

LEPRA section 201 – recent developments

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1 Introduction

Section 201 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) requires police officers to provide certain information (and, in some cases, warnings) when exercising most types of powers.

The obligation to comply with s201, 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. However, this decision was overturned by the Court of Appeal in *Poidevin v Semaan* [2013] NSWCA 334.

Following a government review of LEPRA, some amendments to Part 15 (which includes s201) have recently been enacted. The amendments are in Schedule 2 of the *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*, which was assented to on 24 June 2014. Schedule 2 commenced on 1 November 2014.

2 Summary of section 201 (before recent amendments)

1.1 Application

Police are required to comply with s201 when exercising a range of powers conferred by LEPRA, other legislation and common law.

Subs(3) provides that s201 applies to the exercise of the following powers (whether or not conferred by LEPRA, but *not* under Acts listed in Schedule 1):

- (a) search or arrest;
- (b) search of a vehicle, vessel or aircraft;
- (c) entry of premises (not being a public place);
- (d) search of premises (not being a public place) (note that Sub-section 3AA provides that Section 201 does not apply to certain search and entry powers conferred by covert search warrants);
- (e) seizure of property;
- (f) stop or detention of a person (other than under Part 16) or a vehicle, vessel or aircraft;
- (g) requesting a person to disclose his or her identity or the identity of another person (including a power to require the removal of a face covering for identification purposes);
- (h) establishing a crime scene;
- (i) giving a direction;
- (j) requesting a person to open his or her mouth or shake or move his or her hair (under s21A)

- (k) requesting a person to submit to a frisk search or produce a dangerous implement or metallic object (under s26).

1.2 Exclusions

Subs(6) makes it clear that s201 does not apply to powers exercised under the Acts listed in Schedule 1.

This would include, for example:

- an arrest for breach of bail under the *Bail Act*;
- the detention of a person under the *Mental Health Act*;
- a direction given under the Road Transport legislation;
- the conducting of a forensic procedure under the *Crimes (Forensic Procedures) Act*.

1.3 Information that must be provided

Subs(1) requires the police to provide the person with:

- evidence that the police officer is a police officer (unless he or she is in uniform);
- the police officer's name and place of duty; and
- the reason for the exercise of the power.

1.4 Warnings that must be provided

Subs(2C) requires that, if exercising a power that involves the making of a request or direction that a person is required to comply with by law, the police officer must, as soon as is reasonably practicable after making the request or direction, provide the person with a warning that the person is required by law to comply with the request or direction. However, this warning need not be given if the person has already complied or is in the process of complying.

In the case of a direction given to a person under s198, on the grounds that they are intoxicated and disorderly in a public place, subs(2D) requires a warning to be given even if the person is complying with the direction. The police must warn the person that it is an offence to be intoxicated and disorderly in that or any other public place at any time within 6 hours after the direction is given.

If the person does not comply with the request or direction after being given that warning, and the police officer believes that the failure to comply is an offence, police must then warn the person that failure to comply is an offence.

1.5 Time at which information and warnings must be provided

When exercising a power to request identity, to give a direction to an individual, or to request a person to open their mouth or shake or move their hair, police must give the information required by subs(1) *before* exercising the power (subs(2A)).

In relation to all other powers listed (including giving a direction to a group), police must provide the above information *before or at the time of* exercising the power, if it is practicable to do so. Otherwise they must provide it *as soon as reasonably practicable afterwards* (s201(2) and (2B)). The implications of not complying with s201 as soon as practicable were discussed in the recent case of *Semaan v Poidevin* [2013] NSWSC 226 and *Poidevin v Semaan* [2013] NSWCA 334 (see discussion below).

As mentioned above, the requirement to give warnings only applies to powers involving requests or directions (which would include some search powers). The warning(s) must be given as soon as practicable after issuing the request or direction, but not if the person has complied or is complying (s201(2C)).

1.6 Powers exercised by two or more officers

If two or more officers are exercising a power to which s201 applies, only one officer is required to comply with the section (subs(4)).

However, if a person asks another officer present for their name or place of duty, the officer must give the information requested (subs(5)).

1.7 Police exercising more than one power at the same time

If a police officer is exercising more than one power on a single occasion in relation to the same person, police must only provide their name and place of duty, and evidence that they are a police officer, once. However, they must provide the reason for the exercise of each power (subs(3A)).

3 *Semaan v Poidevin; Poidevin v Semaan* - outline of facts

Mr Semaan was convicted in the Local Court of resisting a police officer in the execution of his duty. In a nutshell, he resisted a police officer's attempt to seize his phone in a purported exercise of the officer's common law power to deal with a breach of the peace. He appealed to the Supreme Court on a point of law.

Police attended a block of flats where they spoke to a group of males, after having received information suggestive of illicit drug use. The officers spoke to Semaan and in the course of this conversation Sergeant Poidevin said, "Wait here until we finish our checks. But it looks like at this stage you will be getting done for trespass". Another officer also said to him "stop swearing or you will be committing an offence", to which Semaan responded, "Oh come on, get fucked, we will see about this. You wait and see. You're fucked now".

Semaan then took his mobile phone from his pocket and started dialling. Sgt Poidevin said, "Mate, get off the phone, get off the phone" and, after his request was ignored, said "give it to me now". He then reached for the phone. Semaan rotated his body, putting the phone out of reach, and also put his right forearm against Sgt Poidevin's chest. Sgt Poidevin took hold of Mr Semaan's upper body and also took hold of the phone. Semaan struggled violently, and this was the basis of the resist charge.

4 Supreme Court decision – *Semaan v Poidevin*

Rothman J found two grounds on which the conviction should be overturned. He also made some obiter comments on breach of the peace.

4.1 Honest and reasonable mistake of fact

Firstly, the prosecution had not discharged its onus of establishing that the accused had not made an honest and reasonable mistake of fact as to whether the officer was lawfully exercising his duty (see discussion at paras 52 to 77).

4.2 Lack of compliance with section 201

Secondly, assuming the seizure of the phone was justified (as to which see discussion below), the prosecution had not proved the "execution of duty" element because there was no evidence that the officer had complied with s201 (see paras 99-110).

In relation to s201, His Honour essentially held that:

1. An important purpose of s201 is to ensure that people who are subject to the exercise of police powers are made aware of the motive of the police.
2. Failure to comply with s201 takes the police outside the lawful execution of their duty, except perhaps where the information required by s201 is already known to the accused.
3. In those situations where the section allows the police to comply with s201 as soon as reasonably practicable after exercising the power, failure to comply with s201 as soon as reasonably practicable *retrospectively* affects the lawfulness of the police officer's conduct.

His Honour said:

[105] The provisions of s201 must be given a purposive construction: *Project Blue Sky*. The purpose of the provision includes overcoming the difficulty to which I have already alluded, namely, a mistaken, honest and reasonable belief as to the motive of the officer.

[106] The officer is required to inform the person of the fact that s/he is a police officer; the station from which the officer derives; and the reason [or motive] for the exercise of power. After being so informed, the possibility of honest and reasonable mistake would not ordinarily arise (or, at least, would require some evidence to overcome the necessary inference from the provision of the information).

[107] The effect of s201(2) of LEPR is that the time for compliance does not arise until (or as soon as) it is not impracticable to comply. When it is first "not impracticable", the duty arises. Failure to comply (or compliance) with the duty, if that time were later than the exercise of the power, has a retrospective effect on the status of the conduct. In so doing, the officers are protected from any "unlawfulness" associated with the exercise of power.

[108] In the absence of evidence of compliance with s201(1) of LEPR, when first "not impracticable", prosecuting authorities are not entitled to rely on or to assert that the conduct was lawful. In other words, even if the conduct may not, at the time of the exercise of power, be "unlawful", in the absence of compliance with the mandatory provisions of s201(1) of LEPR, at the time prescribed, prosecuting authorities are not entitled to rely on the "lawfulness" of the conduct, unless, again reverting to a purposive construction, they can prove that the person, against whom the lawfulness is to be asserted, was otherwise aware of the facts prescribed in s201(1) of LEPR, or that it had not yet become "practicable". Neither has been proved in this prosecution.

[109] The prosecuting authority must prove that the police officer was executing his duty, and, to do so, must assert and prove the "lawfulness" of the officer's conduct. Because of the non-compliance with s201(1) of LEPR, and the failure to prove that the time for compliance had not yet arisen or passed, the prosecution is unable to do that and, therefore, it is unable to prove that Mr Semaan has resisted the officer in the execution of his duty.

4.3 Breach of the peace

His Honour also expressed the view that the seizure of the phone was not justified as there was no reasonable apprehension that it would be used to commit a breach of the peace. This was based on the reasoning that the phone itself was not being used to breach the peace; rather, Sgt Poidevin speculated that Mr Semaan might contact friends who would attend the location and cause a breach of the peace (see paras 78-97).

However, “the learned Magistrate found as a matter of fact that the action was taken for that reason and that the officer held that belief reasonably. As a consequence, I am unable to overturn the judgment on that basis, particularly, because it is not a ground of appeal.” (at para 98).

5 Court of Appeal decision - *Poidevin v Semaan*

The judgment of the Court of Appeal in *Poidevin v Semaan* [2013] NSWCA 334 was delivered on 10 October 2013. The lead judgment was delivered by Leeming JA (with whom Ward JA and Emmett JA agreed). Rothman J’s decision was overturned on both grounds.

5.1 Honest and reasonable mistake of fact

Firstly, it was held that the onus of raising a defence of honest and reasonable mistake of fact rests with the accused; only then does it fall to be negated by the prosecution. In this case, the appellant could not rely on honest and reasonable mistake of fact as it had not been raised in the Local Court (see paras 13 to 15).

5.2 Lack of compliance with section 201

Secondly, it was held that a failure to comply with s201 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 s201:

“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.”

The Court of Appeal was not required to decide whether police conduct occurring *after* it becomes practicable to comply with s201 would be rendered unlawful by lack of compliance with the section. I suggest that it would be unlawful, and there is nothing in the Court of Appeal’s decision to suggest otherwise.

5.3 Breach of the peace

Finally, in relation to the power to deal with a breach of the peace, Leeming JA said (at 32):

“To the extent that His Honour’s language might be taken to restrict the power to seize so that it was only available to seize a mobile phone about to be used as a weapon, rather than as a mobile phone, the power is not so limited.”

6 Issues for consideration

Rothman J raised a couple of issues in his judgment that were not commented upon by the Court of Appeal, and which leave some room for uncertainty.

- Firstly, His Honour commented that, although s201 is a mandatory provision, non-compliance with a mandatory provision will not always render the conduct unlawful

(see paras 102-103). However, His Honour went on to find that failure to comply with s201 when practicable did render the police conduct unlawful in this case.

- Rothman J also suggested that failure to provide some of the information required by s201 (eg the officer's name and place of duty) may not render the police officer's conduct unlawful, if that information is already known to the person subject to the exercise of the power. As His Honour explained, this reflects a purposive approach to the interpretation of the section.

7 Recent amendments to section 201 and related provisions

7.1 Background

A statutory review of LEPR was completed in 2013 by the Department of Attorney-General and Justice, with input from the Ministry for Police. The review took some years and, towards the end of 2013, the then Premier, Barry O'Farrell, suggested that the process was not moving quickly enough and there was an urgent need to fix up certain aspects of LEPR, particularly the power of arrest.

As a result, Paul Whelan (a former ALP Police Minister) and Andrew Tink (a former Coalition Shadow Attorney-General) were commissioned to review certain aspects of LEPR, including the power to arrest without warrant (s99), the detention after arrest provisions (Part 9), and safeguards (s201). It was not a public review process and was conducted without input from stakeholders other than police and DAGJ.

The Whelan/Tink report and the more comprehensive DAGJ report were released in December 2013.

As well as amendments to Part 15 (which includes s201), these reviews have resulted in amendments to s99 (see my separate paper on *Recent changes to police powers of arrest*, updated in April 2014) and to other aspects of LEPR (see *Police powers update July 2014: recent amendments to LEPR*).

Messrs Tink and Whelan recommended the following amendments, which significantly dilute the protection afforded by s201:

- Redrafting the section in "plain English". This would include simply stating that a police officer must "as soon as reasonably practicable" provide the information set out in s201(1). However, the section would continue to require the information to be given before exercising a power that consists of a direction or request to a single person.
- Amending s201(2C) to provide for only one warning to be given when making a direction or request that a person is legally obliged to comply with (instead of the current two-stage warning). However, the amended provision would need to allow for circumstances where a failure to comply with a request or direction is not itself an offence because some additional behaviour is required before the offence is triggered (eg being found intoxicated and disorderly in a public place within 6 hours of a direction being given).
- An amendment to provide that a police officer's failure to provide their name and place of duty would not render the exercise of the power unlawful. However, an officer's failure to provide name and place of duty would be a "notifiable" complaint under the *Police Act*, and therefore subject to automatic review by the Ombudsman. This new provision would be monitored by the Ombudsman over a 12-month period.
- A provision requiring any police officer present during the exercise of a power to provide their name and place of duty if asked (although failure to do so would not invalidate the exercise of the power).

Most of these recommendations have been taken up in the *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*, which was assented to on 24 June 2014.

Schedule 2 of the amendment Act repeals Part 15 of LEPR and inserts a new Part 15. It also makes some other amendments, set out below. Schedule 2 was proclaimed to commence on 1 November 2014.

7.2 Text of LEPR Part 15 (after amendments)

Part 15 - Safeguards relating to powers

Note : For other safeguards relating to seizure or confiscation of property by police, see Part 17. For other requirements relating to personal searches, see Part 4.

201 Police powers to which this Part applies

(1) This Part applies to the exercise of the following powers by police officers:

- (a) a power to stop, search or arrest a person,
- (b) a power to stop or search a vehicle, vessel or aircraft,
- (c) a power to enter or search premises,
- (d) a power to seize property,
- (e) a power to require the disclosure of the identity of a person (including a power to require the removal of a face covering for identification purposes),
- (f) a power to give or make a direction, requirement or request that a person is required to comply with by law,
- (g) a power to establish a crime scene at premises (not being a public place).

This Part applies (subject to subsection (3)) to the exercise of any such power whether or not the power is conferred by this Act.

Note : This Part extends to special constables exercising any such police powers-see section 82L of the Police Act 1990 . This Part also extends to recognised law enforcement officers (with modifications)-see clause 132B of the Police Regulation 2008 .

(2) This Part does not apply to the exercise of any of the following powers of police officers:

- (a) a power to enter or search a public place,
- (b) a power conferred by a covert search warrant,
- (c) a power to detain an intoxicated person under Part 16.

(3) This Part does not apply to the exercise of a power that is conferred by an Act or regulation specified in Schedule 1.

202 Police officers to provide information when exercising powers

(1) A police officer who exercises a power to which this Part applies must provide the following to the person subject to the exercise of the power:

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

(2) A police officer must comply with this section:

- (a) as soon as it is reasonably practicable to do so, or

(b) in the case of a direction, requirement or request to a single person-before giving or making the direction, requirement or request.

(3) A direction, requirement or request to a group of persons is not required to be repeated to each person in the group.

(4) If 2 or more police officers are exercising a power to which this Part applies, only one officer present is required to comply with this section.

(5) If a person subject to the exercise of a power to which this Part applies asks a police officer present for information as to the name of the police officer and his or her place of duty, the police officer must give to the person the information requested.

(6) A police officer who is exercising more than one power to which this Part applies on a single occasion and in relation to the same person is required to comply with subsection (1) (a) and (b) only once on that occasion.

203 Police officers to give warnings when giving or making directions, requirements or requests that must be complied with

(1) A police officer who exercises a power to which this Part applies that consists of a direction, requirement or request must give a warning to the person subject to the exercise of the power that the person is required by law to comply with the direction, requirement or request.

Note : A failure to comply with the direction, requirement or request does not constitute an offence unless a warning under this section has been given-see section 204B.

(2) A warning is not required if the person has already complied with or is in the process of complying with the direction, requirement or request.

(3) A police officer must comply with this section as soon as is reasonably practicable after the direction, requirement or request is given or made.

(4) If 2 or more police officers are exercising a power to which this Part applies, only one officer present is required to comply with this section.

204 Detention period for search of vehicles etc limited

A police officer who detains a vehicle, vessel or aircraft for a search must not detain the vehicle, vessel or aircraft any longer than is reasonably necessary for the purpose of the search.

204A Validity of exercise of powers

(1) A failure by a police officer to comply with an obligation under this Part to provide the name of the police officer or his or her place of duty when exercising a power to which this Part applies does not render the exercise of the power unlawful or otherwise affect the validity of anything resulting from the exercise of that power.

(2) Subsection (1) does not apply if the failure to comply occurs after the police officer was asked for information as to the name of the police officer or his or her place of duty (as referred to in section 202 (5)).

(3) Subsection (1) does not apply to the exercise of a power that consists of a direction, requirement or request to a single person.

204B Commission of offence in relation to exercise of powers where failure by police officer to comply with this Part

(1) A person does not commit an offence under this Act of failing to comply with a direction, requirement or request given or made by a police officer under or in connection with a power to which this Part applies unless the obligations under this Part are complied with when exercising the power.

(2) Subsection (1) does not apply to a failure by a police officer to comply with an obligation under this Part that does not render the exercise of the power by the officer unlawful because of section 204A.

7.3 New Schedule 5, Part 8

This provides that, for the period of 12 months after the commencement of the new s204A of LEPR, the Ombudsman is to keep under scrutiny compliance by police officers with their obligation under Part 15 to provide information about the name and place of duty of a police officer.

For that purpose, the Ombudsman may require the Commissioner of Police to provide information about the exercise of relevant functions by police officers.

The Ombudsman must, as soon as practicable after the expiration of the 12 month period, prepare a report and furnish a copy to the Attorney General, the Minister for Police and Emergency Services and the Commissioner of Police. A copy of the report is to be tabled in each House of Parliament as soon as practicable after it is so furnished.

7.4 Other amendments

A new subsection has been added to s198, to ensure that people being given a “move-on” direction for being intoxicated and disorderly in a public place are adequately warned:

(6) A police officer must give to a person to whom the officer gives a direction under this section (being a direction on the grounds that the person is intoxicated and disorderly in a public place) a warning that it is an offence to be intoxicated and disorderly in that or any other public place at any time within 6 hours after the direction is given. The warning is in addition to any other warning required under Part 15.

Some consequential amendments have also been made to various sections of LEPR, to take account of the restructured Part 15.

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10 December 2014