



# Legislative Assembly

## Law Enforcement (Powers And Responsibilities) Bill Hansard

### Extract

17/09/2002

#### Second Reading

**Mr DEBUS** (Blue Mountains-Attorney General, Minister for the Environment, Minister for Emergency Services, and Minister Assisting the Premier on the Arts) [7.30 p.m.]: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Law Enforcement (Powers and Responsibilities) Bill. The bill represents the outcome of the consolidation process envisaged by the Royal Commission into the New South Wales Police Service to help strike a proper balance between the need for effective law enforcement and the protection of individual rights. This bill constitutes significant law reform. It radically simplifies the law in relation to law enforcement powers, setting out in one document the most commonly used criminal law enforcement powers and their safeguards. Previously complex and diverse law enforcement powers and responsibilities once buried in numerous statutes and casebooks have been consolidated into the bill so that the law is now easily accessible to all members of the community.

Matters included in the bill represent a codification of the common law, a consolidation of existing statute law, a clarification of police powers, or a combination of these. In acknowledgement of the significance of this legislation the Government has consulted widely in the preparation of the bill. Stakeholders and other potentially interested parties were afforded an opportunity to comment on an exposure draft of the bill. The majority of amendments to the exposure draft were made in response to the 29 submissions received. While generally the bill simply re-enacts existing legislation, it does in some circumstances make amendments intended to more accurately reflect areas of the common law or to address areas in the existing law where gaps have been identified. Unless expressly stated, the bill is not intended to change the common law.

I do not propose to address each clause of the bill separately. Unless otherwise stated, the effect of the provisions is intended to reflect the current meaning already provided in the statute books. I will, however, address the areas where there has been substantive reform, in particular: revised powers of entry, simplification of personal search powers and related safeguards, new provisions regarding notices to produce, new provisions regarding crime scenes, revised powers of arrest, revised powers relating to property in police custody, and new general safeguards that apply broadly to the exercise of all police powers.

I turn first to powers of entry. Part 2 of the bill codifies the existing common law powers of entry. Clause 9 provides that a police officer may enter premises if the police officer believes on reasonable grounds that a person has suffered significant physical injury or that there is imminent danger of significant injury to a person. This power to enter premises to prevent death or significant injury represents a clarification of police powers at common law and reflects legitimate community expectations of the role of police. Clause 9 also enacts the common law power of police to enter premises where a breach of the peace is being or is likely to be committed and it is necessary to enter immediately to prevent the breach of peace. The bill deliberately does not define the term "breach of the peace"; this is a well-established concept at common law, and will remain so. A police officer who enters a premises by virtue of the powers in clause 9 may remain on the property only as long as is reasonably necessary in the circumstances.

Clause 10 codifies the existing powers of police to arrest a person, to detain a person under another Act, or to arrest a person named in a warrant where the officer believes on reasonable grounds that the person is in the premises. I turn to the question of search and seizure without warrant. Part 4 of the bill details the powers of search and seizure without warrant. Police powers to conduct personal searches have been significantly simplified without reducing or increasing existing powers, so that police are able to readily understand the types of search that they may undertake, and the community can understand more readily the powers that police have in this respect. A regime of three tiers of searches has been adopted, and safeguards have been introduced to ensure that civil liberties are upheld and that the integrity of the police process is not compromised. I will address the new regime and safeguards in greater detail shortly.

Clause 23 (2) addresses a gap in the law identified in the course of consolidation: While at common law police have the power to search a person who has been arrested on suspicion of committing an offence, it is not clear whether police have the power to search a person arrested otherwise than for an offence. Clause 23 (2) provides that police will have the power to search a person arrested other than for an offence in limited circumstances, that is, where the arresting police officer has a reasonable suspicion that the arrested person who is being taken into custody is carrying something which she or he may use in a way that could endanger a person, or assist a person to escape from custody.

This provision addresses concerns about safety of police and others in custody and is a justifiable law enforcement power. The search powers set out in clause 23 are powers that may be exercised at or after the time of arrest. These powers should be distinguished from those set out in clause 24, which sets out the search powers that may be exercised by a police officer after a person has been arrested and taken into custody, for example, at a police station. Division 3 of this part consolidates the existing police power to search for knives and other dangerous implements. The existing provisions have been substantially redrafted to ensure that the applicable powers and safeguards are consistent with the three-tiered search regime detailed in division 4 of this part, which I shall come to shortly.

The redrafted provisions do not extend or restrict the powers police currently have to search for a knife or other dangerous implement in a public place or school. The existing safeguards have either been incorporated into the safeguard provisions which apply generally to all personal searches conducted under the bill, or have been incorporated within the new definitions of the searches. Division 4 of part 4 details provisions that apply to all personal searches conducted under the bill. In order to provide greater regulation of police search powers, the bill substantially adopts the three-tiered personal search model contained in the Commonwealth Crimes Act 1914, which in turn is based on the Model Criminal Code.

The bill introduces a regime of frisk, ordinary and strip searches in respect of all personal searches conducted under the bill. The bill details the circumstances in which each of the three levels of search may be warranted and provides safeguards to protect the privacy and dignity of persons being searched. The bill provides specific safeguards for any person subjected to a strip search and specific safeguards for children and persons with impaired intellectual functioning who are subjected to a strip search. A frisk search is defined as a search of a person conducted by quickly running the hands over the person's outer clothing or by passing an electronic metal detection device over or in close proximity to the person's outer clothing and an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person.

An ordinary search is defined as a search of a person or articles in the possession of a person that may include requiring the removal and examination of specified items of outer clothing. A strip search is defined as a search of a person or of articles in the possession of the person that may include requiring the person to remove all of his or her clothes, but only those clothes necessary to fulfil the purpose of the search, and a visual examination of the person's body and a search of those clothes. A strip search may be carried out only where the police officer suspects on reasonable grounds that it is necessary for the purposes of the search and that the seriousness and urgency of the circumstances require a strip search. The bill requires that the least invasive kind of search practicable in the circumstances should be used.

The bill introduces safeguards intended to preserve the privacy and dignity of all persons subjected to personal searches under the bill. Clause 32 incorporates a number of safeguards intended to ensure that a police officer conducting any search has regard to the searched person's right to privacy and maintenance of dignity throughout a search. The police officer must comply with the safeguards set out in section 32, unless it is not reasonably practicable in the circumstances to do so. What is reasonably practicable in the circumstances will, of course, be dependent on the individual circumstances. These safeguards require the officer to inform the person of the nature of the search, request their co-operation, conduct the search out of public view and as quickly as possible, and not to question the person searched at that time in relation to a suspected offence.

Clause 33 provides specific safeguards for a person subjected to a strip search. The safeguards in subclauses (1) to (3) of clause 33, which relate to privacy, the absence of people not necessary for the purpose of the search and the presence of support persons, must be complied with unless it is not reasonably practicable in the circumstances. Clause 33 (3) provides for the presence of a support person for children aged between 10 and 18, and persons who have impaired intellectual functioning who are subjected to strip searches. This provision has been included to protect the interests of those who may not be able to protect their own interests, and may also assist police in the conduct of the strip search. The safeguards in subclauses (4) to (6) of clause 33 are, without exception, mandatory and clarify that a strip search is, in fact, a visual search and not an examination of the body by touch. Clause 34 provides that a child under 10 may not be strip searched. The safeguards in division 4 are in addition to safeguards in part 15 that apply generally across the bill. The safeguards better define what a police officer can do when conducting a search, and ensure the integrity of the criminal justice processes.

I turn now to search and seizure with warrant or other authority. Part 5 repeals and re-enacts existing powers set out in the Search Warrants Act 1985 and sections 357EA and 578D of the Crimes Act 1900. The provisions in this part regarding notices to produce clarify and provide a legislative basis for the practice of obtaining documents held by financial institutions. Search warrants, in this context, are considered a blunt instrument: a search warrant may authorise police to search the entire premises for documents held by the financial institution, when only a specific customer's records are sought. In practice, banks produce the documents sought when presented with a search warrant, rather than have police search through all of their records.

The bill will allow a police officer who believes on reasonable grounds that an authorised deposit-taking institution holds documents that may be connected with an offence-such as fraud or money laundering-committed by someone else to apply to an authorised officer for a notice to produce the relevant documents. The notice to produce provisions in the bill do not replace search warrants. The intention of the provision is that police may apply for either a notice to produce or a search warrant, depending on the circumstances. Although the new power imposes a duty on financial institutions to produce particular documents which does not now exist, the change is largely one of process. The provision will not alter the type of documents that can be obtained-a document, for example, can include a document in electronic format-but merely the process in which the documents are obtained.

Consistent with the existing Search Warrants Act 1985, the bill provides that the penalty for failure to comply with a notice to produce, without reasonable excuse, is the same as the penalty for obstructing or hindering a search warrant.

I turn now to crime scenes. It is important that the community has confidence that evidence at a crime scene will not be interfered with, contaminated, lost or destroyed. This bill takes the opportunity to unequivocally clarify the powers that police currently exercise when establishing and undertaking certain actions at crime scenes. Part 7 of the bill outlines when police may establish a crime scene and the powers that may be exercised at a crime scene. The bill creates a two-tiered approach for crime scenes. If police are lawfully on the premises and establish a crime scene, certain basic powers to preserve evidence may be exercised in the first three hours without a crime scene warrant. The powers that may be exercised in the first three hours are aimed primarily at the preservation of evidence and include directing people to leave a crime scene and preventing persons entering a crime scene.

The remaining crime scene powers are investigatory, and search and seizure powers. These powers may generally be exercised only once a crime scene warrant has been obtained. The application procedures for, and safeguards relating to, crime scene warrants are the same as those for a search warrant. The authorised officer may issue a crime scene warrant authorising a police officer to exercise all reasonably necessary crime scene powers at, or in relation to, a specified crime scene. However, police may exercise any of the crime scene powers in the first three hours—that is, without a warrant—if the officer or another officer applies for a crime scene warrant and the officer suspects on reasonable grounds that it is necessary to immediately exercise the power to preserve evidence.

The exception to the requirement for a warrant before the exercise of certain powers is vital. For example, police may need to immediately take a photograph if a crime scene is being flooded, or gain access to a room that is on fire and which police suspect contains evidence of an offence. In these circumstances, waiting for a crime scene warrant to be issued would not be practicable, as the evidence would be destroyed. The bill provides for a number of safeguards for the use of crime scene powers, such as providing time limits on the establishment of a crime scene and specified powers available to use at a crime scene. The bill does not interfere with the ability to establish a crime scene in a public place. The bill does not prevent an officer from exercising a crime scene power or doing any other thing if the occupier consents. Nor does the bill provide police with a new power of entry. Police will only be able to exercise crime scene powers if they are already lawfully on premises or have been granted a crime scene warrant.

The range of offences for which crime scenes may be established is limited to serious indictable offences and where there is an offence committed in connection with a traffic accident causing death or serious injury to a person. The officer must be of the opinion that it is reasonably necessary to establish a crime scene to preserve or search for or gather evidence of such offences. As with notices to produce, these powers are not intended to detract from the search warrants powers. Consistent with the existing Search Warrants Act 1985, the bill provides a penalty for obstructing or hindering a police officer exercising crime scene powers, without reasonable excuse.

I turn now to powers relating to arrest. Part 8 of the bill substantially re-enacts arrest provisions of the Crimes Act 1900 and codifies the common law. The provisions of part 8 reflect that arrest is a measure that is to be exercised only when necessary. An arrest should only be used as a last resort as it is the strongest measure that may be taken to secure an accused person's attendance at court. Clause 99, for example, clarifies that a police officer should not make an arrest unless it achieves the specified purposes, such as preventing the continuance of the offence. Failure to comply with this clause would not, of itself, invalidate the charge. Clauses 107 and 108 make it clear that nothing in the part affects the power of a police officer to exercise the discretion to commence proceedings for an offence other than by arresting the person, for example, by way of caution or summons or another alternative to arrest. Arrest is a measure of last resort. The part clarifies that police have the power to discontinue arrest at any time.

The application of the safeguards contained in part 15 of the bill represents the classification of the common law requirement that persons must be told of the real reason for their arrest and a clarification of the additional requirements that officers must provide their name, place of duty and a warning. I turn now to powers to give directions. Part 14 repeals and re-enacts without amendment legislative provisions in relation to police powers to give reasonable directions. It is intended under clause 197, which sets out the power of police officers to give directions in public places, that a police officer may be "a person affected by the relevant conduct" for the purposes of issuing a direction.

I will now deal with property in police custody. While substantively re-enacting the relevant provisions of the Criminal Procedure Act 1986 and the Police Service Regulation 1990, the bill makes a number of minor amendments to address concerns raised by operational police concerning the disposal of property lawfully in police custody. I turn to the question of overarching safeguards. Part 15 of the bill incorporates generic safeguards applicable to the majority of powers exercisable under the Act. When, for example, police exercise powers of entry, search and arrest, they must, before exercising the power, provide a person subject to the exercise of the power with evidence that the officer is a police officer, his or her name and place of duty; provide the reason for the exercise of the power; and warn that failure or refusal to comply with a request of the police officer in the exercise of the power may be an offence.

The bill recognises, however, that police may not always reasonably be able to comply with the safeguards prior to using their powers, such as in an emergency situation. Accordingly, the clause requires in such circumstances that the safeguards should be exercised as soon as reasonably practicable after the power has been exercised. Even in emergency situations, however, police should strive to comply with all safeguards set out in the

bill. The existing law has been preserved in the case of a power to request disclosure of identity, give a direction, or request a person to produce a dangerous implement.

These requirements must be met before the power is exercised. The bill provides that the Ombudsman will monitor for two years from the commencement of the proposed Act the newly enacted provisions of the bill, including the personal search provisions, the safeguards, crime scenes, notices to produce and other minor changes to police powers. The Minister for Police and I will undertake a review of the proposed Act three years after its assent. With power comes responsibility. The bill represents ideals of transparency, accountability and legitimacy.

Over time this Parliament, as the representative of the community, and the courts have given police certain powers required to effectively fulfil their role in law enforcement. In return for these powers, however, police are required to exercise their power responsibly, particularly when these powers affect the civil liberties of members of the community whom the police serve. The Law Enforcement (Powers and Responsibilities) Bill balances these two ideals admirably and I commend it to the House.