

## Police powers of arrest and detention

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### 1 Introduction

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This paper deals mainly with the power of police to arrest a person for an offence under s.99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA).

It also touches on:

- the common law power to arrest for breach of the peace;
- the power to arrest for breach of bail;
- the citizen's arrest power;
- the power to detain a person for their own safety;
- the implied power to detain to check identity details.

### 2 Power to arrest for an offence: LEPRA s.99

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Section 99 of LEPRA confers power on a police officer to arrest a person without warrant on reasonable suspicion of having committed an offence.

The section was amended by the *Law Enforcement (Powers and Responsibilities) Amendment (Arrest without Warrant) Act 2013*, with effect from 16 December 2013. It now provides:

(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.

### 3 Legislative history of s.99 and its predecessors

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This will assist to interpret the current s.99, and to place the relevant case law in context.

#### 3.1 **Crimes Act s.352**

Before LEPR was enacted, s.352 of the *Crimes Act* relevantly provided:

- (1) Any constable or other person may without warrant apprehend,
  - (a) any person in the act of committing, or immediately after having committed, an offence punishable, whether by indictment, or on summary conviction, under any Act,
  - (b) any person who has committed a serious indictable offence for which the person has not been tried,

and take the person, and any property found upon the person, before an authorised Justice to be dealt with according to law.

- (2) Any constable may without warrant apprehend,
  - (a) any person whom the constable, with reasonable cause, suspects of having committed any such offence,
  - (b) any person lying, or loitering, in any highway, yard, or other place during the night, whom the constable, with reasonable cause, suspects of being about to commit any serious indictable offence,

and take the person, and any property found upon the person, before an authorised Justice to be dealt with according to law.

### 3.2 LEPRA s.99 as originally enacted

LEPRA came into effect on 1 December 2005. The power to arrest was set out in s.99 as follows:

- (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.

In the Attorney-General's Second Reading Speech (NSW Legislative Assembly Hansard, 17 September 2002) it was said:

"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 it 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 purpose, such as preventing the continuance of the offence."

### 3.3 LEPRA s.99 – current version

Section 99 was amended with effect from 16 December 2013. This followed a review of the Act conducted by Paul Whelan (a former ALP Police Minister) and Andrew Tink (a former Coalition Shadow Attorney-General). It was not a public review process and was conducted without input from stakeholders other than police and the Department of Justice and Attorney-General.

- The main amendment was to replace the "arrest as a last resort" provision (formerly s.99(3)) with a new s.99(1)(b). It was clear that the intention of the amendment was to make arrest easier, at least in certain circumstances. However, I suggest that the principle of arrest as a last resort survives (see discussion elsewhere in this paper).

- The amended s.99 also makes it clear that a police officer may arrest a person upon reasonable suspicion of having committed *any* offence, not just a serious indictable offence (s.99(1)(a)).
- The amended s.99 also allows a police officer to arrest if directed to do so by another officer, but only if the officer giving the direction is lawfully entitled to arrest the person without warrant (s.99(2)).
- Unlike the section in its previous form, the amended s.99 does not contain any reference to an arrest “for the purpose of commencing proceedings”. However, for reasons explained elsewhere in this paper, an arrest under s.99 is still unlawful if it is not for the purpose of commencing proceedings.
- Section 105 was also amended, with the addition of a new subs(3). This provides that a police officer may discontinue an arrest despite any obligation to take the arrested person before an authorised officer to be dealt with according to law.

## 4 Criteria for a lawful arrest under s.99

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There are at least four (arguably five) criteria for a lawful arrest under s.99:

- (a) Reasonable suspicion that the suspect has committed an offence;
- (b) Arrest must be for the purpose of commencing proceedings;
- (c) Arresting officer must be “satisfied that arrest is reasonably necessary” for one or more of the purposes listed in s99(1)(b);
- (d) Arresting officer must provide the information set out in LEPRA Part 15 unless it is not reasonably practicable; and
- (e) Any force used must be reasonable (opinions differ as to whether excessive force makes the arrest unlawful *per se*; however, excessive force would almost certainly take an officer outside the lawful execution of his or her duty).

## 5 Reasonable suspicion

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A helpful formulation of “reasonable suspicion” appears in Smart AJ’s judgment in ***R v Rondo* [2001] NSWCCA 540**, at para 53. Although *Rondo* applies to the power to stop and search, its principles have more general application. In summary:

- (a) A reasonable suspicion involves less than a reasonable belief but more than a possibility.
- (b) Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. It may be based on hearsay or material which may be inadmissible in evidence, but the material must have some probative value.
- (c) Regard must be had to the information in the mind of the police officer at the time of stopping the person or making the arrest. The question is then whether that information afforded (objectively) reasonable grounds for the suspicion which the officer formed.

There are a few recent cases which discuss reasonable suspicion (and belief) in the context of arrest.

In ***Hyder v Commonwealth of Australia* [2012] NSWCA 336**, the court discussed the state of mind necessary for a Federal Police officer to have reasonable grounds to make an arrest under s.3W of the Commonwealth *Crimes Act*.

Mr Hyder commenced false imprisonment proceedings in the District Court after having been arrested by a Federal Police agent on tax fraud charges which were subsequently found to be based on mistaken identity. His action was dismissed and his appeal was in turn dismissed by the Court of Appeal.

The legislation requires an arresting officer to believe on reasonable grounds that a person has committed a relevant offence. In forming this belief, the Federal Police officer relied heavily on investigations performed by a senior investigator at the Australian Taxation Office.

It was held by McColl JA (with whom Hoeben JA agreed) at [14]:

“In determining whether the arresting officer had the relevant state of mind (be it suspicion or belief), the court is considering a preliminary stage of the investigation, rather than one requiring evidence amounting to prima facie proof.”

Her Honour went on to discuss the difference between suspicion and belief, and set out (at paragraph [15]) a number of propositions from the relevant case law.

It was held that, in the circumstances, a reasonable person in the agent's position was entitled to rely on the apparent thoroughness of the ATO investigations and the fact that the ATO investigator had a sworn affidavit revealing a detailed investigation and identifying a number of primary records said to reveal relevant facts about the appellant. A reasonable belief may be formed on the basis of information which turned out to be wrong, and a court must be careful not to assess the issue of reasonable grounds with the benefit of hindsight. (see judgment of McColl JA at paras [40] to [46]).

It is worth reading the dissenting judgment of Basten JA, who was of the view that “the material in the [ATO] affidavit was not sufficient to raise a bare suspicion, let alone a belief supported by reasonable grounds, that the applicant was linked with the false accounts” (at [78]).

The meaning of “reasonable grounds” was also discussed in **State of NSW v Bouffler [2017] NSWCA 185**, at paras [87]-[92]. This was a civil case concerning the powers of entry under LEPR ss. 9 and 10, and also touched the power to arrest under the old version of s.99. In a joint judgment, the court (Beazley ACJ, Ward JA and Gleeson JA) held that both the entry and the arrest were lawful.

The Court cited **George v Rockett (1990) 170 CLR 104**, **Hyder**, and **O'Hara v Chief Constable of Royal Ulster Constabulary [1997] AC 286**. The Court quoted from **O'Hara**, making the point that:

“For obviously practical reasons police officers must be able to rely upon each other in taking decisions as to whom to arrest or where to search and in what circumstances. The statutory power does not require that the constable who exercises the power must be in possession of all of the information which had led to a decision, perhaps taken by others, that the time has come for it to be exercised. What it does require is that the constable who exercises the power must first have equipped himself with sufficient information so that he has reasonable cause to suspect before the power is exercised.”

In **Bouffler**, the arresting officers attended the plaintiff's home to arrest him on suspicion of breaching an AVO. Two of the officers had responded to an incident broadcast on police radio, had been apprised of the terms of the AVO, and had observed the victim who one of the officers described as “visibly upset”. One of the officers had also spoken to the victim and was aware of a previous breach of the AVO. A third arresting officer had not participated in the investigation but was informed that the plaintiff was “wanted for breaching an AVO”, and was further told that there was a recent history of domestic violence including one recent incident involving the use of a knife. The Court held that “based on the briefing he received and his own observations, this officer also had reasonable grounds on which to suspect that the respondent had breached the AVO”.

This raises questions about whether a notation on the police system that a person is “wanted” in relation to an offence affords an officer with sufficient grounds to enliven the power of arrest. It is suggested that a mere notification that a person is “wanted” will be insufficient but this will depend on the nature and quality of the information provided on the COPS system. Sometimes the system will contain a direction that a person is “to be arrested” in relation to the offence. Arguably this would bring the arrest within s.99(2), provided that the officer who issued the direction had a reasonable suspicion and also had the state of mind required by s.99(1)(b).

Reasonable suspicion was also discussed in another civil case, **Barram v State of New South Wales [2017] NSWDC 255**. The plaintiff claimed in trespass to land, assault and false imprisonment. Neilson DCJ found for the defendant.

The plaintiff had been arrested for an alleged domestic violence offence, based on a statement made by the complainant and also on observations made by police of her injuries and emotional state. The plaintiff essentially submitted that he should not have been arrested without first being given the opportunity to tell his side of the story.

In holding that the arresting officer suspected on reasonable grounds that the plaintiff had committed an offence, His Honour discussed the relevant principles at paras 50-58. While some of his reasoning was, in my view, unsatisfactory (see in particular para [57]), his Honour was no doubt correct when he said “*the person to be arrested does not need to be interviewed before an arrest can take place or that any full investigation should be undertaken before an arrest is made*”. **Rondo** was cited as a leading authority in support of this proposition.

For a recent example of a case where the police were held to have arrested someone *without* reasonable suspicion, see **Lule v State of New South Wales [2018] NSWCA 125**. In this case the plaintiff was arrested for a break and enter offence based on a description given by the victim of the offence. [Another issue in the appeal was whether the arrest complied with s.99(1)(b), but as s.99(1)(a) (reasonable suspicion) was not satisfied, the Court found it unnecessary to determine this (at [95] – [96]). Beazley P added some comments of her own (at [2]-[5]) expressing “considerable doubt” about whether the arrest complied with s.99(1)(b).]

## 6 Arrest must be for purpose of commencing proceedings

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An arrest for an offence *must be for the purpose of taking proceedings in relation to the offence*, and not for some extraneous purpose such as questioning.

This is a common law principle that has not been displaced by LEPR or by the amendments made in 2013.

This was confirmed in the recent case of **Robinson v State of New South Wales [2018] NSWCA 231** (discussed below).

### 6.1 Common law pre-LEPRA

In **Williams v R (1986) 161 CLR 278**, the High Court dealt with a Tasmanian legislative provision that required a person taken into custody for an offence to be taken before a justice without delay. The High Court confirmed that an arrest for an offence must be for the purpose of commencing proceedings, and that there is no power to detain a person merely for the purpose of investigation or questioning. Further, a statute which authorises the detention of a person must be strictly construed, because of the high value the law places on personal liberty.

Before the enactment of LEPR, the power to arrest without warrant in NSW was set out in s352 of the *Crimes Act*. Like the current s.99 of LEPR, it essentially empowered a police officer to arrest a person in the act of, or having just committed, or on reasonable suspicion of having committed an offence. It also imposed a requirement to take the person before an authorised Justice to be dealt with according to law.

In **Bales v Parmeter** (1935) SR (NSW) 182, Jordan CJ said:

“The statute, like the common law, authorises him only to take the person so arrested before a justice to be dealt with according to law, and to do so without delay and by the most reasonably direct route: *Clarke v Bailey* (1933) 33 SR (NSW) 303.’

and:

“... a police officer has no more authority to restrain the liberty of a suspected person for the purpose, not of taking him before a magistrate, but of interrogating him, than he has

of restraining the liberty of a person who may be supposed to be capable of supplying information as a witness.”

These passages were cited with approval by Mason and Brennan JJ in *Williams*, at 293.

In *R v Dungay [2001] NSWCCA 443*, police decided to arrest the appellant so that he could be taken to the police station and asked questions so as to assist the police in their investigations. Police made no mention in evidence of the appellant being arrested so that he could be taken before a magistrate. Although it was found that the police had reasonable grounds to suspect that the appellant had committed an offence, the arrest was held to be unlawful because it was solely for investigative purposes.

In *Zaravinos v State of New South Wales [2004] NSWCA 320*, the plaintiff recovered damages for wrongful arrest. He was asked to come to the police station for an interview. He attended voluntarily and was immediately arrested. As in *Dungay*, there were reasonable grounds to suspect that the plaintiff had committed an offence. However, the arrest was held to be unlawful because it was done for an extraneous purpose (that is, investigation and questioning), and also because it was done in a “high-handed” manner without properly considering an alternative such as a summons.

## 6.2 Effect of LEPR Part 9

The effect of the High Court decision in *Williams* was somewhat modified by the enactment of Part 9 of LEPR (formerly Part 10A of the *Crimes Act*), which empowers police to detain a person for a limited period after arrest in order to investigate the alleged offence.

However, s.113(1)(a) makes it clear that the power conferred by Part 9 applies only if the person has first been lawfully arrested. *There is still no power to arrest merely for the purpose of questioning, investigation, or ascertaining identity.*

It is worth noting that the “detention after arrest” provisions commenced in 1998 and were thus in force in 1999 when the arrests in both *Dungay* and *Zaravinos* took place.

## 6.3 Case law on LEPR s.99 in its previous form

The following cases dealt with s.99 of LEPR as it was before the 2013 amendments. In *McClellan* and *Dowse* it was held that an arrest under s.99 must be for the purpose of commencing criminal proceedings. The decision in *Williams* also supports this proposition.

### *R v McClellan [2008] NSWLC 11*

This is a decision of Magistrate Heilpern in the Local Court. As well as holding that arrest or detention for the purpose of questioning is unlawful, it also deals with the former s.99(3) and arrest as a last resort.

The defendant was approached by police who were making inquiries into a suspected break and enter. She provided her name and produced her driving licence on request, and her licence details were entered in one of the officers’ notebooks.

After some further conversation, she was told that she was suspected of trying to break into someone’s unit, and, “At this point you have to wait here until we make further inquiries about what has happened. We will get some details from you and carry out some checks. Failure to comply and you may be committing an offence.”

The defendant said, “We don’t have to stay here”. Police again told her she was required to stay. She repeated that she didn’t have to stay, and attempted to leave. Police physically restrained her and a struggle ensued. She was eventually handcuffed and told she was under arrest for assault.

The defendant was charged with assaulting and resisting police in the execution of their duty. She successfully argued that the police were not acting lawfully in the execution of their duty.

Although the police did not use the word “arrest” when refusing to allow the defendant to leave, it was agreed by both prosecution and defence that she was in fact placed under arrest. The defendant submitted the arrest was unlawful, firstly because it was for the purpose of investigation

and not for the purpose of commencing proceedings for an offence. Secondly, even if it was for the purpose of commencing proceedings, there was nothing in s.99(3) that justified the use of arrest.

The prosecution submitted that it was lawful to arrest the defendant because she was reasonably suspected of having committed an offence, and that once she was under arrest the police had the power to detain her to confirm her identity. They submitted that the arrest was justified under s.99(3)(a), for the purpose of ensuring that her identity could be confirmed so she could be brought before a court.

The Magistrate rejected the prosecution submissions, and held that the arrest was unlawful because it was carried out for the improper purpose of investigation. His Honour also found the arrest unlawful on the separate basis that it was not justified under s.99(3)(a). He noted that the police had the defendant's name, address and licence details, and there was no evidence that there was anything suspicious about these details.

His Honour said, at paras 25-26:

“It is my view of s.99 of LEPR that subsection (2) states a general power, and then subsection (3) qualifies that power. The words “must not arrest” in subsection (3) are an unambiguous representation of parliamentary intent creating preconditions for a lawful arrest. Indeed, it is hard to imagine a clearer statement of parliamentary intent. Investigation is not one of these preconditions.

It is arguable that subsection (3) limits those preconditions to circumstances of arrest by the words “for the purpose of taking proceedings”. Thus, the argument goes, police need only have a reasonable suspicion to arrest, and then can detain for the purposes of investigation without concern for s99.(3). Sections 109 to 114 of LEPR do provide powers for detention after arrest for the purposes of investigation, however it was not submitted by the prosecution that these sections were relied upon. It is clear that those sections do not confer any power to detain a person who has not been lawfully arrested – see s. 113(1)(a) of LEPR. Further, such an interpretation would represent such a significant departure from the common law prohibition regarding arrest for investigation that it could not be said to represent a codification of the common law.”

At para 31:

“The courts and the parliament have spoken loudly, clearly and repeatedly – it is not enough to arrest a person simply because there is a reasonable suspicion that they have committed an offence. Arrest will be unlawful unless it is necessary to achieve one of the purposes set out in s99(3). It is not one of those purposes that further investigation needs to take place. Arrest is a last resort.”

At para 33:

“[I]n my view if the initial arrest was for the purpose of investigation, and that was unlawful, it does not matter that the purpose of the detention then changed to something else – McHugh J makes this clear in *Coleman v Power*. The poisoned root affects the entire tree.”

### **Williams v DPP [2011] NSWSC 1085**

In *Williams v DPP* (discussed elsewhere in this paper), Harrison AsJ held that the arrest of the appellant was unlawful because police had not complied with what was then s.99(3).

The DPP submitted that an arrest under s.99 need not always be for the purpose of commencing criminal proceedings; therefore the power is not always constrained by subs(3) (which provided that “police must not arrest a person for the purpose of commencing criminal proceedings unless...”). Her Honour did not accept this submission (see paras 20-23); however, she did not need to decide on this point, as the DPP had conceded that the arrest in this case was carried out with the intention of commencing proceedings.

### **Dowse v State of New South Wales [2012] NSWCA 337**

The plaintiff, who had fallen and injured himself while being chased by police, sued the state in negligence and trespass to the person. The Court of Appeal held that his claims should be



dismissed because, at the relevant time, there had been no trespass to the person and the police did not owe him a duty of care.

An issue also arose in the appeal about the power of arrest. Basten JA (with whom McColl JA and Hoeben JA agreed) said (at 26):

[26] “While it is true, as Lord Hope explained in *O’Hara*, that there are two elements to be satisfied for a warrantless arrest to be valid, namely an honestly held suspicion in the mind of the arresting officer and information in the mind of the arresting officer which when objectively assessed provides reasonable grounds for the suspicion, these are not abstract and independent elements. They justify a deprivation of liberty which in turn is part of an ongoing process by which the person arrested must be taken before an authorised officer to be dealt with according to law: Law Enforcement Act, s 99(4). In other words, the arrest is a first step in the process by which the person is to be made answerable for the offence, the commission of which the officer suspects. The same underlying purpose is to be found in s 99(3) which limits the circumstances in which an officer may arrest a person “for the purpose of taking proceedings for an offence against the person”; it thus assumes that such a purpose must underlie a valid arrest.”

[27] “In other words, an arrest will not be valid merely because the officer believes that an offence has been committed, in circumstances where the officer has no intention of charging the person or having the person charged with that offence.”

#### 6.4 Effect of 2013 amendments to s.99

Although the amended s.99 no longer refers to an arrest “for the purpose of commencing proceedings”, it is suggested that the above authorities are still good law, and that s.99 does *not* justify an arrest for a purpose other than commencing proceedings.

Firstly, the new subs.99(3) (formerly s.99(4)) requires the person under arrest to be brought before an authorised officer (this is defined in s.3 of LEPRA and essentially means a magistrate, registrar or bail justice) as soon as practicable. This is intended to reflect the common law and to make it clear that the purpose of an arrest is to commence proceedings. As Basten JA said in **Dowse** (cited above), the existence of such a provision means that “*arrest is part of an ongoing process by which the person arrested must be taken before an authorised officer to be dealt with according to law*”.

Secondly, the predecessor to s.99 was *Crimes Act* s.352, which did not spell out that an arrest must be for the purpose of commencing proceedings, but did refer to taking the person before an authorised justice to be dealt with according to law. In cases such as *Dungay* and *Zaravinos*, which dealt with s.352, the courts were clear that there was no power to arrest for the purpose of investigation and that there must be an intent to commence proceedings.

Even the previous version of s.99 did not explicitly say that an arrest must be for the purpose of commencing proceedings. The former s.99(3) provided that “a police officer must not arrest a person for the purpose of commencing proceedings unless ...”. The inclusion of the words “for the purpose of commencing proceedings” merely bolstered Basten JA’s holding in **Dowse** (cited above) that arrest must be for the purpose of commencing proceedings. It is suggested that the removal of these words does not change the position.

Finally, there is no evidence that Parliament intended to oust the common law when enacting or amending LEPRA. Nothing in the second reading speech to the Law Enforcement (Powers and Responsibilities) Amendment (Arrest without Warrant) Bill 2013 suggested an intention to change the common law position in this regard:

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

In accordance with the “principle of legality” enunciated by the High Court in **Coco v R (1994) 179 CLR 427**, any intention by the legislature to interfere with fundamental rights “must be clearly manifested by unmistakable and unambiguous language”.

## 6.5 Case law since 2013 amendments

**R v Bennett (2015) NSWDC 1** was a judgment of Mahony DCJ on an appeal against a Local Court conviction for assault police in execution of duty. The alleged offence was committed on 28 January 2014, after the commencement of the 2013 amendment to LEPRA s.99. Although the amendments were not explicitly discussed, it was accepted that arrest for the purpose of investigation or questioning is unlawful.

In this case the police officer gave evidence that he believed the appellant had committed an offence of offensive conduct, but that he stopped him “for a chat” and at that stage was not intending to commence proceedings. His Honour found this to be an unlawful arrest and excluded evidence of the alleged assault under 138 of the *Evidence Act*. Alternatively, his Honour would have allowed the appeal on the basis that the police officer was not acting lawfully in the execution of his duty.

The prosecution also relied on the case of *DPP v Gribble* [2004] NSWSC 926, submitting that the officer’s actions did not constitute an arrest but that the officer was legitimately trying to pull the appellant off the roadway for his own safety. However, his Honour held that this was not a *Gribble*-type situation, as there was no evidence that the appellant was in any danger; he was merely crossing the road and there was no traffic at the time.

**Robinson v State of New South Wales [2018] NSWCA 231** (a decision handed down on 16 October 2018) has clarified that, under the current version of s.99, an arrest must be accompanied by an intent to commence criminal proceedings.

The following is an extract from the case summary on Caselaw NSW:

On 22 December 2013 at 5pm, Mr Robinson attended a Sydney police station in response to attempts by police to contact him. Upon attendance he was immediately arrested, without warrant, for breach of an apprehended violence order. Mr Robinson was offered, and accepted, the opportunity to participate in a record of interview. He was released without charge at 6.18pm, following the conclusion of the interview.

The trial judge accepted the arresting officer’s evidence that a decision to charge him depended on what was said in the interview, and that, at the time of the arrest he was unsure whether charges would be laid against Mr Robinson.

The key issue on appeal was whether the arrest was lawful under section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), in circumstances where there was no positive intent to charge Mr Robinson at the time of arrest.

The Court of Appeal, by majority, held that the arrest was unlawful. The power to arrest exists, and must be exercised, for the purpose of commencing the criminal process and bringing the person arrested before a justice as soon as reasonably practicable. As no decision whether to charge the appellant had been made at the time of arrest, the arrest was not for the purpose of commencing the criminal process; accordingly, it was not authorised by section 99.

The majority’s reasoning was somewhat similar to my own reasoning set out in 6.4 above (but no doubt better-expressed and more authoritative!). I recommend reading the complete judgments of McColl and Basten JJA. It is also worth reading the dissenting judgment of Emmett JA, to understand the contrary view.

## 6.6 Situations in which an arrest may be made without an intention to lay charges (in other jurisdictions)

I wish to mention in passing a recent Tasmanian case, **Barnes v Crossin [2017] TAS SC 61**. I include this just in case you face a prosecutor who attempts to rely on it as authority for something that it is not.

In this case, an arrest for a domestic violence offence was held to be lawful even though the arresting officer had no intention of commencing criminal proceedings. However, this decision turned on some unique provisions in the Tasmanian *Family Violence Act*. Sections 10 and 11 set

out powers of arrest without warrant in situations where the police officer “reasonably suspects that a person has committed family violence”. Section 11 provides:

- (1) Where a police officer reasonably suspects that a person has committed family violence, the officer may arrest that person without a warrant.
- (2) Subject to subsection (4), a person taken into custody under this section or section 10 must be brought before a court as soon as practicable after being taken into custody unless released unconditionally or under section 34 of the Justices Act 1959.
- (3) Subject to subsection (4) of this section, section 4 of the Criminal Law Detention and Interrogation Act 1995 applies to a person taken into custody under subsection (1).
- (4) A police officer may detain a person taken into custody under subsection (1) for a period reasonably required to do any or all of the following:
  - (a) determine the charge or charges which should be laid in relation to the family violence;
  - (b) carry out a risk screening or safety audit;
  - (c) implement the measures identified by a safety audit where it is practical to do so;
  - (d) make and serve a PFVO or an application for an FVO.
- (5) In deciding whether to arrest a person under subsection (1), the police officer is to give priority to the safety, wellbeing and interests of any affected person or affected child.

Therefore it was held that it was lawful to arrest for the purpose of conducting a risk screening or safety audit even if there was no intention to lay charges or even apply for a family violence order.

## 7 Arrest as a last resort

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### 7.1 The discretionary nature of arrest

Firstly, it is important to remember that the power to arrest is discretionary.

Section 9(1) of the *Interpretation Act* 1987 (NSW) provides:

- (1) 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.

In ***R v Metropolitan Police Commissioner; Ex parte Blackburn* [1968] 1 All ER 763**, Lord Denning sitting as Master of the Rolls pointed to the independence of “*every constable in the land*.” (at 769).

In ***R v Beaudry* 2007 SCC 5**, Doyon JA writing for the majority of the Supreme Court of Canada said the following, highlighting the “*central importance of the common law doctrines of police discretion and constabulary independence*”:

[35] There is no question that police officers have a duty to enforce the law and investigate crimes. The principle that police have a duty to enforce the criminal law is well established at common law... (citing English cases as well as Canadian legislation at [36]).

[37] Nevertheless, it should not be concluded automatically, or without distinction, that this duty is applicable in every situation. Applying the letter of the law to the practical, real-life situations faced by police officers in performing their everyday duties requires that certain adjustments be made... The ability – indeed the duty – to use one’s judgment to adapt the process of law enforcement to individual circumstances and to the real-life demands is in fact the basis of police discretion.

These principles also have application in Australia, which of course shares a similar common law system. Police discretion, in the context of arrest, is discussed in many Australian authorities, including **Zaravinos v New South Wales [2004] NSWCA 320**, (2005) 214 ALR 234..

This decision concerned the now-repealed s.352(2) of the *Crimes Act 1900* (NSW), which provided that a police officer may arrest a person upon reasonable suspicion of having committed an offence. This power was not subject to the limitations that are now provided by s.99(1)(b) of LEPRA.

Bryson JA (with whom Santow JA and Adams J agreed) said, at [24]:

[E]ven if on the face of things an arrest is permitted by s.352(2) in the sense that a Constable in truth suspects the person arrested of having committed an offence, and there is reasonable cause for the Constable so to suspect, there must be more: there must be an exercise of the discretion alluded to by the word “may”, and it must be an effectual exercise. Literal fulfilment of subs.352(2)(a) is not enough.

At [27], his Honour quoted from the judgment of Lord Diplock in the English case of *Holgate-Mohammed v. Duke* [1984] AC 437, and went on to say, at [28]:

In my respectful view this passage in Lord Diplock’s speech states clearly the basis for the view that the validity of an exercise of statutory power to arrest under subs.352(2) is not established conclusively by showing that the circumstances in subs.352(2)(a) exist, and that the validity of the decision to arrest and the lawfulness of the arrest also depend on the effective exercise of the discretion alluded to by the word “may”.

In *Zaravinos*, the plaintiff’s claim for false imprisonment was made out because the arrest was performed for an extraneous purpose (that is, investigation and questioning), and also because it was done in a “high-handed” manner without properly considering an alternative such as a summons (at [37]). At [39], his Honour characterised the police conduct as “heavy-handed and officious uses of arbitrary power”.

## 7.2 Common law pre-LEPRA

There is a long line of pre-LEPRA authority to the effect that arrest is a last resort and should not be used for minor offences, particularly where the defendant’s name and address are known and a summons would suffice.

In ***Donaldson v Broomby (1982) 60 FLR 124***, Deane J said, at 126:

Arrest is the deprivation of freedom. The ultimate instrument of arrest is force. The customary companions of arrest are ignominy and fear. A police power of arbitrary arrest is a negation of any true right to personal liberty. A police practice of arbitrary arrest is a hallmark of tyranny. It is plainly of critical importance to the existence and protection of personal liberty under the law that the circumstances in which a police officer may, without judicial warrant, arrest or detain an individual should be strictly confined, plainly stated and readily ascertainable. (At 126).

In ***Lake v Dobson (1981) 5 PS Rev 2221***, at 2223, Samuels J stated:

Arrest, for the great majority of people, is equivalent to an additional penalty. It is a means of setting the criminal process in train which should be reserved for situations where it is clearly necessary, and should not be employed where the issue of summons will suffice.

The NSW Court of Appeal in ***Fleet v District Court of NSW [1999] NSWCA 363***, citing Deane J in *Donaldson*, furthered this principle:

[74] There have been many judicial statements about the inappropriateness of resort to the power of arrest (by warrant or otherwise) when the issue and service of a summons would suffice adequately (*O’Brien v Brabner* (1885) 49 JP 227, *R v Thompson* [1909] 2 KB 614 at 617, *Dumbrell v Roberts* [1944] 1 All ER 326 at 332, *Chung v Elder* (1991) 31 FCR 43). Some are in a **legal** context that differs from the present. (Section 352 of the *Crimes Act 1900* is different in some respects from the legal regime in the Australian

Capital Territory considered in *Donaldson*.) Nevertheless, it remains appropriate that those vested with extraordinary powers of arrest should be reminded of the need to consider whether they should be exercised in a particular case. The arrest in this case seems to have an element of the arbitrary about it, which brings to mind the tyranny Deane J warned against. Such cases are harmful to the free society we all want to preserve.

**DPP v Carr (2002) 127 A Crim R 151** involved a man who was arrested for offensive language after swearing at police. While the arrest was technically lawful, it was held to be improper because it was inappropriate in the circumstances. Mr Carr was accused of a minor summary offence, the police knew his name and address, and there was no reason to believe that a summons would not be effective in bringing him to court.

Smart AJ said (at 159):

“This court in its appellate and trial divisions has been emphasising for many years that it is inappropriate for powers of arrest to be used for minor offences where the defendant's name and address are known, there is no risk of him departing and there no reason to believe that a summons will not be effective. Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear. The consequences of the employment of the power of arrest unnecessarily and inappropriately and instead of issuing a summons are often anger on the part of the person arrested and an escalation of the situation leading to the person resisting arrest and assaulting police. The pattern in this case is all too familiar. It is time that the statements of this court were heeded.”

### 7.3 Case law on LEPRA subs.99(3) in its previous form

Prior to the 2013 amendments, subs.99(3) of LEPRA provided that “A police officer must not arrest a person for the purpose of commencing proceedings for an offence unless he or she suspects on reasonable grounds that arrest is necessary” for one of the purposes listed in subs.99(3).

#### **Williams v DPP [2011] NSWSC 1085**

In this case, Harrison AsJ confirmed that the power to arrest in subs(2) was subject to subs(3).

Police attended a local Masonic hall, where a community function was taking place, to arrest the appellant's brother Joel for a shoplifting offence allegedly committed three weeks earlier. The appellant and his mother both attempted to interfere with the arrest and were charged with hindering police in the execution of their duty. It was conceded that they were hindering; the issue was whether the police were acting lawfully in the execution of their duty.

There was no evidence that the police, when they arrested Joel, were concerned about any of the matters listed in s.99(3)(a)-(f).

At first instance, the magistrate held the arrest was lawful because it complied with s.99(2), that is, the police officer suspected on reasonable grounds that Joel had committed an offence. Despite the submissions put to him by the defence, the magistrate apparently ignored subs(3). The appellant and his mother were both found guilty of hindering police and appealed to the Supreme Court on a point of law.

On appeal, the conviction was set aside. Her Honour held that the arrest was unlawful as it did not comply with s.99(3).

#### **Hage-Ali v State of New South Wales [2009] NSWDC 266**

This was a civil case in which the plaintiff was awarded damages for wrongful arrest.

The plaintiff was arrested, along with three others, as part of a police operation in relation to the supply of cocaine. There was evidence from lawfully-intercepted telephone conversations and SMS messages to suggest that the plaintiff was buying cocaine from a supplier, apparently to on-supply to others.

When arrested, the plaintiff nominated her drug supplier and told police that she would be prepared to co-operate in their investigation. She was taken to the police station, where she was interviewed

and provided an exculpatory statement regarding her apparent supply of cocaine. After agreeing to give a statement against her supplier, she was released without charge.

It was conceded that s.99(2) of LEPPRA was satisfied, as the police officers suspected on reasonable grounds that the plaintiff had committed an offence. However, the plaintiff submitted that the arresting officers were merely ordered to arrest her, and did not have any information specific to her circumstances that would have allowed them to form a reasonable suspicion that arrest was necessary for one of the purposes listed in s.99(3).

The defendant submitted that the arresting police officers had considered s.99(3) at the time of her arrest. The arresting officers gave evidence that, as the plaintiff was part of a group of apparently connected drug suppliers, if she was not arrested at the same time as the others, there was a risk that she could flee the jurisdiction, that evidence could be lost and that offences could continue.

Elkaim DCJ was not satisfied that the arrest was justified by s.99(3). He summarised his reasons as follows (at para 211):

“(a) I do not accept that [the arresting officers] gave individual consideration to the justification for the arrest against the background of [written operational orders] and the plain direction from [a senior officer]. ...

(b) There was no consideration of matters personal to the plaintiff as opposed to a general conclusion to this effect: if she has been supplying drugs then there must be a risk of flight, reoffending or destruction of evidence.

(c) In any event there were not reasonable grounds to suspect any of the purposes in S.99(3) needed to be achieved.”

His Honour said (at para 202):

"[T]here must be, in my view, a deliberate addressing of the purposes in S.99(3) by the police officer concerning the particular person to be arrested. This is not to say that a 'ticking off of a checklist' exercise must be undertaken but rather that the facts personal to the person to be arrested must be considered".

The plaintiff also submitted that her arrest was for a collateral purpose, namely to obtain evidence against her supplier. However, His Honour held (at para 213):

“Although there is a strong flavour of the arrest being made for the purpose of obtaining evidence against Mr B I do not think there is enough evidence to make a positive finding to this effect.”

Leave to appeal the decision to the Court of Appeal was refused on the grounds that the application demonstrated no question of law that warranted consideration by the Court: *State of New South Wales v Hage-Ali* [2011] NSWCA 31.

### **R v McClean [2008] NSWLC 11**

See discussion above.

### **Tilse v State of New South Wales [2013] NSWDC 265**

This was a civil action for the tort of false imprisonment. On 1 May 2011, Ms Tilse presented herself at Grafton Police Station, having been told that police wanted to speak to her about an alleged assault committed at a pub a few days earlier. She was immediately placed under arrest and was in custody for several hours before being charged and released on bail.

The police relied on s.99(3)(d), that arrest was necessary to prevent harassment of or interference with potential witnesses. Specifically it was submitted that it was necessary to arrest her so that appropriate bail conditions could be imposed.

Ms Tilse submitted that this objective could have been achieved by applying for an AVO without the necessity to impose bail conditions. In the alternative, it was submitted that bail conditions could have been imposed without arresting her. She relied on s.15(1) of the *Bail Act 1978*, which provided “An accused person may be granted or refused bail in accordance with this Act, notwithstanding that the person is not in custody.”

Nielson DCJ was of the view that an AVO application would not have been sufficient to protect the witnesses in this particular case. This was partly because the witnesses were not in a domestic relationship with the plaintiff, and in practice it is more difficult to obtain an APVO (particularly a provisional order) than an ADVO (see paras 129-134).

His Honour agreed with the plaintiff's submission that bail could be granted to a person who is not in custody, with the proviso that the accused must be "present at police station" (*Bail Act* 1978 s.17). In the course of his reasons, His Honour revised the view he had expressed in his earlier decision of *Carey v State of New South Wales* [2013] NSWDC 213, in which he said, obiter, "that the only power the police had to grant bail is if a person had been arrested" (see paras 138-152).

Despite his finding that bail conditions could have been imposed without arresting the plaintiff, his Honour concluded that arrest was necessary in the particular circumstances of the case (see paras 153-160). Although Ms Tilse had voluntarily presented herself to the police station, the station was understaffed and police were busy dealing with other persons in custody and were not able to deal with her straight away. "There was nothing...to suggest that the plaintiff might meekly wait around to be dealt with in due course by the police." (at para 160).

Ultimately, the plaintiff recovered some damages because his Honour found that, although the arrest was lawful, she was held in custody for an excessively long period.

#### **State of New South Wales v Robinson [2016] NSWCA 334**

Mr Robinson alleged that he had been wrongly arrested on 13 October 2013 because the arresting police officer did not suspect on reasonable grounds that it was necessary to arrest him for any of the purposes specified in the former s.99(3). The only "purpose" in issue in the proceedings was para (b) of subs (3), namely, "to prevent a repetition or continuation of [an] offence".

The primary judge in the District Court found for the Plaintiff. However, the State of NSW successfully appealed on all grounds (including that the primary judge had applied the wrong test).

In a joint judgment, Beazley P, Payne JA and Sackville AJA held that "necessary" in the context of the former s.99(3) means "needed to be done" or "required" in the sense of "requisite", or something "that cannot be dispensed with" (at paras 37-43).

For the arrest to be lawful, the police officer must have honestly suspected that the arrest was necessary for one of the purposes set out in s 99(3), and this must have been based on objectively reasonable grounds. The State did not need to establish that it was actually necessary to arrest the plaintiff (paras 31-35).

In this case the court found that the arresting officer did hold the relevant suspicion, on reasonable grounds. At the time of the arrest, the police officer had cause to believe that the Plaintiff had a record of violence and a "strong animus" against the victim, that he had stalked her and threatened to bomb her workplace, and that he had breached a court order within hours of it being made.

#### **Other cases**

For further examples of civil cases that apply the former s.99(3), see *Hamilton v State of NSW (No 13) [2016] NSWSC 1311* (police complied with s.99(3), but did not comply with Part 15 and used excessive force), *Smith v State of New South Wales [2016] NSWDC 55* (this involved an arrest for an alleged domestic violence offence; arrest unlawful as it was done for administrative convenience of police and not for a purpose listed in s.99(3)), and *Scott-Irving v New South Wales (No 2) [2014] NSWSC 1040* (plaintiff's claim dismissed as the arrest complied with s.99).

## **7.4 Effect of 2013 amendments to s.99**

### **Is arrest still a last resort?**

From the second reading speech to the Law Enforcement (Powers and Responsibilities) Amendment (Arrest without Warrant) Bill 2013, it is apparent that Parliament intended to make it easier for police officers to arrest suspects. This is reflected in the new s.99(1)(b), which provides more grounds to arrest than the old s.99(3). There has also been a change of language from "must not arrest unless" to "may arrest if".

However, it is suggested that arrest is still a last resort. To depart from this long-held common law principle, more explicit language would have been required. Again, as the High Court held in **Coco v R (1994) 179 CLR 427**:

“The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language.”

In **DPP (NSW) v Mathews-Hunter [2014] NSWSC 843**, Fullerton J was of the view that arrest is a last resort under both the new s.99(1)(b) and s.100. See discussion of this case below, in the context of citizen’s arrest. Although the case concerned s.100, and her Honour’s comments on s.99(1)(b) are *obiter*, these comments are nevertheless persuasive.

### **Objective or subjective test?**

The test that existed in the former s99(3), which had both an objective and a subjective element, has been changed.

Instead of requiring the police officer to “*suspect on reasonable grounds that arrest is necessary...*”, s99(1)(b) now allows a police officer to arrest if “*the police officer is satisfied that the arrest is reasonably necessary...*”.

The new s.99(1)(b) was said to be modelled on s.365 of the Queensland *Police Powers and Responsibilities Act*. However, there is a subtle but significant difference between the two provisions. The Queensland s365 commences as follows:

“It is lawful for a police officer, without warrant, to arrest an adult the police officer reasonably suspects has committed or is committing an offence if it is reasonably necessary for 1 or more of the following reasons”

This imposes an objective test (“arrest is reasonably necessary”), without a subjective element (as in “the police officer is satisfied that arrest is reasonably necessary”). Queensland authorities will therefore be of little assistance to NSW courts in interpreting the new s.99(1)(b).

On a plain reading of the new s99(1)(b), the new test appears to be wholly subjective: it simply requires the police officer to be satisfied in his or her own mind that arrest is reasonably necessary.

This interpretation is supported by the judgment of Basten JA in **State of New South Wales v Randall [2017] NSWCA 88**.

His Honour said, at [13], that s99(1)(b) involves:

“... a precondition to the exercise of the power of arrest which depends, not upon objectively verifiable circumstances, but on the state of satisfaction of the officer. Accordingly, unlike the requirement for reasonable grounds, a challenge to the existence of a suspicion or state of satisfaction will only be available where it can be shown that the suspicion or state of satisfaction was manifestly unreasonable, or “arbitrary, capricious, irrational, or not bona fide”, as explained by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu*. “

In **Barram v State of New South Wales [2017] NSWDC 255** (already referred to above in relation to reasonable suspicion) Neilson DCJ discussed the new s.99(1)(b) at paras 59 to 68.

His Honour discussed the difference between “necessary” and “reasonably necessary” and (at [60]) quoted from his own judgment in *Tilse v State of New South Wales* [2013] NSW DC 265:

'Necessary' is one of those words which in our language is an absolute: something is necessary or it is not; something is fundamental or it is not; something is basic or it is not; something is essential or it is not; something is unique or it is not. However the words 'reasonably necessary' are sometimes used in statutes, and it is clear that when the adjective is modified by the adverb 'reasonably', that the adverb modifies the absoluteness, or strictness of the necessity.

His Honour went on to say, at [61]:

It is clear from what fell from members of the Court of Appeal in *State of New South Wales v Randall* [2017] NSWCA 88 that the question is not whether I am satisfied that the



arrest was reasonably necessary, but the question is whether the police officer was satisfied that it was reasonably necessary to effect the arrest for one of the purposes described in the subparagraphs of s99(1)(b).

and at [64]:

As was pointed out by Basten JA in *State of New South Wales v Randall* (supra) at [13], a challenge to the existence of a suspicion or state of satisfaction is only available where it can be shown that the suspicion or state of satisfaction was "manifestly unreasonable, or 'arbitrary, capricious, irrational, or not bona fide'". I could not characterise the suspicion and satisfaction of the senior constable as being either unreasonable, arbitrary, capricious, irrational and certainly not "bona fide". I accept that the senior constable acted "bona fide".

Ultimately Neilson DCJ was persuaded that the arresting officer was satisfied that the arrest was reasonably necessary on a number of grounds set out in s.99(1)(b). This included to stop repetition of the offence, to preserve evidence, to prevent interference with witnesses and "because of the nature and seriousness of the offence".

In relation to the nature and seriousness of the offence, see the summary of the arresting officer's evidence at paragraphs [22] to [25]. Relevantly, the arresting officer did not simply say something along the lines of "it was a domestic violence offence and DV is always serious", but stated that he had been to many domestic violence events and would put this offence in the category of "*it's higher than run of the mill. I'd probably say more in the serious category*" .... "*based on her injuries, her age, what she was alleging had happened to her*" ... "*in regards to her being punched in the head ... being kicked. The lump on her chest*".

#### **Additional reasons justifying arrest**

The factors listed in the old paras 99(3)(a)-(f) have been carried across to the new s99(1)(b), with minor amendments, and the following have been added:

#### **(ii) To stop the person fleeing from a police officer or from the location of the offence**

This is partly subsumed in s99(1)(b)(iv) (formerly s99(3)(a)), "to ensure that the person appears before a court in relation to the offence".

However, is arguably broader – a person may flee the scene, but be well-known to the police, easy to track down for the purpose of issuing a court attendance notice, and not a flight risk when it comes to attending court. The old s99(3)(a) would not have justified the arrest of such a person.

#### **(iii) To enable enquiries 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**

There is little doubt that this was already encompassed in the old s.99(3)(a) (now s99(1)(b)(iv)). This amendment does not appear to broaden the power in any way. Indeed, it could be said that it imposes more rigor on the police by imposing a duty to attempt to ascertain the person's identity before resorting to arrest.

#### **(v) To obtain property in the possession of the person that is connected with the offence**

It is difficult to see how this differs from the old s99(3)(c) ("to prevent the concealment, loss or destruction of evidence relating to the offence") or the new s99(1)(b)(vi).

#### **(vii) To protect the safety and welfare of any person (including the person arrested)**

This has been broadened out to include persons other than the person being arrested. Some have suggested that this does not significantly broaden the power of police, as they already have a common law power of arrest to deal with a breach of the peace. However, "welfare" is a word capable of very broad interpretation; it is conceivable that police may arrest a person to protect another person's welfare in situations where there is no imminent breach of the peace.

#### **(ix) Because of the nature and seriousness of the offence**

According to the Premier's Second Reading Speech, "this gives police the certainty to act swiftly in the case of serious crimes without having to consider whether any other reason to arrest without a warrant exists".

It was suggested during the parliamentary debate that arrest is appropriate for particular types of offences, such as domestic violence offences, because research has shown that "arresting domestic violence offenders deters future domestic violence from occurring". In particular, the Premier was relying on a 2012 BOCSAR report entitled *The effect of arrest and imprisonment on crime* (<http://www.bocsar.nsw.gov.au/agdbasev7wr/bocsar/documents/pdf/cjb158.pdf>). It is respectfully suggested that the BOCSAR study was concerned with the deterrent effect of being *apprehended*, and not specifically of being *placed under arrest*. The BOCSAR report is *not* evidence for the proposition that being arrested is a greater deterrent to future offending than being served with a CAN.

In *Hage-Ali v State of New South Wales [2009] NSWDC 266* (discussed above) it was held that, under the old s.99(3), it was impermissible to arrest a person based on stereotypes about particular types of offences or offenders. The insertion of s.99(1)(b)(ix) may have altered this position to some degree. However, even after this amendment, the arresting officer will still need to be satisfied that arrest is reasonably necessary *in the particular circumstances*. The power to arrest is a discretionary one and there must be a meaningful exercise of that discretion. An officer who follows a blanket directive by their Local Area Commander to arrest *all* suspects for domestic violence offences (for example) would not be acting in accordance with s.99.

See also the discussion of *Barram* above.

## 7.5 Children (Criminal Proceedings) Act s.8

The principle of arrest as a last resort has even more force when combined with s.8 of the *Children (Criminal Proceedings) Act*, which provides that proceedings against children should generally be commenced by "attendance notice".

While the language of the section is now outdated (having not been amended to take account of the fact that all proceedings are now commenced by CAN and the procedure that used to be known as "charge" is now a "bail CAN"), and the section contains many exceptions, the apparent intention is to create a presumption that proceedings against children should be commenced without resort to arrest and bail.

Even when police have used their power of arrest, it could be argued that s.8 requires them to strongly consider issuing a Field, Future or No Bail CAN rather than a Bail CAN.

See the comments of Rothman J in *DPP (NSW) v GW [2018] NSWSC 50* at [44] – [46], discussed below. See also *DPP (NSW) v AM [2006] NSWSC 348*, where Hall J referred to s8 at [34] – [36].

## 8 Arrest for breach of bail

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### 8.1 Old Act - *Bail Act 1978* s.50

Under the repealed *Bail Act 1978*, s.50(1) set out the actions that police could take in response to an actual or anticipated breach of bail:

(1) Where a police officer believes on reasonable grounds that a person who has been released on bail has, while at liberty on bail, failed to comply with, or is, while at liberty on bail, about to fail to comply with, the person's bail undertaking or an agreement entered into by the person pursuant to a bail condition:

- (a) a police officer may arrest the person without warrant and take the person as soon as practicable before a court, or
- (b) an authorised justice may:

- (i) issue a warrant to apprehend the person and bring the person before a court, or
- (ii) issue a summons for the person's appearance before a court.

## 8.2 Case law under old Act

Courts have been willing to find that an inappropriate exercise of discretion under s.50(1) of the old Act renders an arrest improper.

**NT v R [2010] NSWDC 348** was a District Court appeal concerning a 13-year-old girl arrested at her own home for an alleged breach of a curfew condition the previous night. She was then charged with resisting police and offensive language. Tupman DCJ held that the arrest was improper and excluded the evidence obtained in consequence of that arrest.

Tupman DCJ referred to the common law on arrest as a last resort and held at [14]:

It seems to me, however, that the same provisions and considerations that apply, or ought to apply, in deciding whether or not to arrest a person on [sic] warrant for an offence, or deal with the matter by way of summons, ought equally apply to a decision how to deal with an allegation of breach of bail. There are alternatives available to police, one out of three of which does not involve the issue of a warrant and the taking of a person into police custody. The evidence in this case is that the police officer did not turn her mind to whether or not it would have been appropriate to approach an authorised Justice to issue a summons under s 50 of the Bail Act because she did not understand that that was an available option.

## 8.3 New Act - *Bail Act 2013* s.77

On 20 May 2014, s.50 of the old Act was replaced by s.77 of the *Bail Act 2013*. It reads:

### **77 Actions that may be taken to enforce bail requirements**

(1) A police officer who believes, on reasonable grounds, that a person has failed to comply with, or is about to fail to comply with, a bail acknowledgment or a bail condition, may:

- (a) decide to take no action in respect of the failure or threatened failure, or
- (b) issue a warning to the person, or
- (c) issue a notice to the person (an "application notice") that requires the person to appear before a court or authorised justice, or
- (d) issue a court attendance notice to the person (if the police officer believes the failure is an offence), or
- (e) arrest the person, without warrant, and take the person as soon as practicable before a court or authorised justice, or
- (f) apply to an authorised justice for a warrant to arrest the person.

(2) However, if a police officer arrests a person, without warrant, because of a failure or threatened failure to comply with a bail acknowledgment or a bail condition, the police officer may decide to discontinue the arrest and release the person (with or without issuing a warning or notice).

(3) The following matters are to be considered by a police officer in deciding whether to take action, and what action to take (but do not limit the matters that can be considered):

- (a) the relative seriousness or triviality of the failure or threatened failure,
- (b) whether the person has a reasonable excuse for the failure or threatened failure,
- (c) the personal attributes and circumstances of the person, to the extent known to the police officer,

(d) whether an alternative course of action to arrest is appropriate in the circumstances.

(4) An authorised justice may, on application by a police officer under this section, issue a warrant to apprehend a person granted bail and bring the person before a court or authorised justice.

(5) If a warrant for the arrest of a person is issued under this Act or any other Act or law, a police officer must, despite subsection (1), deal with the person in accordance with the warrant.

Note: Section 101 of the Law Enforcement (Powers and Responsibilities) Act 2002 gives power to a police officer to arrest a person in accordance with a warrant.

(6) The regulations may make further provision for application notices.

## 8.4 Legislative intention behind s.77

Section 77 is more prescriptive than s.50 of the former Act. It sets out a clear hierarchy of options, and a list of matters for the police to consider in deciding what (if any) action to take.

In the Second Reading Speech to the Bail Bill 2013 (NSW Legislative Assembly Hansard, 1 May 2013, <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-74848>), the then Attorney-General, Mr Greg Smith, said:

Part 8 deals with enforcement of bail requirements. The Law Reform Commission recommended that the legislation set out the options open to police when responding to a breach or threatened breach of bail and the matters that should be considered by police when doing so. Proposed section 77 (1) therefore stipulates the actions that a police officer may take in relation to a person who the officer reasonably believes has failed, or is about to fail, to comply with a bail acknowledgement or bail conditions. In those circumstances the officer may decide to take no action, issue a warning, issue an application notice or court attendance notice to the person requiring them to attend court, arrest the person, or apply for an arrest warrant.

Proposed section 77 (3) sets out the considerations that a police officer is required to take into account when deciding whether to take action, and what action to take. They include the seriousness of the failure or threatened failure, whether the person has a reasonable excuse, the personal attributes and circumstances of the person and whether an alternative to arrest is appropriate in the circumstances. Proposed section 77 (2) also makes clear that if an officer arrests a person for a breach, the officer may decide to discontinue the arrest and instead issue a warning, application notice or court attendance notice.

## 8.5 Case law under new Act

***Department (sic) of Public Prosecutions (NSW) v GW [2018] NSWSC 50*** was a decision of Rothman J, allowing an appeal by the DPP against a decision of a Children's Court magistrate to dismiss proceedings against the defendant.

The defendant was a 14-year-old Aboriginal girl who was on bail with a curfew condition. The arresting officer saw the defendant walking in the street, and recognised her and the fact that she was in breach of her curfew. Upon seeing police (or upon hearing her name called) the defendant turned and ran away. The arresting officer gave chase, having already decided to arrest her.

The officer also knew that she was on parole and was a "repeat offender". [Interestingly, the officer also claimed that the defendant had outstanding warrants; however, the primary reason for the arrest was the breach of bail.]

The arresting officer gave evidence that because of the very short amount of time between seeing the defendant and her starting to run away, he did not consider any other alternative conduct in relation to the breach of bail.

The magistrate held that the arrest was improper because the arresting officer had not first considered any alternatives. Evidence of what ensued after the arrest was excluded under section 138 and the charges (assault police, resist police, and use offensive weapon to avoid apprehension) were dismissed.

On appeal, Rothman J held that failure to consider alternatives to arrest will not always render the arrest improper.

[40] It is not every case of a failure to consider all of the options available for a breach of bail that would render an arrest or chase improper. The circumstances of that situation must be considered.

[41] Where, as here, the defendant flees arguably even before the chase commences, there may be insufficient time to consider the other options available under s 77 of the Bail Act. If there were insufficient time in an urgent situation, it could not be said to be improper for a police officer not to consider every other option. An example may suffice.

[42] Let us assume bail is granted on conditions which include a restriction on the presence of an accused within a specified distance of her or his spouse's residence. Let us further assume, that a police officer, knowing of the conditions of bail, observes the accused in the front yard of the accused's spouse's residence. The failure to consider the options available other than arrest may be wholly appropriate because of the perceived urgency. There is no blanket rule.

[43] The reasons of the learned Magistrate did not disclose conclusions of fact from which one can assume or determine that the conduct of failing to consider options other than arrest was an impropriety. Nor do the reasons disclose whether the Constable had sufficient time to consider other options. The judgment of her Honour in *NT v R* is not a prescription that should be applied to every situation of arrest, without regard to the circumstances that led to a failure to consider other options.

It is worth noting His Honour's comments about arrest of young people:

[44] Nothing in the foregoing should be taken to condone or to encourage the arrest or continued detention of young persons and, in particular, young persons of Aboriginal descent. It is a blight on society that, despite the findings of the Royal Commission into Aboriginal Deaths in Custody and since those findings have been published, there has been an increasing rate of incarceration of persons of Aboriginal descent.

[45] The experience of those involved in this area is that positive, therapeutic steps, such as those undertaken in Redfern under the guidance of Inspector Freudenstein, have a far greater effect on the incidence of criminal conduct and the incarceration of Aboriginal persons than continued arrest of such persons and their continued involvement in the cycle of criminality associated with custody. Further, culturally appropriate steps are more effective in achieving a positive outcome.

[46] Lastly, it is necessary, given the foregoing comments, for the Court to reinforce the comments (usually made in the context of a bail application) that it is inappropriate for the powers of arrest to be used for minor offences, where the defendant's name and address are known and there is no risk of the defendant fleeing. Further, in particular, the provisions of s 8 of the Children (Criminal Proceedings) Act 1987 (NSW) emphasise the inappropriateness of treating the arrest of a young person as the first and primary option, even though arrest may "technically" be permitted.

In his judgment, Rothman J referred to the brevity of the Magistrate's reasons (see, eg, paras 43, 49-51), which made it difficult for the Supreme Court to determine the issues. The matter was remitted to the Children's Court for determination according to law.

## 8.6 Can failure to exercise discretion render an arrest unlawful? Are the considerations in subs.77(3) mandatory?

Whether non-compliance with s.77 can render an arrest *unlawful* (as opposed to merely *improper*) will be a matter for the courts to decide.

I would suggest that a complete failure to exercise discretion may render an arrest unlawful in some cases.

An inappropriate exercise of the officer's discretion (as opposed to a failure to exercise any discretion at all) would likely render the arrest improper.

Subs. 77(3) provides "the following matters are to be considered". As to whether these considerations are mandatory, it is instructive to look at cases on s10 of the *Crimes (Sentencing Procedure) Act*, which uses similar language ("the court is to have regard to the following factors").

In ***R v Paris [2001] NSWCCA 83***, Simpson J (with whom Ipp AJA and Wood CJ at CL agreed) said, at [42]:

Subs 3 requires the court to have regard to the four factors listed. This is not intended to preclude the court having regard to any other relevant factors but it does require express regard to those matters identified.

In ***Hoffenberg v District Court of NSW [2010] NSWCA 142***, McClellan CJ at CL, at [27], spoke of the sentencing judge having "discharged his obligation to consider the matters raised by s.10(3)."

Basten JA said, at [10]:

Further, to say that a court "is to have regard to" certain factors (see subs.(3)), suggests that these are mandatory considerations. However, they are really conclusions reached by the court in the course of its considerations. .... Properly understood, the court is not to "have regard to" those factors, but to determine whether those factors exist. Finally, it seems that these are not in truth mandatory considerations, because par (d) includes "any other matter that the court thinks proper to consider". It is not meaningful to make that a mandatory consideration. Again the purpose is to ensure the court considers the full range of factors it considers relevant.

Even on Basten JA's view, the court cannot ignore the factors listed in s.10(3). By analogy, I would suggest that the police must turn their mind to the matters in s.77(3) (unless the situation is of the utmost urgency).

## 9 Citizen's arrest

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### 9.1 Arrest for an offence

LEPRA s.100 provides that a person other than a police officer may arrest a person:

- (a) in the act of committing an offence under any Act or statutory instrument;
- (b) who has just committed any such offence; or
- (c) who has committed a serious indictable offence for which he or she has not been tried.

A citizen *does not have the power to arrest on suspicion*. The person making the arrest must have witnessed the offence or be otherwise satisfied that the offence has been committed (***Brown v G J Coles (1985) 59 ALR 455***).

### 9.2 Arrest for breach of peace

It appears that a citizen also has a common law power to arrest for breach of the peace (see ***Albert v Lavin [1982] AC 546 at 565***). Although this power has not been expressly preserved by LEPRA s.4 (which provides that LEPRA does not affect the common law powers of *police* to deal with a breach of the peace), nor has this power been expressly legislated away.

### 9.3 Safeguards

Although the safeguards in Part 15 do not apply to a citizen's arrest, it appears clear from **Christie v Leachinsky [1947] 1 All ER 567** that a person who is arrested by a private citizen is entitled to be told the reason why (unless of course it is obvious or the person arrested makes it impossible). Lord Du Parcq said (at 578):

"No citizen is bound to submit unresistingly to another citizen in ignorance of the charge made against him. For this reason a citizen cannot be charged for resistance as the right to arrest and the duty to submit are correlative".

### 9.4 Use of force

As with police officers, citizens are empowered to use reasonable force to effect an arrest or to prevent the person's escape (s.231).

### 9.5 Arrest as a last resort

In **DPP (NSW) v Mathews-Hunter [2014] NSWSC 843**, Fullerton J held that the principle of arrest as a last resort applies to the citizen's arrest power in LEPR s.100, at least where the power is being used by a person such as a transit officer who has other options available.

The defendant was travelling on a train when a transit officer observed him drawing on a window using a marker pen. The officer approached the defendant and immediately arrested him for malicious damage. It was alleged that the defendant then assaulted the officer. As well as being charged with offences under the *Graffiti Control Act*, he was charged with common assault and assault occasioning actual bodily harm.

The assault matters were dismissed by the Local Court. The magistrate excluded the evidence of the alleged assault under s.138 of the *Evidence Act*, having found that the arrest was unlawful or improper.

The DPP appealed to the Supreme Court under s.56(1)(c) of the *Crimes (Appeal and Review) Act*. The DPP argued that there was a "critical distinction" between ss. 99 and 100. Due to the absence of a s.99(1)(b) type provision in s.100, it was submitted that s.100 provided an unqualified power of arrest.

This submission was rejected by Fullerton J, who relied on the common law (and principally *DPP v Carr* [2002] NSW SC 194). After quoting from Smart AJ's judgment in *Carr*, her Honour said

49. In the present case the defendant was subjected to the additional punishment of being deprived of his liberty and being physically restrained for the commission of an offence that is punishable only by a fine, in circumstances where the arresting transit officer must be taken to have been aware that there were alternatives available to him even if he may not have been certain as to what they were.

50. Although Smart AJ was dealing with arrest powers under s 352 of the *Crimes Act* (since repealed), I note that the second reading speech to the Bill introducing LEPR in 2002 makes it clear that the legislature intended that both ss 99 **and** 100 would be subject to the restrictions on the exercise of the power to arrest, including that arrest should be exercised only when necessary, and only as a last resort. In any event, s 352 did not displace the common law with regards to limitations on the power to arrest; neither did the enactment of ss 99 and 100 of LEPR which replaced that provision (see *Zaravinos v State of NSW* [2004] NSWCA 320; 62 NSWLR 58 per Bryson JA at [23]). In *Zaravinos*, at [23], Bryson JA observed that because of the high value the law places on personal liberty, "a statute which authorises the detention of a person must be strictly construed".

51. In *Williams v R* [1986] HCA 88; 161 CLR 278, Mason and Brennan JJ considered the "jealousy" with which the common law protects the right to personal liberty:

The right to personal liberty is, as Fullagar J described it, "the most elementary and important of all common law rights": *Trobridge v Hardy*. Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England "without sufficient cause" *Commentaries on the Laws of England ...* He warned:

"Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper... there would soon be an end of all other rights and immunities."

That warning has been recently echoed. In *Cleland v The Queen* Deane J said:

"It is of critical importance to the existence and protection of personal liberty under the law that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed."

The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes.

52. Although his Honour did not say so expressly, it is implicit in his reasons that he was satisfied that the transit officer's decision to arrest the defendant was the result of either expediency or uncertainty as to how to respond in the circumstances, not, as the plaintiff submitted, because it was the appropriate response. Far from the power to arrest being executed as the last resort as is required at law, it was the transit officer's first response. There is no evidence to suggest that obtaining the defendant's details and passing them on to the police would not have been an effective way of dealing with the graffiti offences. In my view, in all the circumstances, the evidence supports his Honour's finding that the arrest was unlawful and improper.

Her Honour went on to hold that the magistrate did not err in excluding the evidence under s.138, and nor did his Honour err by failing to provide adequate reasons. The appeal was therefore dismissed in its entirety.

## 10 Power to arrest for breach of peace

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LEPRA s.4 expressly preserves the powers conferred by the common law on police officers to deal with breaches of the peace.

### 10.1 Definition of breach of the peace

"Breach of the peace" is not defined in LEPRA. The case law demonstrates that it can encompass a wide variety of situations.

In *R v Howell [1982] QB 416* Watkins LJ said (at 427):

"[T]here is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance."

Noise, argument, loud or offensive language does not of itself constitute a breach of the peace (*Parkin v Norman [1982] 2 All E.R. 583*, *Williams v Pinnuck (1983) 68 FLR 303*, *Beaty v Glenister (1884) 51 LT (NS) 304*, *Neave v Ryan [1958] Tas SR 58*, *Nilsson v McDonald (2009) TASSC 66*).

However, in *Nicholson v Avon [1991] 1 VR 212*, it was held that a very noisy party, in the early hours of the morning, and incurring complaints from a neighbour, did amount to a breach of the peace. Marks J said (at 221), "In my opinion, there is no conduct more likely to promote violence than prolonged disturbance of the sleep of neighbours by noise and behaviour of the kind disclosed."



In *State of NSW v Bouffler* [2017] NSWCA 105 (discussed above in the context of reasonable suspicion) the Court held that the police had lawfully entered premises to prevent a breach of the peace. The Court discussed the meaning of breach of the peace at paras [152]-[164] and came to the view that a breach of the peace may include self-harm.

[159] In *State of New South Wales v Tyszyk* [2008] NSWCA 107, Campbell JA, after noting, at [85], that a police officer has a common law duty to prevent or to assist in preventing breaches of the peace, observed:

“The notion of a ‘breach of the peace’ is a multifaceted one, and includes a wide range of actions and threatened actions that interfere with the ordinary operation of civil society.”

[160] Campbell JA, after reviewing the observations made in *Howell* and noting that that approach had been followed in some cases in the United Kingdom, as well as decisions of single judges in Australia: see *Bhattacharya v State of New South Wales* [2003] NSWSC 261 at [38]; *Tomarchio v Pocock* [2002] WASC 156 at [54], observed, at [92], that a wider view had been taken by Lord Denning MR in *R v Chief Constable of the Devon and Cornwall Constabulary, ex parte Central Electricity Generating Board* [1982] QB 458, who stated that:

“There is a breach of the peace whenever a person who is lawfully carrying out his work is unlawfully and physically prevented by another from doing it.”

[161] However, that view had not been endorsed by the other two members of the Court and as Campbell JA pointed out, at [93], it has not been followed in later English cases. It was, however, approved by Angel J in *R v Van Bao Nguyen* (2002) 139 NTR 15; [2002] NTSC 38 at [11], although his Honour did not advert to the later disapproval of Lord Denning’s statement. Campbell JA concluded this discussion by noting, at [101], that:

“... the account of breach of the peace given by *Howell* suggests that the concept of breach of the peace has lost some of the protean quality it once had.”

[162] Ultimately, his Honour did not consider that *State of New South Wales v Tyszyk* was an occasion to determine whether *Howell* was correct.

[163] In *State of New South Wales v McMaster* (2015) 91 NSWLR 666; [2015] NSWCA 228 at [32](6), this Court expressed the view, by reference to Campbell JA’s discussion in *State of New South Wales v Tyszyk* at [87]-[98], that the statement of the Court in *Howell* was unlikely to be exhaustive.

[164] Accordingly, we consider that it is open to us to prefer the view expressed by Campbell JA, that a breach of the peace includes “a wide range of actions and threatened actions that interfere with the ordinary operation of civil society”. In particular, a threat or a realistic apprehension of self-harm could constitute a breach of the peace. Each case will be fact dependent.

## 10.2 Powers to deal with breach of the peace

At common law, police (and citizens) have extensive powers to prevent or to stop breaches of the peace. These include powers of entry, at least in some jurisdictions (*Nicholson v Avon* [1991] 1 VR 212, *Panos v Hayes* (1984) 44 SASR 148, and now enacted into s.9 of LEPR), dispersing picketers (*Commissioner of Police (Tas); ex parte North Broken Hill Ltd* (1992) 61 A Crim R 390), confiscating items such as protesters’ megaphones (*Minot v McKay (Police)* [1987] BCL 722) and arrest or detention (*Albert v Lavin* [1982] AC 546 at 565).

Lord Diplock said in *Albert v Lavin* (at 565):

“[E]very citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking, or is threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will.”

A person using such preventative powers must reasonably anticipate an imminent breach of the peace; it must be a real and not a remote possibility (*Piddington v Bates* [1961] 1 WLR 162; *Forbutt v Blake* (1981) 51 FLR 465).

Detention or arrest is a measure of last resort (*Innes v Weate* (1984) 12 A Crim R 45 at 52; *Commissioner of Police (Tas); ex parte North Broken Hill Ltd* (1992) 61 A Crim R 390).

The force used to restrain the citizen must only be such as is reasonable. The restraint may continue as long as is necessary to prevent the breach of the peace; the citizen must then be either released or arrested (presumably for a specific offence) (see *Albert v Lavin*, *Piddington v Bates*).

The case of *DPP v Armstrong* [2010] NSWSC 885 did not break any new ground but confirmed that police in NSW have a common law power to arrest for breach of the peace.

More recently, *Poidevin v Semaan* [2013] NSWCA 334 affirmed the broad power of police to take action to deal with a breach of the peace. At first instance, Rothman J sought to construe this power quite narrowly, but His Honour's approach was rejected by the Court of Appeal.

## 11 Power to detain a person for their own safety

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Police are also empowered to restrain a person for his or her own safety.

*DPP v Gribble* [2004] NSWSC 926 concerned a man who was standing in the middle of a busy road. He ignored police directions to get off the road, and resisted their attempts to physically move him to the side of the road. When charged with resisting police in the execution of their duty, he argued that the police had no power to restrain him and were not acting in the execution of their duty. The magistrate dismissed the charge, but this decision was reversed on appeal to the Supreme Court.

After reviewing the common law and legislation (including the *Police Act* 1990) concerning the functions and duties of police, Barr J concluded (at para 29):

“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.”

In *R v McLeay* [2009] NSWLC 29, Curran LCM commented (at para 106):

“[A]s a consequence of the implementation of LEPRA, and since *Gribble* was decided, the following subsection (6) was added to s.6 of the *Police Act*:

“Nothing in this section confers on the NSW Police Force a power to provide a police service in a way that is inconsistent with any provisions applicable to police officers under the Law Enforcement (Powers and Responsibilities) Act 2002.”

“It would seem to me that given this amendment, s.6 would now be considerably limited, and in any event it could not be relied upon to expand powers not allowed for in LEPRA....[I]n this regard, I note that my view accords with that of Heilpern LCM in *Police v Randle* (decision of Local Court 21/10/2008 – unreported – at paragraph 70-71).”

In *R v Ali Aikan* [2010] NSWLC 1 (at paras 42-52) Heilpern LCM discussed *Gribble* and the effect of the enactment of LEPRA and the amendment of the *Police Act*. His Honour said “I note that there is a debate relating to the existence of any common law or general power of arrest since the introduction of [LEPRA]”. His view was that there probably still is a residual power to arrest to stop danger or injury in *Gribble*-type situations where an offence has not been committed. However, he did not need to resolve the issue as the case was decided on other grounds (see discussion above in the context of excessive force).

See also **Castillo v R** (District Court NSW, North DCJ, 4 August 2011, 2009/327995). In this case police unsuccessfully argued that grabbing the accused by the jaw and attempting to retrieve something from his mouth was justified in accordance with the *Police Act* and the principle in *Gribble*.

**Director of Public Prosecutions (NSW) v Araura [2012] NSWSC 1120** concerned a woman who was charged with assaulting police in the execution of their duty.

Police entered a residential building where they saw the accused sitting in the stairwell. She was screaming, bleeding profusely from her forearm, and said she wanted to die. A nearby male, believed to be her partner, told the police to "help her". As far as the police knew, she had not committed any offence. One of the police officers tried to calm the accused down, and grabbed both her arms because she was picking at a bleeding wound. She opened her mouth in an attempt to bite the officer, then kicked him a number of times. She was eventually handcuffed and at this time she bit another officer.

The Local Court magistrate, in dismissing the charge, referred to *Gribble* and said:

"It is, in my view, subtly distinguished, however, from these present facts. There is no reference in *Gribble* to protection of persons from self-injury, although one might, after reading the entirety of the case, reach the conclusion that Mr Gribble, who was running into the middle of the road, was posing a danger to himself as well as to others."

The magistrate expressed the view that the risk of self-injury to the accused was not such as to warrant physical intervention by the police, especially given her repeated requests to be left alone.

Davies J upheld the DPP's appeal, holding that *Gribble* was applicable in the circumstances.

In the course of his judgment the magistrate drew a distinction between "course of duty" and "execution of duty", a distinction that is somewhat difficult to understand and which was rejected by Davies J on appeal.

## 12 Power to detain to check details (eg identity, ticket validity)

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In **State of New South Wales v Le [2017] NSWCA 290**, the Court of Appeal (Basten JA, Leeming JA, Payne JA) held that the police have an implied power to detain someone to verify their identity, in circumstances where there is a statutory power to demand this information.

Mr Le was stopped by transport police at a train station. On request he produced his Opal card and then his pension concession card. For reasons best known to themselves, the police were apparently unsatisfied and asked for a form of photo ID such as a driver's licence. Mr Le did not produce any photo ID (and I note in passing that he had no statutory obligation to do so) but provided his date of birth when asked.

The relevant conversation and "detention" was set out in para [9] of the judgment:

The transcript of the conversation did not establish that the claimant's participation in the events was other than consensual up to the point when he was asked to produce something with photo identification such as a driver licence. He argued about his obligation to do that, but agreed to provide the details which would be on it. The officer then said:

"Alright well you're gonna have to wait here while we confirm who you are."

While that may have been an indication that the claimant was not free to leave, the ensuing conversation, which involved him immediately asking the officers to provide their names and station suggests that his continuing presence was consensual. It was only when the respondent noted, "this is my train by the way guys. Can I ..." that the following exchange took place:

"OFFICER: That's fine. Until we finish here you're not leaving.

LE: Am I under arrest?"

OFFICER: No you're not, you're being detained.

LE: What for?

OFFICER: To confirm that this is you, that this card isn't stolen."

Within a matter of seconds he was told that he was free to go. At the point where the officer expressly told him "you're not leaving", it is reasonable to infer that he was then being non-consensually detained. That exercise of power required justification.

At first instance, in the District Court, this was held to be a false imprisonment. The Court of Appeal disagreed, saying, at [3]:

There is no reason why such language should continue to be used in circumstances where it is inapt. What was involved in this case was a brief interruption of the respondent's intended progress which might be described as a temporary detention. Detention is a concept with a range of meanings, but can be used in a sense distinct from arrest, which in turn is distinct from imprisonment and holding in custody. Detention, in that limited sense, involves a temporary deprivation of liberty.

The Court went on to hold that the detention was justified by clause 77C of the Passenger Transport Regulation 2007 (since repealed and replaced by the Passenger Transport (General) Regulation 2017). This clause requires a person travelling on a concession ticket to produce to an authorised officer "evidence (for example, a person's pension or student concession card) that the person is entitled to the concession ticket."

The Court said:

[14] Two issues arose as to the operation of subcl 77C(2). The first was whether the officers were entitled to direct that the respondent produce a driver licence, or some other form of photo identification, as "evidence" that he was entitled to the concession ticket. One limb of the argument appeared to be that the words in parentheses, although commencing with the phrase "for example", denoted the outer limits of the power, so that production of either of the two concession cards exhausted the scope of the power. Accordingly, the production of a pensioner concession card was sufficient to satisfy the requirement under subcl (2) and therefore provided the limit of the officer's authority.

[15] That reading of the subclause is not reasonably open. First, it appears to substitute the word "either" for the phrase "for example" by requiring that either one or other card was sufficient. Secondly, it gives no work to the word "evidence". That terminology is not readily equated with a simple requirement to produce an appropriate concession card.

[16] On the basis that that proposed limitation was unavailable, it was submitted that the Court should consider whether the demand for further identification was "reasonable", according to some objective standard. There are two answers to that submission. First, the purpose of the subclause is to allow the officer to verify that the person who has produced a concession ticket is entitled to it. No doubt the request for further information must be made in good faith by an officer who did not know who the ticket holder was. However, where the production of the concession card did not allow that link to be made, it was not unreasonable of the officer to seek further evidence, which was provided in the form of a date of birth.

[17] Secondly, the use of the term "evidence" does not imply that the matter is to be tested by the court forming its own view as to the relevant connection. Rather, "evidence" refers to a document or information sufficient to satisfy the officer, to whom it is to be produced, of the connection between the person being questioned and the entitlement to a concession ticket. Arguably, the officer's determination as to sufficiency may be challengeable on judicial review grounds, but the court is not entitled to form its own opinion, as opposed to testing the rationality and good faith of the opinion formed by the officer.

The Court went on to hold:

[18] That leaves the critical question as to the operation of subcl 77C(2), namely whether it carries within it an implied power to stop and detain a person for the purpose of carrying

out the exercise which it envisages, namely the giving of a direction and the production of evidence. While it is true that the courts will not read legislation as conferring authority to interfere with the fundamental rights of individuals, absent clear words or a necessary implication, there are two limitations implicit within that proposition. The first is that express words are not essential; the second is that what may be derived by implication will turn on the legislative context and the nature of the interference being authorised.

[19] In the present case, there are no express words such as may appear in other contexts authorising an officer to require a person to stop, listen to the direction and remain until the inquiry has been completed. For example, there is no equivalent language to that found in the *Road Transport Act 2013 (NSW)* empowering an authorised officer to direct the driver of a vehicle to stop the vehicle and not move the vehicle. [12] On the other hand, the conferral of a power (under cl 77E) to request a ticket for inspection, subject to a penalty for non-compliance, necessarily implies a power to make the request and, if necessary, stop the person to allow the request to be made and responded to. The same reasoning applies to cl 77C(2). Accordingly, the steps taken by the officer to direct the production of evidence demonstrating entitlement to the concession ticket carries with it the implied power to detain the person whilst those steps were undertaken. The fact that subcl (3) requires that the person must “immediately comply” with the direction demonstrates that the time of the relevant detention will be quite short. A failure to comply will form the basis for taking other steps, including arrest, in relation to the commission of an offence. That stage was not reached in the present case.

[20] To impose an even tighter constraint on the powers conferred by subcl 77C(2), as proposed by the respondent, is not to advance the cause of liberty, but to force officers to move immediately they are confronted by non-compliance to exercise their far more intrusive powers of arrest. That construction would not best give effect to the purpose revealed by the legislative scheme.

It is important to note that *this case is not authority for any of the following*:

- An obligation to provide photo identification whenever the police ask for it;
- A general power to detain to check or confirm someone’s identity. This power only applies where there is a relevant statutory power to require information;
- A power to arrest or physically restrain a person while checking their details.

## 13 Information that must be provided under Part 15

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### 13.1 Background

Part 15 of LEPPRA requires police officers to provide information when exercising a range of powers.

Part 15 is partly based on the common law in *Christie v Leachinsky* [1947] 1 All ER 567, which requires police to tell the person the reason for the arrest, unless it is obvious (eg. the person is caught red-handed) or the person makes it impossible (eg. by fleeing or forcibly resisting). *Christie v Leachinsky* is still good law, although largely redundant for arrests to which Part 15 applies.

### 13.2 Powers to which Part 15 applies

Part 15 applies to certain powers exercised by police officers. It also applies to special constables and other law enforcement officers (see Note to s.201), but not to private citizens.

Part 15 applies to powers listed in s.201(1), which relevantly include:

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

The effect of s.201 is that Part 15 applies to most powers conferred by LEPR as well as common law and other statutes, except the statutes listed in Schedule 1. Acts listed in Schedule 1 include the *Bail Act*, *Mental Health Act*, *Crimes (Forensic Procedures) Act*, and the *Road Transport Act*, among others.

In an arrest context, Part 15 applies to arrests performed by police officers:

- for an offence (s.99);
- under a warrant;
- for breach of the peace.

It does *not* apply to:

- an arrest for breach of bail;
- a citizen's arrest;
- the detention of an intoxicated person under LEPR Part 16.

Whether it applies to a *Gribble* or *Le*-type situation is doubtful, as the exercise of these powers is best characterised as a detention and not an arrest. However, the power exercised in *Le* could also be described as a power to stop a person, in which case para (a) would apply. In any event the police would be required to comply with Part 15 in relation to:

- (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); or
- (f) a power to give or make a direction, requirement or request that a person is required to comply with by law.

### **13.3 Information that must be provided**

Under s.202(1), a police officer is required to provide:

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

### **13.4 Warnings that must be provided when exercising certain powers**

If the power involves a direction, requirement or request that the person is legally obliged to comply with, the police officer must also warn the person of their obligation to comply (s.203(1)). However, a warning is not required if the person has already complied or is in the process of complying (s.203(2)). A person is not guilty of an offence of failing to comply unless a warning has been given (s.204B).

In the case of a direction given under s.198 (on the grounds that a person is intoxicated and disorderly in a public place), even if the person complies with the direction, the police must warn them that an offence to be intoxicated and disorderly in any public place within the next 6 hours (s.198(6)).

If two or more police officers are exercising the power, only one officer is required to provide the required information (and warning if applicable) (s.202(4) and s.203(4)). However, if the person asks a police officer present for their name and place of duty, the officer must provide this information s.202(5).

### **13.5 Time at which information and warning must be provided**

If police are giving a direction, requirement or request to a single person, the information in s.202(1) must be provided before giving the direction, requirement or request (s.202(2)(b)).

In all other cases, the information must be given as soon as it is reasonably practicable to do so (s.202(2)(a)).

The warnings required by s.203 must be given as soon as reasonably practicable after the direction, requirement or request (s.203(3)).

### 13.6 Effect of non-compliance with Part 15

Although somewhat diluted by some amendments which took effect on 1 November 2014, the provisions of Part 15 (with one exception) are still mandatory.

Non-compliance with the requirement to provide :

- evidence that the officer is a police officer; or
- the reason for the exercise of the power

will take an officer outside the lawful execution of his or her duty.

The new s.204A provides that an officer's failure to provide their name and/or place of duty does not render the exercise of the power unlawful or otherwise effect the validity of anything resulting from the exercise of that power, except:

- if the power consists of a direction, requirement or request to a single person; or
- if the officer was asked for their name or place of duty.

### 13.7 Case law on Part 15

Before the 2014 amendments, the obligations under Part 15 were all contained in s.201.

The obligation to comply with s.201, and the implications of not complying with it as soon as reasonably practicable, were examined by Rothman J in **Semaan v Poidevin [2013] NSWSC 226**.

His Honour held that, in situations where the section allows the police to comply as soon as reasonably practicable after exercising the power, failure to comply with s.201 as soon as reasonably practicable *retrospectively* affects the lawfulness of the police officer's conduct.

However, this was overturned by the Court of Appeal in **Poidevin v Semaan [2013] NSWCA 334**. The lead judgment was delivered by Leeming JA (with whom Ward JA and Emmett JA agreed).

It was held that a failure to comply with s.201 when it becomes practicable does not *retrospectively* render the police officer's actions unlawful (see paras 16-28).

Further, it is not necessary for the officer exercising the power to consider whether or not it is practicable to comply with s.201: "*The question of compliance with the duty imposed by s201(1) turns upon an objective fact, namely, whether or not it is practicable to comply before or at the time of exercising the power.*" (at para 28).

Non-compliance with Part 15 *at a time when compliance is reasonably practicable* would still take an officer outside the lawful execution of their duty.

For an example of a civil case, post-*Poidevin v Semaan*, in which an arrest was held to be unlawful because the police did not tell the plaintiff the true reason for her arrest and thus did not comply with s.201, see **State of New South Wales v Abed [2014] NSWCA 419** (at paras 85-107).

Another civil case is **Hamilton v State of NSW (No 13) [2016] NSWSC 1311**, in which the arrest complied with s.99 but was held to be unlawful because police did not comply with Part 15 as soon as practicable.

## 14 Use of force

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LEPRA s.231 empowers police to use "such force as is reasonably necessary" to make an arrest or to prevent the person's escape.

The law does not appear to be settled as to whether excessive force makes an arrest unlawful *per se* (see, for example, article by Dan Meagher: *Excessive force used in making an arrest: does it make the arrest ipso facto unlawful?*, (2004) 28 Crim LJ 237).

However, there is no doubt that an officer who uses excessive force to make an arrest is acting outside the lawful execution of his or her duty.

In ***Hamilton v State of New South Wales (No 13) [2016] NSWSC 1311***, the plaintiff recovered damages for battery, false imprisonment and malicious prosecution. Although the arrest complied with s.99, it was held to be unlawful because police did not comply with Part 15 as soon as practicable and because they used excessive force.

It was held that the force used must be proportionate to the offence for which the person is being arrested (which, in *Hamilton's* case, was an alleged assault on a taxi driver).

Campbell J said, at [171]:

From the findings I have made .... , I am not satisfied that the force used would have been reasonably necessary to arrest Mr Hamilton. Indeed, on each of my many viewings of Exhibit A and Exhibit B I was struck by what I regard as the unnecessary violence inflicted upon Mr Hamilton. I accept that there are occasions in the execution of the often difficult responsibilities of police officers when great, even deadly, force is reasonably necessary to make an arrest or to prevent the escape of the person after arrest. *What occurred here was not great or deadly force, but it was excessive and disproportionate to all the circumstances of the case, including the seriousness of the crime for which he was being arrested.* [emphasis added].

His Honour went on to say:

[172] In finding the force exerted was unreasonable, I have borne in mind that the precise consequences of the violence suffered by Mr Hamilton were not specifically intended by the officers. I have also borne in mind my finding that S/Cst Mildenhall did not deliberately force Mr Hamilton's head into the concrete wall. This was, however, a natural and probable consequence of the force exerted against Mr Hamilton. Accepting that the consequences of police action were not specifically intended does not lead me to the conclusion that the force exerted was otherwise reasonably necessary.

[172] I accept that the consideration that the officers were attempting to apply learned and accepted techniques for the subjection of violent offenders is relevant to the evaluation of reasonableness. But it can hardly be decisive. That one is trained may make the infliction of violence so much more efficient, but it does not mean its use by an arresting officer must always be taken as reasonable.

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