

Recent changes to police powers of arrest (amendments to section 99 of LEPR)

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1 Summary and background

1.1 Nature and purpose of amendments

The *Law Enforcement (Powers and Responsibilities) Amendment (Arrest Without Warrant) Act 2013* commenced on 16 December 2013.

It has made amendments to the arrest power in section 99. For those who are unfamiliar with section 99, see my latest *Police Powers Update* paper at www.criminalcle.net.au.

The ostensible reason for the amendments was to clarify police powers in relation to arrest, and to ensure that police have the powers they need to respond to diverse and volatile situations.

In my opinion the amending Act, which was poorly drafted and hastily enacted, does not achieve its intended purpose and is likely to cause confusion rather than clarity.

1.2 Background and legislative history

The amending Bill was introduced following a review commissioned by the Premier in response to concerns expressed by Judge Conlon of the District Court (concerns which were apparently shared by some members of the NSW Police Force and NSW Police Association, and which were picked up by talkback radio).

The review was conducted by Paul Whelan (a former ALP Police Minister) and Andrew Tink (a former Coalition Shadow Attorney-General). It was not a public review process and was conducted without input from stakeholders other than police and the Department of Justice and Attorney-General.

A copy of the Bill as passed, and the second reading speeches, can be found at:

<http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/131a07fa4b8a041cca256e610012de17/85f229b8ae726657ca257c13002893be?OpenDocument>

See the following links for debates in the Legislative Assembly:

http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20131113006?open&refNavID=HA4_1

and Legislative Council:

http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC20131119043?open&refNavID=HA3_1

1.3 Commentary on effect of amendments

It remains to be seen how the recent amendments will be interpreted by the courts. There has been some interesting commentary about the amendments and their likely effect.

Vicki Sentas and Rebecca McMahon in their article *Changes To Arrest Laws In NSW*, (published in *Current Issues in Criminal Justice* Vol.25 No.3 in March 2014, and posted at www.criminalcle.net.au with permission from the publisher), express the view that the amendments have significantly broadened police powers and have watered down the principle of arrest as a last resort.

Mark Dennis, in his paper *What The Fuck's Happening? - A Discussion Paper on Sections 99, 105 and 201 of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)* (April 2014, available at criminalcle.net.au), takes a different view. In his opinion, not a great deal has changed as a result of the amendments.

2 Power to arrest on reasonable suspicion of having committed an offence

Firstly, s99 has been amended to clarify that a police officer may arrest a person upon reasonable suspicion of having committed *any* offence, not just a serious indictable offence.

This is a sensible amendment made to correct what appears to have been an oversight in the original drafting of LEPR.

3 Amendments to “arrest as a last resort” provision (formerly section 99(3))

3.1 Replacement of s99(3) with new s99(1)(b)

Section 99(3), the “arrest as a last resort” provision, has been replaced with a new s99(1)(b). Subs 99(1) now reads as follows:

(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.

3.2 New reasons justifying arrest

The factors listed in old subs 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

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

This is vague and potentially open to abuse. 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”.

Incidentally, it has been suggested (in parliamentary debates) that arrest is appropriate for particular types of offences, such as domestic violence offences, because research has showed 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>).

There is some interesting discussion of this in the article by Rebecca McMahon and Vicki Sentas. As I interpret the BOCSAR report, the 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 Court Attendance Notice.

In *Hage-Ali v State of New South Wales* [2009] NSWDC 266, Elkaim DCJ held that, under the old s99(3), it was impermissible to arrest a person based on stereotypes about particular types of offences or offenders. The recent insertion of s99(1)(b)(ix) may have altered this position to some degree. However, it is suggested that, 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 the Local Area Commander to arrest *all* suspects for domestic violence offences (for example) would not be acting in accordance with s99.

3.3 Objective vs 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 may be 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 s99(3) with a wholly subjective one.

The new s99(1)(b) is said to be modelled on s365 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”), not a subjective one (“the police officer is satisfied that arrest is reasonably necessary”). Queensland authorities will therefore be of little or no assistance to NSW courts in interpreting the new s99(1)(b).

4 Power to arrest if directed to do so by another officer

A new s99(2) has been added. It provides:

“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.”

In situations where time is of the essence, this appears to make good sense. For example, Constable A witnesses an assault and is injured while trying to arrest the offender. He directs Constable B, who did not witness the offence, to pursue and arrest the fleeing offender.

However, in situations where there is a time lag between the direction and arrest, this could become problematic. For example, Sergeant X suspects on reasonable grounds that a suspect is involved in the supply of prohibited drugs. She is of the view that arrest is necessary to prevent the suspect from tipping off her accomplices and facilitating their escape. Sgt X directs Constable Y to go out and arrest the suspect. Meanwhile, however, the accomplices are arrested and a search warrant is executed which results in the seizure of significant evidence. By the time Constable Y makes contact with the suspect, the concerns held by Sgt X are no longer in existence. However, on a literal reading of subs(2) it would still be lawful for Constable Y to arrest the suspect.

An even more glaring example is a case of mistaken identity. Supposing one officer directs another to arrest a suspect, but it then becomes clear that the person is no longer a suspect. Does officer A have an obligation to revoke the direction as soon as this becomes known to her? Does officer B have an obligation to satisfy himself that the reasons for officer A's direction is still valid, especially if some days or even weeks have elapsed since the direction was given?

5 Purpose of arrest

Although the old s99 did not spell out that an arrest must be for the purpose of commencing proceedings, the old s99(3) referred to arrest for the purpose of commencing proceedings, and the authorities have made it clear that an arrest for an extraneous purpose (such as investigation) is not lawful.

The new s99 does not include any reference to arrest for the purpose of commencing proceedings.

Combined with the insertion of the new subs(1)(b)(iii), this has led to suggestions that the police may now have the power to arrest solely for the purpose of confirming someone's identity, rather than for the purpose of commencing proceedings.

However, I do not agree with this interpretation. The pre-existing common law is very clear: Even if police suspect on reasonable grounds that the person has committed an offence, an arrest will not be lawful unless it is for the purpose of commencing proceedings. Had the legislature intended to depart from this well-established common law principle, it would have been necessary to use express language.

Further, the new s99(3) requires the person to be taken before an authorised officer to be dealt with according to law (unless the arrest is discontinued before that). This supports the proposition that an arrest must be for the purpose of taking proceedings.

6 Discontinuing arrest

Section 105, which allows the police to discontinue an arrest at any time, has been amended by adding subs(3) which provides:

“A police officer may discontinue an arrest despite any obligation under this part to take the arrested person before an authorised officer to be dealt with according to law.”

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Updated April 2014