



issues backgrounder

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Law Enforcement (Powers and Responsibilities) Amendment (Arrest without Warrant) Bill 2013

1. Introduction

On 30 October Premier Barry O'Farrell introduced the [Law Enforcement \(Powers and Responsibilities\) Amendment \(Arrest without Warrant\) Bill 2013](#) [the **Arrest without Warrant Bill 2013**] in the Legislative Assembly. In the [second reading speech](#) the Premier said that the purpose of the Bill was to ensure that "police have clear, simple and effective powers of arrest to protect the community". He continued:

Less than three weeks ago, I asked former police Minister the Hon. Paul Whelan and former shadow Attorney General Mr Andrew Tink to provide the Government with urgent advice to finalise the statutory review of the Law Enforcement (Powers and Responsibilities) Act. I asked them to give immediate priority to addressing police concerns with section 99 of the Act, which sets out police powers to arrest without a warrant. Police have raised concerns that section 99 is complex and difficult to apply. This has resulted in offenders escaping conviction and at times large police payouts for wrongful arrests, even where the arrest is made by a police officer in good faith.

According to the Premier:

The bill will clarify that police can arrest without a warrant for any offence they reasonably suspect a person is committing or has committed. The reviewers found that poor drafting had resulted in differing interpretations on this matter, with some suggestions that police could only arrest without a warrant for an offence committed in the past if it was a serious indictable offence.

The previous day, responding to a [question without notice](#), the Premier said (in part):

Earlier this month concerns were raised with me by front-line police about the lack of clarity around arrest powers, specifically the practical application of the Law Enforcement (Powers and Responsibilities) Act, which is known across the force as LEPPRA. The Act commenced operation in December 2005 with the intended aim of codifying the day-to-day operations of police powers. However, section 99 concerning arrest powers proved to be highly problematic from the outset. It added complexity to one of the most important powers police use on behalf of the community and made the tough job they do even harder.

I am advised there is evidence that criminals have been using the lack of clarity in these powers to escape conviction and in some instances take legal action against police for illegal arrests. I understand that during the five years from January 2007 to April 2012 the NSW Police Force settled 378 claims for wrongful arrest and that over the past 12 months the average settlement has been around \$75,000. This law never worked as intended and was in need of reform almost from day one.

The Premier went on to say:

The key changes to section 99 clarify police powers to make arrests to: preserve the safety or welfare of any person, including the person arrested; to obtain property in the possession of a person who is connected with the offence; and to make inquiries to establish the person's identity including if police reasonably suspect the information provided by the person is false. The changes to section 99 will also give police the power to arrest because of the nature and seriousness of the offence. That clause will be particularly useful for police dealing with domestic violence matters because international academic research has demonstrated that arresting domestic violence offenders deters them from repeat offences. Further, the changes will give police the power to arrest persons fleeing from police or from the location of a suspected offence.

These reforms draw on the arrest powers that are currently in use in Victoria, Queensland and Britain. The job of police officers is hard enough without having to deal with legal complexities and loopholes. We want to free up police so that they can lock up criminals.

This Issues Backgrounder, the purpose of which is only to present the key sources on this issue of public debate, is organised under the following headings:

- Police power to arrest without warrant – general comment
- Police power to arrest without warrant – current statute law in NSW
- *Keith Johnson v R* (27 September 2013, District Court of NSW, 2013/105079)
- The Arrest without Warrant Bill 2013
- Police power to arrest without warrant in other selected jurisdictions
- Comparative Legislative Tables
- Selected media commentary
- Other sources/websites

2. Police power to arrest without warrant – general comment

The police power to arrest, with or without warrant, can be understood as a lawful exercise of executive authority, more particularly as an expression of the power of the state to exercise legitimate force against a person in certain circumstances and for defined purposes. Where an arrest is made without a warrant and therefore without judicial oversight, the action can be further characterised as an administrative action undertaken at the discretion of the police officer in question.

With or without warrant, an arrest necessarily deprives the person arrested of their liberty; as such, it goes to the core of the fundamental issues at stake in the criminal law concerning the relationship between the individual and the executive authority of the state. Those issues are particularly acute where this executive authority is exercised without a warrant, by administrative discretion, in circumstances where individual rights on one side and, on the other, the legitimate powers of the state to punish crime and prevent harm to others are likely to come into conflict.

The issues at stake may be discussed philosophically as well as practically. For the present, the key point to make is that, for statutory law, the drafting of a provision that adequately defines the circumstances in which a police officer has the power to exercise such discretion and the purposes for which that power might be exercised is obviously problematic; as indeed is the position of the police officer who is called upon to apply the relevant law in difficult, sometimes dangerous, conditions. Perhaps the broader point is that, in the tradition of law to which Australia belongs answers to

questions raised by police powers of arrest without warrant, where practical exigencies and philosophical concerns are often at odds, are not always easily arrived at; they are not meant to be so.

In *Christie v Leachinsky* [1947] AC 573 Lord Simonds observed (at 595):

My Lords, the liberty of the subject and the convenience of the police or any other executive authority are not to be weighed in the scales against each other. This case will have served a useful purpose if it enables your Lordships once more to proclaim that a man is not to be deprived of his liberty except in due course and process of law.

3. Police power to arrest without warrant – current statute law in NSW

Currently, s 99 of LEPRA provides as follows

99 Power of police officers to arrest without warrant

- (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.

Under s 99, the statutory power of a police officer to arrest without warrant is in four parts, as follows:

- By s 99(1) the power is defined in three defined circumstances; (a) where an offence is being committed; (b) where it one has just been committed; or (c) where a serious indictable offence has been committed. In all three cases, the power is limited to statutory offences and does not therefore extend to common law offences, notably breaches of the peace.
- By s 99(2) an arrest can be made if the police officer suspects on “reasonable grounds” that a person has committed a statutory offence. In the [second reading speech](#) for the Arrest without Warrant Bill 2013 the Premier commented: “The bill will clarify that police can arrest without a warrant for any offence they reasonably suspect a person is committing or has

committed. The reviewers found that poor drafting had resulted in differing interpretations on this matter, with some suggestions that police could only arrest without a warrant for an offence committed in the past if it was a serious indictable offence". The issue of statutory interpretation seems to be whether in the case of previous offences this power only applies to serious indictable offences; if so, s 99(2) is to be read as an elaboration upon s 99(1)(c). But note in this respect that s 99(2), like s 99(1)(a) which refers to offences in the process of being committed, refers more generally to "an offence under any Act or statutory instrument".

- By s 99(3) the powers identified under ss 99(1) and (2) can only be exercised where the police officer suspects on reasonable grounds that the arrest is "necessary" for any one or more of the six reasons enumerated under s 99(3)(a) to (f).
- By s 99(4), as soon as practicable the arrested person (and their property) must be taken before an "authorised officer", a term defined under s 3 of LEPRA to include a magistrate.

As to the question of when it is "necessary" to arrest a person, in the [second reading speech](#) for the original LEPRA legislation on 17 September 2002, then Attorney General Bob Debus explained:

Part 8 of the bill substantially re-enacts arrest provisions of the Crimes Act 1900 and codifies the common law. The provisions of part 8 reflect that arrest is a measure that is to be exercised only when necessary. An arrest should only be used as a last resort as it is the strongest measure that may be taken to secure an accused person's attendance at court. Clause 99, for example, clarifies that a police officer should not make an arrest unless it achieves the specified purposes, such as preventing the continuance of the offence.

See also [DPP v Carr](#) [2002] NSWSC 194 where Smart J observed (para 35):

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 is 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 the police.

Note that in respect to children, s 7(c) of the *Young Offenders Act 1997* establishes the "principle that criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter". Provision is also made for the giving of a warning or a caution in respect to certain offences.

The power of arrest cannot be used for the purpose of questioning a suspect or for investigating the circumstances of a suspected offence. In [Zaravinos v NSW](#) (2004) NSWCA 320 Bryson JA said that even though the officers had the reasonable suspicion that an offence had been committed and therefore had the power to arrest (para 37):

the arrests were not lawful unless each decision to arrest was made in good faith and for the purposes for which the power to arrest exists, that is, the purposes of bringing the person arrested before a Justice and conducting a prosecution; and not for some extraneous purpose. Arresting a person for the purpose of questioning him and investigating the

circumstances of the suspected offence or of any other offence is arrest for an extraneous purpose. It is even more clearly an extraneous purpose to arrest a person as a piece of unnecessary highhanded and humiliating behaviour in circumstances in which arrest is not reasonably necessary for the effective conduct of a prosecution. The availability of Information and Summons as an alternative course, and the considerations favouring and adverse to taking that alternative course, are relevant where the validity of the exercise of the power to arrest is in question.

Once arrested, however, Part 9 of LEPR provides police with the power to question the arrested person; s 144(1) states: "A police officer may in accordance with this section detain a person, who is under arrest, for the investigation period provided for by section 115". Section 115 provides:

(1) The investigation period is a period that begins when the person is arrested and ends at a time that is reasonable having regard to all the circumstances, but does not exceed the maximum investigation period.

(2) The maximum investigation period is 4 hours or such longer period as the maximum investigation period may be extended to by a detention warrant.

It can also be noted that a police power to arrest persons who are unlawfully at large exists under s 102 of LEPR; by s 104 there is the same power where a police officer suspects on reasonable grounds that a person has committed an interstate offence. By s 105 an arrest may be discontinued "at any time". Note, too, the police power to arrest without warrant under s 50 of the *Bail Act 1978*.

For further commentary see –

RN Howie and PA Johnson, *Annotated Criminal Legislation NSW, 2011-2012*, Lexis Nexis Butterworths 2012, pp 1769-1774 (Library Catalogue 345.944 HOW 2011-12 117252).

An arrest without warrant will not be within power unless it is effected in good faith and for the purposes contemplated by the enactment. The purpose of the act done must be to vindicate and give effect to the law.

.....

Before the enactment of s 99, it was said that the power of arrest for an offence should not be exercised unless it is necessary to ensure the accused's attendance before the court and only where a summons would not be appropriate... Section 99(3) now confines the use of arrest for the purposes of taking proceedings for an offence to certain defined circumstances.

Wai-Yin Wan et al, "The effect of arrest and imprisonment on crime", [BOCSAR Crime and Justice Bulletin](#), No 158, February 2012.

NSW Ombudsman, [Discretionary Powers](#), Fact Sheet 2012.

Mark Dennis, [The Measure of Last Resort: some things you need to know about the law of arrest](#), June 2011

AM Blackmore and GS Hosking, *Criminal Law NSW 2009, Volume 2*, Thomson Reuters 2009, pp 801-808 (Library Catalogue 346.8-944 CRI V2 804559).

Robert Hayes and Michael Eburn, *Criminal Law and Procedure in NSW*, 3rd ed, Lexis Nexis Butterworths 2009 (Library Catalogue 346.9-944 HAY 3 ed 797108)

D Meagher, “Excessive force used in making an arrest: does it make the arrest ipso facto unlawful?” [Criminal Law Journal](#), Volume 28, August 2006 at 237.

NSW Law Reform Commission, [Report 66 \(1990\) – Criminal Procedure: Police Powers of Detention and Investigation After Arrest](#)

4. [Keith Johnson v R](#) (27 September 2013, District Court of NSW, 2013/105079)

Reference was made in the Premier’s [second reading speech](#) to a recent decision by Judge Conlon in [Keith Johnson v R](#) in the District Court, in which his Honour called for s 99 of LEPRA to be “re-legislated by persons who have a realistic appreciation of the many volatile situations in which it is desirable for arrest to be effected by police officers”.

The case was an appeal from conviction at the Wollongong Local Court on 7 June 2013 in respect to a charge of resist police officer in the execution of duty contrary to s 546C of the Crimes Act 1900. The full details of the matter are set out in the judgment of Judge Conlon, which is available in the Library’s collection. Above all, those details confirm the extremely difficult and hazardous conditions under which police are called upon to perform their duties, especially in a case such as this where the offender is uncooperative and ultimately violent. The bare facts are that the police were called to an incident where they found Johnson and a female, both apparently drug and alcohol affected, at which time Johnson admitted to having assaulted the female who had a blackened and swollen eye. Johnson was aggressive and, as he was being arrested for assault, a scuffle developed between him and a police officer in which the officer sustained a bleeding arm. Back at the police station, the same officer approached Johnson:

and said, “I tried to say at the scene, I’m from Wollongong Police and you’re under arrest because of injuries to your girlfriend’s eye and by your own admission that you assaulted her”. The appellant became extremely aggressive and made more threats to the officer. As a result the officer elected not to attempt to interview him and he was charged.

On appeal, the “major issue” according to Judge Conlon was whether the requirements of s 210 of LEPRA were complied with, a section that is headed “Supplying police officer’s details and giving warnings”. In the event, further to s 201, the arrest of Johnson was held to be lawful.

The other issue for appeal related to s 99 of LEPRA. On the facts, Judge Conlon concluded that the “police were certainly entitled to arrest the appellant”. On a point of statutory interpretation in respect to s 99, he then commented:

However S 99(3) seems to provide that even though a police officer has power to arrest, as per S 99(1) and (2), he must not arrest that person unless the police officer suspects on reasonable grounds that it is necessary to arrest the person in order to achieve one or more of the following purposes...

The requirements of s 99(3) were then set out, with Judge Conlon proceeding to note that it was argued before the magistrate, but not pressed in the District Court, that the police officer did not have in mind one of the purposes set out in s 99(3)(a) to (f) when effecting the arrest and that, as a result, the arrest was unlawful. Judge

Conlon did not accept the argument, saying “I am satisfied the officer had in mind subs (3)(b) when he effected the arrest and he did so on reasonable grounds”. More broadly, his Honour then commented:

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

Specifically, Judge Conlon was concerned that the s 99(3)(f) was too limited in its application, being at present restricted to a concern for the welfare of the person being arrested and not extending to other persons on the scene of the arrest. He said:

Section 99(3)(f) refers to the purpose of preserving the safety and welfare of the “person”. The “person” of course is the one subject to the arrest. Unfortunately it does not include having regard to the safety of the victim or indeed the safety and welfare of ambulance officers who attend scenes of assaults or other violent confrontations.

The judgment concluded with Judge Conlon saying that the “merits of this were totally undeserving of any challenge to the legality of this arrest either at first instance in the Local Court or indeed on appeal”. He added, “As earlier indicated in my view this legislation is in urgent need of amendment”.

5. The Arrest without Warrant Bill 2013

As amended by the Arrest without Warrant 2013 Bill, s 99 of LEPRA would read:

(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.

The 2013 Bill would further insert after section 105 (2):

(3) A police officer may discontinue an arrest despite any obligation under this Part to take the arrested person before an authorised officer to be dealt with according to law.

Based on the Explanatory Note for the 2013 Bill, the following features can be noted:

- The substituted section does not purport to limit the power of arrest for previous offences to serious indictable offences.
- The substituted section extends the reasons for arrest without warrant to include additional reasons in line with section 365 of the *Police Powers and Responsibilities Act 2000* of Queensland. Those additional reasons include: to stop the person fleeing; to make inquiries to establish the identity of the person; to obtain property in the possession of the person connected with the offence; to preserve the safety or welfare of any person; or because of the nature and seriousness of the offence (see Table 3 below).

Other features of the Arrest without Warrant Bill 2013 are as follows:

- A police officer is also empowered to arrest a person without a warrant if directed to do so by another police officer who may lawfully arrest the person. In the [second reading speech](#) for the 2013 Bill the Premier explained: “A similar provision exists in the Victorian Crimes Act [s 458(1)(b)]. The reviewers agreed with New South Wales police that this would be a valuable inclusion in the context of large and complex policing operations”. Note that in *O’Hara v Chief Constable of the RUC* [1997] AC 286 the House of Lords refused to accept that an order to make an arrest would be sufficient by itself to provide reasonable grounds for suspicion (see E Colvin and J McKechnie, *Criminal Law in Queensland and Western Australia*, 6th ed, Lexis Nexis Butterworths 2012, p 695).
- The substituted section makes it clear that a person lawfully arrested without a warrant may be detained by any police officer for the purpose of investigating whether the person committed the offence for which the person has been arrested. As noted by reference to [Zaravinos v NSW](#) (2004) NSWCA 320, in NSW there is no power to arrest a person for the purpose of questioning and investigating them about a suspected offence. Nor does proposed s 99(4) of Arrest without Warrant Bill 2013 purport to give police that power; rather, it confirms that where a “lawful arrest” has been made, for the purposes outlined under proposed s 99(3), then questioning can be

undertaken subject to the time limits and any other conditions set out under Part 9 of LEPPRA. In effect, proposed s 99(4) merely confirms the current legal position, presumably because the law as it stands has not been entirely clear to serving police officers. The Premier in the [second reading speech](#) for the 2013 Bill said: “This amendment is intended to remove uncertainty about whether a person who is otherwise lawfully arrested can be detained for questioning under part 9”.

Proposed s 99(4) is not equivalent to s 365(2) of the Queensland legislation. In that case, the Queensland Police are provided with the power to arrest a person “for questioning...about the offence”, again subject to time limits and the like under the *Police Powers and Responsibilities Act 2000*. It is this power that Colvin and McKechnie refer to as “investigative arrest” (see below).

- Under the current s 99 the requirement for a lawful arrest that a police officer “suspect on reasonable grounds” is twofold: first, by s 99(2) the officer must suspect on reasonable grounds that the person has committed an offence; secondly, by s 99(3), a person must not be arrested unless the officer suspects on reasonable grounds that it is necessary to do so for one or other of the purposes set out in sub-sections (a) to (f). Under the 2013 Bill, this second “suspect on reasonable grounds” test is omitted; in its place is the test that the police officer is satisfied that the arrest is “reasonably necessary” for one of the purposes in sub-sections (i) to (ix).

Some commentators suggest (see the section on media commentary below) that this omission will effect a substantive change in the law. But note that the “reasonably necessary” test would still seem to require an objective basis for the police officer to be satisfied that an arrest is appropriate in the circumstances; it would not be enough for a police officer to arrive at a purely subjective view of what is necessary. In Australian law, the word “reasonably” invariably invokes a test of objectivity, irrespective of the intention of the person doing the act, along with elements of rationality and proportionality (David Hay ed, *Words and Phrases Legally Defined, Volume 2, L-Z*, Lexis Nexis 2007, p 751). The proposed change is based on the Queensland model, in which context it has been said that: “The concept of ‘reasonably’ requires an objective standard to be applied” (H Douglas and S Harbidge, *Criminal Process in Queensland*, LawBook Co 2008, pp 25-26).

- In addition, by the insertion of new sub-section 105(3) the Bill clarifies that a police officer may discontinue an arrest at any time despite the requirement that the arrested person be taken, as soon as is reasonably practicable, before an authorised officer to be dealt with according to law. Again, as with proposed s 99(4), this clarification of the current law may be considered necessary for operational reasons. At present, s 105 provides:

(1) A police officer may discontinue an arrest at any time.

(2) Without limiting subsection (1), a police officer may discontinue an arrest in any of the following circumstances:

(a) if the arrested person is no longer a suspect or the reason for the arrest no longer exists for any other reason,

(b) if it is more appropriate to deal with the matter in some other manner, including, for example, by issuing a warning or caution or a penalty notice or court attendance notice or, in the case of a child, dealing with the matter under the [Young Offenders Act 1997](#).

6. Police power to arrest without warrant in other selected jurisdictions

6.1 Queensland

By s 365 of the [Police Powers and Responsibilities Act 2000](#) (Qld):

- (1) 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 one or more of the following reasons:
 - (a) to prevent the continuation or repetition of an offence or the commission of another offence;
 - (b) to make inquiries to establish the person's identity;
 - (c) to ensure the person's appearance before a court;
 - (d) to obtain or preserve evidence relating to the offence;
 - (e) to prevent the harassment of, or interference with, a person who may be required to give evidence relating to the offence;
 - (f) to prevent the fabrication of evidence;
 - (g) to preserve the safety or welfare of any person, including the person arrested;
 - (h) to prevent a person fleeing from a police officer or the location of an offence;
 - (i) because the offence is an offence against ss. 790: 'Offence to assault or obstruct police officer', or 791: 'Offence to contravene direction or requirement of police officer' of the Police Powers and Responsibilities Act 2000;
 - (j) because the offence is an offence against s. 80: 'Breach of order of conditions' of the Domestic and Family Violence Protection Act 1989;
 - (k) because of the nature and seriousness of the offence; or
 - (l) because the offence is (i) an offence against the *Corrective Services Act 2006*, section 135(4); or (ii) an offence to which the *Corrective Services Act 2006*, section 136 applies.
- (2) Also, it is lawful for a police officer: without warrant, to arrest a person the police officer reasonably suspects has committed or is committing an indictable offence, for questioning the person about the offence, or investigating the offence, under chapter 15; and
- (3) Subject to the *Youth Justice Act 1992*, section 13, it is lawful for a police officer to arrest a child without warrant if the police officer reasonably suspects the child is committing or has committed an offence.

For commentary see –

E Colvin and J McKechnie, *Criminal Law in Queensland and Western Australia*, 6th ed, Lexis Nexis Butterworths 2012, Chapter 25 (Library Catalogue 345.941 COL 6 ed 774162).

The traditional conception of “arrest” was confined to detention for the purpose of bringing an accused before a court to face a charge...A broader conception of arrest by police has been introduced by modern legislation. In Queensland, the detention of a person by police for effectively any lawful purpose other than punishment is now called an arrest.

Colvin and McKechnie describe the power under s 365(1)(k) as a “reserve” position (page 692). They also discuss what they call “investigative arrest”, noting that the

statutory regime further to s 365(2) “leaves little room for common law principles to operate”. They note (page 693):

There is a need to balance the right of a person not to be held in custody indefinitely against the need for police to have adequate time to investigate properly a possible offence. In modern times, arrest for investigative purposes has been widely recognised, but subject to time limits.

MJ Shanahan, PE Smith and S Ryan, *Carter’s Criminal Law of Queensland*, 18th ed, Lexis Nexis Butterworths 2011, p 2411:

In *Coleman v Kinbacher* (Qld Police) [2003] QCA 575 the Court of Appeal held that this section:

- (a) Gives a power to arrest dependent upon a police officer forming the belief prescribed by the section;
- (b) The existence of the power of arrest is distinct and independent from any ultimate determination of guilt;
- (c) Provided the police officer holds the requisite belief and the power of arrest arises, the arrest is lawful notwithstanding that there is ultimately an acquittal of the defendant of the offence for which he was arrested and the arrest is lawful even if the police officer’s belief was founded upon some mistake of fact or law.

H Douglas and S Harbidge, *Criminal Process in Queensland*, LawBook Co 2008, Chapter 2 (Library Catalogue 346 9 943 DOU 699933).

For background commentary on the reform of the law in Queensland see –

Criminal Justice Commission, *Report on a review of police powers in Queensland, Vol 3, Arrest without warrant, demand name and address and move-on powers*, 1993

Review of the Criminal Justice Commission's Report on a review of police powers in Queensland Volumes I-III. [Queensland. Legislative Assembly. Criminal Justice Committee](#) 1993

6.2 Victoria

In Victoria a lawful arrest must be pursuant to statutory law, notably under ss457-458 of the [Crimes Act 1958](#). Section 457 provides that, subject to any relevant statutory provision, every arrest must be with warrant. Section 458(1) then sets out where a police officer, or any other person, may exercise the power of arrest without warrant, as follows:

458 Person found committing offences may be arrested without warrant by any person

(1) Any person, whether a member of the police force or not, may at any time without warrant apprehend and take before a bail justice or the Magistrates’ Court to be dealt with according to law or deliver to a member of the police force to be so taken, any person—

(a) he finds committing any offence (whether an indictable offence or an offence punishable on summary conviction) where he believes on reasonable grounds that the apprehension of the person is necessary for any one or more of the following reasons, namely—

(i) to ensure the attendance of the offender before a court of competent jurisdiction;

(ii) to preserve public order;

(iii) to prevent the continuation or repetition of the offence or the commission of a further offence; or

- (iv) for the safety or welfare of members of the public or of the offender;
- (b) when instructed so to do by any member of the police force having power under this Act to apprehend that person; or
- (c) he believes on reasonable grounds is escaping from legal custody or aiding or abetting another person to escape from legal custody or avoiding apprehension by some person having authority to apprehend that person in the circumstances of the case.

For commentary on this provision see –

G Nash and M Bagaric, *Annotated Criminal Law 2010 – Victoria*, Lexis Nexis Butterworths 2010, pp 475-480 (Library Catalogue 346.8-945 NAS 855812)

C Corns and S Tudor, *Criminal Investigation and Procedure: The Law in Victoria*, Lawbook Co 2009, pp 41-51 (Library Catalogue 346.9-945 COR 806177)

6.3 England and Wales

Section 24 of the Police and Criminal Evidence Act 1984 (PACE), which is headed “Arrest without warrant: constables”, provides:

- (1) A constable may arrest without a warrant—
 - (a) anyone who is about to commit an offence;
 - (b) anyone who is in the act of committing an offence;
 - (c) anyone whom he has reasonable grounds for suspecting to be about to commit an offence;
 - (d) anyone whom he has reasonable grounds for suspecting to be committing an offence.
- (2) If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it.
- (3) If an offence has been committed, a constable may arrest without a warrant—
 - (a) anyone who is guilty of the offence;
 - (b) anyone whom he has reasonable grounds for suspecting to be guilty of it.
- (4) But the power of summary arrest conferred by subsection (1), (2) or (3) is exercisable only if the constable has reasonable grounds for believing that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question.
- (5) The reasons are—
 - (a) to enable the name of the person in question to be ascertained (in the case where the constable does not know, and cannot readily ascertain, the person's name, or has reasonable grounds for doubting whether a name given by the person as his name is his real name);
 - (b) correspondingly as regards the person's address;
 - (c) to prevent the person in question—
 - (i) causing physical injury to himself or any other person;
 - (ii) suffering physical injury;
 - (iii) causing loss of or damage to property;
 - (iv) committing an offence against public decency (subject to subsection (6)); or
 - (v) causing an unlawful obstruction of the highway;
 - (d) to protect a child or other vulnerable person from the person in question;
 - (e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question;
 - (f) to prevent any prosecution for the offence from being hindered by the disappearance of the person in question.
- (6) Subsection (5)(c)(iv) applies only where members of the public going about their normal business cannot reasonably be expected to avoid the person in question.

See also the PACE [Code of Practice for the Statutory Power of Arrest by Police Officers](#) (Code G), as revised in 2012. It states:

1.2 The exercise of the power of arrest represents an obvious and significant interference with the Right to Liberty and Security under Article 5 of the European Convention on Human Rights set out in Part I of Schedule 1 to the Human Rights Act 1998.

1.3 The use of the power must be fully justified and officers exercising the power should consider if the necessary objectives can be met by other, less intrusive means. Absence of justification for exercising the power of arrest may lead to challenges should the case proceed to court. It could also lead to civil claims against police for unlawful arrest and false imprisonment. When the power of arrest is exercised it is essential that it is exercised in a non-discriminatory and proportionate manner which is compatible with the Right to Liberty under Article 5.

Code G explains the “necessity criteria” as this operates in respect to arrests and further explains in detail how this is to be interpreted in relation to the “reasons” for making an arrest in s 24(5) of PACE.

See also - Home Office, [National Statistics - Police Powers and Procedures in England and Wales 2011-12](#)

JR Spencer, “Arrest for questioning”, [Cambridge Law Journal](#), November 2011, Vol 70, Issue 3, p 492

RC Austin, “The new powers of arrest: plus ca change: more of the same or major change?” [Criminal Law Review](#), June 2007 at 459.

7. Comparative Legislative Tables

Table 1 sets out the standard to be applied for a police officer to form the view that an offence has been committed in those jurisdictions canvassed in this paper.

Table 1: Test when police officer suspects offence committed

Arrest without Warrant Bill 2013 (NSW)	Current s 99(2) of LEPPRA (NSW)	S 365(1) Police Powers and Responsibilities Act (Qld)*	S 458(1) Crimes Act 1958 (Vic)	S 24(2) Police and Criminal Evidence Act 1984 (UK)
Suspects on reasonable grounds	Suspects on reasonable grounds	Reasonably suspects	-	Reasonable grounds for suspecting

Table 2 sets out the standard to be applied for a police officer to form the view that an arrest is necessary for a defined purpose in those jurisdictions canvassed in this paper.

Table 2: Test as to whether arrest is necessary

Arrest without Warrant Bill 2013 (NSW)	Current s 99(3) of LEPPRA (NSW)	S 365(1) Police Powers and Responsibilities Act (Qld)*	S 458(1)(a) Crimes Act 1958 (Vic)	S 24(4) Police and Criminal Evidence Act 1984 (UK)
Reasonably necessary	Suspects on reasonable grounds	Reasonably necessary	Believes on reasonable grounds	Reasonable grounds for believing

Table 3 compares the legislative reasons for arresting a person without a warrant in those jurisdictions canvassed in this paper.

Table 3: Reasons for arresting a person without warrant

Arrest without Warrant Bill 2013 (NSW)	Current s 99(3) of LEPR (NSW)	S 365(1) Police Powers and Responsibilities Act (Qld)*	S 458(1) Crimes Act 1958 (Vic)**	S 24(5) Police and Criminal Evidence Act 1984 (UK)***
Stop repeat of offence or other offence	Yes	Yes	Yes	No
Stop person fleeing police or location of offence	No	Yes	No	Yes (to prevent prosecution being hindered by disappearance of person)
Enable inquiries as to person's identity, if not readily established or information likely to be false	No	Yes ("To make inquiries to establish person's identity")	No	Yes (where identity not readily ascertained or truth of information provided in doubt)
Ensure person appears in court	Yes	Yes	Yes	Yes (prevent prosecution being hindered by disappearance of person)
Obtain property connected with the offence in person's possession	No	No (but includes "obtain" evidence relating to offence)	No	No
Preserve or prevent fabrication of evidence	Yes	Yes (also "obtain" evidence relating to offence)	No	No
Prevent harassment or interference with potential witness	Yes	Yes	No	No
Protect safety or welfare of any person	No (safety or welfare of person arrested only)	Yes	Yes	Yes (to prevent person arrested from causing or suffering physical injury)
Owing to serious nature of offence	No	Yes	No	No

* In addition, ss 365(1)(ix) (x) and (xii) of the Queensland Act refers to specific offences and, as discussed below, seems also to provide for an "investigative arrest".

** "To preserve public order" is also included under the Victorian provision, which reflects the common law position in NSW in respect to breaches of the peace.

*** Other powers refer to "committing an offence against public decency", "causing an unlawful obstruction of the highway", "to protect a child or vulnerable person from the person in question" and "to allow the prompt and effective investigation of the offence or of the conduct of the person in question".

8. Selected media commentary

S Tonkin, "Conlon calls for review of police powers", [Illawarra Mercury](#), 28 September 2013.

Judge Conlon said in his view the law needed urgent amendment to allow officers to consider the safety of other people on the scene, for example victims or ambulance paramedics, when establishing grounds for an arrest.

[Police Association of NSW](#), "Judge calls for urgent review of arrest law", 2 October 2013

Police Association President, Scott Weber said, "We support Judge Conlon's remarks recognising the legislation surrounding police arrest powers as being too narrow in its focus.

Further, we welcome his view calling for the law to be urgently amended to allow officers to consider the safety of other people on the scene, for example victims or ambulance paramedics, when establishing grounds for an arrest.

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

This is especially a risk when people are under the influence of drugs and or alcohol. Our members need to be able to deal with and resolve violent situations without as Judge Conlon states, "having to get out a copy [of the legislation]...before effecting the arrest".

Anna Patty, "Paul Whelan called in to 'sort out' arrest powers", [SMH](#), 11 October 2013.

Mr O'Farrell said police have raised concerns about Part 9 and Sections 99 and 201 of the Act and he wanted legislative action to "clean up these provisions as soon as possible".

NSW Greens MP David Shoebridge said the O'Farrell government has been sitting on the statutory review for almost three years and was using its own delay as an "excuse for a half-baked report that excludes the public".

He said section 99 of the Act restates the centuries-old common law precedent that police must not use arrest powers just to question suspects.

"The Premier's statement fails to make reference to a single proven case where police can genuinely say that the existing reasonable checks and balances on police powers have proven unworkable," he said.

"Arrest powers are there so that police can protect the public from people who are either committing a crime or who police believe on reasonable grounds have committed a crime.

"In our legal system arrest powers have never been designed to allow police to arrest people for questioning so they can cut corners in investigations."

Opposition Leader John Robertson said he welcomed the appointment of two eminently qualified individuals to review the legislation. But he said it was extraordinary the Premier had ordered the review only months after it was reported the internal review was near completion. "The Premier likes to shift the blame for his lack of action onto the previous government – but the reality is the O'Farrell government has failed to address this issue in more than two and half years in office," Mr Robertson said.

NSW Police Association president Scott Weber congratulated the Premier, saying the Law Enforcement (Powers and Responsibilities) Act had been a failure and needed urgent overhaul. "This is about the community's desire for police officers to be effective in dealing with crime," he said.

"Police officers have known for a long period of time that criminals use a lack of clarity around arrest powers to escape conviction or as a pay check in regards to suing police for unlawful arrest."

Anna Patty, "Alarm over Premier's bid to increase police powers of arrest", [SMH](#), 4 November 2013.

David Porter, a senior solicitor at the Redfern Legal Centre who specialises in complaints about police conduct, said the proposed law would encourage poor policing and discourage the need for police to conduct more skilled investigations.

"Under the bill, police officers will be able to arrest someone where they have no intention of taking them to court for the offence," he said.

"Even if they only want to give them a \$100 fine, they will be able to hold them in custody for hours.

"By continuing to lower the bar for the exercise of police powers, the government is effectively ushering in a generation of police who do not have daily experience of the skilled investigation that is needed to catch the criminal organisations the people of NSW are actually worried about."

Jane Sanders, from the Shopfront Youth Legal Centre, said police needed better training in how to use their existing powers, not greater ones. "Young officers going out on the beat are well meaning but they are not adequately trained about where their powers begin and end," she said.

Although the new bill was designed to clarify police arrest powers, Ms Sanders said it had made them more ambiguous by giving the mistaken impression police can make an arrest just to check someone's identification.

Vicki Sentas and Nicholas Cowdery, "Focus on police, not the laws", [SMH](#), 4 November 2013.

We should all be alarmed about a sudden and secret review by handpicked former politicians. To make matters worse, the proposed laws are ambiguous. Rather than clearing up concerns they will create new problems.

The law of arrest is centuries old, hammered out by parliament and the courts to ensure responsible police conduct. One of the most important safeguards in the existing law is that arrest is "for the purpose of taking proceedings for an offence against the person".

The proposed law has removed this explicit reference to, and limitation on, the purpose of arrest.

The impacts of obscuring the purpose of arrest are important. First, the wording of the proposed law may give police the mistaken impression they have the power to arrest just to establish a person's ID, or for questioning. This may not be the intention, but the wording of the law will create confusion for police, and possibly more disputes.

Second, a police officer only has to be satisfied that arrest is "reasonably necessary". At present, police need to have some objective basis for arresting someone, in addition to the view they personally hold: "Reasonable grounds to suspect."

These words matter. It should not be enough for a police officer to make an arrest just because he or she thinks it is reasonably necessary to do so. This is why the courts find some arrests are wrongful. The solution to NSW Police being sued is not to change the law to make police decision-making unaccountable; it may be to ensure that police are better trained.

Tim Priest, "Rights of criminals still outweigh police powers" [Daily Telegraph](#), 8 November 2013

Under the current NSW law, only the offender's well-being is taken into account when the decision is made to either arrest or simply give them a ticket to attend court at some later date.

It is obvious to many people that the architects of this dysfunctional Act were more concerned with the rights of the criminal and not the average citizen.

Meanwhile, little has been done to advance police powers in regard to another emerging problem that has been simmering quietly but is set to erupt, and that is child abuse.

9. Other sources/websites

Commonwealth, [Crimes Act 1914](#), Part 1AA, Division 4
South Australia, [Summary Offences Act 1953](#), Part 18
Western Australia, [Criminal Investigation Act 2006](#), ss 127 and 128
Tasmania, [Police Offences Act 1935](#), ss 55, 55A and 56

NSW Law Society [website](#) on police powers of arrest
Legal Aid NSW [website](#) on police powers of arrest
Queensland Police [website](#)
Legal Services Commission of South Australia, [Power of arrest website](#)

Author: Gareth Griffith

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For further information please contact the Research Service on 9230 2356

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