"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 Edition

"What the fuck's happening? I want to go home."
Richard Semaan in the presence of police at Auburn.
Semaan v Poidevin [2013] NSWSC 226 per Rothman J at [17]
(But see now *Poidevin v Semaan* [2013] NSWCA 334)

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Sections 99 and 105 of the *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)* [hereinafter "LEPRA"] were recently amended with the enactment of the *Law Enforcement (Powers and Responsibilities) Amendment (Arrest Without Warrant) Act 2013 (NSW)* [hereinafter "the amending legislation"]. The amending legislation was assented to on 27 November 2013 and commenced operation on 16 December 2013.

WHY DID THE LAW CHANGE ?

On Friday 27 September 2013 at Wollongong District Court, his Honour Judge Conlon SC dismissed the All Grounds Appeal of Keith Johnson. In doing so his Honour made a number of remarks critical of the then section 99 of LEPRA including the following:

> *"The community would be entitled to be concerned that the provisions of this section simply do not take account of the extreme variables that confront police officers in dealing aggressive, violent situations, especially when persons are under the influence of drugs and alcohol. Police officers need to be able to effectively and expeditiously deal with such offences without having to get out a copy of s.99(3)(a) to (f) to see if they can establish one of the purposes therein, before affecting the arrest."*

His Honour went on to say:

> *"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."*

Some of his Honour's remarks where reported in the local newspaper, *"Illawarra Mercury"* the following day on Saturday 28 September 2013. From there, his Honour's remarks became the subject of discussion on talk-back radio.

Wasting little time, the Police Association of NSW issued a Media Release dated Wednesday 2 October 2013 quoting Police Association President Scott Weber as follows:

> *"We support Judge Conlon's remarks recognising the legislation surrounding police arrest powers as being too narrow in its focus. "*
>
> *"Further we welcome his view calling for the law to be urgently amended to allow officers to consider the safety of other people on the scene, for*

example victims or ambulance paramedics, when establishing grounds for an arrest."

"Every day, police officers fulfil their goal of resolving countless violent and dangerous situations without force or minimal force. However, they also have to be aware of the dynamics of violent encounters and how quickly (measured in seconds) a subject can change his or her threatening behaviour into actual violence directed towards the public or the police themselves."

"The is especially a risk when people are under the influence of drugs and or alcohol."

"Our members need to be able to deal with and resolve violent situations without as Judge Conlon states, "having to get out a copy [of the legislation]... before effecting the arrest."

Wasting little time, by Media Release dated 10 October 2013 Premier Barry O'Farrell stated:

"Police have raised particular concerns about Part 9 and Sections 99 and 201 of the LEPRA Act and I want advice on legislative action to clean up these provisions as soon as possible. "

"Police tell me some criminals use the lack of clarity around arrest powers as a loophole to escape conviction and in some instances sue police for large pay-outs."

By way of seeking "advice", Premier O'Farrell enlisted the services of a couple of retired politicians; former ALP Police Minister Paul Whelan and former Liberal Attorney-General Andrew Tink. The Premier would later remark during the course of the Second Reading Speech that having the assistance of these two was:

"...akin to bringing together Ian Chappell and Tony Greig to play for the same side - that is, the public of New South Wales."

Wasting little time, the Bill was introduced to the Legislative Assembly on 30 October 2013. During the course of the Second Reading Speech Premier Barry O'Farrell stated:

"The job of front-line police is already hard enough, ***without being made harder by having to deal with legal complexities"****. [emphasis added].*

Premier O'Farrell also stated:

"The legislation seeks to "uncuff" the police so they can handcuff the criminals."

Wasting little time, the amending legislation passed both House of the State Parliament, was assented to on 27 November 2013 and commenced operation on 16 December 2013.

HOW HAS THE LAW CHANGED? - SECTION 99

The amending legislation repealed the old section 99 and then re-enacted it in its current form.

Appendix I of this paper (see page 25) shows section 99 in its post-amendment form.

Appendix II of this paper (see page 27) shows section 99 of LEPRA in its pre-amendment form.

In essence, it appears that the drafters of the new section have examined interstate legislation [and in particular section 365 of the *Police Powers and Responsibilities Act 2000 (Qld)*] and "improved" the NSW legislation by adding in those matters that were "missing" from the NSW section, but present in the Queensland legislation.

What follows is a discussion as of the new section 99 in comparison to the former section.

The Discretion Whether Or Not To Exercise The Power Of Arrest Remains

The new section 99(1) states that:

> *"A police officer **may,** without warrant, arrest a person if...."*

The former section 99(1) commenced with identical wording.

The meaning of "may and "shall" are defined in section the Interpretation Act 1987 (NSW). Relevantly, section 9(1) states:

> "In any Act or instrument, the word "may", if used to confer a power, indicates that the power may be exercised or not, at discretion."

For an interesting discussion regarding tortious acts of wrongful arrest and unlawful imprisonment involving the failure to exercise a discretion see *Zaravinos v State of NSW* [2004] NSWCA 320, 62 NSWLR 58.

The Common Law Principle That Arrest Be The Measure Of Last Resort Remains

The discretion whether to exercise the power of arrest at all remains. This same discretion existed under the pre-LEPRA general statutory power of arrest [see former s.352 of the *Crimes Act 1900 (NSW)*]. Specifically, the wording of the

former section 352 also used the word "may" in each of its four sub-sections granting police statutory powers of arrest.

When LEPRA was first legislated, the then Attorney-General Bob Debus in the Second Reading Speech stated:

> *'I turn now to powers relating to arrest. 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 arrest is a measure that 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. Clause 99, for example, clarifies that a police officer should not make an arrest unless it achieves the specified purposes, such as preventing the continuance of the offence. Failure to comply with this clause would not, of itself, invalidate the charge. Clauses 107 and 108 make it clear that **nothing in the part affects the power of a police officer to exercise the discretion to commence proceedings for an offence other than by arresting the person,** for example, by way of caution or summons or another alternative to arrest. **Arrest is a measure of last resort.** The part clarifies that police have the power to discontinue arrest at any time.'* [Emphasis added] - see Legislative Assembly Hansard 17 September 2002.

There is nothing in the amending legislation that reverses or diminishes the intention of Parliament.

Note that the Attorney-General was in error in stating that LEPRA "codifies the common law". This is so given section 4 of LEPRA. See also *Poidevin v Semaan* [2013] NSWCA 334 per Leeming JA at [21].

The preceding common law cases concerning arrest as the measure of last resort therefore remain relevant. A good summary of the leading common law authorities on this point can be found in *Fleet v District Court* [1999] NSWCA 363. Since that time see also *DPP v Carr* [2002] NSWSC 194, 127 A Crim R 151 at [35].

"Must Not" Removed From The Former s.99(3)

The new section 99(1)(b) requires that be "satisfied that it is reasonably necessary" to arrest for one of the reasons enumerated in the subsection.

The former section 99(3) was drafted such that it was mandatory ("must not") that the police officer "suspects on reasonable grounds that it is necessary" to arrest the person for one of the purposes enumerated in the subsection.

In practical terms, the position has not changed as a result of the amendment, given that the new subsection 99(1) permits police to arrest a person for any offence past or present AND ["and being the last word in subsection (1)(a)] the

police officer must then also "satisfied it is reasonably necessary" to fulfil one of the bases in subsection (1)(b).

To restate the above in another way - if a police officer fails to comply with both s.99(1)(a) and s.99(1)(b), then the law requires that they must not arrest the person. Nothing of substance has changed.

"Satisfied That It Is Reasonably Necessary"

As noted immediately above, the new section 99(1)(b) requires that police be "satisfied that it is reasonably necessary" as compared to the former section 99(3) requiring that police "suspects on reasonable grounds that it is necessary".

Much will turn on the interpretation of the word "satisfied" in the new section. It is the author's view that having publicly supported the call for legislative change, police may well have made it harder for themselves for the following reasons - firstly, it is the author's view that the word "satisfied" is indicative of the existence of a *belief* in a particular state of affairs - how can one be "satisfied" of something if one merely "suspects" it?. Secondly, the case law supports the proposition that a "suspicion" is something less than a "belief".

In particular, the following cases are of assistance:

George v Rockett [1990] HCA 26; (1990) 170 CLR 104. The relevant legislation concerned police powers and variously used both the terms "reasonable suspicion" and "reasonable belief" at different points. The joint judgment in this case cited at page 115 of the CLR stated:

> *"....it is necessary to bear in mind that suspicion and belief are different states of mind....The facts which can reasonably ground a suspicion may be quite insufficient to reasonably ground a belief...."*

At 116 the Court stated:

> *"The objective circumstances sufficient to show a reason to believe need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture."*

In *R v Rondo* [2001] NSWCCA 540; (2001) 126 A Crim R 562 his Honour Smart J (Spigelman CJ and Simpson J concurring) stated at [53]:

> *"A reasonable suspicion involves less than a reasonable belief but more than a possibility...."*

Both *George v Rockett* and *R v Rondo* were referred to with approval in *Hyder v Commonwealth of Australia* [2012] NSWCA 336 (see especially at [35]). An in-depth analysis of reasonable suspicion and / or reasonable belief is beyond the scope of this paper, however this authority does provide a comprehensive survey of the relevant authorities, and represents the most significant appellate authority in NSW of recent times on these issues.

Arrest For Any Offence

The new section 99(1)(a) authorises arrest for any offence past or present [subject to the further requirements under s.99(1)(b)].

The former section 99(1) authorised arrest if the person was [paraphrasing] (a) in the act of committing an offence; or (b) had just committed an offence; or (c) had committed a serious indictable offence for which the person had not been tried.

"Serious indictable offence" is not defined under LEPRA. It is defined under section 4 of the Crimes Act 1900 (NSW) as meaning "an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more."

The qualification in the former section 99(1)(c) created the curious anomaly that a police officer could not arrest a person for an offence that was not a serious indictable offence if it had happened in the past. As an example, common assault (maximum 2 years) is not a serious indictable offence. An offender who was successful in immediately fleeing the scene of a common assault in order to escape detection would never be able to be arrested by police for the offence.

The curious exception in the former s.99(1)(c) is in the exact same form as the former section 352(1)(b) of the Crimes Act 1900 (NSW). This was the general statutory power of arrest but also set out certain powers of citizen's arrest. The former s.352(1)(a) authorised both police and citizens to make arrests for offences that the arrested person was "committing" or "immediately after having" committed any offence. However, s.352(1)(b) had the effect of limiting the powers of a citizen's arrest to "serious indictable offences for which the person has not been tried." Citizens were prohibited from making arrests for offences committed in the past that were not a "serious indictable offence". That power was extended to police only pursuant to s.352(2)(a).

The author's view is that the former s.99(1)(c) represented a drafting error - with the limitations on citizen's arrest being inadvertently imposed upon police by the words of the former s.352(1)(b) having been unthinkingly transposed into LEPRA. This view is fortified by the absence of any definition in LEPRA of "serious indictable offence" for the purposes of that Act.

The new section 99(1)(a) does nothing more than correct the drafting error found in the former section 99(1)(c).

Specified Basis For Arrest - To Stop The Person Committing Or Repeating The Offence Or Committing Some Other Offence

The new section 99(1)(b)(i) outlines this basis.

The former section 99(3)(b) outlined the preventing of "a repetition or continuation of the offence or the commission of another offence."

Obviously Parliament felt the need to remove really BIG words such as "repetition", "continuation" and "commission" - so many syllables!! More simple words have been added in their place. This is no doubt extremely pleasing for some police who voiced concerns to the Premier that they found section 99 "complex and difficult to apply" (See Second Reading Speech - Hansard 30 October 2013).

Other than the terribly important linguistic modifications, there is no substantive change.

Specified Basis For Arrest - To Stop The Person Fleeing From A Police Officer Or From The Location Of The Offence.

The new section 99(1)(b)(ii) outlines this basis.

The former section 99(3)(a) authorised arrest "to ensure the appearance of the person before a court in respect of the offence."

The former section 99(3)(c) authorised arrest to "prevent the concealment, loss or destruction of evidence relating to the offence".

When comparing the new section with the former section, one would have thought that a person who was "fleeing from a police officer or from the location of the offence" might also be creating a suspicion on reasonable grounds that he or she may also be feeling at least a little philosophically challenged about the idea of appearing at court.

Importantly perhaps, the word "stop" is used. Police already know about this word and should have no trouble dealing with it.

This "new" basis for arrest adds nothing.

Specified Basis For Arrest - To Enable Inquiries To Be Made To Establish The Persons Identity If It Cannot Be Readily Established Or If The Police Officer Suspects On Reasonable Grounds That Identity Information Provided Is False.

The new section 99(1)(b)(iii) outlines this basis.

Both pre- and post this amending legislation, LEPRA contained within it powers for police to obtain the identity of a person if the officer "suspects on reasonable

grounds that the person may be able to assist in the investigation of an alleged indictable offence because the person was at or near the place where the alleged indictable offence occurred, whether before, when, or soon after it occurred." - see LEPRA section 11. It is an offence to fail to produce identification without reasonable excuse - see LEPRA s.12. It is also an offence opt produce false identification - see LEPRA s.13.

The former section 99 did not provide this basis for arrest.

One theoretical difference arises post-amendment, and that is the power to obtain identification information now extends to purely summary offences. However, if the person did not voluntarily provide identification when an officer was otherwise minded to proceed by way of a non-arrest option, how else (other than by way of arrest) would police be able to ensure the person's attendance at court with respect to a purely summary matter? Under the pre-amendment statutory regime, it was open to police to arrest the person, make the relevant inquiries, and then discontinue the arrest (see LEPRA s.105) once the identity is established, with police then reverting to the previously contemplated non-arrest option.

This "new" basis of arrest changes nothing of substance.

Specified Basis For Arrest - To Ensure That The Person Appears Before A Court In Relation To The Offence

The new section 99(1)(b)(iv) outlines this basis.

The former section 99(3)(a) authorised arrest "to ensure the appearance of the person before a court in respect of the offence."

Save for the elimination of the word "appearance" (substituted with "appears") and the elimination of the rather abstract concept (for police) of "in respect of" (substituted with "in relation to") there is no substantive change.

Specified Basis For Arrest - To Obtain Property In The Possession Of The Person That Is Connected With The Offence

The new section 99(1)(b)(v) outlines this basis.

The former section 99(3)(c) authorised police to arrest "to prevent the concealment, loss or destruction of evidence relating to the offence".

There is no real change here.

Specified Basis For Arrest - To Preserve Evidence Of The Offence Or Prevent The Fabrication Of Evidence

The new section 99(1)(b)(vi) outlines this basis.

Again, the former section 99(3)(c) authorised police to arrest "to prevent the concealment, loss or destruction of evidence relating to the offence".

Additionally. the former section 99(3)(e) authorised police to arrest "to prevent the fabrication of evidence in respect of the offence."

Again, there is no real change.

Specified Basis For Arrest - To Prevent The Harassment Of, Or Interference With, Any Person Who May Give Evidence In Relation To The Offence

The new section 99(1)(b)(vii) authorises this basis.

The former section 99(3)(d) was in substantially similar terms, save that "give evidence in proceedings in respect of the offence" has been dumbed down to "give evidence in relation to the offence." Once again, linguistically challenged police will be happy that the Premier has fearlessly come to their assistance. As for the rest of us, there is no real change.

Specified Basis For Arrest - To Protect The Safety Or Welfare Of Any Person (Including The Arrested Person)

The new section 99(1)(b)(viii) authorises this basis.

The former section 99(3)(f) authorised police to arrest "to preserve the safety or welfare of the person."

The new provision expands the position from the protection or welfare of the accused person to "any person including the arrested person." This might include victims, witnesses or others. Victims and witnesses were protected by the former section 99 in any case by virtue of the former s.99(3)(d). Further, if there is a concern about a repetition or continuation of the offence, or the commission of another offence that raises the issue of the protection r welfare of a third person, then the former s.99(3)(b) would authorise arrest.

Whilst it is possible to conceive of situations where a person who is not the arrested person, nor a victim or witness in the proceedings, who would still be in a situation requiring their safety or welfare protected, however, these situations would be relatively rare.

Specified Basis For Arrest - Because Of The Nature Or Seriousness Of The Offence

The new section 99(1)(b)(ix) authorises this basis.

There was no such basis of arrest contained within the former s.99(3).

It has always been the case that the nature or seriousness of the offence could provide a basis for arrest.

In terms of the seriousness of an offence, the real prospect of a custodial sentence in the event of conviction would warrant arrest for the purposes of ensuring the accused person's attendance at court (either by way of the imposition of significant bail conditions or by way of refusal of bail). This issue was provided for in the former section 99(3)(a) concerning ensuring the appearance of the person before a court.

As to the nature of the offence - the protection and welfare of the community and the protection of victims has always been relevant to the question of whether bail should be dispensed with, unconditional, conditional or refused. The nature of the offence might raise such issues. In order to impose bail conditions almost immediately that address these concerns, arrest is necessary. The former section 99 provided for these issues - see in particular the former s.99(3)(d).

WHAT IS THE RELEVANT CASE LAW FOR SECTION 99 OF LEPRA ?

New South Wales Case Law

Obviously the case law was decided under the old form of the section, however, it is still of relevance to a consideration of the newly re-drafted section.

A-G for the State of NSW v Bar-Mordecai [2009] NSWSC 396

This is the foundational case in NSW on the former s.99(3) [see now s.99(1)(b)]. Mr Bar-Mordecai had previously been declared a vexatious litigant by the Supreme Court. He was subsequently seeking to sue police for unlawful arrest, wrongful imprisonment, assault, negligence, and malicious prosecution and was thus seeking leave to file a Statement of Claim. The A-G for NSW opposed the granting of leave on the basis that the proposed cause of action was an abuse of process. The A-G's submission was rejected. In examining the merits of the cause of action, Smart AJ remarked upon the provisions of s.99(3) of LEPRA [see now s.99(1)(b)] at paragraphs [28]-[30] as follows:

> *"[28] In the second reading speech (Hansard, Legislative Assembly, 17 September 2002), the 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 Pt 8 reflect that arrest is a measure that 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. Clause 99, for example, clarifies that a police officer should not make an arrest unless it achieved the specified purposes, such as preventing the continuance of the offence ..."

[29] The authors of Criminal Practice and Procedure NSW write at p 626,002:

> *"Before the enactment of s 99, it was said that the power of arrest for an offence should not be exercised unless it is necessary to ensure the accused's attendance before the court and only where a summons would not be appropriate: Fleet v District Court of NSW [1999] NSWCA 363; BC9906539; (1999) 6 Crim LN 82 [1061]; Director of Public Prosecutions v Carr (2002) 127 A Crim R 151; [2002] NSWSC 194; BC200201026; (2002) 9 Crim LN [1401]. See also Wilson v DPP [2002] NSWSC 935; BC200206024. Section 99(3) now confines the use of arrest for the purposes of taking proceedings for an offence to certain defined circumstances."*

[30] I respectfully agree with the views expressed. I take the view that s 99(3) restricts the circumstances in which the power under s 99(2) may be exercised."

Williams v DPP (NSW) [2011] NSWSC 1085; (2011) 210 A Crim R 554

In this matter police attended a public hall for the purposes of arresting a person who was wanted for shoplifting. Police were aware or believed they were aware of that person's identity. The effected an arrest. Two others physically intervened and were subsequently charged with hinder police in execution of duty. At the Local Court a submission that there was no prima facie case was made as there was no evidence that police effected the arrest for one of the purposes set out in section 99(3) of LEPRA [see now s.99(1)(b)]. The magistrate was rejected the submission. On appeal to the Supreme Court, the magistrate was held to be in error. The decision of A-*G for the State of NSW v Bar-Mordecai [2009] NSWSC 396* was cited with approval at [23].

The relevant "purple passage" can be found at [25]-[26]:

> *"[25] As discussed the evidence indicates an intention on the part of the police at the time of arrest to take proceedings against Joel Williams in relation to the shoplifting offence, thus triggering the operation of s.99(3) of the LEPR Act. There was no evidence that the police had concerns in relation to any of the matters addressed in those sub paragraphs (a) to (f). In these circumstances, it would seem that the elements of a lawful arrest were not made out and therefore an element of the s 546C offences cannot be established at any subsequent hearing of the charge against the plaintiffs.*

[26] Without falling into the error of construing too strictly the unedited extempore remarks of the Magistrate in a busy court (see Acuthan v Coates (1986) 6 NSWLR 472 at 479) the substance of his Honour Magistrate Linden's decision does demonstrate an error in law because his Honour found that the offence of hinder police under s.546C of the Crimes Act was proven against the plaintiffs without finding that the requirements of s.99(3) of the LEPR Act had been met in respect of the arrest of Joel Williams by Sergeant Reid. His Honour erred in law by failing to apply s.99(3)."

DPP v Armstrong [2010] NSWSC 885

This case noted that a magistrate was in error in finding that section 99 of LEPRA was the only power available to police to effect an arrest. Davies J stated:

"[23] The Magistrate's undoubted error in relation to the arrest in s 99 was assuming that s 99 was the only source of power for a police officer to arrest a person without a warrant. It is not disputed that the police retain a power outside s 99 to arrest a person for breach of the peace. Section 4(2) of the Act expressly preserves police powers with regard to breaches of the peace."

Queensland Case Law

Of interest is that many of the new bases for arrest outlined in s.99(1)(b) of LEPRA can also be found in section 365 of the *Police Powers and Responsibilities Act 2000 (Qld).* The following case law from Queensland may be of assistance to practitioners in NSW.

Courtney v Thomson [2007] QCA 49; (2007) 170 A Crim R 233

Raymond Courtney was observed by police to be holding up some signs adjacent a busy road. The signs were said to be offensive to Queensland police, the Queensland Crime and Misconduct Commission, and others. It was held that the actions of Mr Courtney were designed to attract the attention of motorists, and this caused at least one motorist to swerve. Sergeant Thomson arrested Mr Courtney for public nuisance at a later time, namely when he had packed up his signs and was walking in the direction of his home. Mr Courtney was searched and as a result was charged over the possession of a knife. He was also charged with obstructing police as he allegedly pulled away from police during the course of a pat down search. The power to search Mr Courtney was contingent upon him being "lawfully arrested."

The prosecution failed to call any evidence that the police officer held any relevant reasonable suspicion, nor did they call any evidence to demonstrate that any of the bases for arrest under section 365 [see s.99(1)(b) of LEPRA in NSW] had been satisfied. The Queensland Court of Appeal unanimously quashed Mr Courtney's conviction for obstruct police.

de Jersey CJ stated at [13]:

> *"[13] There was however no direct evidence from Sgt Thomson of his having formed the requisite "reasonable suspicion" in arresting the applicant, or evidence bearing on whether an arrest was "reasonably necessary" in terms of s 365 (then s 198) of the Police Powers and Responsibilities Act. To establish Sgt Thomson's lawful entitlement to carry out the search which led to the obstruction, the prosecution needed to establish the lawfulness of the preceding arrest, and that depended on satisfying the requirements of s 365. That was not done."*

Jerrard JA held at [35]:

> *"[35] The important points are whether Sergeant Thomson reasonably suspected Mr Courtney had committed an offence when he arrested him, and whether, for example, he made the arrest to prevent the offence being continued. If Sergeant Thomson did so reasonably suspect, and make an arrest for that reason, the arrest would not be rendered unlawful because the charge on which Mr Courtney was arrested was later dismissed by a court. The lawfulness of the arrest does not depend on whether Mr Courtney was proven to have committed an offence, but whether Sergeant Thomson reasonably suspected Mr Courtney had. As to that, as described, the prosecution led no evidence."*

Holmes JA held at [43]:

> *[43] However, I would go a little further than the Chief Justice: not only did the prosecution fail to establish those matters, but the evidence of Sergeant Thomson strongly suggested that none of the reasons for arrest in s 365(1) existed. Sergeant Thomson's account was that he and his partner had seen the applicant with his signs, causing some difficulties with the traffic flow at the intersection of Finucane Road and Old Cleveland Road. They did not stop, because they were on their way to a more important job, and Sergeant Thomson knew Mr Courtney and where he could find him to follow the matter up. When they returned about an hour later, they saw the applicant walking along the footpath carrying his signs: he was walking in the direction of his residence. According to Sergeant Thomson, having located Mr Courtney, he "advised him he was under arrest for public nuisance".*

R v Hardy [2010] QCA 28

Pamela Hardy was required to undergo a breath test by Queensland police. After failing this test she was informed that she was required to accompany police to a police station. She demanded that "a female police officer be present at the scene" but was told that there were no female police officers working that night. Ms Hardy then stated that she would not go to the police station. She was told that she would be arrested if she did not go with police. The male arresting officer took Ms Hardy by the hand. She pulled her hand away. The officer then handcuffed her because (according to his evidence) there was no need for Ms

Hardy "to bring [up] that issue about getting a female officer" and it "gave him a clear indication that something is likely to happen" namely she was "going to be in a position where she is going to basically chuck a tantrum."

As a result of events that allegedly followed shortly after the above circumstances, Pamela Hardy was charged with three counts of seriously assaulting a police officer.

The matter went to trial before a jury. The prosecution relied upon the evidence of police that Ms Hardy had been arrested for her own safety and the safety of police [in NSW see LEPRA s.99(1)(b)(viii)]. The trial Judge's summing up was held to be defective in that it failed to specify the basis for arrest as found in the relevant section [equivalent to s.99(1)(b) of LEPRA].

Muir JA held at [34] (Fraser JA, Chesterman JA, concurring):

> *"[34] Having regard to the prosecution and defence cases, the primary judge was required to direct the jury on the findings of fact which, if made, would result in the conclusion that the arrest was lawful, or unlawful, as the case may be. He directed that it was lawful to arrest where there was a reasonable suspicion that "the adult has committed or is committing an offence if it is 'reasonably necessary' for one or more of a number of reasons which includes 'to preserve the safety or welfare of any person including the person arrested'". The direction, given with respect to s 365(1)(g) of the Police Powers and Responsibilities Act 2000 (Qld), left open the possibility of a finding that a lawful arrest had occurred for a reason not relied on by the prosecution, not addressed on by defence counsel, or not referred to in the summing-up. The summing-up failed to mention the basis for the arrest relied on by the prosecution."*

This case is authority for the proposition that the prosecution is required to particularise the specific basis relied upon for arrest. Writing to police seeking such particulars may, at best result in withdrawal of charges. It might also result in police having time to reflect on matters they wish to say in evidence (and highly unlikely included in their statements). It may alert the police prosecutor to a deficiency in the evidence of which operational police remain blissfully unaware.

One way of dealing with these difficulties is waiting until the prosecution has closed their case. You are entitled to seek particulars up until and including the close of the prosecution case - see *Johnson v Miller* (1937) 59 CLR 467 especially Dixon J at 490 and Evatt J at 497-498. This may help fashion submissions either as to the absence of a prima facie case, or possibly assisting in shaping final submissions.

Victorian Case Law

De Moors v Davies [1999] VSC 416

This case involved a consideration of s.458(1)(a) of the Crimes Act 1958 (Vic). This subsection relevantly outlines a number of bases for arrest namely:

> *(i) to ensure the attendance of the offender before a court of competent jurisdiction;*
> *ii) to preserve public order;*
> *(iii) to prevented continuation or repetition of the offence or the commission of a further offence; or*
> *(iv) for the safety or welfare of members of the public or of the offender;....*

The facts of the case involved a citizen's arrest. The manager of a hotel chased and apprehended a patron who had used an EFTPOS card in committing some dishonesty offences. In considering the legislation in this case Warren J stated at [13]:

> *"In summary, the provision empowers a citizen's arrest at any time of any person so as to deliver that person to the police where the apprehending person finds the other person committing any offence and where the apprehending person believes on reasonable grounds that the apprehension is necessary for the specified reasons. For present purposes those reasons include ensuring the appearance of the offender at court. Hence, s.458(1) requires a two fold test to be satisfied before the liberty of the individual can be infringed by a member of the public."*

The "two-fold test" referred to in the above passage is also relevantly applicable to police. The author's view is that the NSW legislation also requires a two-fold test. This point is effectively in accordance with the decided cases in NSW, though not expressed in those precise terms.

United Kingdom Case Law

The equivalent legislation in the United Kingdom is found in section 24 of the *Police and Criminal Evidence Act 1984*. This legislation is often referred to by its acronym, "PACE". The leading authorities concerning this section are *Regina v Bowden* [2002] EWCA 1279, 2 All ER (D) 427 (May), and *Regina v Self* [1992] 3 All ER 476. However, due to material differences in the legislation, and also material differences in the general case law on arrest, it is the author's view that these authorities are not really of any assistance to practitioners in NSW. However, it may prove worthwhile to monitor the development of UK case law in the event that something of assistance does emerge in the future."

HOW HAS THE LAW CHANGED? SECTION 105

The former section 105 of LEPRA stated:

> *(1) A police officer may discontinue an arrest at any time.*
>
> *(2) Without limiting subsection (1), a police officer may discontinue an arrest in any of the following circumstances:*
>
> > *(a) if the arrested person is no longer a suspect or the reason for the arrest no longer exists for any other reason,*
> >
> > *(b) if it is more appropriate to deal with the matter in some other manner, including, for example, by issuing a warning or caution or a penalty notice or court attendance notice or, in the case of a child, dealing with the matter under the Young Offenders Act 1997*

The new amended form of section 105 adds subsection (3) in the following terms:

> *(3) 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.*

This new subsection adds nothing. One wonders why the Parliament bothered. What is explicitly stated in subsection (3) is entirely implicit in subsection (2).

WHAT IS THE RELEVANT CASE LAW FOR SECTION 201 OF LEPRA ?

Section 201 of LEPRA (as at 23 March 2014) is set out in Appendix III of this paper (see page 28).

New South Wales Case Law

Poidevin v Semaan [2013] NSWCA 334

This case represents the first and only time s.201 of LEPRA has fallen to be considered by an appellate court in NSW (as at March 2014).

The facts in this matter were that police were called to attend a "domestic" at a block of apartments in Auburn. Upon speaking to the complainant, police were informed that the alleged offender may have gone next door. Police conducted enquires, and in doing so observed a group of men allegedly smoking cannabis in the grounds of the apartment block next door. A locked gate prevented police from entering the premises. Police remained behind the locked gate for a period of about 5 minutes and continued to observe the men before a resident came

along and opened it. The men fled - some of them were never apprehended. Richard Semaan walked up to the front of the flats. He was spoken to by a police officer who asked him what he was doing in the block of flats. He was asked for identification, which he produced. Senior Constable Hockey asked Mr Semaan to wait whilst checks were conducted on him. Mr Semaan waited as Senior Constable Hockey walked away to use the police radio.

At this stage Sergeant Poidevin and another officer approached Mr Semaan. The following exchange took place:

Mr Semaan shouted:

> *"What the fuck's happening? I want to go home."*

Sergeant Poidevin responded:

> *"Wait here until we have finished our checks, but it looks like at this stage you will be getting done for trespass."*

Mr Semaan responded:

> *"Oh come on get fucked. We will see about this, you wait and see, you're fucked now."*

Mr Semaan reached for his phone and commenced dialling. Sergeant Poidevin urged Mr Semaan not to use the phone and to give him the phone. Mr Semaan refused. Sergeant Poidevin attempted to grab the phone. Mr Semaan twisted away and raised his forearm. In the result both men went to the ground. Mr Semaan required an ambulance as a result of an injury to his leg. To this day no police officer has ever told Mr Semaan why he was restrained in that way. He was charged with hinder police.

The magistrate found that Sergeant Poidevin was not trying to arrest Mr Semaan but was trying to seize the phone due to a reasonable apprehension of an imminent breach of the peace.

Mr Semaan appealed to the Common Law Division of the Supreme Court. The matter was heard by Rothman J - see *Semaan v Poidevin* [2013] NWSWSC 226. His Honour Rothman J found at [94] and [95] that the evidence was not capable of sustaining the finding of fact by the Magistrate that the police officer reasonably apprehended an imminent breach of the peace. His Honour also found at [104] that the prosecution in the Local Court made no attempt to prove that it was not reasonably practicable for the requirements of s.201 to be complied with at or before the time the police officer attempted to seize Mr Semaan's phone. His Honour held tat [108] and [109] that the prosecution must provide evidence that it was not reasonably practicable to comply with the requirements of s.201 in order to prove that the officer was acting in the execution of duty.

The decision of Rothman J in the Common Law Division was appealed to the Court of Appeal. The parties agreed that in circumstances where it was not reasonably practicable to comply with the requirements of s.201, acts done by police during the period where it was not reasonably practicable were lawful at that time. The Crown Advocate argued that in the present matter the act of

hindrance was completed prior to the point that it was reasonably practicable for Sergeant Poidevin to make the relevant announcement, and thus the offence was complete. The Court of Appeal accepted this argument and the decision of Rothman J was overturned.

The Court of Appeal rejected the argument that the prosecution must lead some evidence as to the police officer turning his or mind to the question of whether it was reasonably practicable to make the relevant announcement under s.201 when relying on an argument to the effect that it was not reasonably practicable.

Leeming JA stated at [28]:

> *"...Section 201 is an important safeguard to the exercise of coercive power. But if in fact it is not practicable to explain the basis of the officer's authority and the reason for the exercise of power, then there is no sound reason to imply as an additional incident of his or her duty under s 201 (and therefore as an additional element of the offence created by s 546C) that the officer subjectively formed that (uncommunicated) opinion.*

It must be taken from the decision of the Court of Appeal that evidence to the effect that it was not reasonably practicable to comply with the requirements of s.201 at a given point in time is something that can be inferred from the primary facts in evidence pertaining to that point in time.

The Court of Appeal at [34] also rejected Rothman J's reasoning that it was not open to the Magistrate to find that the police officer reasonably apprehended an imminent breach of the peace.

It should be noted that both before Rothman J in the Common Law Division and in the Court of Appeal the Court in each case was not assisted by UK authority concerning similar UK legislation as referred to later in this paper. The parties were at the time unaware of such authority and failed to bring it to the attention of the Court.

The author is now of the view that relevant UK authority will inevitably be relied upon in NSW. It is at the least highly persuasive, and is likely to find its way in the decided cases concerning this legislation in the future.

United Kingdom Case Law

The equivalent provision to section 201 of LEPRA in the United Kingdom is section 28 of the *Police and Criminal Evidence Act* 1984. The section is as follows:

> *(1)Subject to subsection (5) below, where a person is arrested, otherwise than by being informed that he is under arrest, the arrest is not lawful unless the person arrested is informed that he is under arrest as soon as is practicable after his arrest.*
>
> *(2)Where a person is arrested by a constable, subsection (1) above applies regardless of whether the fact of the arrest is obvious.*

(3)Subject to subsection (5) below, no arrest is lawful unless the person arrested is informed of the ground for the arrest at the time of, or as soon as is practicable after, the arrest.

(4)Where a person is arrested by a constable, subsection (3) above applies regardless of whether the ground for the arrest is obvious.

(5)Nothing in this section is to be taken to require a person to be informed—

(a)that he is under arrest; or

(b)of the ground for the arrest,

if it was not reasonably practicable for him to be so informed by reason of his having escaped from arrest before the information could be given.

***DPP v Hawkins* [1988] 3 All ER 673**

This case is the foundational authority in the UK on the statutory equivalent to s.201 of LEPRA in NSW. Hawkins was arrested for common assault, three counts of assault police and the UK equivalent of offensive language. He was not informed as to the reasons for his arrest at the time he was arrested. It was found as a fact that it was not reasonably practicable to do so as he had put up a struggle and assaulted police. It was also found as a fact that it remained impracticable whilst he was being transported to the police station. It was found that when it became practical to inform Hawkins of the reason for his arrest it was held that he was not given the correct reason - either he was given the wrong reason or no reason at all.

It was argued on behalf of Hawkins that police were not acting in the execution of duty with respect to the charges of assault police due to the failure of the police to inform Hawkins of the true reason for his arrest, either at the time of his arrest, or at any time afterwards.

Parker LJ stated at 674-675:

"When a police officer makes an arrest which he is lawfully entitled to make but is unable at the time to state the ground because it is impracticable to do so, it is plain on the wording of the section that it is his duty to maintain the arrest until it is practicable to inform the arrested person of that ground. If, when it does become practicable, he fails to do so, then the arrest is unlawful, but that does not mean that acts, which were previously done and were, when done, done in the execution of duty, become retrospectively, acts, which were not done in the execution of duty. The 1984 Act certainly does not say so and contentions founded upon other consequences of an arrest being unlawful do not assist."

"In my judgment, the position is clear. It is impossible to contend that an officer who makes an arrest which he could lawfully make but is prevented by immediate violence from stating the ground of the arrest is not under a duty to state the ground of arrest as soon as he can. It is also impossible to

contend that he is not under a duty to maintain the arrest until the moment arrives. If, when it does arrive, he then fails to carry out his duty to state the ground I am quite unable to see that such failure can have any effect on what has gone before unless specific provision is made. Here it is not."

Simon Brown J stated at 676 stated:

"Forcefully and attractively as this argument was advanced I unhesitatingly reject it. Its central fallacy seems to me to lie in the unwarranted assumption at the Christie v Leachinsky principle can properly be extended to determine retrospectively the legal character of the conduct in question, i.e. to legalise by reference to subsequent events what at the time was apparently a criminal assault upon a police officer attempting to execute his duty. I say "apparently a criminal assault" because there can be no doubt here but that the police officer was entitled to approach the respondent with a view to arresting him (it was common ground, indeed, that an assault on the officer at that stage would have been unlawful irrespective of what thereafter occurred), then to arrest him, then to restrain him. Indeed his duty required him to take such actions. I recognise of course that by virtue of s.28(3) the arrest ultimately proved to be unlawful. But that is not to say that all the earlier steps taken during the course of events leading to that ultimate position must themselves be regarded as unlawful. Still less so does it follow that conduct on the part of the police officer which at the time was not only permitted but positively required of him in the execution of his duty can become retrospectively invalidated by reference to some later failure (a failure which, I may add could well have been that of some officer other than himself)."

"The answer to the question posed in this appeal is, I have no doubt, this. Section 28(3) plainly dictates the circumstances in which an arrest may be found to have been unlawful and it determines decisively the consequences following the time at which that becomes apparent. In my judgment, however, it says nothing in respect of the intermediate period during which it is not practicable to inform the person arrested of the ground for his arrest. Least of all does it supply the answer to the question, hitherto unconsidered by the authorities, whether a police officer is acting in the execution of his duty during that intermediate period. That is a question which I regard as logically separate and apart from the eventual lawfulness or otherwise of the arrest on which he is engaged. Unless I were driven inexorably by the statute to accept the respondent's argument I would decline to do so: it would certainly produce the most bizarre and unwelcome results. I fell no such compulsion. In the result I concur with Parker LJ's conclusion that this appeal must be allowed."

Lewis v Chief Constable of the South Wales Constabulary **[1991] 1 All ER 206**

Again, this case deals with the UK equivalent of section 201 of LEPRA.

Miss Lewis and Mrs Evans were arrested for a reasonable suspicion of burglary. They were not informed as to the reason for their arrest at the point when they were first arrested. They were taken to the police station. One was told the reason for her arrest after she had been detained for 10 minutes, the other after 23 minutes. Both sued seeking damages for unlawful arrest and wrongful imprisonment. Damages were sought for the whole of the period of their detention on the basis that the whole of the period was unlawful due to the delay in being informed of the reason for their arrest. The Judge at first instance only awarded damages for the periods of 10 and 23 minutes respectively. Both appealed, maintaining that the whole of their period of detention was unlawful.

The appeal was dismissed. Balcombe LJ stated at 210-211:

> *"Simply as a matter of language used, arrest as I have already said, is defined as a continuing act. It starts with the action of taking a person into custody and, undoubtedly, under s.28(3) at that moment the person arrested should be informed of the ground of the arrest, and, if that is not so, that arrest, that taking in to custody, is unlawful. But there is nothing in the section which providers what is the effect of the arrested person subsequently being given the reason for the arrest. Now, clearly, a subsequent giving of the reasons cannot retrospectively make the period between the moment of arrest and the time for giving the reasons lawful, and no one suggest that it did. The question, which this court has to decide, which is precisely the same as the court had to decide in R v Kulynycz [1907] 3 All ER 881, [1971 1 QB 367, is this. What is the effect of telling a person, who was initially arrested without being told of the reasons for his arrest, those reasons at a later time? R v Kulnycz held that thereafter his custody became lawful and, in so far as I have already said that arrest is a continuing act and is the process of being kept in custody or deprived of liberty, it seems to me that there is nothing inconsistent with the wording of s.28(3) to say that from the moment (when reasons are given) the arrest becomes lawful, or the continued deprivation of liberty becomes lawful, or the continued custody becomes lawful. Indeed, the contrary seems to me to be not merely a surprising, but an almost ridiculous, contention, that what the police officer should do in those circumstances is to tell the person concerned, "You are free to go", and, the instant he say that, should place his hands immediately on that person's shoulder and say, "Now you are under arrest and you are arrested for", giving the reasons. It seems opt me that Parliament cannot have intended that such a farce had opt be gone through, and it is sufficient if the police officer gives the reasons and then from that moment onwards the arrest is lawful."*

Queensland Case Law

The equivalent provision in Queensland can be found in section 637 of the *Police Powers and Responsibilities Act* 2000 (Qld). The author has searched both online and examined two leading texts from Queensland before arriving at the view that, at the time of writing (March 2014) no case law had yet emerged from Queensland. Having said that, it would be worth monitoring the position. The easiest way to do that for people who lack comprehensive resources is to bring up the section on Austlii and then hit the "Noteup" button at the top of the page.

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If you have any questions as to the content of this paper, please feel free to contact me. I am best caught on my mobile - **0408 277 374**. Please respect the "no fly zone" on my phone between 9.00am and 10.00am on a court day - I am just about to go in to court too!! Other than that, you are fine to call any time. If you would prefer to email me I can be reached at my email address which is:

dark.menace@forbeshambers.com.au

I will almost always respond within 24 hours.

I have endeavoured to state the law of New South Wales as at 23 March 2014.

Mark Dennis
Forbes Chambers

Raymond Courtney doing what he does best

- see *Courtney v Thomson* [2007] QCA 49; (2007) 170 A Crim R 233

APPENDIX I

SECTION 99 OF LEPRA ***AFTER*** THE ENACTMENT OF THE *LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) AMENDMENT (ARREST WITHOUT WARRANT) ACT 2013 (NSW)* - ***(current as at 23 March 2014)***

99 Power of police officers to arrest without warrant

(cf *Crimes Act 1900* , s 352, Cth Act, s 3W)

(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.

APPENDIX II

SECTION 99 OF LEPRA ***PRIOR TO*** THE ENACTMENT OF THE *LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) AMENDMENT (ARREST WITHOUT WARRANT) ACT 2013 (NSW)*

99 Power of police officers to arrest without warrant

(cf *Crimes Act 1900* , s 352, Cth Act, s 3W)

(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.

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

APPENDIX III

SECTION 201 OF "LEPRA" (AS AT 23 MARCH 2014)

201 Supplying police officer's details and giving warnings

(cf *Crimes Act 1900*, s 563, *Police Powers (Vehicles) Act 1998*, s 6)

(1) A police officer must provide the person subject to the exercise of a power referred to in subsection (3) with the following:
- (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.
- (d) (Repealed)

(2) A police officer must comply with subsection (1) in relation to a power referred to in subsection (3) (other than subsection (3) (g), (i) or (j)):
- (a) if it is practicable to do so, before or at the time of exercising the power, or
- (b) if it is not practicable to do so before or at that time, as soon as is reasonably practicable after exercising the power.

(2A) A police officer must comply with subsection (1) in relation to a power referred to in subsection (3) (g), (i) or (j) before exercising the power, except as otherwise provided by subsection (2B).

(2B) If a police officer is exercising a power to give a direction to a person (as referred to in subsection (3) (i)) by giving the direction to a group of 2 or more persons, the police officer must comply with subsection (1) in relation to the power:
- (a) if it is practicable to do so, before or at the time of exercising the power, or
- (b) if it is not practicable to do so, as soon as is reasonably practicable after exercising the power.

(2C) If a police officer exercises 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 the subject of the request or direction with:
- (a) a warning that the person is required by law to comply with the request or direction (unless the person has already complied or is in the process of complying), and
- (b) 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 by the person is an offence, a warning that the failure to comply with the request or direction is an offence.

(2D) In addition, if a police officer exercises a power that involves the making of a direction under section 198 on the grounds that a person is intoxicated and disorderly in a public place, the police officer must provide the person the subject of the direction with 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.

Note. See section 9 of the *Summary Offences Act 1988*.

(3) This section applies to the exercise of the following powers (whether or not conferred by or under this Act):

(a) a power to search or arrest a person,

(b) a power to search a vehicle, vessel or aircraft,

(c) a power to enter premises (not being a public place),

(d) a power to search premises (not being a public place),

(e) a power to seize any property,

(f) a power to stop or detain a person (other than a power to detain a person under Part 16) or a vehicle, vessel or aircraft,

(g) a power to request 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) a power to establish a crime scene at premises (not being a public place),

(i) a power to give a direction to a person,

(j) a power under section 21A to request a person to open his or her mouth or shake or move his or her hair,

(k) a power under section 26 to request a person to submit to a frisk search or to produce a dangerous implement or metallic object.

(3AA) Despite subsection (3), this section does not apply to the exercise of a power to enter premises or to search premises or a vehicle, vessel or aircraft that is conferred by a covert search warrant.

(3A) If a police officer is exercising more than one power to which this section applies on a single occasion, and in relation to the same person, the police officer is required to comply with subsection (1) (a) and (b) in relation to that person only once on that occasion.

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

(5) However, if a person asks another 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) This section does not apply to the exercise of a power that is conferred by an Act or regulation specified in Schedule 1.

Note. See section 5 (1), which provides that this Act does not limit the functions of a police officer under an Act or regulation specified in Schedule 1.