

# *Changes to Police Powers of Arrest in New South Wales*

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## *Abstract*

Amendments to arrest laws in New South Wales in December 2013 significantly expand the power of arrest and the purpose for which arrest is to be used. This article examines the key changes to s 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) and the flawed Government rationale for the changes. Passed without a formal public consultation process and with great haste, Parliament's statutory intent appears to extend the range of circumstances in which arrest will be legal, in order that arrest be used, most significantly, to deter criminal conduct. This article argues that there has been a radical shift from the purpose of arrest as a last resort for bringing charges against an alleged offender, to a first resort in order to increase arrest rates. We explain how the new provisions formalise the goals of 'proactive policing' in arrest law and provide a framework for future investigation into the potential effects of this goal.

## **Introduction**

New South Wales (NSW) Premier Barry O'Farrell announced on 10 October 2013 that the police powers to arrest and detain suspects in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ('LEPRA') would be reviewed as a matter of urgency (O'Farrell 2013a). Former Shadow Attorney General Andrew Tink and former Police Minister Paul Whelan ('the Reviewers') advised the Premier on changes to LEPRA s 99, which provides police with the power to arrest suspects without a warrant. Three weeks later the *Law Enforcement (Powers and Responsibilities) Amendment (Arrest without Warrant) Act 2013* (NSW) ('LEPRA Amendment Act') was passed by Parliament. There has been criticism that the LEPRA Amendment Bill was drafted without the usual review and consultation processes that may be expected, such as referral to the Attorney General's Criminal Law Review Division and to the full range of stakeholders within the criminal justice system, in order to assess the legal and policy implications of the new law (Sentas and Cowdery 2013; NSW Council for Civil Liberties 2013; Lynch et al 2013).

The *LEPRA Amendment Act* expands the power of arrest in two broad ways: it extends the reasons for which an arrest is lawful and it departs from the previous rationale that arrest be a last resort for commencing proceedings. The reforms improve the clarity of some parts of arrest power, while introducing fundamental ambiguities and breadth overall. This article

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analyses the now-enacted s 99 and compares its purpose to the previous law. It puts forward a framework for understanding the significance of the expanded police power to arrest in NSW. First, we explain the flaws in the Government's key rationales for the swift reform of s 99 — most significantly, that arrest should be deployed for the purpose of deterrence. Second, we consider the cumulative and potential effects of Parliament's removal of the explicit reference in the statute to the purpose of police arrest being to commence proceedings and the ambiguities created by the new, potentially broader test police are required to apply when deciding whether arrest is necessary. Third, the article addresses how the introduction of new reasons to arrest expands the power of arrest.

The manner in which police exercise their discretion under the new laws, and the courts' interpretation of that power, remain to be seen. However, the key changes to the provisions coupled with Parliament's avowed intentions may, in practice, result in its intended effects — a rise in arrest rates and a departure from the fundamental principle of arrest as a last resort. If the new arrest power does achieve higher arrest rates, there may be far-reaching unintended consequences for criminal justice policy. These include an increase in the rates of detention for the purpose of investigation under *LEPRA* Part 9, an increase in the remand population and increased opportunities for police to engage in the use of force to affect arrests. The widening of police arrest powers may further entrench the disadvantage experienced by those most vulnerable to the exercise of police powers, in particular Indigenous peoples and people with mental health issues. This article is neither an empirical study of the power of arrest nor a substantive review of criminological studies on the broader operation and effects of overpolicing. We analyse the statutory changes to s 99 and provide a framework for future research to critique how arrest law is applied.

## The purpose and significance of arrest

Arrest is a deprivation of liberty, a significant intrusion on a citizen's freedom. The process may also involve the use of force and will often be humiliating and demeaning. The courts have recognised that arrest is 'additional punishment involving deprivation of freedom and frequently ignominy and fear' (*DPP v Carr* at [35]). For these reasons, there is a long line of authority recognising that arrest should be a measure of last resort for the purpose of commencing legal proceedings.

In *Williams v The Queen*, Wilson and Dawson JJ observed:

A person who is arrested may be detained only for the purpose of bringing him before a justice (or nowadays before some other person with power to deal with him) to be dealt with according to law. *For arrest is the beginning of imprisonment* and, whilst it is recognized that imprisonment before trial may be necessary in the administration of criminal justice, it must be justified in accordance with the law. (at [8], emphasis added)

When a police officer initiates arrest, unless it is arrest as a last resort in order to charge the person, it is a breach of the separation of powers doctrine. Accordingly, arrest is an 'extraordinary power' to be carefully exercised with restraint by police, particularly because arbitrary arrests 'are harmful to the free society we all want to preserve' (*Fleet v District Court of NSW* at [74]). The use of arrest as a last resort is consistent with enabling the presumption of innocence for suspects at the pre-trial, police process stage, by limiting the State's arbitrary interference with the person. Consequently, police have available to them a number of alternatives to arrest, including issuing Court Attendance Notices or penalty notices, or using their discretion to issue a warning or caution. Under the previous s 99, arrest was only

necessary where the alternatives for charging someone had failed or arrest was the only appropriate action for charging a suspect. When combined with other existing police powers (eg, to get identity/address and to issue move-on directions), s 99 demanded that police exhaust these alternative powers before issuing the arrest for the purpose of bringing a person to court. The courts have settled that the previous s 99 is a power that should be reserved for circumstances in which it is clearly necessary to arrest (*DPP v CAD* at [7]) and as a last resort.

In response to the formal legalism that arrest is for the purpose of prosecution, Dixon (1997:77–8) notes that arrest has, in practice, always been for multiple police purposes that have little to do with bringing suspects to the courts — including harassment and intimidation, street-sweeping, controlling the population, intelligence-gathering and to establish police and state authority. To claim that the old s 99 functioned according to its intended construction would attribute law with autonomy from policing it does not possess. Law does not govern policing so much as frame the sites of contestation over how state practices are administered through liberal norms. Policing, as a power of government not law, is its own source of authority, a sovereign power, whereby the transmission of due process principles are given material meaning (see, eg, Dubber 2011).

Contestation over the legal regulation of policing produces a symbolic and ideological effect on police institutions, whereby police routinely seek to circumvent due process restrictions as obstructions to their work (Dixon 1999:37). *LEPRA* consolidated police powers as a recommendation of the 1997 Wood Royal Commission into Police Corruption, in order to engender police accountability to the rule of law. The NSW Police Force (‘NSW Police’) and the Police Association of NSW have opposed *LEPRA* as an undue constraint on policing since its inception in 2002. The central role of the police lobby in consolidating the drift to a ‘law and order’ agenda in NSW since the late 1980s has been well documented (Hogg and Brown 1998; Loughnan 2010; Martin 2010). In the law-and-order tradition, the recent amendments to s 99 have been the result of a powerful police lobby and an accommodating Government. In our analysis of government discourse, the logic and justification for expanding the arrest power are premised as meeting police frustration with the perceived constraints of law on police conduct.

There are longstanding tensions between common law principles that delimit the power of arrest, and police practices that deploy arrest as an expansive tool of ‘crime prevention’ or deterrence. Contemporary transformations in crime control with the adoption of ‘proactive policing’ by law enforcement agencies in Australia and elsewhere (Ratcliffe 2008) are key to understanding the conflicts between the legal purpose of arrest as last resort and the State’s desire for arrest as a more expansive ‘first resort’ tool. In the Anglo-American tradition, police investigation is directed towards identifying offences and bringing suspects to court — what Innes and Sheptycki (2004) call a ‘prosecution directed mode’. Broadly, the shift away from reactive strategies towards proactive and intelligence-led policing has focused on targeting social disorder and minor forms of offending in order to prevent future offending, in a ‘disruption-directed mode’ of policing whereby prosecutions are supplemented with strategies to disrupt, prevent or deter alleged offenders (Innes and Sheptycki 2004). Proactive policing is embedded in the strategic priorities of NSW Police. Heralded as delivering productivity and efficiency gains, it is measured through the increased use of strategies to disrupt ‘the criminal element’; including stop and search, move-on directions and bail compliance checks (Crown Employees Award 2012). The new arrest provisions potentially auger a new and radical incorporation of proactive policing into the formal structure of the law regulating arrest. We indicate below how key changes to s 99 embed and formalise proactive policing in the law, and the problems in eroding suspects’ formal rights to achieve this purpose.

## Three flawed rationales

### *Complex and difficult to apply*

Three discernible rationales structure the NSW Government's imperative for swift legislative reform expanding the power of arrest.

The first rationale was that the repealed s 99 did not give police an adequate basis to apprehend violent offenders. According to the Premier and the Police Association of NSW, *LEPRA* is cumbersome, unworkable, 'too narrow in its focus' and 'legal red tape' (Police Association of NSW 2013). The Premier's motto during the very short media campaign that accompanied the reforms, 'Uncuff Police so they can handcuff criminals', is mirrored by former NSW Police Detective Tim Priest: '... this legislation has handcuffed police for the past 11 years and prevented them from clearing out the violent and anti-social elements controlling our streets' (Priest 2013).

We will explain how some of the new, expanded grounds for arrest are either unnecessary, previously provided for, or unacceptably wide. *LEPRA* adequately provided for police to apprehend and deploy the power of arrest, where required, to commence proceedings against the person. Furthermore, we explain how key parts of the new provision paradoxically make the new arrest power more complex and ambiguous than before.

### *Charges being dismissed and civil action*

The second, related justification for expanding the arrest power is that 'criminals' are said to be exploiting 'lack of clarity' around police powers. For example, MLA Tim Owen stated: 's 99 ... was deemed too confusing and too complex and resulted in offenders escaping conviction or large payouts for wrongful convictions' (Lynch et al 2013:25590). This rationale fails to pay due regard to the civil justice system as an important and underdeveloped avenue for ensuring citizens receive adequate compensation where the conduct of police upon arrest or detention were unlawful. The Premier provided Parliament with information that there were '378 claims against the police for wrongful arrest in the five years until April 2012', causing MLA Paul Lynch to conclude that some police did not understand the law (Lynch et al 2013:25591). There are however no adequate, publically available statistics on the use of civil litigation in NSW and obtaining accurate data relating to civil claims against police is difficult (Ransley, Anderson and Prenzler 2007:150). Research suggests that litigation against the police is underused in Australia (as compared to the United States and the United Kingdom) and very few cases that could be litigated are (Hopkins 2011). There are significant, systemic barriers to civil litigation, including: the risk of adverse cost awards; the limited availability of legal aid; the prohibitive cost of accessing private lawyers (Hopkins 2011); and police resistance to the litigation process, such as not settling well-evidenced claims (McCulloch and Palmer 2005).

Eroding police accountability impacts on the provision of justice in a democratic society both directly, by reference to those specifically impacted by unlawful or otherwise improper police conduct, and indirectly, through public perceptions of the unequal application of law. Criminal prosecutions of police, including critical incidents, are investigated by police rather than an independent investigation service. In contrast, civil litigation can function as a police accountability mechanism (Ransley, Anderson and Prenzler 2007; Hopkins 2011; Hunter 2011). The High Court has recognised in *NSW v Ibbett* (at [38]–[54]) that the award of exemplary damages for assault and trespass, for example, is an established method by which the State is called to account for police misconduct. Hunter (2011:143) argues that:

To be effective, the message from litigation should enhance good policing practice and that this practice requires conformity to the law and, as a consequence will promote robust prosecutions is a message for police educators and for police management.

In contrast, the explicit rationale of the NSW Government is that the arrest reforms should, and will, limit civil action against the police. It follows that the reforms are intended to lead to a reduction in both civil actions for misuse of police power and police accountability for same. Underpinning this logic (and undermining the presumption of innocence) is the erroneous labelling of those charged, but not yet convicted of an offence, as ‘criminals’ in both NSW Government and police discourse justifying legislative reform.

### *Deployed for the purpose of deterrence*

The third rationale for statutory reform is that arrest should be deployed for the purpose of criminal deterrence. In his second reading speech for the LEPPRA Amendment Bill, the Premier explained that the Reviewers, as well as being influenced by comparative legal jurisdictions:

were also influenced by a 2012 NSW Bureau of Crime Statistics and Research [BOCSAR] report on the effect of arrest and imprisonment on crime. That report assessed the extent to which the probability of arrest, the probability of imprisonment and imprisonment duration impacted on crime rates. Importantly, the BOCSAR report found the biggest deterrent to criminals is the risk of arrest. (O’Farrell 2013b:60)

According to BOCSAR (2012), a 10% increase in the risk of arrest produces a 1.35% reduction in property crime, and just under a 3% reduction in violent crime. There has been only one other substantial Australian study comparing the effects of arrest and imprisonment on crime, and BOCSAR suggest this study has methodological limits (Wan et al 2012:2, 6–7). The relationship between criminal justice mechanisms and crime deterrence is a highly contested field of research internationally. As we explore shortly, the premise that arrest has a deterrent effect on offending, and that this is an objectively legitimate function of arrest specifically, and of criminal justice mechanisms more broadly, requires greater substantiation.

The Premier did not mention that BOCSAR found the effects of increased income on crime reduction to be far stronger than those of arrest rates. For both property offences and violent crime, BOCSAR conclude that measures that affect the economic wellbeing of the community provide more potential leverage over crime than arrest (Wan et al 2012:16–17). In their report, the Reviewers however only cite BOCSAR’s argument that ‘policy makers should focus more attention on strategies that increase the risk of arrest and less on strategies that increase the severity of punishment’ in justifying the introduction of pro-arrest law (Tink and Whelan 2013:2). The Reviewers assert that the new arrest power reflects BOCSAR conclusions ‘and will ensure police have the appropriate power of arrest to prevent criminal activity’ (Tink and Whelan 2013:2, emphasis added). The legislative reform of arrest as a crime-prevention strategy constitutes a major shift to the formal legal purpose of arrest. BOCSAR conclude that arrest has a deterrent effect only if arrest rates are increased above current levels (Wan et al 2012:16). The purpose of the legislative reforms appears to be to enable a substantive *increase* in arrest rates, on the premise that this will deter alleged offenders. Critically, the deterrence thesis of increasing arrest rates for crime control is premised on arrest as a first resort and conflicts with the common law principle of arrest as a last resort for commencing proceedings.

## Key legislative reforms to arrest powers

The *LEPRA Amendment Act* made numerous changes to the repealed s 99. We will focus on four key changes to the repealed section that we argue expand the arrest power for proactive policing purposes: the removal of the explicit reference that arrest is for the purpose of commencing proceedings; the introduction of the ‘reasonably necessary’ standard in the second stage of the test; removal of an express provision that an officer ‘must not arrest’ unless it is for specified purposes, and widening these purposes (now ‘reasons’) for arrest. The relevant extracts of the repealed and current provisions considered in this article are set out below.

### Repealed provision (extract):

- 99(1) A police officer may, without a warrant, arrest a person if:
- (a) the person is in the act of committing an offence under any Act or statutory instrument, or
  - (b) the person has just committed any such offence, or
  - (c) the person has committed a serious indictable offence for which the person has not been tried.
- (2) A police officer may, without a warrant, arrest a person if the police officer suspects on reasonable grounds that the person has committed an offence under any Act or statutory instrument.
- (3) A police officer must not arrest a person for the purpose of taking proceedings for an offence against the person unless the police officer suspects on reasonable grounds that it is necessary to arrest the person to achieve one or more of the following purposes:
- (a) to ensure the appearance of the person before a court in respect of the offence,
  - (b) to prevent a repetition or continuation of the offence or the commission of another offence,
  - (c) to prevent the concealment, loss or destruction of evidence relating to the offence,
  - (d) to prevent harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence,
  - (e) to prevent the fabrication of evidence in respect of the offence,
  - (f) to preserve the safety or welfare of the person.

### New provision (extract):

- 99(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.

### *From last to first resort*

In two key ways, the new s 99 sets about achieving Parliament's intention to change the purpose of arrest from a last resort for laying charges to a first resort for laying charges and deterring crime, as follows. First, the new section removes the explicit reference contained in the previous s 99(3) that the purpose of arrest is to commence proceedings. Parliament would, however, need to expressly extinguish this common law principle, which it has not done. The new s 99(3) implies that there must be an intention to arrest in order to commence proceedings:

- (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.

However, removing the explicit reference to the purpose of arrest for prosecution, communicates to police that they *may* arrest in circumstances, particularly minor matters, where they may otherwise not have considered commencing proceedings, but rather would have dealt with them by way of a diversionary measure. The absent wording may lead police to believe, that they may use the power to increase arrest rates for the purpose of deterrence, whether 'prosecution-directed' deterrence, or not. This would be in accordance with Premier O'Farrell's stated rationale for the changes to s 99.

Second, s 99(1) has made the test for exercising the arrest power potentially more ambiguous for police. There are two stages that an officer needs to consider before effecting an arrest. The first is whether a police officer suspects on reasonable grounds that an offence is being or has been committed. The previous s 99(2) and the new s 99(1)(a) are substantially similar in that they state the general power that a police officer must first have a suspicion on reasonable grounds that the person has committed an offence. An improvement in the new provision is that s 99(1)(a) now brings the suspects on reasonable grounds test into play in relation to *committing* an offence, where it was not previously spelt out. Furthermore, collapsing the old ss 99(1) and 99(2) is a welcome simplification of the first stage of the test.

It is the second stage of the arrest power that is of concern — that is, whether or not the arrest is necessary. The repealed provision required that the police officer 'must not arrest' unless the officer 'suspects on reasonable grounds' that the arrest was *necessary* to achieve one of the purposes set out in the subsection (s 99(3)). The new section provides that an officer 'may arrest' if satisfied that 'it is *reasonably necessary*' for one or more of the reasons that are then set out in s 99(1)(b). Magistrate Heilpern's analysis of the language of the old s 99 highlighted the clear boundaries set by Parliament and intended by the inclusion of 'must not arrest':

- 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. (*R v McClean* at 25)

By replacing 'must not arrest' with 'may arrest' Parliament has watered down the unambiguous restrictions placed upon police with regards to the circumstances they are entitled to arrest (for a discussion of Parliament's intent in first enacting s 99, see Sanders 2013:21–2).

The new formulation is more complex than previously. It is either necessary to arrest or it is not. The meaning of necessary is plain. It is that there is no other means of securing the purpose for the deployment of the arrest. 'Reasonably necessary', on the other hand, is arguably less susceptible of certain application when reading the shifts in language as a

whole from the old to new provisions. The previous provision called for the officer to apply only one test, that of ‘suspicion on reasonable grounds’, to both establishing whether an offence had been committed and whether under s 99(3) arrest was necessary to achieve one of the purposes set out in that subsection. The section now imports two different tests that the officer must apply at the time of making arrest: the reasonable grounds test (s 99(1)(a)) and a ‘reasonably necessary’ test (s 99(1)(b)).

The principles in *R v Rondo* have provided clear guidance as to how the test ‘suspects on reasonable grounds’ should be applied. The NSW Parliament imported the new formulation ‘reasonably necessary’ from the Queensland legislation, without providing an explanation why this aspect of the test has changed. It has failed to indicate in any adequate detail the objective nature of the test in the context of the new s 99. Given that the Queensland test appears to ‘require some objective test to be applied’ (Douglas and Harbidge 2008:26), it would still seem that the test is not a purely subjective one. The courts may well interpret ‘reasonably necessary’ as requiring the officer be satisfied on an objective basis that the arrest was necessary (Griffith 2013:9).

The courts may grapple with determining Parliament’s intent in departing from the longstanding ‘suspect on reasonable grounds’ test. As outlined, the shift away from mandatory language that makes arrest a last resort (from ‘must not arrest’ to ‘may arrest’) reflects Parliament’s intention that the statute expand police discretion to arrest as a first resort. If the courts do interpret ‘reasonably necessary’ as meaning the same as the ‘suspect on reasonable grounds’ test, the legislative intention of Parliament may well be thwarted. In the meantime, frontline police will struggle to give their own meaning to the phrase ‘reasonably necessary’ to arrest.

## New reasons for arrest

The amended s 99(1)(b) provides for five new reasons justifying arrest (following the formation of a reasonable suspicion that an offence has been committed).

### **(1) To stop the person fleeing and to enable inquiries to be made to establish the person’s identity: ss 99(1)(b)(ii)–(iii)**

The new reasons relating to fleeing and identity appear unnecessary given the power to arrest to ensure ‘the appearance of the person before a court in respect of the offence’ (s 99(1)(b)(iv); previously s 99(3)(a)). In relation to persons fleeing, the Review Report did not consider this to be the case:

Police are of the view that the power to arrest to ensure a person’s attendance at court does not provide adequate authority to arrest a suspected offender fleeing from police or the scene of a crime as it requires a convoluted ‘chain of reasoning’ to be established by the arresting officer ... we are convinced by police argument that if this criteria were omitted it may invite argument in Court that Parliament intended that police could not arrest a person ... who was running from the scene of a crime. (Tink and Whelan 2013:5)

The Reviewers’ argument is that if ‘fleeing’ is not specified as a distinct head of power authorising arrest, the authority to arrest on this basis is either lost to police, or will be found unlawful by the courts. Unsubstantiated police views on this issue are unconvincing. It is well established that where there are issues regarding identity or place of residence, there may be difficulties in issuing a Court Attendance Notice (*DPP v Carr* at [6]) and therefore arrest may be made to secure a person’s attendance at court. Fleeing a scene is logically a

valid reason for arresting a person, in appropriate circumstances, to ensure their attendance at court, as the ability to issue a Court Attendance Notice (as first option for laying charges) is thwarted by the suspect's behaviour in trying to escape.

The specification of reasons for arrest to include conduct such as not having identification and fleeing police, reconstructs the meaning of arrest law in several ways. The inclusion of the identity provision may communicate to police that arrests for the sole purpose of establishing identity (NSW Council for Civil Liberties 2013:[2.2]) or arrest for the sole purpose that someone is fleeing police, are permissible. Critical here is the repeal of the explicit prerequisite that an arrest must be for the purpose of 'commencing proceedings'. It may communicate to police that they may arrest a fleeing person or to establish identity in relation to minor matters that may have otherwise been dealt with by way of diversionary action.

The requirement that police must first form a reasonable suspicion that the person has committed or is about to commit a criminal offence *before* arresting for one of the reasons, does not preclude a *practice* of arrest for the sole purpose of fleeing a crime scene or establishing identity. The construction of police suspicion in practice is rarely preparatory or linear, particularly when the goal of crime prevention justifies intervention on the basis of suspicion to be later solidified on objective grounds. The artifice in law of a distinctive, individualised moment of suspicion before a police power is exercised, elides how suspicion is largely shaped in and through social relations, whereby police and those policed are immersed in negotiations over power (Dixon et al 1989:188–9). The formation of grounds for reasonable suspicion on the basis of stereotypes or a suspect being 'out of place' and incongruous, has been charted by scholars as commonplace in police culture (see Dixon et al 1989:185–9). Fleeing from police or a crime scene, for example, might itself ground an initial suspicion, in advance of the formation of objective grounds to arrest. The particularisation of these 'reasons' for arrest communicates to police an explicit resource for 'the subsequent legal categorisation of behaviour' (Dixon et al 1989:196) Empirical research on the contemporary relationship between the practice and law of arrest is warranted.

**(2) *To obtain property in the possession of the person that is connected with the offence: s 99(1)(b)(v)***

Allowing for arrest to obtain property extends arrest powers to an area of investigation that was previously achieved without the need for arrest. Police already have wide powers under *LEPRA* s 21 to carry out the investigative function of evidence-gathering and obtaining property connected with an offence by searching for and seizing items without arresting the person. Of course, it may then be open to police to arrest for another lawful purpose following the detection or seizure of those items.

The Review Report gives the following example as to when the new reason to arrest would apply:

We discussed this issue with police who indicated they wanted this section to obtain evidence that may be on an offender at the time of the arrest (for example, in a shoplifting incident, it would allow police to seize stolen material). (Tink and Whelan 2013:4)

The example of arresting to obtain property from a shoplifting incident reveals the intention of police to apply the power to a minor offence. It also indicates that those officers consulted may not have a proper understanding of their own powers. *LEPRA* s 21 readily establishes that an officer has the power to seize and detain a thing that the officer suspects on reasonable grounds is stolen or otherwise unlawfully obtained, such as goods stolen in the

context of a shoplifting incident, without the need to arrest. Making it lawful to arrest to obtain property effectively authorises arrest for a wide variety of common and relatively minor offences — for example, drug possession offences and property offences such as shoplifting and goods in custody — where a Court Attendance Notice would be the appropriate way of bringing the person to court. Given existing search powers, arresting a person suspected of committing an offence purely to obtain property is unnecessary and may potentially achieve no other purpose than to increase arrest rates.

**(3) *To protect the safety or welfare of any person (including the person arrested): s 99(1)(b)(viii)***

This new reason finds its roots in the judgment of His Honour DC Judge Conlon in *Johnson v The Queen*. This appeal against conviction for a ‘resist police officer’ charge was referred to in Premier O’Farrell’s speech introducing the Bill to Parliament (O’Farrell 2013:60), in particular the following judgment extracts:

The community would be entitled to be concerned that the provisions of this section do not take account of the extreme variables that confront police officers in dealing with aggressive, violent situations, especially when persons are under the influence of drugs and alcohol ... This section needs to be re-legislated by persons who have a realistic appreciation of the many volatile situations in which it is desirable for arrest to be effected by police officers. (*Johnson v The Queen* at 5)

What the Premier omitted from his speech was that His Honour found that the police officer making the arrest in this case acted lawfully under the now-repealed arrest power in that the officer ‘had in mind subs 3(b) when he effected the arrest and he did so on reasonable grounds’ (*Johnson v The Queen* at 5). That is, there were grounds for arresting to prevent the repetition or continuation of the offence. The now-repealed section that was in such ‘urgent need of attention’ was in fact adequate to make lawful the arrest of Mr Johnson, whose appeal was dismissed. Police have the discretion to ensure the safety of victims from future violence by arresting the accused pursuant to the existing reason to prevent the repetition of the offence.

Judge Conlon’s comments were likely to have stemmed, in part, from the finding that the offender appeared ‘drug and alcohol affected’ and that ‘they (referring to both the victim and the appellant) were becoming aggressive’, and also from His Honour’s observations that the previous purpose of arrest did ‘not include having regard to the safety of victim or indeed the safety and welfare of ambulance officers who attend scenes of assaults or other violent confrontations’ (*Johnson v The Queen* at 5).

The inclusion of the reason to arrest to protect the *safety* of any person may have the benefit of shielding third parties from harm when police are confronted with a violent offender in a volatile situation. However, allowing for arrest for the protection of the ‘welfare’ of any person is too broad and has the potential to be applied inconsistently given the breadth of the term, which is undefined in the legislation. If ‘welfare’ is interpreted broadly, there is a danger of arrests being effected for reasons falling short of ensuring a person is protected from maintaining their safety or to prevent the repetition of an offence. With such a broad power now available, it is essential that police are well trained to be aware of the range of alternatives to arrest and legislation that assist police to prevent violent harms without arrest. For example, police have the discretion (pursuant to *LEPRA* s 206) to detain an intoxicated person found in a public place if they are likely to cause injury to themselves or another person. Further, police have the power to apprehend and take a person to a mental health facility (pursuant to the *Mental Health Act 2007* (NSW) s 22) if the

person appears to be suffering from a mental illness or disturbance and has committed an offence, or if it is probable that the person will attempt to cause serious harm to themselves or another person.

**(4) *Because of the nature and seriousness of the offence: s 99(1)(b)(ix)***

The breadth of this final new reason introduces substantial ambiguities into the grounds for arrest. What constitutes sufficient seriousness? What ‘nature’ of offences is intended to trigger arrest? Are individual officers to exercise their own discretion in interpreting these terms? If NSW Police are to define and direct which offences are to fall into this category, is that assessment likely to be subject to changing policies over time, and will it differ across the priorities of local area commands?

The NSW Law Society argues the breadth of this provision may lead to arrests being based on blanket policies or stereotypes (Lynch et al 2013). While not specified in the legislation, a presumptive pro-arrest policy in relation to domestic violence appears to be the intended focus of the operation of this section: ‘Importantly, we think this provision would give certainty to police to make an arrest when confronted with sufficient evidence of a domestic violence offence’ (Tink and Whelan 2013:5).

Victims of domestic violence certainly require protection from those who are alleged to have committed offences against them. Indeed, if there is a need to arrest — for example, to prevent a repetition of the offence — then, in some circumstances, arrest may well be the lawful and appropriate course for laying charges. However, a blanket or presumptive policy to arrest because of the offence type does not take into account individual circumstances including the nature and circumstances of the offence and the likelihood of a repetition of the offence.

Moreover, in the Review Report the rationale for increased arrests for domestic violence offences is to prevent domestic violence crime: ‘We accept that the view of police that international academic research has demonstrated that arresting domestic violence offenders deters future domestic violence offending’ (Tink and Whelan 2013:5). While the research relied on by police was not referenced, there is no consensus in this field. For example, Lawrence Sherman, the prime promoter of the thesis that arrest deters domestic violence in the United States, found in later work that arrest could *increase* the frequency of offending, especially for unemployed and minority offenders, and points to other recent international research with similar results (Sherman 2002). Excessive or unnecessary arrests experienced as punishment may increase defiance and future crime in marginalised communities (Sherman 1993). Increasing attention is being given internationally to the value of procedural justice in shaping effective policing of domestic violence. The problem of police under-enforcement of the law is not necessarily remedied by pro-arrest policy, as research from different jurisdictions indicates it may backfire with the unintended consequence of ‘dual arrest’ of victims alongside alleged offenders (Stubbs 2013:10–15). This article does not provide a survey of the literature regarding pro-arrest policies and potential effects on the prevalence of domestic violence. Empirical research on this question is presently being conducted in Australia in partnership with NSW Police (see Stubbs 2013), and warrants consideration for understanding how the new arrest laws will be operationalised.

## Systemic impacts of higher arrest rates

NSW Parliament's intention to widen arrest powers to deter crime may have unintended effects on other critical criminal justice policy issues. We briefly overview key policy areas not adequately considered in the legislative reform process, and argue that these must be monitored to assess the potential impact of the new arrest laws.

### *Indigenous people, vulnerable people and the use of force*

Arrest reforms will likely have a disproportionate impact on Indigenous people and vulnerable people, such as those with a mental illness. The Royal Commission into Aboriginal Deaths in Custody insisted that arrest be a measure of last resort as a way of reducing the appalling over-representation of Indigenous persons in the criminal justice system (Commonwealth 1991:Vol 5 [87(a)]). Despite this recommendation, research indicates that Indigenous people are arrested at disproportionately high rates, both in relation to adults (Hunter 2001) and young people (Cunneen 2008:47). The police practice of not using alternatives to arrest for Indigenous people in relation to minor offences (Behrendt, Cunneen and Libesman 2009), and the often resultant offences of resist arrest, assault police and offensive language, has been noted by the courts as requiring urgent attention (*DPP v Carr*).

Previous diagnosis of a mental disorder has also recently been found to be associated with higher arrest rates (Forsythe and Gaffney 2012). People suffering a mental disorder are also over-represented in the prison population (Butler and Allnut 2003:2; Australian Institute of Health and Welfare 2013:34). Moreover, arrests 'gone wrong' particularly impact on those with mental health issues or who are drug affected — sometimes fatally, as was the case in the police arrest and shooting of Adam Salter, and in the arrest, tasering and death of Roberto Curti. Effecting an arrest triggers the operation of *LEPRA* s 231, thus allowing police to use 'reasonable force' to effect the arrest. Expanding the circumstances in which arrests may be made will likely increase the rate of instances where force is used by police, including for less serious matters and for reasons that were formerly improper or illegal. As the threshold for arrest lowers, the risk will rise of arrest potentially inflaming situations unnecessarily, such as where a person has committed a relatively minor offence (or perhaps no offence at all) and takes umbrage at being arrested in such circumstances.

### *Operation of LEPRA Part 9 and the remand population*

*LEPRA* s 99(4) makes clear that a person who is lawfully arrested 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.

If it is accepted that arrest rates are likely to rise, the practical effect is that detention for investigation can be achieved far more easily. This is because Part 9 will commence upon a lawful arrest being effected and in a wider number of circumstances for less serious offences. The effect upon an individual who experiences detention, even temporarily, should not be understated. The legislation acknowledges the operation of Part 9 as constituting punishment in that 'a court may take into account any period during which the person was detained' in passing sentence for a person convicted of an offence (*LEPRA* s 122).

An increase in arrests leading to increased detention under Part 9 will necessarily lead to an increase in bail determinations being made by police (and authorised officers upon

refusal of bail by police) pursuant to *LEPRA* s 114(4). Research cited by Brown (2013:81) identifies that the imprisonment rates in NSW between 1984 and 2008 rose 171.2%, with a significant component of the rise in imprisonment rates stemming from an increase in the remand population. The immediate drivers of the increase in the remand population in NSW are: an increase in the number of bail refusals in local and higher courts; an increase in the time spent on remand; a decrease in the number of decisions to ‘dispense with bail’; and an increase in instances of bail revocations (Brown 2013:82–3). If bail determinations are likely to increase as a result of the operation of *LEPRA* Part 9, the trends in relation to the impact of adverse bail determinations highlights the strong possibility of an increase in remand population. The impact of the new *Bail Act 2013* (NSW) on remand population remains to be seen (Brown 2013:94–5).

The Reviewers stated that ‘concerns were raised that increased arrest rates may also increase remand rates, however, police have stated this is not the case as not all people who are arrested are remanded, and some arrested will be discontinued once the purpose of arrest no longer exists’ (Tink and Whelan 2013:7). The Reviewers reliance on police dismissal of the role of arrest in increasing remand rates, rather than evidence-based research, is unpersuasive. The power to discontinue arrest has existed over the time of the increase on remand population cited above. In the context of the Premier’s expectation that there be an increase in arrest rates, the number of bail determinations logically must increase and the impact of adverse bail determinations — on individuals, their families and their communities, and financially<sup>1</sup> — requires consideration. Richards and Renshaw’s (2013) national study recommends minimising the unnecessary use of remand in relation to young people. The study details the devastating adverse impacts remand may have on young people, including: increasing the risk of potential physical and psychological harm as a result of removal from usual support structures; the negative impacts of associating with sentenced young people; difficulties accessing therapy; and being more likely to be given a sentence of incarceration than young people who received bail (Richards and Renshaw 2013:2–3).

## Conclusion

The NSW Government argues that its arrest reforms target violent offenders and serious crime. The breadth and ambiguity of the new arrest provision is likely to extend significant impacts beyond serious and violent crime. This article has explained how the reforms shift the purpose of arrest from a last resort for commencing prosecutions, to a first resort for the purpose of crime deterrence in order to increase arrest rates. Formalising the goals of ‘proactive policing’ in arrest law may exacerbate the overpolicing and incarceration of Indigenous people and other marginalised groups. Police practice requires monitoring to ensure the legislative reforms do not undermine diverse measures to address overrepresentation in the criminal justice system.

The focus should be with better training police on properly and lawfully exercising their powers. Well-trained police officers ought to know how to effectively use the extensive powers already available to them, while not infringing the fundamental rights of the person and thus giving rise to civil suits. Despite the ‘urgent need to reform’ s 99, since the enactment of the new provision on 16 December 2013, the *NSW Police Force Handbook* and the *Code of Practice for CRIME (Custody, Rights, Investigation, Management and*

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<sup>1</sup> Corrective Services NSW (2013) figures for 2013 indicate that it cost A\$222.90 per day to imprison an adult and the NSW Audit reported that in 2012 the average daily cost to detain a young person was A\$765 (Audit Office of NSW 2012:27).

*Evidence*), have not been updated to include the new provisions or provide guidance to police as to how they should be exercised.<sup>2</sup>

At the time of writing, the NSW Government has signalled its intention to amend the remainder of *LEPRA* with reforms focused on diluting the safeguards governing police powers (Part 5) and increasing the initial period of detention for investigation from four hours to six hours (Part 9), among other amendments. If additional reforms to police powers are to have a credible basis and properly consider the wider policy impacts, there must be a formal consultation process with a range of stakeholders within the criminal justice system.

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<sup>2</sup> This information is current as of 16 February 2014.

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