 contains savings and transitional provisions.

Conclusion

LEPAR, while commendable, still lacks coherence and has failed to address some of the more problematic aspects of police powers in NSW. It remains to be seen whether LEPAR will bring about a change in police practice and culture. In particular:

Will police better understand 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 give defence lawyers more grounds for illegal search (entry, arrest, etc) arguments?

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www.lawlink.nsw.gov.au/lawlink/pdo/11_pdo.nsf/pages/PDO_papersbypublicdefenders.

Mary Spiers' paper is available on the CLRD website at:

www.lawlink.nsw.gov.au/lawlink/clrd/11_clrd.nsf/pages/CLRD_reports.

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Any errors or omissions are my responsibility. Corrections, suggestions, and queries will be gratefully received by email at jane.sanders@freehills.com.