‘Police Powers in the Local Court’

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Introduction

1. The question of a whether an action by police was lawful, proper, or fully compliant with legislative requirements, will often be a key question in Local Court matters.

2. In most cases the lawfulness or propriety of the exercise of a police power will be relevant because it can lead to exclusion of incriminatory evidence or because proof of an offence requires that police have been acting ‘in execution of duty’ i.e. lawfully.

3. Less commonly it will be relevant where it is an element of a particular offence that a police officer has acted in accordance with a particular statutory provision.[1]

4. In all three circumstances you can secure a dismissal of a charge by proving that police have acted unlawfully, or sometimes by raising a reasonable doubt about the question.

5. Your clients are very often interacting with police in circumstances where compulsory powers are being used. Experience tells us that very often these powers are being misused. There are many wins to be had on this basis.

6. The capacity to identify a potential issue and then to successfully advance an argument at hearing, depends on having a broad understanding of the limits and scope of police power and being able to focus on a particular power that arises for consideration in a particular matter.

[1] For example, a person cannot be guilty of an offence against section 12 of the *Law Enforcement (Powers and Responsibilities) 2002* (NSW) unless the police officer has complied with section 11 of the same Act.

7. The aim of this paper is to overview some common police powers related issues that arise regularly in the Local Court and to provide some guidance on how procedurally such issues are best advanced.

8. Much more detailed analysis on particular police powers and issues can be found in various textbooks, or in papers available online including those by Mark Dennis, Jane Sanders, Will Tuckey, Felicity Graham and others.[2]

9. Very often the exercise of a police power will engage with a fundamental right.

10. In *Momcilovic v The Queen* (2011) 245 CLR 1 Heydon J at [444] attempted to categorise those rights that can be considered as fundamental, it can be seen that many are engaged by commonly exercised police powers (my emphasis):

> *"Freedom from trespass by police officers on private property; procedural fairness; the conferral of jurisdiction on a court; and vested property interests...; rights of access to the courts; rights to a fair trial; the writ of habeas corpus; open justice; the non-retrospectivity of statutes extending the criminal law; the non-retrospectivity of changes in rights or obligations generally; mens rea as an element of legislatively-created crimes; freedom from arbitrary arrest or search; the criminal standard of proof; the liberty of the individual; the freedom of individuals to depart from and re-enter their country; the freedom of individuals to trade as they wish; the liberty of individuals to use the highways; freedom of speech; legal professional privilege; the privilege against self-incrimination; the non-existence of an appeal from an acquittal; and the jurisdiction of superior courts to prevent acts by inferior courts and tribunals in excess of jurisdiction".*

11. The fundamental nature of the rights very often engaged by the exercise of police powers should weigh heavily in judicial interpretation of statutes[3] and the exercise of discretion in respect of evidence obtained unlawfully or improperly.

12. As an ALS lawyer you should never accept the tendency among some judicial officers to trivialise the unlawful exercise of police powers like arrest, search, detention and the like.

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[2] A number available at http://criminalcpd.net.au/police-powers/

[3] As a consequence of the principle of legality. See, *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115 131 and *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523*, "Unless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation".*

13. You should rail (respectfully and intelligently) against the view that unlawfully obtained evidence must always be admitted if the consequence of exclusion would be a summary criminal charge would fail.

14. The criminal justice system deals with these right often, but there breach is almost never trivial.

15. The ALS has a reputation at excelling at the defence of matters involving police powers. This is no coincidence. The organisation was formed in reaction to the misuse of police powers. The fight continues.

Power v Duty

16. It is important at the outset to be aware that not all police conduct involving actions such as stops, searches and the like, will necessarily be considered to be exercises of statutory police power.

17. The fundamental starting point is that statutory power is only needed to authorise conduct that would otherwise be unlawful, i.e. be tortious.

18. Consent will generally render what might be otherwise be unlawful, as lawful.

19. For example, if police approach a group of young people and ask to look in a bag and the young person offers up the bag and drugs are found, it may be open to infer that the young person consented to the search. The absence of reasonable suspicion will not render such a search unlawful, because the search was not otherwise unlawful i.e. tortious.

20. Often of course a question will arise as to whether a person only submitted because they perceived they were under compulsion. If that is the case then there will have been no true consent.

21. In *DPP v Leonard* (2001) 53 NSWLR 227 James J found that a person may consent to a search even if unaware of a right to refuse, if in fact they did consent and were not compelled.

22. This is not to say that all such non-tortious conduct will be considered to have been within an officer's duty. This is discussed further below.

Exclusion of Evidence

23. The most common way that unlawful or improper police conduct impacts on Local Court practise is where inculpatory evidence can be excluded by as a consequence. This will generally occur on application by the defendant.

24. Section 138 looms large in any consideration of police powers issues in the Local Court, relevantly it provides:

> *(1) Evidence that was obtained:*
>
> *(a) improperly or in contravention of an Australian law, or*
>
> *(b) in consequence of an impropriety or of a contravention of an Australian law,*
>
> *is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.*
>
> *(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:*
>
> *(a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning, or*
>
> *(b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.*

25. Sub-section three then provides for a range of non-exclusive mandatory relevant considerations.

26. The typical circumstances where section 138 might apply is where police have unlawfully exercised a power and found evidence as a result. For example, searching a person where there was no reasonable basis to suspect the person was in possession of relevant items.

27. Section 138 can also have operation however where the 'evidence' sought to be excluded is the actual commission of criminal offences, where they have been precipitated by unlawful or improper police conduct.

28. The classic example that arises in the ALS practise is the so called "trifecta" where an Aboriginal person is stopped by police for swearing, the situation develops and the person resist police, the situation develops further and the person assaults police. The trifecta being the three charges commonly laid as a result.

29. In the case of the trifecta if the original police conduct involved in stopping/arresting/searching the person was unlawful, evidence of the actual commission of consequent offences of resist/assault/hinder can be excluded from evidence.

30. *DPP v Carr* (2002) 127 A Crim R 151; [2002] NSWSC 194 is a leading authority dealing with such a situation.

31. Mr. Carr was arrested for offensive language in Wellington, NSW, despite being well known to police. While in the dock he threatened police:

> *"I'm going to get you knocked, you go to Sydney I'll get you killed, you and that other cunt, I'm going to kill your kids and I'm going to kill you. I'm going to get my brothers to cut your throat, I'm going to kick the cunt right out of you."*

32. Magistrate Heilpern excluded the evidence of the threats, finding

> *"the evidence relating to resist police, assault police and intimidate police was obtained in consequence of an impropriety in the sense that the actions and words that flowed after the words 'you are under arrest' would not have occurred had the officer not acted improperly."*

33. On appeal, Smart AJ upheld the decision in this respect, stating:

> *"There is a distinction between the commission of further offences by a defendant as a result of improper police conduct which precipitated them and the evidence of them which becomes available to be adduced on the one hand, and evidence improperly obtained as to past offences and unconnected with further offences. Can s138(1) operate to render inadmissible evidence obtained of the commission of further offences following an improper act or omission by the police such as an ill-advised arrest as to an earlier offence and/or the withholding of medical treatment? A number of situations may arise. The person arrested may in a state of anger at his ill-advised arrest commit a serious crime, for example, attempted murder or maliciously inflict grievous bodily harm with intent to do so. In such a case, the evidence of those subsequent acts would be admitted. On the other hand he may commit a relatively minor crime such as a mild assault or resist arrest.*

Further, he may, if moderately intoxicated, utter threats never intended to be carried out. There is also the example of a reaction at the police omitting to summon necessary medical or other attention when they should have done so".

34. And further:

"If the offences were moderately serious to serious and disproportionate to an ill-advised arrest it would not be possible to contend that the evidence of such offences was obtained in consequence of an impropriety. A question of degree is involved".

35. As Smart JA observes, not all breaches of the law (or improprieties) occurring as part of or prior to the obtaining of evidence will mean that evidence has been 'obtained' for the purposes of section 138.[4]

36. In *DPP v Coe* [2003] NSWSC 363 Adams J stated:

"The word "obtained" is in ordinary parlance and should not be unduly or artificially restricted: Haddad & Treglia (2000) A Crim R 312 per Spigelman CJ at [73] but it cannot apply more widely than circumstances which fairly fall within its ambit. Where "real evidence" is indeed obtained as a result of impugned conduct, then the case would, of course, come within the purview of the section, even if the conduct was not undertaken for the purpose of acquiring the evidence. Where, however, the evidence in question is that of offences which have been caused by the impugned conduct, it does not seem to me that the evidence will have been "obtained" unless something more is shown than the mere causal link: the circumstances must be such as to fit fairly within the meaning of "obtained", almost invariably because the conduct was intended or expected (to a greater or lesser extent) to achieve the commission of offences"

37. This raises the question of whether evidence of prior offences can be considered not have been not 'obtained' despite coming into possession of police during a search or other conduct undertaken unlawfully.

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[4] For a detailed discussion of this issue see from para 171 onwards of Felicity Graham's paper TASER! TASER! TASER!
A CASE STUDY ON LAW AND PROCEDURE PERTAINING TO POLICE TASERS online at http://criminalcpd.net.au/wp-content/uploads/2016/09/Taser_Taser_Taser__A_Case_Study_on_Law_and_Procedure_Pertaining_To_Police_Tasers__Felicity_Graham.pdf

38. Would for example a trivial breach of a LEPRA protection, that had no impact on whether the power was exercised or not, mean the evidence was unlawfully obtained?

Execution of Duty

39. The second way that that unlawful or improper police conduct impacts on Local Court practise is where the offence charged requires proof that police where acting in the 'execution of duty'.

40. This arises in respect of an array of offences, including some of those created by Division 8A of Part 3 of the *Crimes Act 1900* (NSW) titled, '*Assaults and other actions against police and other law enforcement officers'* which includes those commonly charged offences of resist, hinder, stalk, harass, intimidate and assault police officer and their aggravated forms.

41. Section 60(1) for example creates a series of offences, all with 'execution of duty' as an element:

> *"A person who assaults, throws a missile at, stalks, harasses or intimidates a police officer* ***while in the execution of the officer's duty****, although no actual bodily harm is occasioned to the officer, is liable to imprisonment for 5 years".*

42. Various complicated issues attend the question of what is meant by 'duty' and Will Tuckey's paper '*Off Duty – Examining Police Duty and Transgressions'* examines that question in some detail.[5]

43. It certainly includes things other than arresting criminals or investigating crimes.

44. There are a number of often cited formulations of the concept of police duty.[6]

45. Lord Parker CK in *Rice v Connolly* [1966] 2 QB 414 defined police duty as follows:

> *… that it is part of the obligation and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the*

[5] http://criminalcpd.net.au/wp-content/uploads/2016/09/Off_Duty__Will_Tuckey.pdf
[6] The ones cited below are collated in Will Tuckey's paper cited above.

powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice".

46. Cosgrove J in *Innes v Weate* [1984] Tas R 14; 12 A Crim R 45 at [51] stated:

> *"There are two difficulties in this concept of duty. One is that it cannot be stated in other than general terms – the range of circumstances in which the duty to act may arise is too wide, too various, and too difficult to anticipate for the compilation of an exhaustive list. The other is that the existence and nature of the duty depends upon a reasonable assessment by the constable of any given situation. That assessment may be examined in the courts and held to be right or wrong…It is important that a constable should have a wide discretion to act swiftly and decisively; it is equally important that the exercise of that discretion should be subject to scrutiny and control".*

47. In *R v K* 118 ALR 596 Gallop, Spender and Burchett JJ, held at [601]:

> *… a police officer acts in the execution of his duty from the moment he embarks upon a lawful task connected with his functions as a police officer, and continues to act in the execution of that duty for as along [sic] as he is engaged in pursuing the task and until it is completed, provided that he does not in the course of the task do anything outside the ambit of his duty so as to cease to be acting therein".*

48. Under section 6 of the *Police Act 1990* (NSW) the NSW Police Force has functions including the provision of 'policing services', which are defined to include:

> ***police services*** *includes:*
>
> *(a) services by way of prevention and detection of crime, and*
>
> *(b) the protection of persons from injury or death, and property from damage, whether arising from criminal acts or in any other way, and*
>
> *(c) the provision of essential services in emergencies, and*
>
> *(d) any other service prescribed by the regulations.*

49. *DPP v Gribble* [2004] NSWSC 926; 151 A Crim R 256 was a case involving police conduct in laying hands on a person who was standing in the middle of a road, at night, in dark clothing. A Magistrate had dismissed assault police charges on the basis there was no evidence police were in execution of duty.

50. Barr J stated at [28] to [29]:

"It was submitted that Senor Constable Duffey and Senior Constable Suitor were met with an emergency. They were in the middle of a busy road at night confronted by an irrational man dressed all in black who had already made plain his intention to disregard police instructions and to stay where he was in the middle of the road, endangering himself and others. The risk to his safety and to the safety of the officers and other road users was obvious and would have been pressing. I think that the submission should be accepted.

In my opinion those circumstances gave rise to a duty on the part of the officers to do what they reasonably could to remove the defendant and others from the danger to which his action was giving rise. They twice required him to get off the road and he twice refused. His refusal was irrational and he was otherwise behaving inappropriately. In my opinion when the officers laid hands on the defendant they were acting in the course of their duty to protect the defendant and others from the danger which he was presenting. The Magistrate erred in her finding to the contrary".

51. In a case that raises a question about whether an officer is in duty, on account of the intrinsic nature of what they are doing (as opposed to whether they are lawfully doing it) it will be necessary to closely examine the statutory and common law functions of police and whether the conduct is actually police duty.

52. What clearly however is not included in an officer's duty is breaching the law.

53. In *Coleman v Power* [2004] HCA 39; 220 CLR 1; 209 ALR 182; 78 ALJR 1166 (1 September 2004) the High Court considered an appeal in respect of an offence that had as an element that a police officer was, 'acting in the execution of his or her duty'.

54. McHugh J stated at [117] to [121] (my emphasis):

"Each of the sub-sections under which the appellant was charged is predicated on the lawfulness of the action being resisted or obstructed. It is not part of an officer's duty to engage in unlawful conduct. If the officer acts outside his or her duty, an element of the offence is missing. In Re K, after reviewing the authorities on the scope of an officer's duty, the Full Court of the Federal Court said[94]:

"The effect of all those cases is that a police officer acts in the execution of his duty from the moment he embarks upon a lawful task connected with his functions as a police officer, and continues to act in the execution of

> *that duty for as long as he is engaged in pursuing the task and until it is completed, provided that he does not in the course of the task do anything outside the ambit of his duty so as to cease to be acting therein."*

An officer who unlawfully arrests a person is not acting in the execution of his or her duty. In Nguyen v Elliott[95], the Supreme Court of Victoria set aside convictions for assaulting and resisting an officer in the execution of his duty when the arrest was unlawful and therefore not made in the execution of the officer's duty. The accused was approached by two constables who believed that he might have been involved in drug dealing. The accused attempted to walk away but was detained by the first officer who wished to search him. The accused became aggressive and kicked the first officer. The second officer crossed the street to assist the first officer to control the accused. The accused was forced into the police vehicle and continued to protest. He was then taken out and handcuffed during which the accused bit the second officer on the hand. Before the magistrate, the first officer acknowledged that he did not reasonably suspect that the accused was in possession of drugs but was merely curious about whether the accused possessed drugs. The charges relating to the first officer were dismissed. The prosecution claimed the second officer's position was different because he had good reason to believe he was lawfully assisting his partner to effect an arrest for what the second officer assumed was an assault on the first officer. Hedigan J held that the conviction for resisting arrest could not stand. His Honour said:

> *"... it cannot be said that a police officer is acting in the execution of his duty to facilitate an unlawful search and arrest. The right of citizens to resist unlawful search and arrest is as old as their inclination to do so. The role of the courts in balancing the exercise of police powers conferred by the State and the rights of citizens to be free from unlawful search and seizure may be traced through centuries of cases."*

In setting aside the conviction, Hedigan J applied the decision of the Full Court of the Supreme Court of Victoria in McLiney v Minster where Madden CJ said[96]:

> *"... it is an important principle of law that no man has the right to deprive another of his liberty except according to law, and if he does so the person so unlawfully deprived has a perfect right to use reasonable efforts to beat him off and get out of his custody."*

Hedigan J held that, although the second officer acted in good faith, his conduct was also unlawful and he was not acting in the execution of his duty when assisting the first officer to effect an unlawful arrest.

Although a charge of assaulting a police officer in the execution of his or her duty will fail when the officer has engaged in unlawful conduct such as an unlawful arrest, the accused may be convicted of common assault if his or her response is excessive. The author of a Comment on Nguyen refers to the availability of this course being open to the prosecution[97]. The author referred to Kerr v DPP[98] where the Queen's Bench Division refused to uphold a conviction for assaulting a constable in the execution of his duty where the constable, believing his partner had already arrested a woman, took hold of her arm to detain her. The woman retaliated by punching the constable. Because no arrest had taken place, the officer's conduct was outside his duty. However, the Court referred to the possibility of an alternative charge of common assault".

Obligations of General Application on Police

Announcement

55. A common way that police take themselves outside of duty is non-compliance with obligations of announcement when exercising specific statutory powers.

56. Announcement obligations were previously a feature of the common law[7], but are now provided for in legislation with section 202 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) stating:

(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.

[7] See for example, *Christie v Leachinsky* [1947] 1 All ER 567

(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

57. The powers to which that obligations applied are listed in section 201:

(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.

58. Schedule 1 then lists the following acts:

Bail Act 2013 No 26
Casino Control Act 1992 No 15
Children and Young Persons (Care and Protection) Act 1998 No 157
Children (Care and Protection) Act 1987 No 54
Children (Criminal Proceedings) Act 1987 No 55
Children (Protection and Parental Responsibility) Act 1997 No 78
Crimes Act 1900 No 40
Crimes (Administration of Sentences) Act 1999 No 93
Crimes (Forensic Procedures) Act 2000 No 59
Criminal Procedure Act 1986 No 209
Drug Misuse and Trafficking Act 1985 No 226
Heavy Vehicle (Adoption of National Law) Act 2013
Heavy Vehicle National Law (NSW)
Law Enforcement and National Security (Assumed Identities) Act 2010
Law Enforcement (Controlled Operations) Act 1997 No 136
Liquor Act 2007 No 90
Mental Health Act 2007
Registered Clubs Act 1976 No 31
Road Obstructions (Special Provisions) Act 1979 No 9
Road Transport Act 2013
State Emergency and Rescue Management Act 1989 No 165
State Emergency Service Act 1989 No 164
Surveillance Devices Act 2007
Telecommunications (Interception) (New South Wales) Act 1987 No 290
Wool, Hide and Skin Dealers Act 1935 No 40
Young Offenders Act 1997 No 54

59. Section 203 is also important:

> *(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.*
>
> *(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.*

60. Section 204A creates an important exception to these obligations of general application that specifically intersects with the execution of duty elements of criminal offences:

> *(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*

61. *Fernando v* R (2011/412250) (19 March 2012) was a case where a conviction for resist police officer in execution of duty was set aside because of non-compliance with the LEPRA announcement obligation.

62. Police attended a house in respect of domestic violence allegations to arrest the appellant and said, "*Stanley you didn't come down to the station so I have come here to speak to you about this morning*".

63. The officer then reached towards Mr. Fernando saying, "*Stanley I just wanted to talk to you*". Mr. Fernando ran away but was apprehended and handcuffed while being told to "*stop resisting*".

64. Lerve ADCJ (as His Honour then was) said:

> *"The police officer did not announce, nor did she indicate that she was arresting the accused. She placed her hands on the suspect, which is one of the usual signs of arrest. Very much the officer was in breach of s.201 of the Law Enforcement (Powers and Responsibilities) Act. With very considerable regret, given the conduct of the accused in this case, both with the child and his appalling behaviour towards the police officers, I come to the conclusion that his arrest was unlawful."*

65. *R v O'Neill* [2001] NSWCCA 193 (21 May 2001) is an interesting case where the issue was:

> *"..whether the forcible entry into the respondent's home was preceded with the formalities the common law requires in order for the attempted arrest to be "lawful" within the meaning of s33B. On the day in question, the police officers knocked on the door of the respondent's house and repeated numerous times*

"Leslie, it's the Police. Open the door, we need to speak to you". There was no reply, although footsteps and other noises could be heard from inside the house. This request was repeated through an open window, and again at the front door. The officers left for a short time, and returned, saying, "Leslie O'Neill, it's the police. Open this door. We need to speak with you." This was repeated a few more times, and met with yelling from the respondent behind the door. He yelled, "get fucked. Leave me alone. I'm not opening this door." One of the officers replied, "Leslie, this is the police. Open this door or I will open it." The respondent continued to yell. Shortly after this, the officers kicked down the door and entered the house. The respondent attacked them with the fire extinguisher, striking one of the officers on the head with the canister once its contents were exhausted

66. Mason P at [25] stated:

"Unless the "exigent circumstances" exception applies (as to which see Lippl at 636-7) or unless statute provides to the contrary, the constable proposing to force entry in order to execute coercive process (cf Plenty at 641, 650-1) such as a search or arrest warrant or to effect an arrest must state a lawful reason for entry without permission. The "cause" or "purpose" that must be announced by the officer and rejected by the resident is a basis for entry without consent. Gleeson CJ refers to this in Lippl as the officer's "authority".

Reasonable Force

67. Felicity Graham's paper[8] *'Taser! Taser! Taser! A Case Study on Law and Procedure Pertaining to Police Tasers'* contains an extensive analysis of the concept of reasonable force under the common law and now LEPRA.

68. Section 230 of LEPRA states:

"*It is lawful for a police officer exercising a function under this Act or any other Act or law in relation to an individual or a thing, and anyone helping the police officer, to use such force as is reasonably necessary to exercise the function*

69. Section 231 states:

A police officer or other person who exercises a power to arrest another person may use such force as is reasonably necessary to make the arrest or to prevent the escape of the person after arrest

[8] http://criminalcpd.net.au/wp-content/uploads/2016/09/Taser_Taser_Taser__A_Case_Study_on_Law_and_Procedure_Pertaining_To_Police_Tasers__Felicity_Graham.pdf

70. Excessive force would be unlawful force and therefore place an officer outside the execution of duty. Whether it renders an arrest unlawful *per se* is possibly a different question.

71. In *Woodley v Boyd* [2001] NSWCA 35, Heydon JA (with whom Foster AJA and Davies AJA agreed) stated as follows on the pre-LEPRA position on use of force in the exercise of police powers (all emphasis added):

> *"According to some writers, at common law, which applies in New South Wales, a person effecting an arrest may use whatever force is "reasonable" in the circumstances (Archbold: Criminal Pleading Evidence and Practice 2000 para 19-39) or "reasonably necessary" (Wiltshire v Barrett [1966] 1 QB 312 at 326 and 331). "Thus if the arrestee offered resistance, the arrestor could increase his force in proportion to the force of that resistance":* R *W Harding, The Law of Arrest in Australia (eds Duncan Chappell and Paul Wilson) The Australian Criminal Justice System (2nd ed, Butterworths, 1977) p 254. A more elaborate test has been propounded in the context of whether the killing of a felon in the course of committing a felony is a justifiable homicide, or manslaughter, or murder. It was put thus by the Full Court in* R *v Turner [1962] VR 30 at 36:*
>
> > *"When a felony is committed in the presence of a member of the public, he may use reasonable force to apprehend the offender or for the prevention of the felony. What is reasonable depends upon two factors. He is entitled to use such a degree of force as in the circumstances he reasonably believes to be necessary to effect his purpose, provided that the means adopted by him are such as a reasonable man placed as he was placed would not consider to be disproportionate to the evil to be prevented (i.e. the commission of a felony or the escape of the felon)."*
>
> *It may perhaps be questioned whether the tests stated apply where the arresting party causes injury to the arrested party, as distinct from death. However, for present purposes it is convenient to assume, as counsel for both the plaintiff and the defendants did, that* R *v Turner states the law in that context as well. In evaluating what is reasonable, necessary or reasonably necessary the duties of police officers must be remembered. In Lindley v Rutter [1981] QB 128 at 134 Donaldson LJ said:*
>
> > *"It is the duty of any constable who lawfully has a prisoner in his charge to take all reasonable measures to ensure that the prisoner does not escape or assist others to do so, does not injure himself or others, does not destroy or dispose of evidence and does not commit further crime such as, for example, malicious damage to property. This list is not exhaustive, but it is sufficient for present purposes. What measures are reasonable in the*

> *discharge of this duty will depend upon the likelihood that the particular prisoner will do any of these things unless prevented. That in turn will involve the constable in considering the known or apparent disposition and sobriety of the prisoner. What can never be justified is the adoption of any particular measures without regard to all the circumstances of the particular case."*

The same duties and considerations apply where a police officer is deciding how to effect an arrest. And, in evaluating the police conduct, the matter must be judged by reference to the pressure of events and the agony of the moment, not by reference to hindsight. In McIntosh v Webster (1980) 43 FLR 112 at 123, Connor J said:

> *"[Arrests] are frequently made in circumstances of excitement, turmoil and panic [and it is] altogether unfair to the police force as a whole to sit back in the comparatively calm and leisurely atmosphere of the courtroom and there make minute retrospective criticisms of what an arresting constable might or might not have done or believed in the circumstances."*

the question of whether touching is necessary and lawful when effecting an arrest arose. If a police officer touches but does not arrest a suspect, the conduct will be unlawful if, for example, it was designed to effect a detention against the suspect's will (Ludlow v Burgess (1971) 75 Cr App R 227). But it will not be unlawful if the goal was to attract the suspect's attention: it may be an interference with the suspect's liberty, but it is a trivial one which does not take the officer out of the course of his duty (Donnelly v Jackman (1970) 54 Cr App R 229). It is possible to effect a lawful arrest without touching the arrested person: Grainger v Hill (1838) 5 Scott 561 at 575; Greenwood v Ryan (1846) 1 Legge 275; Warner v Riddiford (1858) 4 CB (NS) 180; Alderson v Booth [1969] 2 QB 216; Dellit v Small, ex p Dellit [1987] Qd R 303. Glanville Williams, "Requirements of a Valid Arrest" [1954] Crim LR 6 at 11 summarised the law as follows:

> *"An imprisonment, or deprivation of liberty, is a necessary element in an arrest; but this does not mean that there need be an actual confinement or physical force. If the officer indicates an intention to make an arrest, as, for example, by touching of the suspect on the shoulder, or by showing him a warrant of arrest, or in any other way by making him understand that an arrest is intended, and if the suspect then submits to the direction of the officer, there is an arrest. The consequence is that an arrest may be made by mere words, provided that the other submits."*

The difficulty of the field is illustrated by the fact that Glanville Williams' example of "touching" is, while not "physical force", nonetheless technically a battery unless it is otherwise justifiable. It is also possible to effect an arrest without using words of arrest, though it is desirable to use them if possible (R v Hoare [1965] NSWR 1167).

Detention of Vehicles etc

72. Section 204 also casts an obligation of general application:

> *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*

Certain Particular Powers

73. To determine the lawfulness of police conduct it will generally be necessary to look to the specific power said to have been exercised and determine whether the authority granted has been exceeded or otherwise not complied with.

Arrest

74. Section 99 of LEPRA states:

> *(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"

75. There are four essential requirements for a lawful arrest:

- Reasonable suspicion that the person has committed an offence;[9]
- It must be for the purpose of commencing proceedings;[10]
- Satisfaction that the arrest is reasonably necessary for one or more of the purposes listed in sub paragraph (1)(b)[11];
- The announcement obligations in Part 15 of LEPRA must have been complied with (as discussed above)

Stop and Search

76. Section 21 of LEPRA provides:

(1) A police officer may, without a warrant, stop, search and detain a person, and anything in the possession of or under the control of the person, if the police officer suspects on reasonable grounds that any of the following circumstances exists:

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[9] *R v Rondo* [2001] NSWCCA 540, *Hyder v Commonwealth of Australia* [2012] NSWCA 336 *State of NSW v Bouffler* [2017] NSWCA 185 *Barram v State of New South Wales* [2017] NSWDC 255

[10] *Williams v R* (1986) 161 CLR 278, *Bales v Parmenter* (1935) 52 WN (NSW) 41 *Williams v DPP* [2011] NSWSC 1085

[11] *State of New South Wales v Randall* [2017] NSWCA 88.

(a) the person has in his or her possession or under his or her control anything stolen or otherwise unlawfully obtained,

(b) the person has in his or her possession or under his or her control anything used or intended to be used in or in connection with the commission of a relevant offence,

(c) the person has in his or her possession or under his or her control in a public place a dangerous article that is being or was used in or in connection with the commission of a relevant offence,

(d) the person has in his or her possession or under his or her control, in contravention of the Drug Misuse and Trafficking Act 1985, a prohibited plant or a prohibited drug.

(2) A police officer may seize and detain:

(a) all or part of a thing that the police officer suspects on reasonable grounds is stolen or otherwise unlawfully obtained, and

(b) all or part of a thing that the police officer suspects on reasonable grounds may provide evidence of the commission of a relevant offence, and

(c) any dangerous article, and

(d) any prohibited plant or prohibited drug in the possession or under the control of a person in contravention of the Drug Misuse and Trafficking Act 1985, found as a result of a search under this section.

77. In *R v Rondo* [2001] NSWCCA 540 Simpson J stated at [53]

"(a) A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be some thing which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs cover by s 357E. A reason to suspect that a factor exists is more than a reason to consider or look into the possibility of its existence.

(b) Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.

(c) What is important is the information in the mind of the police officer (undertaking the relevant course of action). Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole of these surrounding circumstances."

78. There are various safeguards that apply to police searches.

Safeguards in relation to searches

- *s 32(2) – must inform whether will be required to remove clothing and why necessary.*
- *s 32(3) – must ask for co-operation.*
- *s 32(4) – reasonable privacy and as quickly as reasonably practicable.*
- *s 32(5) – least invasive kind of search practicable.*
- *s 32(6) – must not search genital area or breasts unless reasonable suspicion that it is necessary.*
- *s 32(7) – same sex.*
- *s 32(8) – no search while person is being questioned.*
- *s 32(9) – must be allowed to dress as soon as search is finished.*
- *s 32(10) – if clothing is seized, left with or given reasonably appropriate clothing.*

- *Additional safeguards in relation to strip searches*
  - *s 33(1) – strip search in private; not in presence or view of the opposite sex or someone whose presence is not necessary.*
  - *s 33(2) – parent, guardian or personal representative present.*
  - *s 33(3) – strip search of child (10-18yo) or impaired intellectual functioning MUST be conducted in presence of parent/guardian or other person unless not reasonably practicable.*
  - *s 33(4) – strip search must not include search of cavities or examination by touch.*
  - *s 33(5) and (6) – removal of no more clothes and no more visual inspection than reasonable belief that reasonably necessary.*
  - *s 34 – no strip search on child under 10 yo.*

Other Police Powers

79. The array of police powers that may arise in a Local Court practise is extensive and includes:
    - Entry and Search Powers
    - Traffic Powers
    - Power to require identification and proof
    - Non LEPRA arrest powers
    - Move on directions

Procedure and Tactics

80. In a *voir dire* concerned with possible exclusion of evidence sought to be led by the prosecution the burden is on the defence on the balance of probabilities to prove unlawfulness or impropriety.

81. Of course, once such is established, section 138 casts a burden on the prosecution to persuade the court that, "*the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained*".

82. In cases where the offence/s in question does not have 'execution of duty' as an element the only real forensic choice is whether to seek a *voir dire* in advance of the hearing proper or whether to indicate to the court what evidence is objected to, but to make exclusionary arguments in the course of closing or no case to answer submissions.

83. The resolution of that issue might depend on:

    - The extent to which the outcome of the *voir dire* will obviate the calling of other evidence;

    - The extent to which there is a tactical/forensic advantage in seeking to separate the issues;

    - The attitude of the Magistrate (often the bench will prefer to determine *voir dire* issues as part of the hearing, on efficiency grounds, though not always)

84. In a Local Court matter where 'execution of duty' is an element of the offence often more difficult forensic decisions are posed.

85. For example, it may be that on a hand up brief the prosecution may be unable to prove that a police officer was in lawful execution of duty.

86. It may also be that conducting a *voir dire* on the issue will allow the prosecutor to call evidence that establishes (rightly or wrongly) beyond reasonable doubt that the police were in fact in the lawful execution of duty.

87. On the other hand, impropriety may ground exclusion, but not necessarily take police outside the execution of duty.

88. In other cases however it may be worth conducting a *voir dire* in advance, losing on discretion and then relying on that ruling to make a no case to answer submission on the execution of duty element.

89. Resolution of these issues is very fact specific, the best approach is to be aware of the different choices and to assess their possible application in each case.

90. The author welcomes comments and feedback on this paper.

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