

Arrest without warrant in New South Wales (March 2015 update)

1 Introduction

This paper deals mainly with the power of police to arrest a person under s.99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA).

It also touches on the common law power to arrest for breach of the peace, the power of police to arrest for breach of bail under s.77 of the *Bail Act 2013*, and the citizen's arrest power under LEPRA s.100.

2 Power to arrest for an offence: LEPRA s.99

Section 99 of LEPRA confers power on a police officer to arrest a person without warrant on reasonable suspicion of having committed an offence.

The section was amended by the *Law Enforcement (Powers and Responsibilities) Amendment (Arrest without Warrant) Act 2013*, with effect from 16 December 2013. It now provides:

(1) A police officer may, without a warrant, arrest a person if:

- (a) the police officer suspects on reasonable grounds that the person is committing or has committed an offence, and
- (b) the police officer is satisfied that the arrest is reasonably necessary for any one or more of the following reasons:
 - (i) to stop the person committing or repeating the offence or committing another offence,
 - (ii) to stop the person fleeing from a police officer or from the location of the offence,
 - (iii) to enable inquiries to be made to establish the person's identity if it cannot be readily established or if the police officer suspects on reasonable grounds that identity information provided is false,
 - (iv) to ensure that the person appears before a court in relation to the offence,
 - (v) to obtain property in the possession of the person that is connected with the offence,
 - (vi) to preserve evidence of the offence or prevent the fabrication of evidence,
 - (vii) to prevent the harassment of, or interference with, any person who may give evidence in relation to the offence,
 - (viii) to protect the safety or welfare of any person (including the person arrested),

(ix) because of the nature and seriousness of the offence.

(2) A police officer may also arrest a person without a warrant if directed to do so by another police officer. The other police officer is not to give such a direction unless the other officer may lawfully arrest the person without a warrant.

(3) A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person before an authorised officer to be dealt with according to law.

Note : The police officer may discontinue the arrest at any time and without taking the arrested person before an authorised officer-see section 105.

(4) A person who has been lawfully arrested under this section may be detained by any police officer under Part 9 for the purpose of investigating whether the person committed the offence for which the person has been arrested and for any other purpose authorised by that Part.

(5) This section does not authorise a person to be arrested for an offence for which the person has already been tried.

(6) For the purposes of this section, property is connected with an offence if it is connected with the offence within the meaning of Part 5.

3 Summary of recent amendments to s.99

As mentioned above, s.99 has been amended with effect from 16 December 2013.

The main amendment was to replace the “arrest as a last resort” provision (formerly s99.(3)) with a new s99.(1)(b). The effect of this is discussed in Part 7 of this paper.

The amended s.99 also makes it clear that a police officer may arrest a person upon reasonable suspicion of having committed *any* offence, not just a serious indictable offence (s.99(1)(a)).

The amended s.99 also allows a police officer to arrest if directed to do so by another officer, but only if the officer giving the direction is lawfully entitled to arrest the person without warrant (s.99(2)).

Unlike the section in its previous form, the amended s.99 does not contain any reference to an arrest “for the purpose of commencing proceedings”. However, for reasons explained in Part 6 of this paper, an arrest under s.99 is still unlawful if it is not for the purpose of commencing proceedings.

There has also been an amendment to s.105, with the addition of a new subs(3). This provides that a police officer may discontinue an arrest despite any obligation to take the arrested person before an authorised officer to be dealt with according to law.

The following papers (most of which can be found at www.criminalcle.net.au) offer some commentary on the likely impact of the amendments:

- *What The Fuck's Happening? - A Discussion Paper on Sections 99, 105 and 201 of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)*, Mark Dennis (April 2014)
- *Changes To Arrest Laws In NSW*, Vicki Sentas and Rebecca McMahon, Current Issues in Criminal Justice Vol.25 No. 3 (March 2014)
- *Actions against police, Peter O'Brien and Adrian Canceri* (August 2014)

It is also worth noting that amendments have been made to other parts of LEPR. Please refer to my separate papers *LEPRA Section 201 – recent developments* (updated December 2014) and *Police powers update March 2015: recent legislative amendments*.

4 Criteria for a lawful arrest under s.99

There are four (arguably five) criteria for a lawful arrest under s99:

- (a) Reasonable suspicion that the suspect has committed an offence;
- (b) Arrest must be for the purpose of commencing proceedings;
- (c) Arresting officer must be “satisfied that arrest is reasonably necessary” for one of more of the purposes listed in s99(1)(b);
- (d) Arresting officer must provide the information set out in LEPPRA Part 15 unless it is not reasonably practicable; and
- (e) Any force used must be reasonable (opinions differ as to whether excessive force makes the arrest unlawful *per se*; however, excessive force would almost certainly take an officer outside the lawful execution of his or her duty).

5 Reasonable suspicion

“Reasonable suspicion” is now a relatively well-understood concept and will not be discussed in detail in this document.

A helpful formulation of “reasonable suspicion” appears in Smart AJ’s judgment in *R v Rondo* [2001] NSWCCA 540, at para 53. In summary:

- (a) A reasonable suspicion involves less than a reasonable belief but more than a possibility.
- (b) Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. It may be based on hearsay or material which may be inadmissible in evidence, but the material must have some probative value.
- (c) Regard must be had to the information in the mind of the police officer at the time of stopping the person or making the arrest. The question is then whether that information afforded (objectively) reasonable grounds for the suspicion which the officer formed.

6 Purpose of arrest

An arrest for an offence *must be for the purpose of taking proceedings in relation to the offence*, and not for some extraneous purpose such as questioning. This is a common law principle that has not been displaced by LEPPRA.

6.1 Common law pre-LEPPRA

In *Williams v R* (1986) 161 CLR 278, the High Court confirmed that an arrest for an offence must be for the purpose of commencing proceedings. The Court held that a person so arrested must be taken before a justice without delay, and that there is no power to detain a person merely for the purpose of investigation or questioning. Further, a statute which authorises the detention of a person must be strictly construed, because of the high value the law places on personal liberty.

In *R v Dungay* [2001] NSWCCA 443, police decided to arrest the appellant so that he could be taken to the police station and asked questions so as to assist the police in their investigations. Police made no mention in evidence of the appellant being arrested so that he could be taken before a magistrate. Although it was found that the police had reasonable grounds to suspect that the appellant had committed an offence, the arrest was held to be unlawful because it was solely for investigative purposes.

In *Zaravinos v State of New South Wales* [2004] NSWCA 320, the plaintiff recovered damages for wrongful arrest. He was asked to come to the police station for an interview. He attended voluntarily and was immediately arrested. As in *Dungay*, there were reasonable grounds to suspect that the plaintiff had committed an offence. However, the arrest was held to be unlawful because it was done for an extraneous purpose (that is, investigation and questioning), and also because it was done in a “high-handed” manner without properly considering an alternative such as a summons.

6.2 Case law on LEPRA s.99 in its previous form

The effect of the High Court decision in *Williams* was somewhat modified by the enactment of Part 9 of LEPRA (formerly Part 10A of the *Crimes Act*), which empowers police to detain a person for a limited period after arrest in order to investigate the alleged offence. However, s113(1)(a) makes it clear that the power conferred by Part 9 applies only if the person has first been lawfully arrested. *There is still no power to arrest merely for the purpose of questioning, investigation, or ascertaining identity.*

The Supreme Court case of *Williams v DPP* [2011] NSWSC 1085, and the Local Court decision of *R v McClean* [2008] NSWLC 11 both dealt with s.99 of LEPRA as it was before the 2013 amendments. In *McClean* it was held that an arrest under s.99 must be for the purpose of commencing criminal proceedings. The decision in *Williams* also supports this proposition.

***R v McClean* [2008] NSWLC 11**

This is a decision of Magistrate Heilpern in the Local Court. As well as holding that arrest or detention for the purpose of questioning is unlawful, it also deals with the former s.99(3) and arrest as a last resort.

The defendant was approached by police who were making inquiries into a suspected break and enter. She provided her name and produced her driving licence on request, and her licence details were entered in one of the officers' notebooks.

After some further conversation, she was told that she was suspected of trying to break into someone's unit, and, “At this point you have to wait here until we make further inquiries about what has happened. We will get some details from you and carry out some checks. Failure to comply and you may be committing an offence.”

The defendant said, “We don't have to stay here”. Police again told her she was required to stay. She repeated that she didn't have to stay, and attempted to leave. Police physically restrained her and a struggle ensued. She was eventually handcuffed and told she was under arrest for assault.

The defendant was charged with assaulting and resisting police in the execution of their duty. She successfully argued that the police were not acting lawfully in the execution of their duty.

Although the police did not use the word “arrest” when refusing to allow the defendant to leave, it was agreed by both prosecution and defence that she was in fact placed under arrest. The defendant submitted the arrest was unlawful, firstly because it was for the purpose of investigation and not for the purpose of commencing proceedings for an offence. Secondly, even if it was for the purpose of commencing proceedings, there was nothing in s.99(3) that justified the use of arrest.

The prosecution submitted that it was lawful to arrest the defendant because she was reasonably suspected of having committed an offence, and that once she was under arrest the police had the power to detain her to confirm her identity. They submitted that the arrest was justified under s.99(3)(a), for the purpose of ensuring that her identity could be confirmed so she could be brought before a court.

The Magistrate rejected the prosecution submissions, and held that the arrest was unlawful because it was carried out for the improper purpose of investigation. His Honour also found the arrest unlawful on the separate basis that it was not justified under s.99(3)(a). He noted that the police had the defendant's name, address and licence details, and there was no evidence that there was anything suspicious about these details.

His Honour said, at paras 25-26:

“It is my view of s.99 of LEPRA that subsection (2) states a general power, and then subsection (3) qualifies that power. The words “must not arrest” in subsection (3) are an unambiguous representation of parliamentary intent creating preconditions for a lawful arrest. Indeed, it is hard to imagine a clearer statement of parliamentary intent. Investigation is not one of these preconditions.

It is arguable that subsection (3) limits those preconditions to circumstances of arrest by the words “for the purpose of taking proceedings”. Thus, the argument goes, police need only have a reasonable suspicion to arrest, and then can detain for the purposes of investigation without concern for s99.(3). Sections 109 to 114 of LEPRA do provide powers for detention after arrest for the purposes of investigation, however it was not submitted by the prosecution that these sections were relied upon. It is clear that those sections do not confer any power to detain a person who has not been lawfully arrested – see s. 113(1)(a) of LEPRA. Further, such an interpretation would represent such a significant departure from the common law prohibition regarding arrest for investigation that it could not be said to represent a codification of the common law.”

At para 31:

“The courts and the parliament have spoken loudly, clearly and repeatedly – it is not enough to arrest a person simply because there is a reasonable suspicion that they have committed an offence. Arrest will be unlawful unless it is necessary to achieve one of the purposes set out in s99(3). It is not one of those purposes that further investigation needs to take place. Arrest is a last resort.”

At para 33:

“[I]n my view if the initial arrest was for the purpose of investigation, and that was unlawful, it does not matter that the purpose of the detention then changed to something else – McHugh J makes this clear in *Coleman v Power*. The poisoned root affects the entire tree.”

Williams v DPP [2011] NSWSC 1085

In *Williams v DPP* (discussed in Part 7.2 of this document), Harrison AsJ held that the arrest of the appellant was unlawful because police had not complied with s.99(3).

The DPP submitted that an arrest under s.99(2) need not always be for the purpose of commencing criminal proceedings; therefore the power is not always constrained by subs(3) (which provided that “police must not arrest a person for the purpose of commencing criminal proceedings unless...”). Her Honour did not accept this submission (see paras 20-23); however, she did not need to decide on this point, as the DPP had conceded that the arrest in this case was carried out with the intention of commencing proceedings.

6.3 Effect of recent amendments to s.99

It is submitted that the above authorities are still good law, despite the fact that the amended s.99 no longer refers to an arrest “for the purpose of commencing proceedings” .

Subs.99(4) requires the person under arrest to be brought before an authorised officer (this is defined in s.3 of LEPRA and essentially means a magistrate, registrar or bail justice) as soon as practicable. It is suggested that subs. 99(4) is intended to reflect the common law and to make it clear that the purpose of an arrest is to commence proceedings.

Further, there was nothing in the second reading speech to the Law Enforcement (Powers and Responsibilities) Amendment (Arrest without Warrant) Bill 2013 that suggested an intention to change the common law position. A copy of the second reading speech can be found at: <http://www.parliament.nsw.gov.au/prod/parliament/nswbills.nsf/131a07fa4b8a041cca256e610012de17/85f229b8ae726657ca257c13002893be?OpenDocument>

The recent case of *R v Bennett* (2015) NSWDC 1 is worth noting. This was a judgment of Mahony DCJ on an appeal against a Local Court conviction for assault police in execution of duty. Although

the recent amendments to s.99 were not explicitly discussed, it was accepted that arrest for the purpose of investigation or questioning is unlawful.

In this case the police officer gave evidence that he believed the appellant had committed an offence of offensive conduct, but that he stopped him “for a chat” and at that stage was not intending to commence proceedings. His Honour found this to be an unlawful arrest and excluded evidence of the alleged assault under 138 of the *Evidence Act*. Alternatively, His Honour would have allowed the appeal on the basis that the police officer was not acting lawfully in the execution of his duty.

The prosecution also relied on the case of *DPP v Gribble* [2004] NSWSC 926, submitting that the officer’s actions did not constitute an arrest but that the officer was legitimately trying to pull the appellant off the roadway for his own safety. However, His Honour held that this was not a *Gribble*-type situation, as there was no evidence that the appellant was in any danger; he was merely crossing the road and there was no traffic at the time.

7 Arrest as a last resort

7.1 Common law pre-LEPRA

There is a long line of pre-LEPRA authority, including *Fleet v District Court of NSW* [1999] NSWCA 363 and *DPP v Carr* (2002) 127 A Crim R 151, to the effect that arrest is a last resort and should not be used for minor offences where the defendant’s name and address are known and a summons would suffice.

Carr involved a man who was arrested for offensive language after swearing at police. While the arrest was technically lawful, it was held to be improper because it was inappropriate in the circumstances. Mr Carr was accused of a minor summary offence, the police knew his name and address, and there was no reason to believe that a summons would not be effective in bringing him to court.

Smart AJ said (at 159):

“This court in its appellate and trial divisions has been emphasising for many years that it is inappropriate for powers of arrest to be used for minor offences where the defendant’s name and address are known, there is no risk of him departing and there no reason to believe that a summons will not be effective. Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear. The consequences of the employment of the power of arrest unnecessarily and inappropriately and instead of issuing a summons are often anger on the part of the person arrested and an escalation of the situation leading to the person resisting arrest and assaulting police. The pattern in this case is all too familiar. It is time that the statements of this court were heeded.”

7.2 Case law on LEPRA subs.99(3) in its previous form

Prior to the 2013 amendments, subs.99(3) of LEPRA provided that “A police officer must not arrest a person for the purpose of commencing proceedings for an offence unless he or she suspects on reasonable grounds that arrest is necessary” for one of the purposes listed in subs.99(3).

This was said to give a statutory basis to the principle of arrest as a last resort. In the LEPRA Second Reading Speech (NSW Legislative Assembly Hansard, 17 September 2002), the then Attorney-General said:

“Part 8 of the Bill substantially re-enacts arrest provisions of the Crimes Act 1900 and codifies the common law. The provisions of Part 8 reflect that it is a measure that it is to be exercised only when necessary. An arrest should only be used as a last resort as it is the strongest measure that may be taken to secure an accused person’s attendance at court.”

***Williams v DPP* [2011] NSWSC 1085**

In *Williams v DPP* [2011] NSWSC 1085, Harrison AsJ confirmed that the power to arrest in subs(2) is subject to subs(3).

Police attended a local Masonic hall, where a community function was taking place, to arrest the appellant's brother Joel for a shoplifting offence allegedly committed three weeks earlier. The appellant and his mother both attempted to interfere with the arrest and were charged with hindering police in the execution of their duty. It was conceded that they were hindering; the issue was whether the police were acting lawfully in the execution of their duty.

There was no evidence that the police, when they arrested Joel, were concerned about any of the matters listed in s.99(3)(a)-(f).

At first instance, the magistrate held the arrest was lawful because it complied with s.99(2), that is, the police officer suspected on reasonable grounds that Joel had committed an offence. Despite the submissions put to him by the defence, the magistrate apparently ignored subs(3).

The appellant and his mother were both found guilty of hindering police and appealed to the Supreme Court on a point of law.

On appeal, the conviction was set aside. Her Honour held that the arrest was unlawful as it did not comply with s.99(3).

***Hage-Ali v State of New South Wales* [2009] NSWDC 266**

This was a civil case in which the plaintiff was awarded damages for wrongful arrest.

The plaintiff was arrested, along with three others, as part of a police operation in relation to the supply of cocaine. There was evidence from lawfully-intercepted telephone conversations and SMS messages to suggest that the plaintiff was buying cocaine from a supplier, apparently to on-supply to others.

When arrested, the plaintiff nominated her drug supplier and told police that she would be prepared to co-operate in their investigation. She was taken to the police station, where she was interviewed and provided an exculpatory statement regarding her apparent supply of cocaine. After agreeing to give a statement against her supplier, she was released without charge.

It was conceded that s.99(2) of LEPRA was satisfied, as the police officers suspected on reasonable grounds that the plaintiff had committed an offence. However, the plaintiff submitted that the arresting officers were merely ordered to arrest her, and did not have any information specific to her circumstances that would have allowed them to form a reasonable suspicion that arrest was necessary for one of the purposes listed in s.99(3).

The defendant submitted that the arresting police officers had considered s.99(3) at the time of her arrest. The arresting officers gave evidence that, as the plaintiff was part of a group of apparently connected drug suppliers, if she was not arrested at the same time as the others, there was a risk that she could flee the jurisdiction, that evidence could be lost and that offences could continue.

Elkaim DCJ was not satisfied that the arrest was justified by s.99(3). He summarised his reasons as follows (at para 211):

“(a) I do not accept that [the arresting officers] gave individual consideration to the justification for the arrest against the background of [written operational orders] and the plain direction from [a senior officer]. ...

(b) There was no consideration of matters personal to the plaintiff as opposed to a general conclusion to this effect: if she has been supplying drugs then there must be a risk of flight, reoffending or destruction of evidence.

(c) In any event there were not reasonable grounds to suspect any of the purposes in Section 99(3) needed to be achieved.”

His Honour said (at para 202):

"[T]here must be, in my view, a deliberate addressing of the purposes in Section 99(3) by the police officer concerning the particular person to be arrested. This is not to say that a

'ticking off of a checklist' exercise must be undertaken but rather that the facts personal to the person to be arrested must be considered".

The plaintiff also submitted that her arrest was for a collateral purpose, namely to obtain evidence against her supplier. However, His Honour held (at para 213):

"Although there is a strong flavour of the arrest being made for the purpose of obtaining evidence against Mr B I do not think there is enough evidence to make a positive finding to this effect."

Leave to appeal the decision to the Court of Appeal was refused on the grounds that the application demonstrated no question of law that warranted consideration by the Court: *State of New South Wales v Hage-Ali* [2011] NSWCA 31.

***R v McClean* [2008] NSWLC 11**

See discussion at Part 6.2 above.

***Tilse v State of New South Wales* [2013] NSWDC 265**

This was a civil action for the tort of false imprisonment. On 1 May 2011, Ms Tilse presented herself at Grafton Police Station, having been told that police wanted to speak to her about an alleged assault committed at a pub a few days earlier. She was immediately placed under arrest and was in custody for several hours before being charged and released on bail.

The police relied on s.99(3)(d), that arrest was necessary to prevent harassment of or interference with potential witnesses. The defendant submitted that it was necessary to arrest her so that appropriate bail conditions could be imposed.

Ms Tilse submitted that this objective could have been achieved by applying for an AVO without the necessity to impose bail conditions. In the alternative, it was submitted that bail conditions can be imposed without arresting the suspect. She relied on s.15(1) of the old *Bail Act 1978*, which provided "An accused person may be granted or refused bail in accordance with this Act, notwithstanding that the person is not in custody."

Nielson DCJ was of the view that an AVO application would not have been sufficient to protect the witnesses in this particular case. This was partly because the witnesses were not in a domestic relationship with the plaintiff, and in practice it is more difficult to obtain an APVO (particularly a provisional order) than an ADVVO (see paras 129-134).

His Honour agreed with the plaintiff's submission that bail could be granted to a person who is not in custody, with the proviso that the accused must be "present at police station" (*Bail Act 1978* s.17). In the course of his reasons, His Honour revised the view he had expressed in his earlier decision of *Carey v State of New South Wales* [2013] NSWDC 213, in which he said, obiter, "that the only power the police had to grant bail is if a person had been arrested" (see paras 138-152).

Despite his finding that bail conditions could have been imposed without arresting the plaintiff, his Honour concluded that arrest was necessary in the particular circumstance of the case (see paras 153-160). Although Ms Tilse had voluntarily presented herself to the police station, the station was understaffed and police were busy dealing with other persons in custody and were not able to deal with her straight away. "There was nothing...to suggest that the plaintiff might meekly wait around to be dealt with in due course by the police." (at para 160).

Ultimately, the plaintiff recovered some damages because his Honour found that, although the arrest was lawful, she was held in custody for an excessively long period.

7.3 Effect of recent amendments to s.99

Is arrest still a last resort?

From the second reading speech to the Law Enforcement (Powers and Responsibilities) Amendment (Arrest without Warrant) Bill 2013, it is apparent that Parliament intended to make it easier for police officers to arrest suspects. This is reflected in the new s.99(1)(b), which provides more grounds to arrest than the old s.99(3). There has also been a change of language from "must not arrest unless" to "may arrest if".

Some commentators (eg McMahon and Sentas, and O'Brien and Canceri, whose papers are referred to in Part 2 of this paper) have suggested that the amendments have weakened the concept of arrest as a last resort. O'Brien and Canceri note that the amendments "were put in place explicitly to limit civil actions against police" and "The legislation is now permissive rather than prohibitive in form". (see paras 39-47).

However, it is my view that arrest is still a last resort. To depart from this long-held common law principle, explicit language would have been required.

In *DPP (NSW) v Mathews-Hunter* [2014] NSWSC 843, Fullerton J was of the view that arrest is a last resort under both the new s.99(1)(b) and s.100. Although the case concerned s.100 (the citizen's arrest power), and her Honour's comments on s.99(1)(b) are obiter, these comments are nevertheless persuasive. For a discussion of this case, see Part 11 of this paper.

Objective or subjective test?

The test that existed in the former s99(3), which had both an objective and a subjective element, has been changed.

Instead of requiring the police officer to "*suspect on reasonable grounds that arrest is necessary...*", s99(1)(b) now allows a police officer to arrest if "*the police officer is satisfied that the arrest is reasonably necessary...*".

On one view, this new test is wholly subjective: it simply requires the police officer to be satisfied in his or her own mind that arrest is reasonably necessary.

An alternative view is that the presence of the word "reasonably" before "necessary" implies that the police officer must be satisfied on reasonable grounds that arrest is necessary. This interpretation is bolstered by the fact that nowhere in the second reading speech (or the speeches of any Government members in the Upper or Lower House) is it suggested that the legislative intention was to replace the objective test in s.99(3) with a wholly subjective one.

The new s.99(1)(b) is said to be modelled on s.365 of the Queensland *Police Powers and Responsibilities Act*. It might therefore be expected that guidance could be drawn from Queensland authorities. However, there is a subtle but significant difference between the two provisions. The Queensland s365 commences as follows:

"It is lawful for a police officer, without warrant, to arrest an adult the police officer reasonably suspects has committed or is committing an offence if it is reasonably necessary for 1 or more of the following reasons"

This imposes an objective test ("arrest is reasonably necessary"), without a subjective element (as in "the police officer is satisfied that arrest is reasonably necessary"). Queensland authorities will therefore be of little assistance to NSW courts in interpreting the new s.99(1)(b).

Additional reasons justifying arrest

The factors listed in the old paras 99(3)(a)-(f) have been carried across, with minor amendments, and the following have been added:

(iii) To enable enquiries to be made to establish the person's identity if it cannot be readily established or if the police officer suspects on reasonable grounds that identity information provided is false

There is little doubt that this was already encompassed in the old section 99(3)(a) (now s99(1)(b)(iv)). This amendment does not appear to broaden the power in any way. Indeed, it could be said that it imposes more rigor on the police by imposing a duty to attempt to ascertain the person's identity before resorting to arrest.

(v) To obtain property in the possession of the person that is connected with the offence

It is difficult to see how this differs from the old s99(3)(c) ("to prevent the concealment, loss or destruction of evidence relating to the offence") or the new s99(1)(b)(vi).

(ii) To stop the person fleeing from a police officer or from the location of the offence

This is partly subsumed in s99(1)(b)(iv) (formerly s99(3)(a)), "to ensure that the person appears before a court in relation to the offence".

However, is arguably broader – a person may flee the scene, but be well-known to the police, easy to track down for the purpose of issuing a court attendance notice, and not a flight risk when it comes to attending court. The old s99(3)(a) would not have justified the arrest of such a person.

(vii) To protect the safety and welfare of any person (including the person arrested)

This has been broadened out to include persons other than the person being arrested. Some have suggested that this does not significantly broaden the power of police, as they already have a common law power of arrest to deal with a breach of the peace. However, “welfare” is a word capable of very broad interpretation; it is conceivable that police may arrest a person to protect another person’s welfare in situations where there is no imminent breach of the peace.

(ix) Because of the nature and seriousness of the offence

According to the Premier’s Second Reading Speech, “this gives police the certainty to act swiftly in the case of serious crimes without having to consider whether any other reason to arrest without a warrant exists”.

It was suggested during the parliamentary debate that arrest is appropriate for particular types of offences, such as domestic violence offences, because research has shown that “arresting domestic violence offenders deters future domestic violence from occurring”. In particular, the Premier was relying on a 2012 BOCSAR report entitled *The effect of arrest and imprisonment on crime* (<http://www.bocsar.nsw.gov.au/agdbasev7wr/bocsar/documents/pdf/cjb158.pdf>). It respectfully suggested that the BOCSAR study was concerned with the deterrent effect of being *apprehended*, and not specifically of being *placed under arrest*. The BOCSAR report is *not* evidence for the proposition that being arrested is a greater deterrent to future offending than being served with a CAN.

In *Hage-Ali v State of New South Wales* [2009] NSWDC 266 (discussed above) it was held that, under the old s.99(3), it was impermissible to arrest a person based on stereotypes about particular types of offences or offenders. The recent insertion of s.99(1)(b)(ix) may have altered this position to some degree. However, even after this amendment, the arresting officer will still need to be satisfied that arrest is reasonably necessary *in the particular circumstances*. The power to arrest is a discretionary one and there must be a meaningful exercise of that discretion. An officer who follows a blanket directive by their Local Area Commander to arrest *all* suspects for domestic violence offences (for example) would not be acting in accordance with s.99.

8 Power to arrest for breach of peace

LEPRA s.4 expressly preserves the powers conferred by the common law on police officers to deal with breaches of the peace.

Part 15 of LEPRA imposes obligations on police officers who are exercising common law powers of arrest.

8.1 Definition of breach of the peace

“Breach of the peace” is not defined in LEPRA. The case law demonstrates that it can encompass a wide variety of situations, although it appears well-established that there must be a threat of violence (which may include the provocation of another person to violence).

In *R v Howell* [1982] QB 416 Watkins LJ said (at 427):

“[T]here is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.”

Noise, argument, loud or offensive language does not of itself constitute a breach of the peace (*Parkin v Norman* [1982] 2 All E.R. 583, *Williams v Pinnuck* (1983) 68 FLR 303, *Beaty v Glenister* (1884) 51 LT (NS) 304, *Neave v Ryan* [1958] Tas SR 58, *Nilsson v McDonald* (2009) TASSC 66).

However, in *Nicholson v Avon* [1991] 1 VR 212, it was held that a very noisy party, in the early hours of the morning, and incurring complaints from a neighbour, did amount to a breach of the peace. Marks J said (at 221), "In my opinion, there is no conduct more likely to promote violence than prolonged disturbance of the sleep of neighbours by noise and behaviour of the kind disclosed."

8.2 Power to deal with breach of the peace

At common law, police (and citizens) have extensive powers to prevent or to stop breaches of the peace. These include powers of entry, at least in some jurisdictions (*Nicholson v Avon* [1991] 1 VR 212, *Panos v Hayes* (1984) 44 SASR 148, and now enacted into s.9 of LEPR), dispersing picketers (*Commissioner of Police (Tas); ex parte North Broken Hill Ltd* (1992) 61 A Crim R 390), confiscating items such as protesters' megaphones (*Minot v McKay (Police)* [1987] BCL 722) and arrest or detention (*Albert v Lavin* [1982] AC 546 at 565).

Lord Diplock said in *Albert v Lavin* (at 565):

"[E]very citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking, or is threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will."

A person using such preventative powers must reasonably anticipate an imminent breach of the peace; it must be a real and not a remote possibility (*Piddington v Bates* [1961] 1 WLR 162; *Forbutt v Blake* (1981) 51 FLR 465).

Detention or arrest is a measure of last resort (*Innes v Weate* (1984) 12 A Crim R 45 at 52; *Commissioner of Police (Tas); ex parte North Broken Hill Ltd* (1992) 61 A Crim R 390).

The force used to restrain the citizen must only be such as is reasonable. The restraint may continue as long as is necessary to prevent the breach of the peace; the citizen must then be either released or arrested (presumably for a specific offence) (see *Albert v Lavin*, *Piddington v Bates*).

The case of *DPP v Armstrong* [2010] NSWSC 885 did not break any new ground but confirmed that police in NSW have a common law power to arrest for breach of the peace.

More recently, *Poidevin v Semaan* [2013] NSWCA 334 affirmed the broad power of police to take action to deal with a breach of the peace. At first instance, Rothman J sought to construe this power quite narrowly, but His Honour's approach was rejected by the Court of Appeal.

9 Information that must be provided under Part 15

9.1 Background

Part 15 of LEPR requires police officers to provide information when exercising a range of powers. It has recently been amended, with effect from 1 November 2014.

Before the amendments, the requirements were set out in s.201. Police officers exercising certain powers were required to provide evidence of being a police officer, their name and pace of duty, and the reason for the exercise of the power.

In the case of powers involving requests or directions, this information had to be provided before the exercise of the power. In the case of other powers, the information had to be given before or at the time of exercising the power, if practicable to do so, or otherwise as soon as reasonably practicable afterwards.

In some circumstances, police were also required to warn the person about their obligation to comply with a request or direction.

These requirements are partly based on the common law in *Christie v Leachinsky* [1947] 1 All ER 567, which provides that a person who is arrested without warrant is entitled to know why. *Christie*

v Leachinsky requires police to tell the person the reason for the arrest, unless it is obvious (eg. the person is caught red-handed) or the person makes it impossible (eg. by fleeing or forcibly resisting). It is still good law, although largely redundant for arrests to which Part 15 applies.

9.2 Effect of non-compliance with the former s.201

The obligation to comply with s.201, and the implications of not complying with it as soon as reasonably practicable, were examined by Rothman J in *Semaan v Poidevin* [2013] NSWSC 226.

His Honour held that, in situations where the section allows the police to comply as soon as reasonably practicable after exercising the power, failure to comply with s.201 as soon as reasonably practicable *retrospectively* affects the lawfulness of the police officer's conduct.

However, this was overturned by the Court of Appeal in *Poidevin v Semaan* [2013] NSWCA 334. The lead judgment was delivered by Leeming JA (with whom Ward JA and Emmett JA agreed).

It was held that a failure to comply with s.201 when it becomes practicable does not *retrospectively* render the police officer's actions unlawful (see paras 16-28).

Further, it is not necessary for the officer exercising the power to consider whether or not it is practicable to comply with s.201: "*The question of compliance with the duty imposed by s201(1) turns upon an objective fact, namely, whether or not it is practicable to comply before or at the time of exercising the power.*" (at para 28).

Non-compliance with s.201 *at a time when compliance is reasonably practicable* would still take an officer outside the lawful execution of their duty.

For an example of a civil case, post-*Poidevin v Semaan*, in which an arrest was held to be unlawful because the police did not tell the plaintiff the true reason for her arrest and thus did not comply with s.201, see *State of New South Wales v Abed* [2014] NSWCA 419 (at paras 85-107).

9.3 Recent amendments to Part 15 (as of 1 November 2014)

The *Law Enforcement (Powers and Responsibilities) Amendment Act 2014* makes amendments which dilute the protection afforded by s201. Schedule 2 of the amendment Act, which commenced on 1 November 2014, repeals Part 15 of LEPRA and inserts a new Part 15.

The main amendments are:

- (a) In respect of most powers, police must simply provide the required information as soon as reasonably practicable. However, the information must still be given *before* exercising a power that consists of a direction or request to a single person.
- (b) In general, only *one* warning need be given when making a direction or request that a person is legally obliged to comply with (previously there was a two-stage warning required).
- (c) A police officer's failure to provide their name and place of duty no longer renders the exercise of the power unlawful. However, the obligation of police to provide their name and place of duty is to be kept under scrutiny by the Ombudsman, who is to provide a report after a 12-month period.
- (d) Any police officer present during the exercise of a power must provide their name and place of duty if asked.

My paper on *LEPRA section 201 – recent developments* (updated December 2014) sets out the current text of Part 15 and discusses the amendments in more detail.

9.4 Powers to which Part 15 applies

Part 15 applies to certain powers exercised by police officers. It also applies to special constables and other law enforcement officers (see Note to s.201), but not to private citizens.

Part 15 applies to powers listed in s.201(1), as long as they are not specifically excluded by s.210(3). It applies to powers conferred by LEPR as well as common law and other statutes, except the statutes listed in Schedule 1. Acts listed in Schedule 1 include the *Bail Act*, *Mental Health Act*, *Crimes (Forensic Procedures) Act*, and the *Road Transport Act*, among others.

In an arrest context, Part 15 applies to arrests performed by police officers for an offence, on a warrant, or for breach of the peace. It does *not* apply to an arrest for breach of bail or to a citizen's arrest.

9.5 Information that must be provided

Under s.202(1), a police officer is still required to provide:

- (a) evidence that he or she is a police officer (unless in uniform);
- (b) his or her name and place of duty; and
- (c) The reason of the exercise of the power.

If the power involves a direction, requirement or request that the person is legally obliged to comply with, the police officer must warn the person of their obligation to comply (s.203(1)). However, a warning is not required if the person has already complied or is in the process of complying (s.203(2)). A person is not guilty of an offence of failing to comply unless a warning has been given (s.204B).

In the case of a direction given under s.198 (on the grounds that a person is intoxicated and disorderly in a public place), even if the person complies with the direction, the police must warn them that an offence to be intoxicated and disorderly in any public place within the next 6 hours (s.198(6)).

If two or more police officers are exercising the power, only one officer is required to provide the required information (and warning if applicable) (s.202(4) and s.203(4)). However, if the person asks a police officer present for their name and place of duty, the officer must provide this information s.202(5).

9.6 Time at which information must be provided

If police are giving a direction, requirement or request to a single person, the information in s.202(1) must be provided before giving the direction, requirement or request (s.202(2)(b)).

In all other cases, the information must be given as soon as it is reasonably practicable to do so (s.202(2)(a)).

The warnings required by s.203 must be given as soon as reasonably practicable after the direction, requirement or request (s.203(3)).

9.7 Effect of non-compliance with Part 15

Although it has been somewhat diluted, Part 15 is still a mandatory provision. Non-compliance (except by failing to provide the officer's name and place of duty) will take an officer outside the lawful execution of his or duty.

The new s.204A provides that an officer's failure to provide their name and/or place of duty does not render the exercise of the power unlawful or otherwise effect the validity of anything resulting from the exercise of that power, except:

- if the power consists of a direction, requirement or request to a single person; or
- if the officer was asked for their name or place of duty.

10 Arrest for breach of bail

Under the repealed *Bail Act 1978*, s50 set out the actions that police could take in response to an actual or anticipated breach of bail. Although there was provision for an authorised justice to issue a summons or a warrant, this option was rarely used. Instead, it was the practice of police to arrest without warrant (and indeed, officers were often directed by their superiors to exercise no discretion).

Courts have been willing to find that an inappropriate exercise of discretion under s50 of the old Act renders an arrest improper. See, for example, *NT v R* [2010] NSWDC 348, which concerned a 14-year-old girl arrested at her own home for an alleged breach of a curfew condition the previous night.

Section 77 of the *Bail Act 2013* (which commenced on 20 May 2014) seems to have led to some change in police practice. Although some would say that s77 falls short of providing that arrest for breach of bail is a last resort, it sets out a clear hierarchy of options and matters that the police officer must consider.

Section 77, in full, reads:

77 Actions that may be taken to enforce bail requirements

(1) A police officer who believes, on reasonable grounds, that a person has failed to comply with, or is about to fail to comply with, a bail acknowledgment or a bail condition, may:

- (a) decide to take no action in respect of the failure or threatened failure, or
- (b) issue a warning to the person, or
- (c) issue a notice to the person (an "application notice") that requires the person to appear before a court or authorised justice, or
- (d) issue a court attendance notice to the person (if the police officer believes the failure is an offence), or
- (e) arrest the person, without warrant, and take the person as soon as practicable before a court or authorised justice, or
- (f) apply to an authorised justice for a warrant to arrest the person.

(2) However, if a police officer arrests a person, without warrant, because of a failure or threatened failure to comply with a bail acknowledgment or a bail condition, the police officer may decide to discontinue the arrest and release the person (with or without issuing a warning or notice).

(3) The following matters are to be considered by a police officer in deciding whether to take action, and what action to take (but do not limit the matters that can be considered):

- (a) the relative seriousness or triviality of the failure or threatened failure,
- (b) whether the person has a reasonable excuse for the failure or threatened failure,
- (c) the personal attributes and circumstances of the person, to the extent known to the police officer,
- (d) whether an alternative course of action to arrest is appropriate in the circumstances.

(4) An authorised justice may, on application by a police officer under this section, issue a warrant to apprehend a person granted bail and bring the person before a court or authorised justice.

(5) If a warrant for the arrest of a person is issued under this Act or any other Act or law, a police officer must, despite subsection (1), deal with the person in accordance with the warrant.

Note: Section 101 of the Law Enforcement (Powers and Responsibilities) Act 2002 gives power to a police officer to arrest a person in accordance with a warrant.

(6) The regulations may make further provision for application notices.

Whether an arrest that does not comply with s77 is unlawful or merely improper will be a matter for the courts to decide. I would suggest that the use of the words "The following factors are to be considered" in subs(3) means that a police officer's failure to consider any of these factors would render an arrest unlawful. An inappropriate exercise of the officer's discretion (as opposed to a failure to exercise any discretion) would probably render the arrest improper.

See also O'Brien and Canceri's paper (at paras 18 to 38) for a discussion of arrest for breach of bail under the old Act and some comments as to the differences between the old s.50 and the new s.77.

11 Citizen's arrest

11.1 Arrest for an offence

LEPRA s.100 provides that 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;
- (b) who has just committed any such offence; 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*. The person making the arrest must have witnessed the offence or be otherwise satisfied that the offence has been committed (*Brown v G J Coles* (1985) 59 ALR 455).

11.2 Arrest for breach of peace

It appears that a citizen also has a common law power to arrest for breach of the peace (see *Albert v Lavin* [1982] AC 546 at 565). Although this power has not been expressly preserved by LEPRA s4 (which provides that LEPRA does not affect the common law powers of *police* to deal with a breach of the peace), nor has this power been expressly legislated away.

11.3 Safeguards and use of force

Although the safeguards in s.201 do not apply to a citizen's arrest, it appears clear from *Christie v Leachinsky* [1947] 1 All ER 567 that a person who is arrested by a private citizen is entitled to be told the reason why (unless of course it is obvious or the person arrested makes it impossible).

As with police officers, citizens are empowered to use reasonable force to effect an arrest or to prevent the person's escape (s.231).

11.4 Arrest as a last resort

In *DPP (NSW) v Mathews-Hunter* [2014] NSWSC 843, Fullerton J held that the principle of arrest as a last resort applies to the citizen's arrest power in LEPRA s.100, at least where the power is being used by a person such as a transit officer who has other options available.

The defendant was travelling on a train when a transit officer observed him drawing on a window using a marker pen. The officer approached the defendant and immediately arrested him for malicious damage. It was alleged that the defendant then assaulted the officer. As well as being charged with offences under the *Graffiti Control Act*, he was charged with common assault and assault occasioning actual bodily harm.

The assault matters were dismissed by the Local Court. The magistrate excluded the evidence of the alleged assault under s.138 of the *Evidence Act*, having found that the arrest was unlawful or improper.

The DPP appealed to the Supreme Court under s.56(1)(c) of the *Crimes (Appeal and Review) Act*. The DPP argued that there was a "critical distinction" between sections 99 and 100. Due to the absence of a s.99(1)(b) type provision in s.100, it was submitted that s.100 provided an unqualified power of arrest.

This submission was rejected by Fullerton J, who relied on the common law (and principally *DPP v Carr* [2002] NSW SC 194). After quoting from Smart AJ's judgment in *Carr*, her Honour said

49. In the present case the defendant was subjected to the additional punishment of being deprived of his liberty and being physically restrained for the commission of an offence that is punishable only by a fine, in circumstances where the arresting transit officer must be taken to have been aware that there were alternatives available to him even if he may not have been certain as to what they were.

50. Although Smart AJ was dealing with arrest powers under s 352 of the *Crimes Act* (since repealed), I note that the second reading speech to the Bill introducing LEPR in 2002 makes it clear that the legislature intended that both ss 99 **and** 100 would be subject to the restrictions on the exercise of the power to arrest, including that arrest should be exercised only when necessary, and only as a last resort. In any event, s 352 did not displace the common law with regards to limitations on the power to arrest; neither did the enactment of ss 99 and 100 of LEPR which replaced that provision (see *Zaravinos v State of NSW* [2004] NSWCA 320; 62 NSWLR 58 per Bryson JA at [23]). In *Zaravinos*, at [23], Bryson JA observed that because of the high value the law places on personal liberty, "a statute which authorises the detention of a person must be strictly construed".

51. In *Williams v R* [1986] HCA 88; 161 CLR 278, Mason and Brennan JJ considered the "jealousy" with which the common law protects the right to personal liberty:

The right to personal liberty is, as Fullagar J described it, "the most elementary and important of all common law rights": *Trobridge v Hardy*. Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England "without sufficient cause" *Commentaries on the Laws of England* ... He warned:

"Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper... there would soon be an end of all other rights and immunities."

That warning has been recently echoed. In *Cleland v The Queen* Deane J said:

"It is of critical importance to the existence and protection of personal liberty under the law that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed."

The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes.

52. Although his Honour did not say so expressly, it is implicit in his reasons that he was satisfied that the transit officer's decision to arrest the defendant was the result of either expediency or uncertainty as to how to respond in the circumstances, not, as the plaintiff submitted, because it was the appropriate response. Far from the power to arrest being executed as the last resort as is required at law, it was the transit officer's first response. There is no evidence to suggest that obtaining the defendant's details and passing them on to the police would not have been an effective way of dealing with the graffiti offences. In my view, in all the circumstances, the evidence supports his Honour's finding that the arrest was unlawful and improper.

Her Honour went on to hold that the magistrate did not err in excluding the evidence under s.138, and nor did his Honour err by failing to provide adequate reasons. The appeal was therefore dismissed in its entirety.

12 Use of force

LEPRA s.231 empowers police to use “such force as is reasonably necessary” to make an arrest or to prevent the person’s escape.

The law does not appear to be settled as to whether excessive force makes an arrest unlawful *per se* (see article by Dan Meagher: *Excessive force used in making an arrest: does it make the arrest ipso facto unlawful?*, (2004) 28 Crim LJ 237). However, an officer who uses excessive force to make an arrest would be acting outside the lawful execution of his or her duty.

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Updated March 2015