

# Proposed Law Enforcement (Powers and Responsibilities) Regulation 2016

Legal Aid NSW Submission to NSW  
Department of Justice

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## About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance to socially and economically disadvantaged people across NSW. Legal Aid NSW provides information, community legal education, advice, assistance and representation through a large in-house legal practice and private practitioners.

The Legal Aid NSW criminal law practice provides legal assistance and representation in each jurisdictional level including proceedings the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Legal Aid NSW Children's Legal Service (CLS) advises and represents children and young people involved in criminal cases in the Children's Court. A key service provided by the CLS is the Youth Hotline: a telephone service providing legal advice and information to young people under 18, including young persons in custody. The Hotline operates as a 24-hour service from Friday 9am to Sunday midnight and also on public holidays. This submission has been prepared with additional input from Legal Aid NSW's Civil Law Division, which provides advice and representation to disadvantaged clients in respect of human rights and discrimination matters.

Legal Aid NSW thanks the Department of Justice for the opportunity to provide a submission on the proposed *Law Enforcement (Powers and Responsibilities) Regulation 2016*.

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## Introduction

Legal Aid NSW notes that the draft *Law Enforcement (Powers and Responsibilities) Regulation 2016 (the Regulation)* largely replicates the current *Law Enforcement (Powers and Responsibilities) Regulation 2005*. The Regulation plays an important role in balancing the exercise of police powers and the rights of citizens who may be subject to those powers. It has been updated in piecemeal fashion over several years. The forms that it prescribes are complex and potentially incomprehensible to the average layperson.

Legal Aid NSW considers there would be benefit in a comprehensive review of the Regulation, with a particular focus on re-writing the prescribed forms in plain English.

In the interim, and given the limited timeframes of this consultation, Legal Aid NSW confines its comments to the four new changes to the Regulation required to commence the *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*. These changes relate to:

1. A Form of summary of Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA)* to be provided to detained persons and protected suspects,
2. The prescription of persons of the same sex (other than police officers) who may conduct personal searches for the purpose of section 32 of LEPRA,
3. The exercise of powers at crime scenes in prescribed rural areas under section 92(3) of LEPRA, and
4. A Code of Practice for directions under Part 14 of LEPRA.

The following comments address each of these changes in turn.

## Form of summary of Part 9 of LEPRA to be provided to detained persons

### Form 31

Legal Aid NSW notes that the proposed prescribed Form 31 replicates the current standard form provided by NSW Police to suspects containing the caution and summary of rights under Part 9 of LEPRA. The content of the Form remains overly wordy and legalistic. It should be comprehensively re-drafted in plain English.

In the meantime, we submit the following in respect of Form 31:

- **Introduction:** the opening words “I am your custody manager...” implies that only custody managers can administer the Part 9 rights. Since the 2014 amendments to LEPRA, this is no longer the case. Under section 112A of LEPRA Part 9 rights can now be administered in the field by an independent police officer

at the scene of a search warrant. This is a significant amendment, implemented in response to the 2013 Tink and Whelan Review of LEPR, and designed to avoid suspects being taken to a potentially remote police station for the Part 9 provisions to be administered.

- **Introduction to paragraph 1:** Replace the phrase "you should inform me" with "you should tell me...."
- **Paragraph 2:** There may be little point in providing a suspect who does not speak English with information as to their rights, including the right to an interpreter, following the statement, "If you cannot speak English...." While this may assist those suspects who have some English language skills, it should not replace the need for the statement (and indeed the entire form) to be made available in alternate formats, including in the main community languages in New South Wales apart from English, and in a format that caters for suspects with limited or no literacy.
- **Paragraph 5 (time in custody):** Reference is made here to the potential extension of the usual investigation period. This should include a statement advising the suspect of both (a) the maximum time for which detention can be extended (6 hours, as per the amended section 118(3) of LEPR), and (b) the total maximum investigation period (12 hours).
- **Paragraphs 6 and 7:** The qualifying phrase "*if I can*" (arrange for privacy of the suspect's communication with a lawyer, friend etc) does not reflect the requirements of section 123 of LEPR. Section 123 provides that the custody manager must, as soon as practicable,
  - Give the suspect reasonable facilities to enable the suspect to communicate with the lawyer, friend etc, and
  - Allow the suspect to do so in circumstances in which, so far as is practicable, the communication will not be overheard.

The right to privacy of communications is particularly important to juveniles. However, "*if I can*" is broader than the LEPR provision, as it denotes an element of subjectivity that is quite different from the objective test in section 123. We therefore suggest the phrase be replaced with "*as far as can be arranged*" or "*if it's possible in the circumstances*".

- **Paragraph 9 (second sentence):** The sentence, "*However, as explained earlier, there are exceptions to this right not to say or do anything*" should be removed. There is no qualification in section 123(3) of LEPR on the obligation to defer the investigation to facilitate a suspect's communication with a lawyer/friend etc.
- **Paragraph 11:** insert the phrase "on reasonable grounds" after "if I believe".

- **Paragraph 12:** the circumstances referred to in this statement (as to when a custody manager is not required to let a suspect communicate with a lawyer/friend etc) should be set out here. Without further detail, the suspect will have no understanding about why this important right has been, or may be, removed.
- **Paragraph 13:** replace the word "inform" with "tell".
- **Acknowledgment (after paragraph 17):**
  - As presently drafted, there is a note in small font at the end of the Form which states that the Form is for information only and is not required to be signed by the suspect. This information should be more prominent, either by increasing the font and/or placing the statement directly under the Subheading "Acknowledgment."
  - Suspects are not required to give reasons why they may choose not to sign the Form. The section at the end of the Form providing for such reasons to be detailed should therefore be deleted.
  - The Form should contain a clear statement explaining that there is no obligation on a suspect to participate in a recorded ERISP interview solely for the purpose of recording their refusal.

## Form 32

Legal Aid NSW reiterates the points made above in respect of Form 32 (Summary of Part 9 of LEPRA for protected suspects). We also suggest the current sub-heading "you are not under arrest and are free to leave at any time" be repeated as a separate paragraph. At the moment it is formatted as per other sub-headings. It is an important right that should also appear as a standalone paragraph.

## Support person form for vulnerable persons

Legal Aid NSW submits that there should be a separate form prescribed in relation to the role of support persons for vulnerable detained persons and protected suspects. Some aspects of the current information sheet provided to vulnerable persons (which is not prescribed) are misleading, and should be corrected in the development of a prescribed form. For example:

- It should be made clear that a support person has a role notwithstanding the suspect may choose not to participate in an interview. The present information sheet incorrectly presumes that there will be an interview, in which a support person will be involved, and
- Page 2 of the information sheet refers to exceptions to the right to silence (e.g. the form of demand under the *Road Transport (General) Act*) without making clear that these exceptions are themselves qualified, and do not entail any obligation for the suspect to then participate in a full interview.

## Persons of the same sex (other than police officers) who may conduct personal searches for the purpose of section 32(7A) (b) (Clause 46)

Legal Aid NSW notes the intention of Clause 46 is to facilitate the requirement of section 32(7A) of LEPRA that searches be conducted, as far as is reasonably practicable, by a person of the same sex as the person searched.

Legal Aid NSW supports measures to preserve the dignity and privacy of individuals who are searched. However, this is preferably achieved through appropriate recruitment and workforce development of the NSW Police Force rather than through the delegation of this important investigatory function to persons other than police. This is particularly so in light of:

1. the recently consolidated search power and its extension to strip searches, and
2. the lack of prescription around the phrase “immediately available” in section 32(7A) of LEPRA. In our view, the delegation of police search powers should only occur in the situation of last resort, and where some urgency around the need to conduct a personal search can be demonstrated.

With these concerns in mind, Legal Aid NSW:

- does not oppose the prescription of Corrective Services officers to conduct personal searches (Clause 46(a)), and suggests that this include officers who fulfil an equivalent role in Juvenile Justice,
- does not support the inclusion of ambulance officers and nurses, whose primary duty of care will be to the suspect or to other person(s) in the vicinity requiring medical treatment (Clause 46(b) and (c)). This duty may be compromised if they are required to conduct a search at the direction of police, and
- strongly opposes the proposed delegation to the executive of a further class of persons who, in the opinion of the Commissioner of Police, have appropriate training, expertise etc. in conducting personal searches (proposed Clause 46(d)). The power to conduct a personal search is a limited statutory abrogation of the fundamental right of personal privacy and dignity. Extension of this power should only occur pursuant to legislation or regulation.

## Exercise of powers at crime scenes in prescribed rural areas under section 92(3)

Legal Aid NSW has no comment on this proposal.

## Code of practice for directions under Part 14 of LEPRA

Section 200A of the *Law Enforcement (Powers and Responsibilities) Amendment Act 2014* contemplate the prescription of a Code of Practice for directions under Part 14 of LEPRA. That section expressly provides that the Code of Practice relate to the exercise of police powers in Part 14 of LEPRA and to the rights of persons to whom directions are given under this Part (our emphasis).

Legal Aid NSW's primary concern about the Code of Practice is that it makes only limited reference to the important rights of persons set out in Part 15 of LEPRA. These rights are particularly important to young people whose use of public space carries with it the risk of a disproportionate use of police powers in respect of that group. Contrary to section 200A of LEPRA, the Code of Practice does not inform a police officer what those rights actually are.

We submit that Clause 5 of Schedule 3 should therefore set out in summary form the Part 15 safeguards, including the safeguards reflected in:

- Section 202: police to provide their name, place of duty and reason for exercise of the power as soon as it is reasonably practicable to do so (and in any event before the power is exercised),
- Section 203: police to give a warning to the person that they are legally required to comply with the direction/request etc, and
- Section 204B: an offence is not committed unless the obligations under Part 15 have been met.

We further submit as follows:

### Directions relating to public places

**Clause 2(3)** refers to "the purpose of putting an end to the conduct". However, a direction under section 197 of LEPRA may be for the purpose of reducing (not necessarily eliminating) the conduct or its effect. This should also be reflected in this Clause (as it is in Clause 2(4)).

#### **Clause 2(5):**

- The reference to a person's age, gender, race etc. is an important limit on the exercise of police powers, and should be referred to in a standalone clause.
- The phrase "in the absence of other factors" should be removed, as it suggests that a combination of a person's age, gender, race, etc. with their behaviour is relevant to the decision to exercise the police power. Such features are not relevant in any context. The only relevant factor founding a decision to give a direction will be the behaviour of the individual(s) concerned.

- Religious affiliation should be included in the list of potentially discriminatory factors.

Bearing in mind the above points, Clause 2(5) should be re-worded as follows:

*Where the person's presence constitutes the relevant conduct, it is likely the direction will be a direction to move on. For example, a group of people blocking the entrance to a shop by sitting in the doorway are, by their presence, obstructing other people. The obstruction itself may constitute the relevant conduct.*

*In exercising these powers, police officers should also be aware that a person's age, gender, racial appearance, antecedents, or apparent religious affiliation is not a factor relevant to exercising a discretion to issue a move on direction.*

## Move on directions to intoxicated persons in public places

- **Clause 2(6)** refers to circumstances in which police can give a move on direction to an intoxicated person "prescribed in section 198 of the Act." We submit that these circumstances should be set out in summary form, including that there must be reasonable grounds for the police officer's belief as to the person's intoxication and its likely effect, and
- The Code should clearly state the maximum period of a move on direction in relation to an intoxicated person (that is, 6 hours, as per section 198(3) of LEPR) in addition to this timeframe being referred to part of the offence warning in Clause 5(2).