

Admissibility Issues Arising From the Detention of Suspects for Investigation under Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002*

A paper presented by Stephen Lawrence¹ at the Aboriginal Legal Service NSW/ACT Ltd (Western Zone) Annual Conference, at Rydal, March 2012

Introduction

1. Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) “LEPRA” is a short but complex piece of legislation which gives rise to a large number of potential admissibility issues, particularly in relation to records of interview.
2. This paper firstly attempts to explain the historical basis for the introduction of Part 10A² of the *Crimes Act 1900* (NSW), the predecessor legislation of the current Part 9 scheme. Part 10A was re-enacted as Part 9 of LEPRA in 2002 and was in all respects similar.
3. It is seen that the enactment of the scheme was a reaction to a number of decisions of the High Court of Australia and the Supreme Court of New South Wales which clarified the power of police to delay the taking of arrested persons to court in order to question or otherwise investigate the suspect.
4. These decisions, which ruled unlawful the police practice of delaying the taking of persons before a Court in order to question them, were based on the long standing legal principle forbidding arrest for questioning.

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² Inserted into the *Crimes Act* by the *Crimes Amendment (Detention after Arrest) Act* (No 48 of 1997)

5. Secondly, the paper explains the key operative provisions of Part 9, including the regulations to the Act which modify the operation of the part in respect of vulnerable persons, including Aboriginal people.
6. It is seen that key provisions of the part are applicable both to persons who have been arrested and to persons who are in the company of police and in a state of 'deemed arrest'.
7. Thirdly, the paper explore some admissibility issues that arise as a result of the operation of the Part including:
 - Part 9 and 'arrests' for the purposes of questioning
 - Breach of the investigation period limit and time outs
 - Breach of requirements to provide legal advice to ATSI people
 - Breach of requirements to provide support people to ATSI people
 - Breach of other protective provisions in Part 9

1. Why Does Part 9 Exist?

8. As will be explored in detail below Part 9 allows a person to be detained for the purpose of questioning and other investigation following their arrest.
9. This detention often has the effect of delaying the time that it takes for a person to be taken before a Court.

10. This power is exceptional, in that the law has long required arrested persons to be taken before a court as soon as practicable following arrest and time taken investigating or questioning a suspect was previously not a lawful basis for extending the detention of a suspect.

11. Currently in New South Wales the requirement to take a person before a court as soon as practicable comes from a number of legislative provisions:

- Section 239 of the *Criminal Procedure Act* 1986 states, “..A person who is arrested under a warrant must be brought before a Judge, a Magistrate or an authorised officer as soon as practicable”

- Section 99(4) of LEPRA states, “..A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person, and any property found on the person, before an authorised officer to be dealt with according to law”

- Section 3 of the same Act defines “authorised officer” to mean:

“..a Magistrate or a Children’s Magistrate, or

a registrar of the Local Court, or

an employee of the Attorney General’s Department authorised by the Attorney General as an authorised officer for the purposes of this Act either personally or as the holder of a specified office”.

- Section 20 of the *Bail Act* 1978 (NSW) states,

“..Where an accused person is refused bail by an authorised officer or is not released on bail granted by an authorised officer:

(a) the police officer for the time being in charge of the police station at which the person is in custody, or

(b) if the person is not in custody at a police station, a police officer who has custody of the person,

shall, as soon as practicable, bring the person or cause the person to be brought before a court for the purpose of having the court exercise its powers in relation to bail or for the purpose of the person being dealt with otherwise according to law”

12. In a series of High Court cases³ the High Court considered the question of whether it was consistent with similar provisions for police to delay taking an arrested person to court in order to question them for the offence for which they had been arrested.

13. In *Williams v R* (1986) 161 CLR 278 the High Court considered the following factual scenario:

“..In the early hours of the morning of 17 May 1984 police at Scottsdale, a town in the north of Tasmania, received information that the applicant had been seen in hotel premises at Scottsdale apparently in the act of committing a burglary. The applicant fled from the scene in a motor vehicle and was eventually arrested after his car had run off the road and he had attempted to escape into the bush. The arrest was made at about 6.00 a.m. by Constable Gibson who told the applicant that he was satisfied that he was responsible for several burglaries in the northern area of Tasmania. The applicant was then taken to the police station at Scottsdale and was kept there until he could be interviewed by officers of the C.I.B. who had to come from Launceston. Those officers, Detective Sergeant Otley and Detective Canning, arrived at about 8.45 a.m. Sergeant Otley told the applicant that he wanted to speak to him about matters that had occurred at Scottsdale that morning or on the evening before. In the circumstances the learned trial judge concluded that the applicant was taken into police custody only for those crimes which he had committed at Scottsdale -

³ Apparently commencing with *Regina v. Iorlano* [1983] HCA 43

namely, the crimes the subject of counts twenty-seven to twenty-nine in the indictment. The applicant was later taken in a police vehicle to Launceston, where he arrived at about 11.00 a.m. After he had been shown a number of police reports, he indicated that he had been involved in a number of offences during the previous month in other parts of Tasmania - these were the crimes that were the subject of counts one to twenty-six. At about 1.10 p.m. the detectives commenced to conduct a series of interviews with the applicant and to make records of the interviews, in the course of which the applicant confessed to the various crimes. The interviews, which related to different counts, were conducted in no particular order. The first record related to counts one and two and was completed by about 1.45 p.m.; the second related to counts twenty-seven to twenty-nine (the Scottsdale matters) and was completed by about 3.00 p.m. None of the records was signed. The last of the interviews concluded at about 8.30 p.m. At about 9.03 p.m. the applicant was taken before a police inspector to whom he confirmed the correctness of each of the records of interview. He was taken before a magistrate at 10.00 a.m. on the following day".⁴

14. The relevant legislative provision was Section 34A(1) of the *Justices Act 1959* (Tas) which stated:

"..Where a person has been taken into custody for an offence, he shall, unless he has been released under section 34, be brought before a justice as soon as is practicable after he has been taken into custody."

15. Brennan and Mason JJ stated at 15:

"..If a person cannot be taken into custody for the purpose of interrogation, he cannot be kept in custody for that purpose, and the time limited by the words "as soon as practicable" cannot be extended to provide time for interrogation. It is therefore unlawful for a police

⁴ *Williams v R* (1986) 161 CLR 278 Gibbs CJ at 2

officer having the custody of an arrested person to delay taking him before a justice in order to provide an opportunity to investigate that person's complicity in a criminal offence, whether the offence under investigation is the offence for which the person has been arrested or another offence”.

16. In reaching this conclusion Brennan and Mason JJ issued an invitation for legislative consideration of the issue, stating at 17:

“..The jealousy with which the common law protects the personal liberty of the subject does nothing to assist the police in the investigation of criminal offences. King C.J. in Reg. v. Miller (1980) 25 SASR 170, in a passage with which we would respectfully agree (at p 203) pointed out the problems which the law presents to investigating police officers, the stringency of the law's requirements and the duty of police officers to comply with those requirements - a duty which is by no means incompatible with efficient investigation. Nevertheless, the balance between personal liberty and the exigencies of criminal investigation has been thought by some to be wrongly struck: see, for example, the Australian Law Reform Commission Interim Report on "Criminal Investigation", Report No. ALRC 2, Ch.4. But the striking of a different balance is a function for the legislature, not the courts. The competing policy considerations are of great importance to the freedom of our society and it is not for the courts to erode the common law's protection of personal liberty in order to enhance the armoury of law enforcement. It should be clearly understood that what is in issue is not the authority of law enforcement agencies to question suspects, but their authority to detain them in custody for the purpose of interrogation. If the legislature thinks it right to enhance the armoury of law enforcement, at least the legislature is able - as the courts are not - to prescribe some safeguards which might ameliorate the risk of unconscionable pressure being applied to persons under interrogation while they are being kept in custody”.

17. These decisions were followed by the Supreme Court of New South Wales. In *Ainsworth* (1991) 57 A Crim R 174 Hunt J considered the question of what the test of 'reasonable practicability' means in the context of a legislative requirement to bring a person before a court. Hunt J stated:

"..It permits reasonable time to be taken to decide to charge the person arrested and to prefer that charge...It does not permit any delay for the purpose of interrogating or investigating the offence, although each is permitted - provided that the arrested person is still brought before a justice when it becomes reasonably practicable to do so".

18. In *Michaels v The Queen* (1995) 184 CLR 117 Brennan, Deane, Toohey and McHugh JJ stated:

"..on one aspect the law is quiet clear. It is unlawful for a police officer to delay taking an arrested person before a Justice in order to question the person or to make further inquiries relating to the offence for which the person has been arrested, or to some other offence".

19. In the same case Gaudron J stated:

*"..Personal liberty is the most important and fundamental of all common law rights. And it is well settled that statutory provisions are to be construed as abrogating important common law rights only to the extent that their terms clearly require that course. Nothing in s.212 of the Act requires abrogation of the common law rule that a person may not be detained merely for the purpose of questioning. Thus, as was held in *Reg. v. Iorlano* (23), it does not authorise delay for the purpose of questioning an arrested person. And, as was held in *Williams v. The Queen* (24), the same is true of s.34A(1) of the Justices Act 1959 (Tas.) and s.303(1) of the Criminal Code (Tas.) which, respectively, are expressed in terms of the arrested person being brought before a justice "as soon as is practicable" and "without delay"*.

20. These authorities rest on the long standing principle that arrest for the purposes of questioning is unlawful. The decisions stand for the proposition that a necessary corollary of this principle is that extension of detention for the purposes of questioning is similarly unlawful.
21. The operation of Part 9 can therefore be understood as an exception to the general state of the law as created by the legislation discussed above and as an exception to the long standing principle that forbids detention for the purposes of questioning/investigation. It is in this sense that the part can be described as exceptional.
22. This stream of authority placed the questioning of arrested suspects into a heightened state of uncertainty and are the direct reason for the existence of Part 9 of LEPRA.
23. The New South Wales Law Reform Commission was tasked to investigate the matter and produced its 1990 Report 'Criminal Procedure: Police Powers of Detention and Investigation after Arrest'.⁵
24. The Commission identified three problems with the strict approach of the Courts stating:

"..1.51 The failure of the common law to match concern with practical application has at least three quite unfortunate results. First, the treatment that an arrested person receives will vary dramatically - and arbitrarily - depending upon the time of arrest. A person arrested at 10:00 am on a Tuesday could expect to be taken before a justice as soon as police complete the necessary paperwork, which should take no more than an hour in most cases. This may well significantly hamper police investigations if they comply with the law, particularly since there is a significant difference between the level of evidence

⁵ Report 66

needed to justify an arrest and that (greater) level needed to lay a criminal charge.⁷⁴ However, a person arrested at 4:00 pm on a weekday need not be taken before a justice until 10:00 am the following morning, and could be subject to many hours of interrogation and other investigative procedures (such as identification parades). A person arrested at the weekend, particularly a long (holiday) weekend, could spend some days in police custody, all the while subject to questioning and investigation.

1.52 The second problem follows from the first: it is in the interests of police, especially in complex cases, to purposely effect an after-hours arrest in order to gain substantially more time to complete their investigations. There is nothing actually unlawful in this gimmickry, but it is not a sound or ethical basis on which to operate a system of criminal investigation. In the course of the recent Royal Commission of Inquiry into the circumstances surrounding the arrest and charging of Insp. Harry Blackburn, it emerged that the arresting officers had received and followed the advice of a senior Crown Prosecutor to stage the arrest at "4:00 pm or so", rather than the planned 6:00 am, in order to give themselves more time for questioning and to avoid the Williams issue.⁷⁵

1.53 Finally, there is the problem that police may simply ignore the common law requirement to bring the arrested person before a justice when they see this as substantially interfering with the proper investigation of a case. In the course of its consultations, the Commission learned from numerous senior police officers that police would be willing to "risk it", particularly in serious cases, rather than lose potentially valuable evidence".

25. The Commission recommended:

“..The replacement of the existing common law regime on the detention of persons by the police for the purposes of investigation with a statutory scheme is aimed at:

(1) providing clear and comprehensive rules of procedure for police to follow in dealing with suspects;

(2) allowing police a realistic opportunity for proper investigation in the period between arrest and charging a person before a court (or release on police bail), within a regulated structure;

(3) enunciating and enhancing the safeguards available to persons in the custody of police, so that such “rights” become meaningful, realisable, and enforceable;

(4) regularising the treatment of persons in police custody, so that this is no longer contingent on the time or day of arrest, the sophistication of the person involved, the location of the custody, or notions of “voluntariness” or “consent” on the part of the person in custody;

(5) increasing confidence in the integrity of police investigative methods and the evidence subsequently produced in court; and

(6) significantly reducing delays and costs in the criminal justice system by reducing the great amount of time currently spent in criminal trials considering challenges (on voir dire) to the admissibility of Crown evidence”.⁶

26. The result was Part 10A of the *Crimes Act* 1900. As is clear from the recommendations and the report generally the concern of the Law Reform Commission was not solely the question of extending detention following

⁶ Chapter 2 Summary of Recommendations

arrest but also the need for protective safeguards for the benefit of detained persons.

27. The Attorney-General made the following comments in his second reading speech for the *Crimes Amendment (Detention After Arrest) Act 1997* noting the role the High Court decision in *Williams* played in the development of the reform:

“..The Government is pleased to introduce the Crimes Amendment (Detention after Arrest) Bill. This is a very important piece of legislation. It is a significant milestone in the history of the criminal justice system of this State. For many years, the law has been that the purpose of arrest is to take a suspected person before a justice. The police have had no power to arrest and detain a person for investigation of an alleged offence. Prior to 1986 the position was interpreted by some courts with a measure of flexibility. In particular, whether or not police could delay taking a lawfully arrested person before a justice, in order to investigate the alleged offence, was arguably unclear. However, in 1986 the High Court handed down its decision in the case of Williams v The Queen. In that judgment, the High Court affirmed that there is no power to delay taking before a justice an arrested person in order to question that person or in order to complete any other investigatory procedure.

Accordingly, at common law, it is unlawful for a police officer, having the custody of an arrested person, to delay taking that person before a justice in order to provide an opportunity to investigate the person's involvement in an offence. So much has been clear in this State since 1986. The High Court observed that this rule "does nothing to assist the police in the investigation of criminal offences". Their Honours, Mr Justice Wilson and Mr Justice Dawson, stated that, "It would be unrealistic not to recognise that the restrictions placed by the law upon the purpose for which an arrested person may be held in custody have on occasions hampered the police, sometimes seriously, in their

investigation of crime." However, the court took the view that it was for the legislature, not for the courts, to address that question of balance.

The decision in Williams' case has been very much honoured in the breach over the years. Honourable members will be aware that there exists a judicial discretion to admit illegally or improperly obtained evidence. Because of the way that discretion has, on many occasions, been exercised in favour of the admission of such evidence, it could be said that the right to be free of unlawful detention has not been able to be properly exercised in practice. Where the law and practice diverge in this way, the law is inevitably tarnished. Citizens are denied the right to know the law. They can have no certainty that there will be any sanction for the breach of their liberties. That is a problem that must be remedied.

The Crimes Amendment (Detention After Arrest) Bill addresses the problem. It does so by creating a regime whereby police are empowered to detain persons in custody after arrest for the completion of investigatory procedures, but only for strictly limited periods. A detailed system is set out whereby police and citizens will know precisely their rights and obligations. In short, the bill strikes a proper balance between allowing the police to make legitimate investigations of alleged offences on the one hand, and, on the other hand, safeguarding the rights of ordinary citizens suspected of having committed those offences"

2. What Does Part 9 Do?

28. Part 9 allows an arrested person to be further detained for the purpose of investigation and questioning and confers certain rights and protections to detained persons subject to questioning and other investigative procedures.

Person to Whom the Part Applies

29. Section 111 states that the part applies to “*..a person, including a person under the age of 18 years, who is under arrest by a police officer for an offence*”.

30. Section 110 expands the category of persons considered to be under arrest, in stating:

(2) A reference in this Part to a person who is under arrest or a person who is arrested includes a reference to a person who is in the company of a police officer for the purpose of participating in an investigative procedure, if:

(a) the police officer believes that there is sufficient evidence to establish that the person has committed an offence that is or is to be the subject of the investigation, or

(b) the police officer would arrest the person if the person attempted to leave, or

(c) the police officer has given the person reasonable grounds for believing that the person would not be allowed to leave if the person wished to do so.

31. It is significant to note that this ‘deemed arrest’ provision is in identical terms to section 139(5) of the *Evidence Act 1995* (NSW) which requires police to caution persons who have been arrested, as such, case law in relation to that section may be of assistance where the applicability of the definition is in issue.

32. Section 113 states, “*..this part does not confer any power to arrest a person, or to detain a person who has not been lawfully arrested*”.

33. Section 113 is in the opinion of the writer an important qualifier as it ensures that no argument could be made that section 114 could be read with section 110(2) to create a form of detention for the purposes of questioning of

persons not actually arrested by police, i.e. as a way to justify detention subject to section 114 in the absence of a previous lawful arrest.

34. The expanded definition of arrest would appear to be in the Part to ensure that the range of rights existing for persons detained pursuant to Division 3 of the Part are also applicable to persons who are not detained pursuant to the part but are nonetheless being subject to investigatory procedures.

35. This interpretation is consistent with the second reading speech for the introduction of the predecessor legislation where the Attorney-General stated:

“..Second, the bill adopts a broad concept of arrest by way of the definition in proposed section 355(2). That again is something that is of the utmost importance because of the power imbalance that could exist between police officers and persons in custody. The bill recognises that, even when a person in custody is not formally under arrest, that person may feel or believe that he or she is not free to leave the company of police. Such a perception may arise because of something said or implied by the police, but equally it may arise when the person’s belief does not arise from actions of police. The bill ensures that, where appropriate, a situation of that sort is treated in the same way as a situation in which the person is formally under arrest”.

36. The expanded definition in section 110 should therefore be understood as a mechanism to apply the range of rights contained within Division 3 of the part to persons deemed to be arrested.

37. Curiously however nowhere in Division 3 is the word ‘arrest’ or ‘arrested’ used, so as to directly bring into play the expanded definition.

38. Rather the division uses the word ‘detained’, (which could more readily be presumed to be a reference to detention pursuant to Division 2).

39. On balance however the better view would seem to be that section 110(2) must be intended to apply Division 3 rights to persons deemed to be arrested

and that it does in fact succeed in doing so. No other purpose for the expanded definition is discernable. Persons arrested are as a question of law in a state of detention and it should be considered that the use of the word detained/detention in Division 3 triggers the application of section 110 despite the lack of precision in the language used.

40. Section 113 is also of importance in ensuring that the part has no lawful application to persons whose initial arrest was unlawful. As is discussed below the admissibility of any investigation and questioning undertaken during a period while a person was in such custody will need to be considered.

Detention for the 'Investigation Period'

41. Division 2 of the part begins with section 114, the most significant operative provision of the part.

42. Sub-section (1) states, "*a police officer may in accordance with this section detain a person, who is under arrest, for the investigation period provided for by section 115*".

43. Sub-section (2) limits this detention in stating, "*..a police officer may so detain a person for the purpose of investigating whether the person committed the offence for which the person is arrested*".

44. Further sub-sections make it clear that the person may also be investigated for other offences during this investigation period where police form a reasonable suspicion as to the person's involvement in such an offence. Importantly however the section does not grant another investigation period or increase the length of the investigation period in those circumstances.

Length of the Investigation Period and its Extension

45. Section 115 states that the investigation period is:

“(1) The investigation period a period that begins when the person is arrested and ends at a time that is reasonable having regard to all the circumstances, but does not exceed the maximum investigation period.

(2) The maximum investigation period is 4 hours or such longer period as the maximum investigation period may be extended to by a detention warrant”.

46. Section 116 requires police to take into account a range of factors in determining what is reasonable time and states in sub-section (2) that, *“..the burden lies on the prosecution to prove on the balance of probabilities that the period of time was reasonable”.*

47. There is perhaps a tendency among some to assume that if an interview or other procedure was undertaken within the 4 hour period that it is legitimate and the fruits admissible. This assumption is a dangerous one as the legislation is clear that 4 hours is the maximum period (unless extended) not the default permissible period of detention.

48. Section 117 is an important qualifier to the investigation period provisions. It stated that a number of time periods are to be disregarded in determining how much of the investigation period has lapsed.

49. These exceptions include:

“(a) any time that is reasonably required to convey the person from the place where the person is arrested to the nearest premises where facilities are available for conducting investigative procedures in which the person is to participate,

(b) any time that is reasonably spent waiting for the arrival at the place where the person is being detained of police officers, or any other persons prescribed by the regulations, whose particular knowledge

of the investigation, or whose particular skills, are necessary to the investigation,

- (c) any time that is reasonably spent waiting for facilities for complying with section 281 of the Criminal Procedure Act 1986 to become available,*
- (d) any time that is required to allow the person (or someone else on the person's behalf) to communicate with a friend, relative, guardian, independent person, Australian legal practitioner or consular official,*
- (e) any time that is required to allow such a friend, relative, guardian, independent person, Australian legal practitioner or consular official to arrive at the place where the person is being detained,*
- (f) any time that is required to allow the person to consult at the place where the person is being detained with such a friend, relative, guardian, independent person, Australian legal practitioner or consular official,*
- (g) any time that is required to arrange for and to allow the person to receive medical attention,*
- (h) any time that is required to arrange for the services of an interpreter for the person and to allow the interpreter to arrive at the place where the person is being detained or become available by telephone for the person,*
- (i) any time that is reasonably required to allow for an identification parade to be arranged and conducted,*
- (j) any time that is required to allow the person to rest or receive refreshments or to give the person access to toilet and other facilities as referred to in section 130,*
- (k) any time that is required to allow the person to recover from the effects of intoxication due to alcohol or another drug or a combination of drugs,*

(l) any time that is reasonably required to prepare, make and dispose of any application for a detention warrant or any application for a search warrant or crime scene warrant that relates to the investigation,

(m) any time that is reasonably required to carry out charging procedures in respect of the person,

(n) any time that is reasonably required to carry out a forensic procedure on the person under the Crimes (Forensic Procedures) Act 2000, or to prepare, make and dispose of an application for an order for the carrying out of such a procedure”.

50. As with section 116, “..the *burden lies on the prosecution to prove on the balance of probabilities that the particular time was a time that was not to be taken into account*”.

51. Section 118 allows an ‘*authorised officer*’⁷ upon the application, in person or over the telephone, of a police officer, to extend the investigation period for one period of up to a maximum of 8 hours if satisfied:

“(a) the investigation is being conducted diligently and without delay, and

(b) a further period of detention of the person to whom the application relates is reasonably necessary to complete the investigation, and

(c) there is no reasonable alternative means of completing the investigation otherwise than by the continued detention of the person, and

⁷ Defined in section 3 of the Act, authorised officer means:

(a) a Magistrate or a Children’s Magistrate, or

(b) a registrar of the Local Court, or

(c) an employee of the Attorney General’s Department authorised by the Attorney General as an authorised officer for the purposes of this Act either personally or as the holder of a specified office.

(d) circumstances exist in the matter that make it impracticable for the investigation to be completed within the 4-hour period”.

Safeguards Relating to Persons in Custody for ‘Questioning’

52. Division 3 of the Part creates a bundle of rights attaching to persons being detained.

Who do the Safeguards Apply to?

53. The title of the division curiously only refers to persons detained for ‘questioning’, however it is clear the Division is not limited to persons being questioned and that the detention can be for the purpose of investigating the persons involvement in the offence, or other offences, and a variety of ‘investigative procedures’ might occur during that period. See for example section 123 and its reference to ‘investigative procedures’.

54. The rights created by the division are clearly bestowed upon arrested persons whose detention has been extended pursuant to section 114.

55. As discussed above, in the author’s view the safeguards also apply to persons in a state of ‘deemed arrest’ pursuant to section 110.

56. The Division would appear to have no application to arrested persons not subject to detention under section 114 (such as persons arrested for breach of bail, on sentence warrants, parole warrants and so on), except where the commencement of an investigative procedure triggers the application of the expanded definition in section 110(2) and the application of the Division 3 rights.

What are the Safeguards?

57. The safeguards contained in Division 3 are in the form of legislative obligations placed on the 'custody manager'.

58. This term is defined in section 3 to mean:

"..the police officer having from time to time the responsibility for the care, control and safety of a person detained at a police station or other place of detention".

59. Schedule 2 to the *Law Enforcement (Powers and Responsibilities) Regulation 2002* is a 'Guideline to Custody Managers' and is prescriptive as to what such persons should do and not do in the conduct of their duties under the Act. They are well worth reading and contain reference to the treatment of aboriginal people.

60. Under Division 3 a person detained (or deemed to be under arrest) must:

- Be cautioned, section 122(1)(a)
- Be given a document, being, *"..a summary of the provisions of this Part that is to include reference to the fact that the maximum investigation period may be extended beyond 4 hours by application made to an authorised officer and that the person, or the person's legal representative, may make representations to the authorised officer about the application"* under section 122 (1) (b).
- Be given the opportunity to communicate in private whether in person or on the telephone with a friend, relative, guardian or independent person and Australian legal practitioner, section 123⁸

⁸ Subject to the exceptions in section 125 of the Act.

- Be told of, “*..of any request for information as to the whereabouts of the person made by a person who claims to be a friend, relative or guardian of the detained person*”, section 126⁹
- Be told of, “*..of any request for information as to the whereabouts of the person made by a person who claims to be an Australian legal practitioner representing the detained person, or a consular official of the country of which the detained person is a citizen, or a person (other than a friend, relative or guardian of the detained person) who is in his or her professional capacity concerned with the welfare of the detained person*”, section 127.¹⁰
- Be provided with an interpreter, section 128.¹¹
- Receive “*..medical attention if it appears to the custody manager that the person requires medical attention or the person requests it on grounds that appear reasonable to the custody manager*”.
- Be given, “*..reasonable refreshments and reasonable access to toilet facilities*” and be given “*facilities to wash, shower or bathe and (if appropriate) to shave*” if “*it is reasonably practicable to provide access to such facilities, and the custody manager is satisfied that the investigation will not be hindered by providing the person with such facilities*” under section 130.

61. Section 131 creates an obligation on the custody manager to maintain records in relation to all detained persons.¹²

62. This provision is of central practical importance in the conduct of admissibility arguments concerning evidence gathered during procedures to which Part 9 applies.

⁹ Subject to the exceptions contained in the section.

¹⁰ Subject to the exceptions contained in the section.

¹¹ Subject to the exceptions contained in the section.

¹² Regulations made pursuant to the Act contain additional requirements in relation to these records.

63. The section states:

“.. (1) The custody manager for a detained person must open a custody record in the form prescribed by the regulations for the person.

(2) The custody manager must record the following particulars in the custody record for the person:

(a) the date and time:

(i) the person arrived at the police station or other place where the custody manager is located, and

(ii) the person came into the custody manager’s custody,

(b) the name and rank of the arresting officer and any accompanying officers,

(c) the grounds for the person’s detention,

(d) details of any property taken from the person,

(e) if the person participates in any investigative procedure, the time the investigative procedure started and ended,

(f) details of any period of time that is not to be taken into account under section 117,

(g) if the person is denied any rights under this Part, the reason for the denial of those rights and the time when the person was denied those rights,

(h) the date and time of, and reason for, the transfer of the person to the custody of another police officer,

(i) details of any application for a detention warrant and the result of any such application,

- (j) if a detention warrant is issued in respect of the person, the date and time a copy of the warrant was given to the person and the person was informed of the nature of the warrant and its effect,*
- (k) the date and time the person is released from detention,*
- (l) any other particulars prescribed by the regulations.*
- (3) The custody manager is responsible for the accuracy and completeness of the custody record for the person and must ensure that the custody record (or a copy of it) accompanies the person if the person is transferred to another location for detention.*
- (4) The recording of any matters referred to in this section must be made contemporaneously with the matter recorded in so far as it is practicable to do so.*
- (5) As soon as practicable after the person is released or taken before a Magistrate or authorised officer or court, the custody manager must ensure that a copy of the person's custody record is given to the person.*

64. Invariably in voir dire hearings concerning such evidence there is information of use in these documents.

Special Provisions for Vulnerable People (Including Aboriginal and Torres Strait Islander Persons)

65. Section 112 of the Act allows regulations to be made which modify the application of the Part to:

- (a) persons under the age of 18 years, or*
- (b) Aboriginal persons or Torres Strait Islanders, or*
- (c) persons of non-English speaking background, or*

(d) persons who have a disability (whether physical, intellectual or otherwise).

66. The *Law Enforcement (Powers and Responsibilities) Regulation 2005* then creates a number of additional rights/obligations/protections for these 'vulnerable' people.

Assistance in Exercising Rights

67. Regulation 25 states:

"..The custody manager for a detained person who is a vulnerable person must, as far as practicable, assist the person in exercising the person's rights under Part 9 of the Act, including any right to make a telephone call to a legal practitioner, support person or other person".

Support Person

68. Regulation 27 states:

"..A detained person who is a vulnerable person is entitled to have a support person present during any investigative procedure in which the detained person is to participate"

69. Various provisions within Regulation 26 and 27 govern who can be a support person and the circumstances in which the right operates.

70. Regulation 29 states that a child cannot waive the right to have a support person present.

71. Regulation 28 states that *"..a detained person is a vulnerable person is entitled to a support person under clause 27 or to consult with a friend, relative, guardian or independent person under section 123 (4) of the Act, but not both", "...however, a friend, relative, guardian or independent person of the*

detained person who, under section 123 (1) (a) (ii) of the Act, attends the place of detention is not prevented by this clause from acting as a support person if the detained person requests it”.

72. Regulations 30 and 31 govern the role of support persons.

73. Under regulation 35 certain times expended in relation to support persons can be disregarded in determining the ‘investigation period’.

Cautions

74. Section 34 places additional obligations on police in respect of cautioning vulnerable people, stating:

(1) If a detained person who is a vulnerable person is given a caution, the custody manager or other person giving the caution must take appropriate steps to ensure that the detained person understands the caution.

(2) If the detained person is given a caution in the absence of a support person, the caution must be given again in the presence of a support person, if one attends during the person’s detention.

(3) A reference in this clause to the giving of a caution is a reference to the giving of a caution that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

Detention Warrants

75. If an investigation period has been extended in relation to a vulnerable person certain additional information must have been provided to the authorised officer.

Custody Notification Scheme

76. Regulation 33 is the sole legislative basis for the ALS Custody Notification Scheme.

77. The Regulation states:

“..33 Legal assistance for Aboriginal persons or Torres Strait Islanders

(1) If a detained person is an Aboriginal person or Torres Strait Islander, then, unless the custody manager for the person is aware that the person has arranged for a legal practitioner to be present during questioning of the person, the custody manager must:

(a) immediately inform the person that a representative of the Aboriginal Legal Service (NSW/ACT) Limited will be notified:

(i) that the person is being detained in respect of an offence, and

(ii) of the place at which the person is being detained, and

(b) notify such a representative accordingly”

78. The regulation seems designed to interplay with section 123 of the Act and also operates to allow aboriginal people to speak to a lawyer over the telephone while in police custody.¹³

79. In *R v Phung* [2001] NSWSC 115 Wood CJ stated of the predecessor legislation to LEPRAs:

“63 Additionally, I observe that police should not automatically assume that their obligations under the legislation, can be met by a rote reading of the requisite cautions and advice, or by the handing over of printed forms for an accused to read for himself or herself. Nor should they assume that compliance can be proved by the securing of a simple

¹³ *Campbell and 4 Ors v Director of Public Prosecutions (NSW)* [2008] NSWSC 1284 is an authority dealing with the regulation.

signature or initial on the custody management report. There is a positive obligation, under the legislation, to ensure that a child or vulnerable person can understand what is being said - for example see [regulation 29](#). That may extend to satisfying themselves that he or she can speak English or can read. Moreover, the regulations give rise to a positive obligation to assist a vulnerable person in exercising his or her rights - see [regulation 20](#).

64 The final observation that needs to be made, in this context, is that the onus of proving compliance with the legislative regime rests upon the Crown. That means that it will need to have the necessary evidence available, if an issue is taken up in relation to the interview of a child as well as in relation to all other accused who are interviewed or subjected to forensic tests in circumstances attracting the legislation. Unless police secure that evidence, then it may well be necessary, as in this case it was, for the evidence to be excluded”.

3. Admissibility Issues Arising from the Operation of Part 9

Arrest for Questioning

80. Consistent with the deemed arrest provision in section 110 of the Act police regularly apply Part 9 of the Act to persons who have not been arrested

81. This is perfectly permissible, to the extent that Division 3 rights are given, except if in doing so police actually do arrest the person or act so as to convey the direct impression to the person that they have been arrested.

82. Such an impression can be given simply by the provision of standard documents issued to persons pursuant to the Part.

83. An example of this can be seen from the judgment of Judge Nicholson in the matter of *R v Steven Powell* [2010] NSWDC 84 (8 March 2010).

84. The factual scenario in Powell was that an accused had been remanded in custody in respect of an offence after refusing a police interview. Subsequent to his remand police visited him at Wellington prison (without notifying the ALS, his legal representatives when he was remanded in custody) and arranged for his transfer to police custody pursuant to a Local Leave Order issued pursuant to section 25 of the *Crimes (Administration of Sentence) Act* 1999.

85. Police then used this order to transfer Mr. Powell into police custody at a designated part of the prison. He was then interviewed.

86. Judge Nicholson stated as follows in relation to the question of whether Mr. Powell had been arrested (my emphasis):

“..24. Senior Constable Renee Smith, Detective Senior Constable Peter Ensor and Senior Constable Simon Thorsteinsson made their way to Wellington Correctional Centre for the purposes of speaking to a number of inmates. Steven Powell was included among their lists of inmates to be spoken to. Upon arrival the three police officers were escorted by custodial staff to the Wellington Police Control Area. About 12.30pm or perhaps a little before that time Steven Powell was brought to the control area and at least technically remained under secure escort of correctional officers at all times.

25. Senior Constable Renee Smith received the accused at the Police Custodial Centre at Wellington Correctional Centre and introduced him to the Custody Manager, Senior Constable Thorsteinsson who entered him into police custody at 12.36pm. Whether he was informed orally that he was under arrest is not clear but he was certainly informed in writing that he was arrested. That arrest is confirmed by the custody records as occurring at 12.35pm by Detective Senior Constable Renee Smith. The grounds for arrest are identified as B & E, SMV. B & E I

assume stands for break and enter and SMV, as I understands it, steal motor vehicle.

26. He was certainly informed orally by Senior Constable Thorsteinsson that he was "here in custody with us". He was given the standard Caution and Summary of Pt 9 of LEPRA. The first three sentences under the heading IMPORTANT are worth noting:

"This Form tells you about some of the things the police will do for you when you are in their custody at a police station...You have been arrested by police and they can keep you in their custody for a reasonable time to conduct their investigations."

(My emphasis)

27. The Caution and Summary document is signed by Senior Constable Thorsteinsson as an acknowledgement that at 12.40pm he had informed the detained person of the information contained in the form".

87. It can thus be seen that the standard police documents created pursuant to Part 9 may have played a crucial role in the accused being effectively arrested.

88. Another fairly common police practice is to actually arrest a person in order to facilitate the application of Part 9 to them. The author recently appeared in a Dubbo Local Court matter where a suspect in a matter involving an offence of aggravated dangerous driving attended voluntarily at a police station to be interviewed.

89. The client was immediately informed orally he was under arrest, entered into Part 9 custody and an interview subsequently took place. The client was released at the conclusion of the interview and subsequently summonsed.

90. It was difficult upon a reading of the record of interview to see how its content could have undermined any reasonable suspicion that led to the arrest. The

overwhelming inference was that the person had been arrested in order to apply Part 9 to them and to conduct a record of interview. This can only be considered an arrest for questioning and accordingly unlawful. The admissibility of any interview given in these circumstances will need to be determined under section 138 of the *Evidence Act 1995*.

91. By contrast in another matter that the author was recently involved in a more sophisticated approach was evident. Police were seeking to interview a suspect who had not been arrested. The suspect was informed that she was not under arrest and was given amended Part 9 documents which made it clear that she was not detained.

92. The amended documents stated that she was being questioned subject to “section 110 of the LEPRA” (presumably a reference to the deemed arrest definition) and that she was free to leave at any time.

93. These issues would seem to generally arise from a lack of understanding among some police of the actual purpose of Part 9 and the inter relationship between the operation of the Part and the arrest powers in section 99 of the Act.

Extension of Detention Following an Unlawful Arrest

94. Section 113(1) states:

“.. This Part does not:

(a) confer any power to arrest a person, or to detain a person who has not been lawfully arrested”

95. This section means that a person who remains in custody post-arrest pursuant to section 114 may be in unlawful custody. It will therefore always be important when considering the admissibility of evidence gathered during an investigation period to consider the lawfulness of the actual arrest. (Generally

the lawfulness of an arrest needs to be considered under the relevant sections of LEPRA including Parts 8 and 15 of the Act).

Extension of Detention for the Purpose of Investigating Matters for Which the Person has Not Been Arrested

Extension of Detention when no Investigation Period Available

96. In a recent Dubbo District Court matter of *Regina v Dwayne Peckham* [2011] NSWDC (15 December 2011) ADCJ Lerve dealt with a situation where a suspect had been arrested on a sentence warrant issued pursuant to section 25 of the *Crimes (Sentencing Procedure) Act 1999* and taken to a police station in Sydney.

97. Police then detained the suspect pursuant to Part 9 of LEPRA in order that he could be interviewed by Dubbo police in relation to an armed robbery matter, for which the evidence suggested he was not arrested in relation to.

98. Time outs under section 117 of LEPRA were recorded in the custody management records in respect of the armed robbery matter and the accused ultimately detained for over 24 hours before being taken to Court.

99. The fundamental problem with this approach is that there will generally be no 'investigation period' available to police when a person has been arrested pursuant to a sentence warrant as the person has already been convicted. It will generally follow that there can be no detention, "*..for the purpose of investigating whether the person committed the offence for which the person is arrested*" and police will be unable to justify detention for the purpose of investigation under section 114.

100. It was accordingly therefore not open to police to extend the detention of the accused in respect of the armed robbery matter.

101. Acting Judge Lerve stated at 29:

“..In these circumstances I am left with the impression that the accused was in fact being detained not for the purpose prescribed by the relevant legislation but rather to ensure that the police from Dubbo had an opportunity to question the accused. The initial arrest of the accused on the warrant was lawful, but his detention thereafter was not. This is reason enough to exclude the record of interview and the evidence of the DNA”.

102. This admissibility argument will be potentially open whenever a person has been arrested for a matter where there is no investigation period available but where the person has been investigated for other matters for which they have not been arrested for. If detention is extended in such circumstances there will almost certainly be a question as to unlawful detention.

Detention when the Investigation Period has been Exceeded

103. It is important to note that section 114 states:

“..If, while a person is so detained, the police officer forms a reasonable suspicion as to the person’s involvement in the commission of any other offence, the police officer may also investigate the person’s involvement in that other offence during the investigation period for the arrest. It is immaterial whether that other offence was committed before or after the commencement of this Part or within or outside the State”.

104. This means that the question of whether investigations in relation to a matter (for which a person has not been arrested for) have occurred within a reasonable period for the purposes of section 115 will depend entirely on what is the reasonable investigation period for the matter the person has actually been arrested for.

105. For example, a four hour investigation period for a common assault matter may be unreasonable. It will be irrelevant to that question that the

police were also investigating the person for a murder for which they had not been arrested.

Other Admissibility Issues – A Checklist

106. If every matter where admissions or other evidence had been obtained following Part 9 detention it will be necessary to consider carefully the compliance with the various provisions detailed above.

107. Asking the following questions may be a useful checklist:

- Was the arrest lawful?
- Was there an investigation period available for the matter for which the person was arrested?
- Was the investigation period utilized reasonable? (Can the prosecution prove that (as they have the burden)
- Are the time outs claimed reasonable? (Can the prosecution prove that? as they have the burden)
- Was the extension of the period pursuant to a detention warrant done in compliance with the Act?
- If your client was not given Part 9 rights, were they in a state of deemed arrest and therefore should have been?
- Was your client cautioned by the custody manager?
- Were they given a Part 9 Summary of Rights?

- Where they given the proper opportunity to communicate in private with a friend, relative, guardian or independent persons and a lawyer?
- Were they told of inquiries made about them while in custody as required?
- Did they receive medical attention etc if required?
- Were they given reasonable access to refreshments, toilet facilities etc?
- Were the proper records maintained?
- Did the custody manager assist them in exercising their rights as required by Regulation 25?
- Were the support person requirements complied with?
- Did the custody manager take appropriate steps to ensure they understood the caution (which is more than just reading it to them)
- Was the Custody Notification Scheme contacted?

108. If the answer to any of these questions is no the Act has been breached.

109. Not all individual breaches will necessarily lead to exclusion of evidence, however some breaches will alone probably lead to exclusion. Alternatively a combination of breaches may lead to exclusion.

The author welcomes feedback on this paper.

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