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**Police Powers in NSW:  
Background to the Law  
Enforcement (Powers and  
Responsibilities) Bill 2001**

by

**Gareth Griffith**

**Briefing Paper No 11/2001**

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**ISSN 1325-5142**

**ISBN 0 7313 16991 1**

August 2001

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## EXECUTIVE SUMMARY

On 6 June 2001 the Minister for Police foreshadowed the release of an exposure draft of a Bill to consolidate police powers in NSW – the Law Enforcement (Police Powers and Responsibilities) Bill 2001. It was also said that the new drug laws - the *Police Powers (Internally Concealed Drugs) Act 2001* and the *Police Powers (Drug Premises) Act 2001* – would be incorporated into the consolidation Bill in the future. This paper presents a background commentary on these reforms and proposed reforms and summarises their main provisions. Its findings are as follows:

- the new drug laws belong to a raft of legislation which has been introduced in recent years to extend, refine and articulate police powers (page 3) ;
- a common feature of these legal reforms is that they seek to define the conditions upon which police powers can be exercised, thereby providing a range of procedural safeguards for the individual. This is in marked contrast to the situation in the not so distant past when the law provided little, if any, guidance to the police as to how they should exercise their common law or statutory powers. The contemporary era has seen therefore a move towards ‘policing by law’ (page 3);
- in NSW an important non-legislative reference point for police powers is the 1998 *Code of Practice for Custody, Rights, Investigations, Management and Evidence* (page 4);
- recent legislation in this area includes the: *Crimes Amendment (Detention After Arrest) Act 1997* (the power to detain after arrest for purposes of investigation); *Children (Protection and Parental Responsibility) Act 1997*; *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (the knife laws); *Police Powers (Vehicles) Act 1998* (the power to request disclosure of driver and passenger identity); and the *Crimes (Forensic Procedures) Act 2000*;
- an important change to the law under the *Crimes (Forensic Procedures) Act 2000* is that, unlike the power to conduct medical examinations under section 353A (2) of the *Crimes Act 1900* where a person had to be in lawful custody and charged with a criminal offence, it permits forensic samples (including for DNA testing) to be taken from ‘suspects’ (page 25);
- the *Police Powers (Internally Concealed Drugs) Act 2001* also applies to ‘suspects’. Internal searches may be carried out in certain circumstances on suspects over 10 years of age. An internal search can only be carried out on a child between 10 and 17 ‘by order of an eligible judicial officer’. Adult suspects who are not under arrest and who consent to an internal search can be: detained for up to 2 hours while a request for consent is made; kept in custody for up to 24 hours while the search is conducted; if the search reveals matter that could be drugs on their body they can be detained for a further 48 hours; and, in exceptional circumstances this detention period can be extended by up to 96 hours. In the worst case scenario this regime would involve detention for up to 7 days and 2 hours (plus any ‘time outs’). Various safeguards are provided under the Act which is not likely to commence before 2002 (pages 29-37);
- the *Police Powers (Drug Premises) Act 2001* was proclaimed to commence on 1 July 2001. The Act creates three new offence categories as follows: (a) entering or being on drug premises; (b) an owner or occupier knowingly allowing premises to be used as drug premises; and (c) organising, conducting or assisting in the operation of drug

premises. For each of these offences there is a penalty of 50 penalty units or 12 months imprisonment, or both, for a first offence. On a second or subsequent conviction there will be a penalty of 500 penalty units or five years imprisonment, or both. Directors and/or managers of corporations may be held liable in the event the corporation has contravened the legislation. If found on, or entering or leaving, drug premises it is for the accused person to satisfy the court that he or she was there 'for a lawful purpose or with a lawful excuse' (pages 39-44);

- the *Police Powers (Drug Premises) Act 2001* also amends section 28F of the *Summary Offences Act 1988* which provides police with a power to give reasonable directions to a person in a public place. The amendment extends the range of relevant behaviour or presence in a public place to include the supply of, or soliciting others to supply, prohibited drugs, or to obtain, procure or purchase prohibited drugs (pages 44-45);
- influential in the discussion concerning the consolidation of police powers is the landmark legislation in England and Wales, the *Police and Criminal Evidence Act 1984*. Pursuant to the Act, Codes of Practice are issued by the Home Secretary and brought into force by a statutory instrument approved by resolution in both Houses of Parliament (page 46);
- landmarks in the Australian consolidation process include the Queensland *Police Powers and Responsibilities Act 2000* (page 48);
- in NSW the consolidation process gained its main impetus from the Wood Royal Commission into the NSW Police Service which handed down its final report in May 1997 (page 49);
- the Minister for Police has said that the Law Enforcement (Police Powers and Responsibilities) Bill 2001 would create 'new law' in four significant areas: establishing crime scenes; safeguards applying to searches of persons after arrest; police assistants; and notices to produce documents. 'Police currently exercise powers in those areas', the Minister said, 'but the precise nature and extent of the powers is not clearly defined' (page 50);
- many of the current statutory powers, including the general search powers under sections 357-357E of the *Crimes Act 1900*, as well as the power of arrest without warrant found in section 352 of the same Act, are not subject to any of the procedural safeguards which have characterised more recent developments in police powers. Though not mentioned in these terms by the Minister, the Bill would in this respect create 'new law' intended to provide consistent procedural rules for the safeguarding of civil liberties. Specific and additional safeguards would apply to searches conducted under the 'knife laws', but not to other searches conducted without warrant. Statutory arrangements are also made for searching persons (a) on or after arrest, and (b) in lawful custody. Provision is made for three kinds of searches, namely, frisk, ordinary and strip searches (pages 52-57); and
- the Bill sets out the arrangements for the review of its operation after it is in force. Unlike other recent legislation in this area, these arrangements do not include a role for an independent review by the NSW Ombudsman (page 72);
- the Police Commissioner's generic power to issue instructions would be continued under the Bill but, unlike the PACE Codes of Practice, the power is not made subject to either parliamentary approval or public consultation (page 51).

## 1. INTRODUCTION

Major developments in police powers have occurred, or have been foreshadowed, over the past few months in NSW. On 27 March 2001, in a Ministerial Statement the Premier outlined a strategy to combat the drug trade in Cabramatta under which the police would be given new powers to search and detain. This was part of what the Mr Carr described as ‘an evidence-based plan, to be mounted in three stages, which will apply statewide – not just at Cabramatta. Stage one is a criminal justice plan. Stage two is a plan for compulsory treatment and stage three is a plan for prevention and early intervention’.<sup>1</sup> In respect to the first, criminal justice stage of the plan, cognate Bills were introduced by the Attorney General into the Legislative Assembly on 30 May 2001 - the Police Powers (Internally Concealed Drugs) Bill 2001 and the Police Powers (Drug Premises) Bill 2001. These measures were subsequently passed by both Houses of the NSW Parliament. Note that the Minister proposed in his Second Reading speech that the drug premises law would commence in July 2001,<sup>2</sup> whereas the internally concealed drugs law would be ‘proclaimed at a later date so police are satisfied they have the appropriate protocols in place to facilitate the operation of the legislation’.<sup>3</sup>

On the same day as these measures were being debated in the Legislative Assembly, the Minister for Police, in answer to a question without notice, announced the release of an exposure draft of a Bill to consolidate police powers.<sup>4</sup> The draft Bill is called the Law Enforcement (Powers and Responsibilities) Bill 2001 [**the Draft Police Powers Consolidation Bill 2001**]. An exposure draft was made available on 8 June 2001. The Minister told Parliament that four months have been set aside for the consultation process, with a view to introducing legislation in 2002. He said, too, that the new police powers to ‘crack down on drug dealing in Cabramatta’ would be incorporated into the Bill in the future.<sup>5</sup> For this reason, the present paper includes discussion of the relevant aspects of the drug related measures - the *Police Powers (Internally Concealed Drugs) Act 2001* and the *Police Powers (Drug Premises) Act 2001* - in its commentary on the Draft Police Powers Consolidation Bill 2001.

This paper is in three parts. The first presents an overview of police arrest, stop, search and detain powers at common law and statutory law up to the passing of the anti-drug trade package in June 2001. This is the legislative context to which the more recent developments in police powers in NSW belong. The second part sets out the main provisions of the *Police*

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<sup>1</sup> NSWPD (Hansard proof, LA), 27 March 2001, pp 2-6.

<sup>2</sup> The *Police Powers (Drug Premises) Act 2001* was proclaimed to commence on 1 July 2001 -*NSW Government Gazette*, No 106, 29 June 2001, p 5207.

<sup>3</sup> NSWPD (Hansard proof, LA), 30 May 2001, p 32.

<sup>4</sup> NSWPD (Hansard proof, LA), 6 June 2001, p 36.

<sup>5</sup> NSWPD (Hansard proof, LA), 6 June 2001, p 37.

*Powers (Internally Concealed Drugs) Act 2001*<sup>6</sup> and the *Police Powers (Drug Premises) Act 2001*.<sup>7</sup> In the third part of the paper the Draft Police Powers Consolidation Bill 2001 is summarised and discussed. It should be noted that this paper is not comprehensive in scope. It does not, for example, deal with police powers to conduct controlled operations or to carry out surveillance, two areas which are not affected by the reforms and proposed reforms discussed in this paper.

## 2. POLICE POWERS – THE LEGAL BACKGROUND IN NSW

### 2.1 Law and practice

The discussion of police powers in this paper is largely formalistic or legalistic in nature. That is, it defines police powers as ‘specific authorities provided by statute or common

<sup>8</sup> Moreover, these powers are defined almost exclusively in their contemporary form, as they exist in the law books here and now.

An approach of this kind has undeniable limitations. Owing to its lack of an historical perspective, it tells us nothing of the unique development of police powers in NSW. Nor yet does it analyse the true origins of such a common law police power as the power to search arrested persons. The paper does not, for example, ask whether this power is in fact derived from common law jurisprudence, or whether the case law merely confirmed and legitimised established practice.

Secondly, owing to its formalistic nature the approach leaves unexplored the relationship between law and actual policing practice. One view is that police operate to a large extent, not by using their legal powers, but more informally, often by securing the ‘consent’ of a suspect to be searched, for example, or for the searching of his or her premises. According to Professor David Dixon’s influential account of this subject, in the recent past in NSW ‘policing by consent’ was not a reaction to inadequate police powers but ‘simply the usual

<sup>9</sup> How the ongoing move towards the greater articulation and consolidation of police powers – ‘policing by law’ – will impact on the informalities embedded in traditional policing practice remains to be seen.<sup>10</sup> Far from being undesirable, policing by consent reflects the principle that people should co-operate with police and should not obstruct them when they are performing their duty. It should, however, involve the real consent and co-operation of the citizen.

<sup>6</sup> Henceforth, the **Internally Concealed Drugs Act 2001**.

<sup>7</sup> Henceforth, the **Drug Premises Act 2001**.

<sup>8</sup> D Dixon, *Law in Policing*, Clarendon Press 1997, p 73. Much of the discussion in this section is based on Chapters 2 and 3 of Dixon’s work.

<sup>9</sup> Ibid, p 123.

<sup>10</sup> Ibid, p 124. Dixon has argued that they are likely to co-exist. On the relationship between legal regulation and consent, Dixon wrote: ‘As legal regulation comes to delimit police powers, consent becomes increasingly significant. Some of the consequences of consensual encounters are that statutory requirements for the exercise of powers do not apply, record-making is unnecessary and the rights of the suspects do not have the protections which are the corollaries of the exercise of legal power.’



## 2.2 Policing by law

The reforms enacted in the Internally Concealed Drugs Act 2001 and the Drug Premises Act 2001, as well as the changes proposed in the Draft Police Powers Consolidation Bill, belong to a raft of legislation which has been introduced in recent years to extend, refine and articulate police powers. Legislation for the carrying out of forensic procedures has been enacted, as has a new statutory regime for the conduct of criminal investigations. These are matters which touch upon issues of central importance to the liberty of the individual. For example, forensic procedure powers raise fundamental questions about the bodily integrity of the person. Likewise, powers to detain suspects for the purposes of investigation raise concerns about freedom from arbitrary detention.

That is not to suggest that the legislation introduced to date in NSW contravenes these rights. Indeed, a common feature of the recent legal reforms in this area is that they have sought to define the conditions upon which these powers can be exercised by the police, thereby providing a range of procedural safeguards for the individual. This is in marked contrast to the situation in the not so distant past when the law provided little, if any, guidance to the police as to how they should exercise their common law or statutory powers. Writing in 1967 of the comparable situation in the United Kingdom, Lord Devlin commented:

It is quite extraordinary that, in a country which prides itself on individual liberty [the definition of police powers] should be so obscure and ill-defined. It is useless to complain of police overstepping the mark if it takes a day's research to find out where the mark is.<sup>11</sup>

This might be said to form the basis of the move towards 'policing by law'. If police are to have special powers, it is argued, then the nature of those powers, along with the relationship between the officers of the state who exercise them and their fellow citizens, needs to be properly articulated. As Justice Michael Kirby said in 1979:

[As]...a focus for our clear thinking and for articulating the modern balance which our society is prepared to strike between its need for effective law enforcement and the protection of individual rights, we should endeavour to collect the principal rights and duties of citizens and police in a comprehensive statute. This is one area where knowledge of ...[civil]...rights is vital.<sup>12</sup>

An important issue in this debate is the balance that is to be struck between the need for

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<sup>11</sup> Lord Devlin, *Police powers and responsibilities: common law, statutory and discretionary* (1967) 2 *Australian Police Journal* 122: cited in NSWLRC, *Report No 66 – Police Powers of Detention and Investigation After Arrest*, 1990, p 19..

<sup>12</sup> Quoted in Queensland Criminal Justice Commission, *Report on a Review of Police Powers in Queensland - Volume 1: An Overview*, May 1993, p 93.

flexibility in deciding when and how to enforce the law, on one side, and the regulation of police powers, on the other. That police must exercise some measure of professional discretion if they are to be effective is clear enough. At the same time, it is often argued that the use police make of their powers needs to be guided by some kind of regulatory framework, in the interest of accountability, transparency and the protection of the freedom of the individual. A police service which cannot act due to lack of discretionary powers is near useless; a police service whose acts are free from check or oversight is likely to be dangerous.

### 2.3 Overview of the legal context

The new legislation and the draft consolidation Bill belong to a legislative context which includes quite recent innovations in the criminal law, as well as far older components. These include:

- the *Crimes (Forensic Procedures) Act 2000* which provides police with the power to take DNA samples from suspects, prisoners convicted of serious indictable offences and volunteers;
- section 357E was inserted into the NSW *Crimes Act 1900* in 1979. It provides a police officer with the power to stop and search ‘any person whom he or she reasonably suspects of having or conveying any thing stolen or otherwise unlawfully obtained or any thing used or intended to be used in the commission of an indictable offence’. The same section also provides a power to search vehicles.
- section 353A (‘Power to search person, make medical examination, take photograph, finger-prints etc’) was inserted into the NSW *Crimes Act 1900* in 1924;
- Part 10A (‘Detention after arrest for purposes of investigation’) of the NSW *Crimes Act 1900* was proclaimed to commence in 1998; and
- Section 37 (4) (‘Powers of search and detention’) of the *Drug Misuse and Trafficking Act 1985* which provides that a member of the police force may stop, search and detain ‘any person in whose possession or under whose control the member reasonably suspects there is, in contravention of this Act, any prohibited plant or prohibited drug’.

In respect to the Internally Concealed Drugs Act 2001 an added component of this legislative context is the Commonwealth *Customs Act 1901*. As the Minister commented in his Second Reading speech, the search powers under the new Act are based on the internal search provisions of the Commonwealth customs legislation. He also made the point that the new NSW legislation ‘incorporates many of the protections contained in the *Crimes (Forensic Procedures) Act 2000* to ensure that suspects are adequately protected against unwarranted searches and have access to safeguards’.<sup>13</sup>

Another, but this time non-legislative point of reference for stop, search and detain powers generally, is the *Code of Practice for Custody, Rights, Investigation, Management and Evidence (CRIME)* issued by the NSW Police Service in February 1998. This sets out the powers of police officers with respect to searches, arrest, detention and investigation of crime, together with the procedures officers are advised to follow. According to the Police

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<sup>13</sup> NSWPD (Hansard proof, LA), 30 May 2001, p 31.

Commissioner, Mr Ryan, the Code:

...represents a major step towards improving the accountability of the NSW Police Service to the community it serves. It provides members of the community as well as members of the NSW Police Service with a succinct reference to the powers of police when investigating offences. Most importantly, for the first time in the history of the Service, the Code provides members of the community with advice on their rights in dealing with police.<sup>14</sup>

Although this Code sets out the relevant statutory law, it is not a legal document and covers matters which are not found in any Act. It also warns that it is *not* a 'comprehensive set of requirements which must be followed by police in exercising the powers of their office'.<sup>15</sup> Nonetheless, the Code is a formal management document designed to establish and regularise professional standards in investigatory contexts and, as such, it may be that a court would have regard to what it says in some circumstances.<sup>16</sup> The Code, which replaced the *Commissioner's Instructions*, can be said to constitute an important landmark in the clarification and official elucidation of police powers in NSW.<sup>17</sup> A generic power to issue 'instructions' is found at present under section 8 (4) of the *Police Service Act 1990*. This would be continued under clause 184 of the Draft Police Powers Consolidation Bill 2001.

#### 2.4 The power to arrest<sup>18</sup>

Little, if anything, has changed in this area of the law since, in its 1990 report on *Police Powers of Detention and Investigation After Arrest*, the NSW Law Reform Commission commented:

Despite its critical importance in the criminal process, the law of arrest remains an amalgam of common law decisions, scattered statutory provisions, and de facto practice. The usual distinction made in relation to powers of arrest is between those powers which

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<sup>14</sup> NSW Police Service, *Code of Practice for Custody, Rights, Investigation, Management and Evidence (CRIME)*, February 1998, p 4.

<sup>15</sup> Ibid.

<sup>16</sup> Note that in *Heiss v R* (1992) 111 FLR 362 it was held that the Northern Territory's Police General Orders do not have the force of law and are for guidance only. They cannot effect the lawfulness of an arrest. The status of the Victorian Police Commissioner's Standing Orders were discussed in *R v Lee* (1950) 82 CLR 133 -see D Brown et al, *Criminal Laws*, 3<sup>rd</sup> edition, The Federation Press 2001, pp 226-227.

<sup>17</sup> Both the *Code of Practice for CRIME* and the advice on *Procedures for the Evidence Act* were developed by the Police Service to complement the introduction of the *Crimes Amendment (Detention after Arrest) Act 1997* which inserted a new Part 10A into the *Crimes Act 1900*. This is discussed below.

<sup>18</sup> Powers of arrest are set out under Part 8 of the Draft Police Powers Consolidation Bill 2001.

may be exercised without the need for a warrant (issued by a justice) and those which may only be exercised on the basis of a warrant.<sup>19</sup>

At common law, a police officer can arrest without warrant any person the officer reasonably suspects has committed a felony.<sup>20</sup> A private citizen can arrest without warrant only where a felony has actually been committed. Both police officers and private citizens can arrest without a warrant a person who commits a breach of the peace, or where it is reasonably believed that the person is about to commit a breach of the peace.<sup>21</sup> Neither police officers nor private citizens have any power at common law to arrest a person without warrant for the commission of a misdemeanour<sup>22</sup> unless there is a breach of the peace.

In NSW various statutory provisions supplement the common law, most importantly section 352 of the *Crimes Act 1900*.

- (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.
- (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.<sup>23</sup>

Certain features of this section can be noted. Section 352 (1) confers powers of arrest without warrant on both police officers and private citizens, whereas section 352 (2) confers power only on a police officer. The power under section 352 (2) may be exercised upon the

<sup>19</sup> NSWLRC Report No 66, n 11, p 4.

<sup>20</sup> Felony'is now defined to mean a serious indictable offence'and misdemeanours'are minor indictable offences'or all other indictable offences -section 580E, *Crimes Act 1900*. A serious indictable offence is an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more -section 4, *Crimes Act 1900*.

<sup>21</sup> A breach of the peace usually amounts to an actual assault, the creation of public alarm through wrongful conduct, or obstruction of a police officer in the execution of his or her duty. Merely annoying, disturbing or abusive conduct are not generally sufficient to establish a breach of the peace -R Watson, AM Blackmore and GS Hosking, *Criminal Law (NSW)*, LBC Information Services at [2.33470].

<sup>22</sup> See n 20.

<sup>23</sup> Sub-sections (3) and (4) of section 352 deal with aspects of arrest pursuant to a warrant.

reasonable suspicion of the police officer, and it is not necessary to show that an offence was actually committed by the arrested person. Further, the powers of arrest conferred on a police officer under sub-sections 352 (1)(a) and (b) are broader than those available under the common law, since the arrest may be made not only for serious indictable offences (felonies), but also for minor indictable offences (misdemeanours) and other offences created by statute. The power of police to arrest persons loitering in the circumstances set out in sub-section 352 (2)(b) also goes beyond the common law.<sup>24</sup>

Other provisions of the *Crimes Act* conferring powers of arrest without warrant include: section 352AA which permits a police officer to arrest on the reasonable suspicion that the person is a prisoner unlawfully at large;<sup>25</sup> and section 352A which confers a power of arrest for interstate offences.

Schurr commented that ‘An arrest is not lawful unless the person being arrested is told of the reason for the arrest at the time of the arrest’.<sup>26</sup> The Code of Practice for CRIME directs officers to ‘tell the person at the first opportunity in clear words they are arrested, what for’.<sup>27</sup> Consistent with section 355 (2) of the *Crimes Act*, the Code defines ‘arrest’ to include when a person is in the company of a police officer for the purpose of participating in investigatory procedures if: the officer believes there is sufficient evidence to establish the person has committed an offence that is or is to be the subject of the investigation; the officer would arrest the person if they attempted to leave; or where the officer has given the person reasonable grounds for believing that they would not be allowed to leave if they wished to do so.<sup>28</sup>

The Code of practice for CRIME also reminds police of alternatives to arrest, stating ‘Do not for the purpose of charging, arrest for a minor offence when it is clear a summons or court attendance notice (field) will ensure attendance at court. Also keep in mind your ability to issue infringement notices for many offences’.<sup>29</sup> As to children, the Code directs officers not to start criminal proceedings against a child ‘except by summons or court attendance notice, unless the exceptions in section 8 of the *Children (Criminal Proceedings) Act* apply’.<sup>30</sup> Note, too, that since April 1998 police are required to consider the alternative

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<sup>24</sup> NSWLRC Report No 66, n 11, p 5. The report added: The arrest powers of private citizens are also somewhat broader than under the common law, since s352(1) extends to all statutory offences and not merely to felonies; however, private citizens are not empowered to arrest on the basis of reasonable suspicion alone’.

<sup>25</sup> But, note, this is defined to exclude escapees from lawful custody.

<sup>26</sup> B Schurr, *Criminal Procedure (NSW)*, LBC Information Services at [1.410].

<sup>27</sup> Code of Practice for CRIME, n 14, p 8.

<sup>28</sup> Ibid, p 47.

<sup>29</sup> Ibid, p 8. A summons may be issued under section 24 or 60 of the *Justices Act 1902*; a Court Attendance Notice may be issued under sections 100AB -100AG of the *Justices Act 1902*.

<sup>30</sup> Ibid, p 10. The exceptions in section 8 include where the proceedings brought against a child

procedures under the *Young Offenders Act 1997* before commencing proceedings for relevant offences by way of summons, attendance notice or penalty notice.<sup>31</sup>

## 2.5 The power of entry<sup>32</sup>

‘The policy of the law is to protect the possession of property and the privacy and security of its occupier’. These are the words of the High Court, which went on to say:

A person who enters the property of another must justify that entry by showing that he or she either entered with the consent of the occupier or otherwise had lawful authority to enter the premises. Except in the cases provided for by the common law and by statute, constables of police and those acting under the Crown have no special rights to enter land.<sup>33</sup>

Consistent with this, the Code of Practice for CRIME warns police officers: ‘You have no general power to enter and search premises without the owner’s or occupier’s consent. The invasion of privacy must be justified’.<sup>34</sup> It then sets out those circumstances where police can enter premises without the consent of the occupier, as follows:<sup>35</sup>

- *To arrest someone you believe on reasonable and probable grounds to be on the premises and, except where circumstances dictate otherwise, you have asked the occupier to let you in and they have refused.* It has been held that, for police exercising the statutory power of arrest under section 352 of the Crimes Act, a warrant is not necessary for this purpose.<sup>36</sup> This contrasts with the position at common law where there is a power to enter premises to arrest someone, but only with an arrest warrant. In other words, if certain conditions are met, section 352 permits police to engage in conduct that would otherwise amount to a trespass. The fact that the fugitive is not

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involve a serious indictable offence, certain indictable offences under the *Drug Misuse and Trafficking Act 1985*, or where there are reasonable grounds for believing that the child will not comply with the summons or is likely to commit further offences.

<sup>31</sup> Section 9 (2) (2A), *Young Offenders Act 1997*. Provision is made for warnings or cautions to be given, or for the holding of youth justice conferences.

<sup>32</sup> Part 2 of the Draft Police Powers Consolidation Bill 2001 is headed Powers of entry’ and Part 7 is headed, Search, entry and seizure powers related to domestic violence offences’.

<sup>33</sup> *Plenty v Dillon* (1991) 171 CLR 635 at 647.

<sup>34</sup> Code of Practice for CRIME, n 14, p 36.

<sup>35</sup> Code of Practice for CRIME, n 14, p 36.

<sup>36</sup> *Lippl v Haines* (1989) 18 NSWLR 620; Schurr, n 26 at [1.860]. It was held that a police officer entering a house forcibly to effect an arrest could do so against the will of a householder only if there were reasonable and probable grounds for the belief that the person sought was within the premises and if a proper announcement was made before entry. The court was prepared not to insist on the proper announcement prior to entry in exigent circumstances (eg where someone was at a window with a gun, firing or ready to fire at police outside).

found on the premises does not make the entry unlawful as long as the police officer had reasonable and probable cause to believe that the person was in the premises.

- *To arrest on immediate pursuit an escapee from lawful custody.* The power articulated in the Code of Practice for CRIME derives from the doctrine of the ‘hot pursuit’ of persons unlawfully at large. Escaping from lawful custody is of course an offence, for which the offender is subject to arrest. Presumably, therefore, section 352 of the *Crimes Act* might again establish a statutory basis for the power at issue, but only, it might be said, where there is reasonable and probable cause to believe that the escapee is on the premises. A power of rearrest in relation to ‘prisoners unlawfully at large’ is also found under section 352AA of the *Crimes Act*. However, this is defined to exclude escapees from lawful custody. Instead, its operation is restricted to the rearrest of persons released from gaol by mistake.
- *To prevent an imminent or actual breach of the peace, or to prevent a felony which is about to take place.* Under common law the power of entry may be exercised by a police officer (or a citizen) if an arrestable offence is about to be committed, and would be committed, unless prevented.<sup>37</sup> This common law power of entry does not extend to misdemeanours, except to deal with or prevent a breach of the peace.<sup>38</sup> It is said in this regard that ‘Police officers are entitled in the exercise of their duty to prevent the commission of an offence or a breach of the peace, to enter and remain on private premises where a public meeting is being held, if they have reasonable grounds for believing that an offence (for example, seditious speech), incitement to violence or a breach of the peace is immanent or likely to be committed’.<sup>39</sup> A related statutory instance of a power of this sort is section 10 of the *Disorderly Houses Act 1943* which permits entry by police, without warrant, into premises declared to be a disorderly house. Entry onto land which may be used as a means of escape from a disorderly house is also permitted and, for these and related purposes, police may ‘break open doors, windows, and partitions, and do such other acts as may be necessary’.<sup>40</sup>
- *To execute a search warrant.*<sup>41</sup> Various statutory provisions apply in this respect, including powers of entry in cases of child prostitution or pornography,<sup>42</sup> and in relation to cases of domestic violence where warrants may be obtained by radio or telephone.<sup>43</sup> These domestic violence powers of entry are only to be used where a police officer has been denied entry to a dwelling-house. ‘Entry by invitation’ is also provided for under

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<sup>37</sup> *Swales v Cox* [1981] QB 849; affirmed in *Plenty v Dillon* (1991) 171 CLR 635 at 647.

<sup>38</sup> *Halliday v Nevill* (1984) 155 CLR 1 at 12.

<sup>39</sup> R Watson, AM Blackmore and GS Hosking, *Criminal Law (NSW)*, LBC Information Services, [2.33530].

<sup>40</sup> Section 10 (d), *Disorderly Houses Act 1943*.

<sup>41</sup> See generally section 10 of the *Search Warrants Act 1985* which lists various provisions to which the Act applies.

<sup>42</sup> Section 357EA, *Crimes Act 1900*.

<sup>43</sup> Section 357G, *Crimes Act 1900*.

section 357F of the *Crimes Act*, and in domestic violence cases such entry is lawful if the invitation is made by a victim, notwithstanding that an occupier of the house has refused entry to the police.<sup>44</sup> In any event, if entry is by warrant or invitation, police are directed to take only such action as is reasonably necessary to, for example, render aid or investigate whether an offence has been committed.<sup>45</sup> A police officer must inquire about the presence of firearms and is to remain in the dwelling-house only as long as is reasonably necessary to take the specified action.<sup>46</sup>

## 2.6 The power to detain after arrest for purposes of investigation<sup>47</sup>

Traditionally, the uncertainty in this area of the law was notorious. At common law, a person cannot be arrested solely for the purpose of questioning. Moreover, once under arrest, it is unlawful for a police officer to delay taking the person before a justice solely for the purpose of questioning or investigation. When arresting a person without a warrant under section 352 of the *Crimes Act*, the common law required that a police officer take the person before a justice 'without unreasonable delay', or in as short a time as is 'reasonably practicable'. This left ample scope for confusion when it came to translating principle into practice and the High Court in *Williams*,<sup>48</sup> the leading case in this field, went so far as to invite legislative reform. The NSW Law Reform Commission agreed, stating in 1990 that it found it:

...remarkable that an area of the law of such fundamental importance to personal liberty has been left in a state which is so informal, so uncertain and so inconsistent for so long. This is true not only of the law surrounding detention after arrest (*Williams*), but also of the whole area of criminal investigation, including the safeguards which are meant to be available to suspects and the consequences for breach of procedural rules or for the poor exercise of discretion. It is highly unlikely that an area of law which dealt with the ownership of property would have been allowed to remain in this state without urgent legislative attention.<sup>49</sup>

In NSW a police officer's common law duty to take a person before a justice as soon as practicable after arrest has been replaced by a statutory scheme introduced by the *Crimes Amendment (Detention After Arrest) Act 1997*. These amendments constitute Part 10A of

<sup>44</sup> Section 357F (4), *Crimes Act 1900*.

<sup>45</sup> Section 357H, *Crimes Act 1900*.

<sup>46</sup> Section 357H (1) (a1) and section 357H (1) (b), *Crimes Act 1900*.

<sup>47</sup> Part 9 of the Draft Police Powers Consolidation Bill 2001 is headed 'Investigations and questioning'. This Part is a re-statement of the law which operates at present under Part 10A of the *Crimes Act*. A more detailed discussion is presented in -G Griffith, *Police Powers of Detention After Arrest*, NSW Parliamentary Library Briefing Paper No 8/1997.

<sup>48</sup> *Williams v R* (1986) 161 CLR 278.

<sup>49</sup> NSWLRC Report No 66, n 11, p 18.



the Crimes Act. Under Part 10A police may detain a person for investigation for 4 hours, or for a further period not exceeding 8 hours if a warrant to extend the investigation period is obtained. Certain times, known as ‘time outs’, are to be disregarded in calculating this investigation period.<sup>50</sup> Various safeguards apply, including the right to communicate (or attempt to communicate) with a friend or legal practitioner<sup>51</sup> and, in appropriate circumstances a right to medical assistance<sup>52</sup> and to reasonable refreshments and facilities.<sup>53</sup> A detained person must be informed of these rights by a ‘custody manager’ who must also caution the person concerned.<sup>54</sup> Special rules are set out in the Regulations relating to ‘vulnerable’ persons such as children, Aborigines and Torres Strait Islanders, persons of non-English speaking background and persons with a physical, intellectual or other disability. For example, provision is made for the attendance and participation of a ‘support person’ during questioning, and in the case of children this right cannot be waived.<sup>55</sup> Further Aboriginal and Torres Strait Islander children should only be placed in a cell in ‘exceptional circumstances that make it necessary for the well-being of the child’.<sup>56</sup> Other children are not to be placed in a cell unless no other secure accommodation is available, or a cell is the most comfortable form of secure accommodation available to the custody manager.<sup>57</sup> It was observed in a recent case that ‘the regulations give rise to a positive obligation to assist a vulnerable person in exercising his or her rights’.<sup>58</sup>

Significantly, Part 10A does not confer any new powers of arrest, questioning or investigation. It does not, for example, allow for additional forensic procedures to be undertaken. Also, for Part 10A to apply a person must be under ‘arrest’, a word which is defined in section 355 (2)-(4) of the *Crimes Act*. To be under arrest a police officer must believe there is sufficient evidence to establish that the person committed the offence under investigation.<sup>59</sup> Part 10A does not therefore legalise a regime of detention for the police to

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<sup>50</sup> Section 356F, *Crimes Act 1900*.

<sup>51</sup> Section 356N, *Crimes Act 1900*. The right to communicate with a friend need not be complied with in certain circumstances, for example, where the custody manager believes on reasonable grounds that it is likely to result in the destruction of evidence, or where the safety of other persons may be at risk (section 356P). However, the right to communicate with a legal practitioner is not qualified in this way.

<sup>52</sup> Section 356T, *Crimes Act 1900*.

<sup>53</sup> Section 356U, *Crimes Act 1900*.

<sup>54</sup> Section 356M, *Crimes Act 1900*.

<sup>55</sup> Clause 23, Crimes (Detention After Arrest) Regulation 1998.

<sup>56</sup> Schedule 1, Part 2, clause 5, Crimes (Detention After Arrest) Regulation 1998.

<sup>57</sup> Schedule 1, Part 2, clause 6, Crimes (Detention After Arrest) Regulation 1998.

<sup>58</sup> *R v Phung and Huynh* [2001] NSWSC 115 (26 February 2001) at para 63.

<sup>59</sup> Under this ‘deemed arrest’ provision a person who is under arrest is also defined to mean someone the police officer would arrest if the person attempted to leave, or someone who

go on ‘fishing expeditions’ to see if someone could be charged. It does, however, formally establish an investigation period of up to 12 hours before an arrested person must be brought before a magistrate and dealt with according to law.<sup>60</sup> Thus, the February 1998 NSW Police Service Code of Practice for CRIME advises officers:

You may detain someone you have arrested for the purpose of investigating whether they have committed the offence, for a reasonable period which is not to exceed four hours...The time starts from the arrest. You can get an extension for a further eight hours by applying to an authorised justice.<sup>61</sup>

A common criticism of the Part 10A regime is that, in order to make the right to contact a legal representative effective, ‘a specific custody-based duty solicitor scheme is required’.<sup>62</sup> Provision for a Ministerial review of Part 10A is made in section 356Y, to be undertaken as soon as possible after the Part had been in operation for 12 months and tabled in Parliament within another 12 months after the start of the review process. As at 1 August 2001, no such review has been tabled in either House of Parliament.

## 2.7 The power to detain a person for his or her own good<sup>63</sup>

Not all police powers of detention are exercised in connection with the investigation of an offence. An example is the *Intoxicated Persons Act 1979* which permits the police to remove intoxicated persons from a public place and to detain them in what is called ‘an  
<sup>64</sup> As amended in 2000, the term ‘intoxicated person’ is defined to mean ‘a person who appears to be seriously affected by alcohol or another drug  
<sup>65</sup> Thus, whereas in its original form the Act had been restricted to persons affected by alcohol, it now extends to any drug or combination of drugs.

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has given the police officer reasonable grounds for believing that he or she would not be allowed to leave if he or she wished to do so. Further, the definition makes it clear that a person is not taken to be under arrest merely because he or she is in the company of a police officer who is exercising a power under a law to detain and search the person or to require the person to provide information or to answer questions! For example, a person is not under arrest when he or she is required to take a breath test under the traffic laws, or where a person suspected of carrying a knife is searched under the Police and Public Safety Act.

<sup>60</sup> *Bales v Parmenter* (1935) 35 SR (NSW) 182.

<sup>61</sup> NSW Police Service Code of Practice for CRIME, n 14, p 9.

<sup>62</sup> D Brown et al, *Criminal Laws*, 3<sup>rd</sup> edition, The Federation Press 2001, p 221.

<sup>63</sup> Part 15 of the Draft Police Powers Consolidation Bill 2001 relates to intoxicated persons. Basically it restates the police power to detain such persons, but only in accordance with the *Intoxicated Persons Act 1979*.

<sup>64</sup> Section 3, *Intoxicated Persons Act 1979*. This means a police station or a detention centre under the *Children (Detention Centres) Act 1987*.

<sup>65</sup> Section 3, *Intoxicated Persons Act 1979*.

Significantly, no penalties or charges are associated with the Act and a police officer is prohibited from detaining a person under the relevant section ‘because of behaviour that constitutes an offence under any law’.<sup>66</sup> The Act’s purpose is not to punish, therefore, but to protect either persons or property and to prevent disorderly behaviour in public places. A detained person must subsequently be released into the care of a ‘responsible person’, but can be detained where, for example, a responsible person cannot be found.<sup>67</sup> If detained, an intoxicated person must be released as soon as he or she ceases to be intoxicated.<sup>68</sup>

Various concerns have been expressed over the years about the application of the *Intoxicated Persons Act 1979*, not least concerning its potential impact on Aboriginal people when, in its original form, the legislation permitted the detention of a person found ‘intoxicated in a public place’ for up to 8 hours in a ‘proclaimed place’.<sup>69</sup> Often in non-metropolitan areas this meant detention in a police cell. What is envisaged under the amendments made in 2000 is a multi-agency approach in which police will have access to the Supported Accommodation Assistance program service, thereby hopefully diverting intoxicated persons away from detention in police cells.<sup>70</sup> These amendments were only proclaimed to commence on 16 March 2001<sup>71</sup>.

The word ‘detain’ is not used in the *Children (Protection and Parental Responsibility) Act 1997*. Under that Act, in the interests of the welfare of children under 16, police can remove a child from public places in what is called an ‘operational area’ and escort the child into the care of various persons, including the Director-General of the Department of Community Services, for a period up to 24 hours.<sup>72</sup> As discussed below, both the *Intoxicated Persons Act* and the *Children (Protection and Parental Responsibility) Act* contain search powers.

## **2.8 The power to stop and conduct searches before and after arrest<sup>73</sup>**

At common law there is no power to conduct a medical examination without the consent of the person, either before or after arrest.<sup>74</sup> A police officer could lawfully search the body,

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<sup>66</sup> Section 5 (2), *Intoxicated Persons Act 1979*.

<sup>67</sup> Section 5 (4), *Intoxicated Persons Act 1979*.

<sup>68</sup> Section 5 (6) (f), *Intoxicated Persons Act 1979*.

<sup>69</sup> The issue is discussed in -D Brown et al, *Criminal Laws*, 3<sup>rd</sup> edition, The Federation Press 2001, pp 1002-1005.

<sup>70</sup> *NSWPD*, 30 May 2000, p 6094.

<sup>71</sup> *Government Gazette of the State of NSW*, 16 March 2001, p 1228.

<sup>72</sup> Section 22, *Children (Protection and Parental Responsibility) Act 1997*.

<sup>73</sup> Under Part 13 of the Draft Police Powers Consolidation Bill 2001 is headed ‘Safeguards relating to powers of search, arrest, seizure, to request identity and to give directions.’

<sup>74</sup> *R v Boulton* (1871) 12 Cox CC 87 at 91.

clothing and property in the immediate possession of a person arrested, but only if such a search was reasonably believed to be necessary: (a) for the purpose of discovering a concealed weapon which might be used by the person to injure himself or others or to assist escape; or (b) to secure or preserve evidence with respect to the offence for which the person is in custody.<sup>75</sup> Thus, the police have a common law power to search a person on arrest, based on the principle of safety in some cases and in others on the interests of justice, in order that evidence of the crime might not be destroyed or lost.

This common law position has been modified by statute. Search powers are provided before a person has been charged with an offence. For example, section 8 of the *Search Warrants Act 1985* permits a police officer who is executing a search warrant to search a person found on the premises whom the officer ‘reasonably suspects of having a thing mentioned in the warrant’. Further, various provisions also permit police to search persons without a warrant. These include:

- Section 357 of the *Crimes Act 1900* which provides police with a power to detain or search any person in possession in a public place of a ‘dangerous article’ which is being or has been used in the commission of an offence; police can also seize and detain any such article. Further provision is made for a power to seize dangerous articles found on premises;
- Section 357E of the *Crimes Act 1900* which provides a police officer with the power to stop and search ‘any person whom he or she reasonably suspects of having or conveying any thing stolen or otherwise unlawfully obtained or any thing used or intended to be used in the commission of an indictable offence’. A power to search vehicles is also provided for under this section. However, a broader range of powers exist for this purpose under the *Police Powers (Vehicles) Act 1998*;
- Section 6 of the *Intoxicated Persons Act 1979* which provides that a police officer who has lawfully detained an intoxicated person may search that person and take possession of any personal belongings;
- Section 29 of the *Children (Protection and Parental Responsibility) Act 1997* which empowers a police officer to frisk search a person (under the age of 16 and in an area prescribed by the Act) he believes on reasonable grounds may be carrying a concealed weapon and to take possession of any weapon found in the person’s possession, if it is believed that retaining the weapon may be dangerous. A frisk search is defined to mean: a search of a person conducted by quickly running the hands over the person’s outer garments; and an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person;
- Section 28A of the *Summary Offences Act 1988* (the ‘knife laws’ as introduced by the *Crimes Legislation Amendment (Police and Public Safety) Act 1998*) which permits a police officer, with reasonable grounds to suspect that a person has unlawful custody of a knife or other dangerous implement, to search the person and to examine any bag or other personal effect the person has with them; and
- Section 37 (4) (‘Powers of search and detention’) of the *Drug Misuse and Trafficking Act 1985* which provides that a member of the police force may stop, search and detain

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<sup>75</sup> ALRC, *Report No 2, Interim – Criminal Investigation*, AGPS 1975, p 25.

‘any person in whose possession or under whose control the member reasonably suspects there is, in contravention of this Act, any prohibited plant or prohibited drug’.

Among the most significant of these powers are sections 357E of the *Crimes Act* and section 37 (4) of the *Drugs Misuse and Trafficking Act* which give police a wide discretion to search without a warrant or before arrest. In both cases a search can only be conducted where a police officer ‘reasonably suspects’ that there are relevant grounds for it to be conducted. These search powers were outlined and analysed in a recent report by the NSW Ombudsman in which the powers under the above provisions were contrasted with those operating under section 28A of the *Summary Offences Act* (the knife laws). The report commented that, for police to carry out a search under section 28A:

...they *must* provide evidence that they are police officers, give their name and station, give the reasons for the search and warn that failure to comply may be an offence. Also, there are practical limits on the intrusiveness of the search permitted.<sup>76</sup> There are no such requirements or limits formally set out in the *Crimes Act* or the *Drugs Misuse and Trafficking Act*.<sup>77</sup>

Two issues arise in this context. First, what constitutes ‘reasonable grounds’ for suspecting a person? Secondly, what, if any, limits can be set on the way searches may be conducted under the broad discretionary powers?

***What are reasonable grounds for suspicion to stop and search?*** As to the issue of ‘reasonable grounds for suspicion’ this is said to involve both an objective and a subjective element. The case law suggests that ‘reasonable grounds can only be determined by *objectively* judging the reasonableness of the facts *subjectively* identified and assessed by the police officer prior to conducting a search in light of all the circumstances in play at the time’.<sup>78</sup> Reasonable grounds involves less than a reasonable belief but more than a reasonable possibility.<sup>79</sup> According to the Code of Practice for CRIME, reasonable suspicion means ‘More than mere imagination or conjecture’.<sup>80</sup> The Code advises officers, ‘In

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<sup>76</sup> For example, police may not conduct a strip search (section 28A (2)(a)).

<sup>77</sup> NSW Ombudsman, *Policing Public Safety: Report under section 6 of the Crimes Legislation Amendment (Police and Public Safety) Act*, November 1999, p 119.

<sup>78</sup> NSW Ombudsman, n 77, p 149.

<sup>79</sup> *Streat v Bauer* (unreported, SC (NSW)), 16 March 1998 per Smart J. The case related to the refusal of a driver and a passenger to submit to a search in circumstances where the main basis for police stopping them was ‘Intelligence’ via police radio that the car they were driving ‘was a suspect vehicle that may be used for break and enter offences and that it was not reported stolen’. The court criticised the ‘hebulous nature’ of this intelligence, as police conducting the search had no details of why the vehicle was a suspect vehicle’ or the way in which it was suspected: NSW Ombudsman, n 77, pp 149-150. The distinction between ‘suspicion’ and ‘belief’ is discussed further in part 5.6 below of this paper.

<sup>80</sup> Code of Practice for CRIME, n 14, p 48.

determining whether you have reasonable suspicion consider all the circumstances of each situation', adding 'Your decision must be objective...'.<sup>81</sup> The issue was also discussed in the April 1999 issue of *Policing Issues and Practice Journal* which commented:

It is extremely difficult to explain what is meant by the term 'reasonable suspicion' beyond that the suspicion must be reasonable in all the circumstances of the particular case. Case law provides some guidance but courts tend to make their assessment on a number of factors rather than any single issue. Suffice to say that you should be prepared to explain why and how you developed your suspicion that the person should be subjected to a search and what you were searching for...Whether your suspicion is reasonable or not is a matter for the court to decide.<sup>82</sup>

The article went on to say that both the NSW Ombudsman and the Police Service Code of Practice for CRIME have 'expressed the view that it is unreasonable for police officers to stop, detain and search pedestrians under s357E(a) of the Crimes Act (NSW) merely because of their presence in the vicinity of an offence'.<sup>83</sup> Officers were also advised in the article not to search 'people just as a matter of routine', and not to use special legislative search powers 'opportunistically' – 'don't use your power to search for knives to carry out a search when your suspicion relates to drugs'.<sup>84</sup>

***What kind of searches may be conducted before arrest?*** It has been noted that under section 28A of the *Summary Offences Act 1988* (the knife laws) certain restrictions are placed on the power of police to search for knives and other dangerous implements. For instance, police cannot ask a person 'to remove any item of clothing' other than a hat, gloves, coat or jacket. In conducting a search, police may either use a metal detector or search 'by quickly running the hands over the person's outer garments'. If something is found, police may require the person to produce the object, but must warn 'that failure to produce any thing detected or seen by the police officer during the search may be an offence'.

Comparable safeguards and restrictions are not found under the general stop and search provisions. This raises the question as to what limits, if any, are set on the power to search suspects before arrest in these circumstances, or indeed where a person may 'consent' to be searched without any formal authority being invoked?<sup>85</sup> The *Code of Practice for CRIME*

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<sup>81</sup> Code of Practice for CRIME, n 14, p 39.

<sup>82</sup> M Enders and B McMahon, Police discretion –searching persons' (April 1999) 7 *Policing Issues and Practice Journal* 43 at 44.

<sup>83</sup> Ibid, p 44.

<sup>84</sup> Ibid, pp 44-45.

<sup>85</sup> Ibid, p 120. The Ombudsman discussed those situations where a person consents to a search for which there is no formal authority. Cited is the comment of Professor David Dixon to the effect that 'The police officer who "asks" a young person to turn out his or her pockets

advises that usually only frisk searches should be conducted: ‘Generally, conduct a frisk search only. A strip search cannot be conducted unless clearly justified’.<sup>86</sup> Likewise, the now superseded *Commissioner’s Instructions* stated:

Personal searches of the body in the absence of an arrest are confined to ‘frisk’ type searches unless the seriousness and urgency of the circumstances require and justify a more intrusive search of the surface of the body.<sup>87</sup>

The fact remains, however, that sections 357E of the *Crimes Act* and section 37 (4) of the *Drugs Misuse and Trafficking Act* are not made subject to explicit statutory safeguards or restrictions.

***The power to search after arrest:***<sup>88</sup> Powers of search and seizure also apply under section 353A (1) of the *Crimes Act* once a person is in ‘lawful custody’ and charged with an offence. In these circumstances a police officer ‘may search the person and take from the person anything found upon that search’.<sup>89</sup> The now superseded *Commissioner’s Instructions* stated expressly that a strip-search could be conducted at this stage, but warned that this should not extend to the searching of body cavities.<sup>90</sup> As to when strip searches of the ‘surface of the body’ may be conducted, Annexure A to the Code of Practice for CRIME explains that there will be ‘rare’ occasions when such searches are justified, as for example when ‘critical evidence relating to the offence being investigated might be lost’. Remember, the Code advises:

Do not strip-search a prisoner unless the seriousness and urgency of the circumstances require and justify a more intrusive search of the surface of the body.  
Do not strip-search a prisoner, unless the prisoner knows in substance the reason why it is being imposed.  
Do not search body cavities.<sup>91</sup>

As for searching children, the Code warns that a search can only be conducted in the

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on the street has no more need of a legal power than the shop attendants or airline security personnel who check your bag: an explicit or implied consent (which in practice may be no more than acquiescence) is all that is needed’.

<sup>86</sup> Code of Practice for CRIME, n 14, p 40.

<sup>87</sup> Instruction 37.03.

<sup>88</sup> Part 10 of the Draft Police Powers Consolidation Bill 2001 sets out police powers in relation to persons in custody, including the power to search persons after arrest.

<sup>89</sup> Special provision is made for a constable to request a female to conduct the search, that is, where the person in custody is female and no female constable is available.

<sup>90</sup> Instruction 37.03.

<sup>91</sup> Code of Practice for CRIME, n 14, p 50.

presence of a support person (unless the child has asked otherwise and has asked in the presence of a support person and that person has agreed).<sup>92</sup>

## 2.9 The power to search disorderly houses

The legislation most clearly related to the Drug Premises Act 2001 is the *Disorderly Houses Act* of 1943, section 10 (e) of which empowers police to search premises declared to be of this kind, without warrant, and seize liquor or drugs found there or any implements related to the use of liquor or drugs. Although the power operates without a warrant, it is conditional on the Supreme Court declaring the premises in question to be a disorderly house. Note, too, in anticipation of the later discussion on the Drug Premises Act 2001, that the onus is on a person found upon such premises to prove that he or she was there for a lawful purpose.<sup>93</sup>

## 2.10 The power to give reasonable directions in public places (the ‘move-on’ power)<sup>94</sup>

The *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (the knife laws) amended the *Summary Offences Act* by the insertion of section 28F which provides police with a power to give reasonable directions to a person in a public place. As originally enacted the power only applied where the police officer had ‘reasonable grounds to believe that the person’s behaviour or presence in the place’ constituted an obstruction, harassment, intimidation or caused fear. However, the power was extended under the *Police Powers (Drug Premises) Act 2001* to include behaviour or presence in a public place relating to the supply, or soliciting others to supply, prohibited drugs, or to obtaining, procuring or purchasing prohibited drugs.<sup>95</sup> Move-on directions must now be reasonable in the circumstances for the purpose of ‘stopping’ the supply or purchase of drugs, or for the purpose of reducing or eliminating the obstruction, harassment, intimidation or fear in question. Before the direction is given a police officer must: provide his or her name and place of duty; inform the person of the reason for the direction; and warn the person that failure to comply may be an offence.<sup>96</sup>

In her November 1999 report the Ombudsman reviewed the police use of the section 28F directions power over the first 12 months of its operation. The report found that police data showed that 22% of all directions were issued to indigenous people, and that around 51% of the indigenous people given section 28F directions were aged 17 years or younger. Reflecting on these findings, the Ombudsman said: ‘It is not clear why such high numbers

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<sup>92</sup> Ibid.

<sup>93</sup> Section 7, *Disorderly Houses Act 1943*.

<sup>94</sup> Part 12 of the Draft Police Powers Consolidation Bill 2001 is headed Powers to give

<sup>95</sup> This amendment is discussed in that part of the paper dealing with the *Police Powers (Drug Premises) Act 2001*.

<sup>96</sup> Section 28F (4), *Summary Offences Act 1988*. Unless in uniform, police officers must also provide evidence that they are members of the Police Service.



of Aboriginal and Torres Strait Islander people are subject to s. 28F directions'.<sup>97</sup> The Ombudsman added that the impact of the 'move on' power was of particular concern to the Western Aboriginal Legal Service which argued that the power 'brings otherwise law abiding persons into contact with the police and the criminal justice system'.<sup>98</sup> The Ombudsman recommended that the use of 'reasonable directions' powers be governed by a code of practice (made pursuant to a Regulation) which clearly articulates the rights of citizens as well as the powers of police.<sup>99</sup>

### **2.11 The power to demand name and address**<sup>100</sup>

The *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (the knife laws) also amended the *Crimes Act* by inserting section 563. That section enables a police officer to request the name and address of a person if the officer believes on reasonable grounds that the person may be able to assist in the investigation of an alleged indictable offence because the person was at or near the place around the time that the offence was committed. Before making such a request, a police officer must: provide evidence that he or she is a police officer; give his or her name and place of duty; give the reason for the request; and warn that a failure to comply with the request may be an offence. A person must not, without reasonable excuse, fail to comply with the request, give a false name, or fail to give their correct address in full.

Under sub-section 563 (4) a police officer 'may' also request proof of a person's name and address and there has been some debate as to whether failure to do so would constitute an offence. The Ombudsman noted in this regard that sub-section 563 (3) makes it an offence for a person, without reasonable excuse, to fail or refuse to comply with any request 'under

When explaining the purpose of section 563, the Minister for Police said: 'There is currently no obligation on persons to provide their name and address to a police officer, even if they have witnessed a serious crime. The lack of power hampers efforts to break through the code of silence that members of serious criminal gangs use to ensure members do not provide information about criminal activities'.<sup>102</sup> According to the Ombudsman, 'The

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<sup>97</sup> NSW Ombudsman, n 77, p 232.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid, pp 345-346. For further commentary see- G Griffith, *Police Powers and Drug Law Enforcement in NSW*, Parliamentary Library Briefing Paper No 6/2001, pp 18-23. See also D Brown, n 69, pp 1013-1019.

<sup>100</sup> A general power to require identity to be disclosed is provided under Part 3, Division 1 of the Draft Police Powers Consolidation Bill 2001.

<sup>101</sup> NSW Ombudsman, n 77, p 294. Under clause 13 of the Draft Police Powers Consolidation Bill 2001 giving a false name, without reasonable excuse, or anything less than a full and correct address would be an offence. However, failure or refusal to comply with a request to provide proof of identity would not constitute an offence.

<sup>102</sup> *NSWPD*, 28 April 1998, 3971.

Government intended the provision to be confined to those circumstances where someone may not be willing or able to provide a full statement *at the scene* of an indictable offence. The power, therefore, was to be of assistance in tracking down people away from the scene where they might be more forthcoming about what they may have witnessed'.<sup>103</sup>

## 2.12 The power to request disclosure of driver and passenger identity<sup>104</sup>

The *Police Powers (Vehicles) Act 1998* was passed as a direct response to the 'drive-by' shooting at Lakemba police station on 1 November 1998. It can be seen as companion legislation to the *Police and Public Safety Act 1998*, with the Minister for Police stating in the Second Reading speech that it had been 'drafted to provide consistency' with that Act.<sup>105</sup> Both pieces of legislation were said to be part of the Carr Government's crackdown on gang crime. The Minister for Police went on to comment:

One gap in the current law is the inability of investigating police to demand that the owner of a vehicle identify who was driving the vehicle at the time a serious offence was committed. This gap reinforces a strict code of silence. The Carr Government is determined to give police the powers they need to assist to break through the wall of silence about serious crime. Although the Traffic Act gives police the power to demand this information from owners in relation to traffic offences, this power does not extend to more serious offences.<sup>106</sup>

The *Police Powers (Vehicles) Act 1998* creates a new police power to request identification details from drivers and owners of vehicles. Where a police officer 'reasonably suspects that a vehicle was or may have been used in the commission of an indictable offence' its driver may be requested to disclose his or her own identity and that of any passenger. Likewise, an owner (who was not the driver) may be requested to disclose the identity of the driver and any passenger.<sup>107</sup> The driver or owner must comply with the request unless he or she has a reasonable excuse not to do so.<sup>108</sup> It is an offence to give false or misleading information.<sup>109</sup> Note that, although the identity of passengers may be disclosed, there is no power in the legislation to request passengers themselves to provide identification details.

<sup>103</sup> NSW Ombudsman, n 77, p 286.

<sup>104</sup> A power to require disclosure of the identity drivers and passengers is provided under Part 3, Division 2 of the Draft Police Powers Consolidation Bill 2001.

<sup>105</sup> *NSWPD*, 12 November 1998, p 9902.

<sup>106</sup> *NSWPD*, 12 November 1998, p 9903.

<sup>107</sup> Section 6 (1), *Police Powers (Vehicles) Act 1998*.

<sup>108</sup> Sections 7 and 8, *Police Powers (Vehicles) Act 1998*. A relatively severe maximum penalty of 50 penalty units or 12 months imprisonment, or both applies.

<sup>109</sup> Section 9, *Police Powers (Vehicles) Act 1998*.

The procedural requirements that apply before a police officer may make an identification request are identical to the requirements relating to the ‘demand name and address’ power under section 563 of the *Crimes Act 1900*.<sup>110</sup>

In August 2000 the Ombudsman reported on the first 12 months of the operation of the *Police Powers (Vehicles) Act 1998*. In respect to the power to request driver and passenger identification, the report found that in 1999 there were 36 recorded uses, with eight offences resulting in a charge or other legal process under the Act.<sup>111</sup> Various recommendations were made by the Ombudsman, including ‘That Parliament consider whether self-incrimination should constitute a reasonable excuse under the Vehicles Act and in this context whether any amendments to the Act are necessary’.<sup>112</sup>

### **2.13 The power to stop and search vehicles (including the road block power)<sup>113</sup>**

The *Police Powers (Vehicles) Act 1998* also extended the powers of police to stop and search vehicles beyond those available under section 357E of the *Crimes Act 1901* and section 37 (4)(b) of the *Drug Misuse and Trafficking Act 1985*.<sup>114</sup> In the Second Reading speech the Minister for Police commented in this respect:

Currently, police can search a vehicle only when they suspect that the particular vehicle was used in a specific offence. In some cases, although police know that a serious crime has been committed, they cannot identify a particular vehicle. The new provisions will mean that they can stop and search a group or class of vehicles.<sup>115</sup>

Part 3 of the *Police Powers (Vehicles) Act 1998* confers on police a power to stop and search ‘any specified vehicle (or class of vehicles)’ in certain circumstances. This ‘vehicle search power’ is defined so as to empower police to: establish a road block; stop vehicles; search vehicles and give reasonable directions to any person in the vehicle for the purpose of facilitating the search; and seize anything found in the search which is suspected of

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<sup>110</sup> Section 6 (2), *Police Powers (Vehicles) Act 1998*.

<sup>111</sup> NSW Ombudsman, *Vehicle Powers, Questions and Answers, Report under section 16 of the Police Powers (Vehicles) Act*, August 2000, pp 33-35.

<sup>112</sup> *Ibid*, p 48.

<sup>113</sup> Part 4, Division 2 of the Draft Police Powers Consolidation Bill 2001 is headed Vehicle entry,

<sup>114</sup> Other powers apply under the *Road Transport (General) Act 1999*, section 51 (1) where a tyre deflation device may be used to stop or assist in stopping a vehicle. Also relevant are various sections of the *Road Transport (Safety and Traffic Management) Act 1999*, including section 13 (4) which permits a vehicle to be stopped for the purpose of breath testing the driver.

<sup>115</sup> *NSWPD*, 12 November 1998, p 9903.

constituting evidence of an indictable offence.<sup>116</sup>

This ‘vehicle search power’ can only be used by police when authorised by a ‘senior police officer’. Such authorisation, which can remain in effect for a maximum of 6 hours,<sup>117</sup> may only occur where an indictable offence is suspected, or where a serious risk to public safety is suspected.<sup>118</sup> Unless a person has a reasonable excuse not to do so, he or she must stop the vehicle and must comply with any direction given under a search authorisation.<sup>119</sup> Provision is also made for the recording of search authorisations, but an authorisation is not invalidated by a failure to record.<sup>120</sup>

As noted, in August 2000 the Ombudsman reported on the first 12 months of the operation of the *Police Powers (Vehicles) Act 1998*. The Ombudsman found that in 1999 there were 68 recorded uses of the vehicle search powers.<sup>121</sup> On the other hand, a high rate of recording error was also found.<sup>122</sup> No charges were laid in relation to any offence in Part 3 of the legislation,<sup>123</sup> and the Ombudsman found no uses of the section 10 (3) power to give reasonable directions over the review period.<sup>124</sup> The report asked ‘was there a power to establish road blocks prior to the Act?’. By way of an answer, it said:

STAYSAFE noted [in 1994] that other than for the purpose of heavy motor vehicle inspections and random breath testing police ‘do not generally have the power to stop a particular class of motorist, or to stop motorists for a particular type of offence’. STAYSAFE also formed the view that other than in these circumstances, ‘when police set up checkpoints they do so without any real power to support their actions’. We agree with STAYSAFE’s view of police road block powers.<sup>125</sup>

According to the Ombudsman, 8 requests for road block authorisation were made in 1999,

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<sup>116</sup> Section 10 (6), *Police Powers (Vehicles) Act 1998*.

<sup>117</sup> Section 11 (2), *Police Powers (Vehicles) Act 1998*.

<sup>118</sup> Section 10 (1) and (2), *Police Powers (Vehicles) Act 1998*.

<sup>119</sup> Section 10 (5), *Police Powers (Vehicles) Act 1998*.

<sup>120</sup> Section 12 (2), *Police Powers (Vehicles) Act 1998*.

<sup>121</sup> NSW Ombudsman, n 111, p 70.

<sup>122</sup> *Ibid*, p 72.

<sup>123</sup> *Ibid*, p 71.

<sup>124</sup> *Ibid*, p 74.

<sup>125</sup> *Ibid*, p 68. The reference is to STAYSAFE 27, *Traffic Stops, Police Chases and Public Pursuits of Motor Vehicles*, 1994.

a low figure which was said to be ‘in line with the experience on other jurisdictions’.<sup>126</sup> There followed a lengthy commentary in the report on each of these requests, as well as on the operation of this aspect of the legislation generally. Particular note was taken of the dangers involved in establishing road blocks and undertaking high speed pursuits. Among the many recommendations made by the Ombudsman was that the Police Service ‘develop a checklist for senior officers for authorising any road block’. It was indicated that the list should include such matters as: risks associated with road blocks involving young people and children; whether the suspected indictable offence warrants the establishment of a road block; and the Service’s position concerning pursuits.<sup>127</sup>

#### **2.14 The power to conduct medical examinations**

As noted, at common law there is no power to conduct a medical examination without the consent of the person, either before or after arrest. In NSW this situation was altered by statute in 1924, but the extent of that alteration was relatively limited. This refers to section 353A (2) of the *Crimes Act 1900* which provides:

When a person is in lawful custody upon a charge of committing any crime or offence which is of such a nature and is alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his or her person will afford evidence as to the commission of the crime or offence, any legally qualified medical practitioner acting at the request of any officer of police of or above the rank of sergeant, and any person acting in good faith in his or her aid and under his or her direction, may make such an examination of the person so in custody as is reasonable in order to ascertain the facts which may afford such evidence.

The elements which have to be made out to make this section operative include: (a) the person examined must be in lawful custody; (b) a criminal charge must have been laid; (c) the police officer who orders the medical examination must be of or above the rank of sergeant; (d) this officer must have reasonable grounds for believing such an examination will provide evidence of the offence with which the accused has been charged; and (e) the examination must be carried out by a qualified medical practitioner.<sup>128</sup>

In the 1995 case of *Fernando v Commissioner of Police*<sup>129</sup> the Court of Appeal found that section 353A (2) permitted external examinations by eye and touch only. Thus, the NSW Police had no power to compulsorily acquire blood samples or any other form of body fluid or tissue by an internal examination of persons in lawful custody. In the aftermath of the *Fernando* decision, the *Crimes Act* was amended. New subsections 3A to 3D were added

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<sup>126</sup> NSW Ombudsman, n 111, p 74.

<sup>127</sup> NSW Ombudsman, n 111, p 89.

<sup>128</sup> M Swain, *Forensic Samples*, NSW Parliamentary Library Briefing Paper No 22/1995, p 3.

<sup>129</sup> (1995) 36 NSWLR 567. In *Dickson v The Commissioner of Police* [1999] NSWSC 1100 (16 November 1999) it was held that the subsection does not authorise the marking of the person’s body during an examination. Specifically, the placing of ink dots on the defendant went beyond an examination by eye and touch.

to section 353A which provide:<sup>130</sup>

- A person authorised to make a medical examination of a person in lawful custody can take samples of the person's blood, saliva and hair;<sup>131</sup>
- Evidence concerning the samples can be given only in proceedings concerning the crime or offence in relation to which the samples were taken and the samples must be destroyed as soon as practicable after the conclusion of the proceedings and the exhaustion of any right of appeal concerning the crime or offence;<sup>132</sup>
- The place of 'lawful custody' is not limited to a police station;<sup>133</sup> and
- Samples can be taken without the consent of the person in lawful custody.<sup>134</sup>

No additional safeguards, such as informed consent<sup>135</sup> and the requirement for a court order to compulsorily take a sample, were added. Nor was a distinction made between intimate and non-intimate samples. As well, no accountability measures were inserted into the *Crimes Act* to ensure that the police do not abuse these extended powers. Furthermore, unlike section 353AA which deals with the photographing and fingerprinting of children under 14 years of age, no special provision is made in section 353A for the taking of bodily samples from juveniles.<sup>136</sup> Significantly, in the Second Reading Speech for the 1995 amendments the Attorney General made it clear that this was 'an interim measure' and that the Government was 'committed to the introduction of a much more comprehensive regime which will more fully regulate this contentious area'.<sup>137</sup>

## 2.15 The power to conduct forensic procedures

This more comprehensive regime was introduced under the *Crimes (Forensic Procedures)*

<sup>130</sup> As discussed below, sections 353A (3A) and (3B) were repealed by the *Crimes (Forensic Procedures) Act 2000* and now only apply to relevant samples taken before 1 January 2001.

<sup>131</sup> Section 353A (3A), *Crimes Act 1900*.

<sup>132</sup> Section 353A (3B), *Crimes Act 1900*.

<sup>133</sup> Section 353A (3C), *Crimes Act 1900*. The power of the police to take blood and other samples can be exercised notwithstanding that the person is not actually in the custody of police provided that the person is in custody in respect of the charge and the section is not limited to the period between arrest and appearance at court: *Hawes v Governor of Goulburn Correctional Centre* (CA(NSW), 18 December 1997, unreported, BC9707659); (1998) 5 Crim LN 13 -RN Howie and PA Johnson, *Annotated Criminal Legislation New South Wales*, 1999/2000 Edition, Butterworths 2000, p 373.

<sup>134</sup> Section 353A (3D), *Crimes Act 1900*.

<sup>135</sup> That section 353(3D) does not require the consent of the person in custody was confirmed in *R v Knight (aka Black)* [2001] NSWCCA 114 (30 March 2001).

<sup>136</sup> M Swain, n 128, p 10.

<sup>137</sup> *NSWPD*, 1 June 1995, p 541. The Attorney General noted that the amendment was an interim measure pending the final release of the model criminal code committees bill which has yet to be endorsed by the Standing Committee of Attorneys-General.

*Act 2000 [the Forensic Procedures Act]* which commenced operation on 1 January 2001.<sup>138</sup> The Act established a scheme for obtaining forensic samples from suspects, prisoners convicted of serious indictable offences and volunteers. Arrangements concerning the control, use and destruction of material derived from the forensic sampling procedures, including procedures relating to a national DNA database, were also established under the Act.

***Suspects under the Forensic Procedures Act:*** Significantly, the Forensic Procedures Act repealed section 353A (3A) and (3B) of the *Crimes Act*, thereby introducing a new regime for the taking of blood, saliva and hair samples.<sup>139</sup> A major change to the law is that the Forensic Procedures Act permits samples to be taken from ‘suspects’, a word defined to mean:

- A person whom a police officer suspects on reasonable grounds has committed an offence;
- A person charged with an offence;
- A person who has been summoned to appear before a court in relation to an offence alleged to have been committed by the person;
- A person who has been served with an attendance notice issued under section 100AB of the *Justices Act 1902* in relation to an offence.

This new ‘suspects’ regime is more inclusive than section 353A of the *Crimes Act* where, to be subjected to medical examination, a person must be in lawful custody and charged with a criminal offence. Whereas under the new regime a person suspected of an indictable offence may be detained and subjected to forensic procedures before being charged. For samples to be taken from suspects a police officer must be satisfied that they ‘might produce’<sup>140</sup> The burden lies with the prosecution to prove that a police officer had reasonable grounds for believing or suspecting that a person is a suspect. A civil standard of proof applies – ‘on the balance of probabilities’.<sup>141</sup>

***Safeguards under the Forensic Procedures Act:*** However, it is also the case that, under this regime, a range of procedures are in place designed to ensure either that forensic procedures are carried out on suspects with their informed consent, or that appropriate orders are in place. Before giving consent a suspect must be informed of certain matters,

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<sup>138</sup> Part 8 of the Act, dealing with the carrying out of forensic procedures on volunteers, is to commence at a later date.

<sup>139</sup> Schedule 1, *Crimes (Forensic Procedures) Act 2000*.

<sup>140</sup> Section 12, *Crimes (Forensic Procedures) Act 2000*. The Model Criminal Code Officers Committee had proposed a stricter test of where a sample is likely to produce evidence – A Haesler, ‘An overview of DNA testing and the new Crimes (Forensic Procedures) Act 2000’, paper presented at the Institute of Criminology Seminar on the Use of DNA in the Criminal Justice System, 11 April 2001, p 29.

<sup>141</sup> Section 103, *Crimes (Forensic Procedures) Act 2000*.

including details of the way in which the forensic procedure is to be carried out.<sup>142</sup> Also, a suspect must be cautioned before a forensic procedure starts<sup>143</sup> and given a 'reasonable opportunity to communicate privately with a legal practitioner of his or her choice.'<sup>144</sup> In relation to the granting of consent and the carrying out of forensic procedures different conditions apply depending on certain factors, including: whether the procedures concerned are intimate or non-intimate in nature: whether the suspect is under arrest: and whether he or she is a child, an 'incapable person', or an Aboriginal or Torres Strait Islander. If reasonably practicable, children, incapable persons and Aboriginal and Torres Strait Islanders who are suspects must have an interview friend or legal representative present when a forensic procedure is carried out.<sup>145</sup> Children, between the ages of 10 and 18, and incapable persons cannot consent to a forensic procedure.<sup>146</sup> Instead, all such procedures are made subject to court supervision.<sup>147</sup> The Act does not, in any event, authorise the carrying out of forensic procedures on a child younger than 10.<sup>148</sup>

***Must a suspect be under arrest?*** A person suspected of an indictable offence can also be detained under the Forensic Procedures Act before being charged. If a suspect who is not under arrest consents to a forensic procedure then it must be carried out within two hours.<sup>149</sup> If a suspect is under arrest, then he or she may be detained for up to 2 hours for a forensic procedure after the end of the investigation period permitted under Part 10A of the Crimes Act.<sup>150</sup> Questioning of the suspect, whether under arrest or not, must be

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<sup>142</sup> Section 13, *Crimes (Forensic Procedures) Act 2000*.

<sup>143</sup> Section 46, *Crimes (Forensic Procedures) Act 2000*.

<sup>144</sup> Section 9, *Crimes (Forensic Procedures) Act 2000*. Different conditions apply if a suspect is under arrest, in which case a police officer need not allow private communication with a legal practitioner for evidentiary reasons. Note that the NSW Law Society has called recently for free around-the-clock legal advice for suspects who are subjected to DNA testing: *ABC News Online*, Law society urges free legal advice in DNA testing cases', 31 July 2001.

<sup>145</sup> Sections 54 and 55, *Crimes (Forensic Procedures) Act 2000*. Note that an interview friend (other than a legal representative) may be excluded if he or she unreasonably interferes with or obstructs the carrying out of the procedure'

<sup>146</sup> Section 8, *Crimes (Forensic Procedures) Act 2000*.

<sup>147</sup> Section 23 (c), *Crimes (Forensic Procedures) Act 2000*. Special provisions also apply to children as volunteers, in which case a parent or guardian can consent on their behalf (section 76). For a commentary on these provisions see R Ludbrook, Children as involuntary volunteers under the Crimes (Forensic Procedures) Act 2000 (NSW); *paper presented at the Institute of Criminology Seminar on the Use of DNA in the Criminal Justice System*, 11 April 2001, pp 31-34.

<sup>148</sup> Section 111, *Crimes (Forensic Procedures) Act 2000*.

<sup>149</sup> Section 16, *Crimes (Forensic Procedures) Act 2000*.

<sup>150</sup> Section 42, *Crimes (Forensic Procedures) Act 2000*. The Act's relationship with Part 10A of the *Crimes Act* is dealt with in section 113.



suspended while a forensic procedure is being carried out.<sup>151</sup>

***What are intimate forensic procedures?*** Although the Forensic Procedures Act permits intimate forensic procedures to be carried out, it is important to note that it does not authorise the police to conduct body cavity searches. Thus ‘intimate’ forensic procedures are defined under the Act to include such things as: the taking of samples of blood, saliva or public hair; the external examination of the genital or anal area or the buttocks, or the breast of a female or transgender person; the photographing of these areas of the body; or the taking of a sample by vacuum suction from the same areas. ‘Internal’ searches as such are not permitted.

## **2.16 The power to conduct internal searches under the Commonwealth Customs Act 1901**

It is said that the only powers NSW police have to conduct body cavity searches are when they are assisting in the investigation of drug importation at the customs barrier.<sup>152</sup> Schurr commented in this respect that the power to conduct internal searches under sections 219RA-219ZL of the Commonwealth *Customs Act 1901* was introduced in 1979 and expanded in 1991. ‘The powers’, she added ‘are used everyday’.<sup>153</sup> Thus, section 219S (1) provides:

Where a detention officer or police officer suspects on reasonable grounds that a person is internally concealing a suspicious substance, an officer of Customs or police officer may detain the person for the purposes of enabling an application for an order for the detention of the person under section 219T to be made.

An initial order for detention under section 219T is for 48 hours, a period which may be extended for a further 48 hours if a renewal order is obtained. The detention period may also be extended by another 48 hours to allow for the internal search to be arranged and conducted, thereby allowing for a total detention period of up to 6 days.<sup>154</sup> On the other hand, where a person refuses to submit to an internal search, the period of detention may be extended for an indeterminate ‘appropriate’ period to be ordered by a judge.<sup>155</sup>

Internal searches must be carried out by a medical practitioner, subject to specified conditions,<sup>156</sup> at a hospital or a medical surgery or other practicing rooms of a registered medical practitioner.<sup>157</sup> Various safeguards are provided under the Act, including the right

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<sup>151</sup> Section 45 (1), *Crimes (Forensic Procedures) Act 2000*.

<sup>152</sup> B Schurr, *Criminal Procedure (NSW)*, LBC Information Services, [12.50].

<sup>153</sup> *Ibid*, [12.1000].

<sup>154</sup> Section 219V (10), *Customs Act 1901* (Cth).

<sup>155</sup> Section 219V (11), *Customs Act 1901* (Cth).

<sup>156</sup> Section 219Z, *Customs Act 1901* (Cth).

<sup>157</sup> B Schurr, *Criminal Procedure (NSW)*, LBC Information Services, [12.620].

to contact a lawyer<sup>158</sup> and, where a detainee is found by a judge or magistrate to be in need of protection, a person is to be appointed to represent the detainee's interests.<sup>159</sup> A caution must be given before a Customs or police officer may question a person in custody for an external or internal search. Among other things, the detainee must be informed: that the detainee is not obliged to answer any questions asked of him or her; and that anything said by him or her may be used in evidence. However, as Schurr explained, 'A caution is only required before questioning and is not required before an internal search is conducted or a body sample is taken'.<sup>160</sup>

Under this customs scheme no minimum age applies below which a person may not be searched or detained. It was said in the debate prior to the legislation being passed that an exemption 'might encourage the use of minors as drug couriers'.<sup>161</sup> Better, then, it was argued to include children under the scheme and have special provisions for their protection. Thus, all children under 18 years of age are defined to be persons 'in need of'<sup>162</sup> A different approach has been adopted under the Internally Concealed Drugs Act 2001 where, as explained below, a minimum age of 10 applies for the carrying out of internal searches.

## 2.17 Comments

In NSW as in most other common law jurisdictions the last two decades of the twentieth century witnessed a move to formalise, articulate and sometimes expand police powers. One example is the law relating to powers of entry in domestic violence cases, which in this State was largely a creation of the 1980s. Another is the long debate about police powers in relation to criminal investigations which culminated in the new statutory scheme established under Part 10A of the *Crimes Act* in 1997. The knife laws of 1998 and the forensic procedures legislation of 2000 are further features of this general trend towards a fuller statutory articulation of police powers. This trend was supplemented by the release in 1998 of the non-statutory Code of Practice for CRIME.

This move towards the statutory articulation of police powers was part of a broader law and order debate and, as such, it was the subject of ongoing controversy. Concerns about the expansion of police powers, along with the potential for their abuse, were foremost in the civil liberties side of this debate. From the opposing standpoint it was argued in defence of this new statutory approach that, unlike the common law and older statute law position, it was far more concerned to set out the safeguards which should apply to the exercise of police powers. In other words, although flexibility and discretion would remain central features of policing operations, under this new approach the scope of that discretion and flexibility is curtailed and regulated to an extent not seen before. Comparison of the stop and

<sup>158</sup> Section 219W, *Customs Act 1901* (Cth).

<sup>159</sup> Section 219X, *Customs Act 1901* (Cth).

<sup>160</sup> B Schurr, *Criminal Procedure (NSW)*, LBC Information Services, [12.280].

<sup>161</sup> Review of the Commonwealth Criminal Law 1991, *Fifth Interim Report*, para 5.34.

<sup>162</sup> Section 4 (20), *Customs Act 1901* (Cth).

search powers and the safeguards relating to these under the controversial knife laws (section 28A of the *Summary Offences Act 1988*) with the at-large powers under section 357E of the *Crimes Act* is a case in point.

Of course, the debate about the expansion of police powers and its implications for civil liberties continues. For some, the danger is that the law and order debate is leading us towards an inappropriate trade-off of arguably fundamental liberties for dubious safeguards which are not backed up by a legally-binding police code of practice. Many others believe that such a trade-off, if that is what it is, is worth making for the sake of the fight against crime. All these issues were to the fore in the debate surrounding Internally Concealed Drugs Act 2001 and the Drug Premises Act 2001. They are likely to be re-visited in some form or other in the context of the Draft Police Powers Consolidation Bill 2001.

### **3. THE INTERNALLY CONCEALED DRUGS ACT 2001**

#### **3.1 Background**

In his Ministerial Statement of 27 March 2001 the Premier announced plans to give police the power to detain an individual and have a medical practitioner assist in a search to determine whether a person had swallowed or otherwise concealed a prohibited drug upon his or her person. This was followed by the introduction into Parliament on 30 May 2001 of the Police Powers (Internally Concealed Drugs) Bill 2001, in the Second Reading speech for which the Attorney General said:

Currently the only powers New South Wales police have to conduct internal searches are when they are assisting in the investigation of drug importation, under the Commonwealth Customs Act 1901. Under that Act a person entering Australia may be detained and searched if suspected on reasonable grounds on internally concealing prohibited drugs. While based on the internal search provisions of the Customs Act 1901, the Bill incorporates many of the protections contained in the Crimes (Forensic procedures) Act 2000 to ensure that suspects are adequately protected against unwarranted searches and have access to safeguards.<sup>163</sup>

For its part, the NSW Law Society's Criminal Law Committee aired its concern that the legislation 'is intended to target young people who are alleged to be "drug couriers"' and predicted that 'there will be little impact on organisers and main dealers'. The Committee continued: 'Despite the Government's attempt to ensure that the legislation contains adequate protections and that people have access to safeguards, recent court cases have shown that police do not always adhere to the legislative requirements that are currently in place'.<sup>164</sup> Other comments made by the Criminal Law Committee are noted in the context

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<sup>163</sup> NSWPD (Hansard proof, LA), 30 May 2001, p 31.

<sup>164</sup> NSW Law Society Briefing Note to Members of Parliament, *Police Powers (Internally*

of specific provisions of the Internally Concealed Drugs Act 2001 which was assented to on 27 June 2001.<sup>165</sup>

### 3.2 Main provisions of the Internally Concealed Drugs Act 2001

This legislation extends the search and detain powers available to the NSW Police Service. The points of similarity between this Act and the relevant provisions of the Commonwealth customs legislation are noted in the ensuing discussion. The main provisions of the Internally Concealed Drugs Act 2001 are as follows:

**What is an internal search?** The first point to make is that the Act would not authorise a body cavity search. The term ‘internal search’ is defined to mean:

..any search of a person’s body involving an ultrasound, MRL, X-ray, Cat scan or other form of medical imaging, but does not include a search of a person involving an intrusion into the person’s body cavities.

In the Second Reading speech the Minister commented in this respect that the legislation ‘permits non-intrusive internal searches’. The Act certainly stops short of the search powers available under the Commonwealth customs legislation.

**Who can be internally searched?** The new legislative regime relates to ‘suspects’. These must be over 10 years of age.<sup>166</sup> Otherwise ‘suspect’ is defined to mean:

a person whom a police officer suspects on reasonable grounds has swallowed or is internally concealing a prohibited drug that the suspect has in his or her possession for the purpose of committing an offence against the *Drugs Misuse and Trafficking Act 1985* involving the supply of prohibited drugs.

To some extent this is modelled on section 219S (1) of the *Customs Act* which refers to persons suspected on ‘reasonable grounds’ of the concealment of any ‘suspicious substance’.<sup>167</sup> The main difference is that the Bill would restrict the range of suspects to those found in possession of a prohibited drug for the purpose of an offence involving only the ‘supply’ of that drug. However, supply is defined broadly under the *Drugs Misuse and Trafficking Act* to include ‘agreeing to supply, or offering to supply, or keeping or having in possession for supply’, with section 25 (1) of that Act then establishing that ‘A person who supplies, or who knowingly takes part in the supply of, a prohibited drug is guilty of an offence’. Further, section 29 provides that a person who possesses a ‘traffickable quantity’ of a prohibited drug shall ‘be deemed to have the prohibited drug in his or her

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*Concealed Drugs) Bill 2001*, 4 June 2001, p 1. Cited were *R v Phung and Huynh* [2001] NSWSC 115 (26 February 2001) and *R v T* [2001] NSWCCA 210.

<sup>165</sup> *NSW Government Gazette*, No 108, 6 July 2001, p 5320.

<sup>166</sup> Section 6, *Internally Concealed Drugs Act 2001*.

<sup>167</sup> ‘Suspicious substance’ is defined to mean a narcotic involving an offence punishable by imprisonment for 7 years or more –section 4, *Customs Act 1901*.

possession for supply'.<sup>168</sup> As an indication of what this means in practice, 3.0g of both heroin and cocaine constitutes a traffickable quantity of those drugs. Under section 7 a prohibited drug in 'the order or disposition of a person shall be deemed to be in the possession of the person'. To this the Drug Premises Act 2001 has added 'or that is in the order or disposition of the person jointly with another person by agreement between the persons'.

In referring to 'suspects' the Internally Concealed Drugs Act also follows a similar course to that adopted by the Forensic Procedures Act. Again, this new 'suspects' regime is more inclusive than section 353A of the Crimes Act where, to be subjected to medical examination, a person had to be in lawful custody and charged with a criminal offence. The Internally Concealed Drugs Act can be said to confirm the shift away from that approach. It would also seem to confirm that advances in medical technology can allow for internal searches to be carried out which are not as physically intrusive as what might have been required in the past. At the same time, the level of intrusiveness involved in conducting a Cat scan, to take one example, must be recognised.

***Who must prove belief of suspicion and to what standard?*** The Act's approach in this respect is identical to that adopted under the Forensic Procedures Act. Thus, the burden lies with the prosecution to prove that a police officer had reasonable grounds for suspecting a person. A civil standard of proof applies – 'on the balance of probabilities'.<sup>169</sup>

***When may an internal search be carried out?*** For adult suspects it can take place either with the suspect's written informed consent,<sup>170</sup> or else, where consent has been refused, by order of 'an eligible judicial officer'. Such an order is also required for a search to be carried out on a child who is over 10 years of age. Unlike the Commonwealth customs legislation, which applies to persons of all ages, the Internally Concealed Drugs Act does not apply to children under 10.

Adult suspects must be informed of certain matters before giving consent, including details of the kinds of procedures that can be carried out in an internal search and of their right to refuse consent to such a search.<sup>171</sup> A suspect must also be cautioned at some point before the internal search begins and told that 'he or she does not have to say anything while the search is carried out but that anything the person does say may be used in evidence'.<sup>172</sup>

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<sup>168</sup> Unless, that is, the person can prove he or she possessed the prohibited drug for purposes other than supply, or in relation to certain named drugs, that the person obtained the drug from a medical practitioner. In both cases the burden of proof is shifted on to the defendant.

<sup>169</sup> Section 31, *Internally Concealed Drugs Act 2001*.

<sup>170</sup> Section 7, *Internally Concealed Drugs Act 2001*. Special provisions relate to Aboriginal and Torres Strait Islanders under section 9 (3).

<sup>171</sup> Section 10, *Internally Concealed Drugs Act 2001*.

<sup>172</sup> Section 20, *Internally Concealed Drugs Act 2001*.

***Can children over 10 consent to an internal search?*** No. The regime under the Internally Concealed Drugs Act is similar in this respect to the Forensic Procedures Act which treats children between the ages of 10 and 17 as incapable of giving informed consent. An internal search could only be carried out on a child ‘by order of an eligible judicial officer’.<sup>173</sup> Further, as amended by the Legislative Council, for health reasons limits are set on the number of times children can be subjected to internal searches involving ‘electromagnetic, radiation or radiography’. An order cannot be made under the Act if such searches have been conducted ‘on 2 or more occasions in the previous 2 years unless the eligible judicial officer considers that exceptional circumstances exist that otherwise justify the making of the order’.<sup>174</sup>

***When may a police officer apply for an order for an internal search?*** If a competent adult suspect has refused consent for an internal search a police officer may apply for a court order. However, under section 8 of the Act the officer may only make such an application if certain conditions are in place. First, the officer must be satisfied that the person is a ‘suspect’. Secondly, the officer must have reasonable grounds to believe that the search ‘is likely to produce evidence’ that the suspect is supplying a prohibited drug.<sup>175</sup> This is a stricter test than the ‘might produce evidence’ test which operates under the Forensic Procedures Act.<sup>176</sup> In detaining a suspect to apply for an order the police officer must also be ‘satisfied that the detention is justified in all the circumstances’.

Commenting on these provisions, the Attorney General said: ‘This high threshold has been included in the legislation to ensure that its provisions are used in exceptional circumstances, rather than as a matter of course. Internal searches will not be carried out simply to obtain evidence of possession or use of a prohibited drug – the suspected offence must involve the supply of a prohibited drug, contrary to the Drugs Misuse and Trafficking Act 1985’.<sup>177</sup> ‘Supply’ is defined broadly under that latter Act, as has been explained.

***For how long can suspects be detained under the Act?*** Under the Internally Concealed Drugs Act 2001 a suspect may be detained: (a) by a police officer for the purpose of requesting the suspect to consent to an internal search; (b) by a police officer for the purpose of applying for a court order to conduct an internal search; (c) by order of an eligible judicial officer for the purpose of carrying out an internal search; (d) by a police

<sup>173</sup> Section 7, *Internally Concealed Drugs Act 2001*.

<sup>174</sup> Section 14 (4), *Internally Concealed Drugs Act 2001*.

<sup>175</sup> Section 8, *Internally Concealed Drugs Act 2001*.

<sup>176</sup> Section 14 (2) (b), *Internally Concealed Drugs Act 2001*. The same ‘is likely’ test operates for the judicial officer when deciding whether to grant an order. The judicial officer must also be satisfied that the person is a ‘suspect’ and that the making of the order is justified in all the lause 14 (2). The test that there are reasonable grounds for believing that the search is likely to produce evidence’ is also applied.

<sup>177</sup> NSWPD (Hansard proof, LA), 30 May 2001, p 32.

officer where a suspect who consents to an internal search is detained for the purpose of carrying out the search; and (e) by a police officer if, in the opinion of the medical practitioner carrying out the search, ‘any matter’ that could be drugs are found on the suspect’s body. The conditions applying to these different circumstances vary as follows:

- (a) *detention by a police officer for the purpose of requesting the suspect to consent to an internal search* - where consent is requested the conditions vary if a person is or is not under arrest. If a person is under arrest, then the detention period to request consent can last for 2 hours beyond the investigation period provided for by section 356D of the Crimes Act, that is, for 4 hours initially or for a further period up to 8 hours under a detention warrant. In other words, the present Bill contemplates a total detention period of up to 14 hours for a suspect under arrest. If not under arrest, a suspect can only be detained for up to 2 hours while a request for a consent to search is made.<sup>178</sup>
- (b) *detention by a police officer for the purpose of applying for a court order to conduct an internal search* - identical provisions apply under (a) and (b).<sup>179</sup>
- (c) *detention by order of an eligible judicial officer for the purpose of carrying out an internal search* - where a suspect is detained in these circumstances, provision is made for a detention period ‘not exceeding 24 hours’.<sup>180</sup>
- (d) *detention by a police officer where a suspect who consents to an internal search is detained for the purpose of carrying out the search* - where a suspect who consents to an internal search is detained for the purpose of carrying out the search, the Act is not entirely clear as to the conditions that apply. Section 37 (3) states that the Act does not authorise keeping a suspect in custody ‘for more than 24 hours...after *the suspect consents to*, or an eligible judicial officer authorises, the carrying out of an internal search’ (emphasis added). In other words a 24 hour detention period is contemplated in respect to a suspect who consents to an internal search. No court order is required and there is no requirement to inform a suspect of this fact before he or she consents to the search. There is, however, a requirement to inform a suspect that he or she might be detained for up to 48 hours if the search ‘reveals the presence of matter that could be  
<sup>181</sup>
- (e) *detention by a police officer if, in the opinion of the medical practitioner carrying out the search, ‘any matter’ that could be drugs are found on the suspect’s body* - a detention period ‘not exceeding 48 hours’ is provided for where an internal search reveals, in the opinion of the medical practitioner carrying out the search, ‘any matter’ that could be drugs on the suspect’s body.<sup>182</sup> Detention must be at a hospital or at the surgery of the medical practitioner in question. But note that this detention period may be extended by a detention order under section 38. For a judicial officer to make a

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<sup>178</sup> Section 8 (3), *Internally Concealed Drugs Act 2001*.

<sup>179</sup> Section 8 (3), *Internally Concealed Drugs Act 2001*.

<sup>180</sup> Section 14 (1), *Internally Concealed Drugs Act 2001*.

<sup>181</sup> Section 10 (c), *Internally Concealed Drugs Act 2001*.

<sup>182</sup> Sections 11 (2) and 37 (4), *Internally Concealed Drugs Act 2001*.

detention order he or she must be satisfied that the extension ‘is reasonably necessary to carry out an internal search or to confirm that matter present in the suspect’s body that was revealed by an internal search is drugs’.<sup>183</sup> As originally proposed no time limit was placed on this extension of time. However, amendment by the Legislative Council has ensured that an extension period cannot exceed 48 hours. In ‘exceptional circumstances’ this period can be extended a second time, but the maximum period cannot in any circumstances be extended more than twice. In other words, section 38 now allows for a total extension period of up to 96 hours over and above the 48 hour detention period provided for under sections 11 (2) and 37 (4).

To summarise in respect to suspects who are not under arrest and who consent to an internal search: first they can be detained for up to 2 hours while a request for consent is made; secondly, they can be kept in custody for up to 24 hours while the search is conducted; thirdly, if the search reveals matter that could be drugs on their body they could be detained for a further 48 hours; and fourthly, in exceptional circumstances this detention period can be extended by up to 96 hours. In the worst case scenario this regime would involve detention for up to 7 days and 2 hours (plus any ‘time outs’).

That a suspect who is not under arrest and who consents to an internal search can be detained for up to 24 hours while the search is conducted is worthy of comment. This is especially so as there is no requirement under section 10 for a police officer to inform a suspect of this fact before giving consent. A suspect must be informed that he or she may be detained for up to 48 hours if the search reveals ‘matter that could be drugs’ on his or her person. But the fact that the suspect can be detained for an initial period of 24 hours need not be made known to the person. Moreover, this 24 hour detention period contrasts markedly with the situation under the Forensic Procedures Act where, if a suspect who is not under arrest consents to the procedure, then it must be carried out within 2 hours; and where a suspect who is under arrest can only be detained for up to 2 hours after the end of the maximum investigation period of 12 hours permitted under Part 10A of the *Crimes Act*. Admittedly, the procedures contemplated under the Internally Concealed Drugs Act are more complex than the mouth swabs normally used for DNA testing and the 24 hour detention period may be explained on that basis. It cannot be explained on the grounds that delays may occur in waiting for medical personnel and equipment because, as it is noted below, such delays are provided for under the legislation’s time out provisions.

Another point of comparison for the Internally Concealed Drugs Act 2001 is the detention regime operating under the Commonwealth *Customs Act 1901*. This regime is more onerous still, as an initial detention period of 48 hours applies. On the other hand, for a person to be detained for such a period under the customs legislation an order must be made by a judge or magistrate who must be satisfied that there are reasonable grounds for suspecting the detainee.<sup>184</sup> Under the Internally Concealed Drugs Act 2001 a suspect can be detained for 24 hours without a court order and without being informed of the potential detention period involved.

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<sup>183</sup> Section 38 (3), *Internally Concealed Drugs Act 2001*.

<sup>184</sup> Section 219T (3), *Customs Act 1901* (Cth).



The NSW Law Society's Criminal Law Committee described detention periods under the Internally Concealed Drugs Act as 'long' and said it was 'concerned to ensure that suspects, particularly children, are not held for inappropriate procedures when other, less intrusive, methods of investigation might be available to police'.<sup>185</sup>

***What provision is made for time outs?*** The definition of what constitutes 'time out' is modelled on section 356F of the *Crimes Act*, although in certain respects the approach is also tailored to the unique requirements of the Internally Concealed Drugs Act. The effect, basically, is that time outs are to be disregarded when working out the period of time a suspect has been detained. For instance, time reasonably spent waiting for a medical practitioner or for equipment needed to carry out an internal search is to be disregarded for these purposes.<sup>186</sup> It is for the prosecution to prove 'on the balance of probabilities' that time may be disregarded.<sup>187</sup>

***What rights and safeguards do suspects have under the Act?*** If suspects are detained under the proposed legislation they may consult either a legal practitioner at any time, or communicate with 'another person'.<sup>188</sup> However, the right to communicate with another person is qualified in nature, for it can be denied by a police officer in the interests of safeguarding the processes of law enforcement or to protect the life and safety of any person. The right to consult with a legal practitioner is not qualified in this way. Any suspect may also be represented by a legal practitioner at a hearing for an application for an order to conduct an internal search.<sup>189</sup> In addition, indigenous persons, 'incapable persons' and children *must* have a 'search friend' at such a hearing,<sup>190</sup> as well as at the time the search is carried out.<sup>191</sup> If an order is made for a search to be undertaken in these cases, search friends must be appointed by the eligible judicial officer.<sup>192</sup>

Provision is also made for interpreters to be made available to suspects with an inadequate knowledge of English or a physical disability which impedes reasonable fluency in the

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<sup>185</sup> NSW Law Society's Criminal Law Committee, n 164, p 2.

<sup>186</sup> Section 3, *Internally Concealed Drugs Act 2001*.

<sup>187</sup> Section 33, *Internally Concealed Drugs Act 2001*.

<sup>188</sup> Section 23, *Internally Concealed Drugs Act 2001*.

<sup>189</sup> Section 13 (5), *Internally Concealed Drugs Act 2001*.

<sup>190</sup> Section 13, *Internally Concealed Drugs Act 2001*. Following the model of the Forensic Procedures Act in this respect, a search friend may be excluded from the hearing if the search friend unreasonably interferes with or obstructs the hearing of the application.

<sup>191</sup> Section 15 (2), *Internally Concealed Drugs Act 2001*.

<sup>192</sup> Section 14 (6), *Internally Concealed Drugs Act 2001*.

English language.<sup>193</sup> A further safeguard is that, if practicable, an electronic recording is to be made of a police officer asking a suspect to consent to an internal search and of any responses made by the suspect to this request.<sup>194</sup> The burden of proving impracticability in this or any other regard under the Act lies on the prosecution on ‘the balance of

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Reflecting on the ‘right’ to access to legal advice generally in NSW criminal legislation, the NSW Law Society’s Criminal Law Committee called it ‘illusory’ in the absence of a concomitant right to legal aid. The Committee stated: ‘The Government must commit to providing funding so that people can obtain legal advice at the police station’.<sup>196</sup> It went on to comment that ‘Australia explores overseas (particularly UK) models for police powers without accepting the necessity to provide supporting structures (eg, the availability of funded legal advice at the police station)’.<sup>197</sup>

***Who is to carry out an internal search and where?*** As with the customs legislation, a medical practitioner ‘or an appropriately qualified person’ is to carry out a search. It must be carried out at a hospital or the surgery or other practising rooms of a medical practitioner.<sup>198</sup> Moreover, the medical practitioner is directed to prepare a report on all internal searches for the Police Commissioner and, due to a Legislative Council amendment, such a report must ‘indicate whether the internal search involved the use of electromagnetic

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***Is the Act to be monitored or reviewed?*** Yes. For the first two years of its operation it is to be monitored by the Ombudsman who must, as soon as practicable after that two year period expires, report to the Minister for Police and the Commissioner of Police. The former is to lay a copy of any report before Parliament. An amendment moved by the Government in the Legislative Council has ensured that the Ombudsman may require information about the operation of legislation not only from the Police Commissioner but also from any public authority. It seems the amendment was ‘sought by the Ombudsman in light of the fact that information may be required from other agencies such as courts, the Community Relations Commission and health services’.<sup>200</sup>

Further, the Minister for Police must review the Act after two years and table the report in

<sup>193</sup> Section 24, *Internally Concealed Drugs Act 2001*.

<sup>194</sup> Section 27, *Internally Concealed Drugs Act 2001*.

<sup>195</sup> Section 32, *Internally Concealed Drugs Act 2001*.

<sup>196</sup> NSW Law Society’s Criminal Law Committee, n 164, p 1.

<sup>197</sup> *Ibid*, p 3.

<sup>198</sup> Section 15, *Internally Concealed Drugs Act 2001*.

<sup>199</sup> Section 22 (2), *Internally Concealed Drugs Act 2001*.

<sup>200</sup> *NSWPD (Hansard proof, LC)*, 21 June 2001, p 57.

Parliament within 12 months of the Ombudsman furnishing a report to the Minister.

**Commencement:** In the Second Reading speech the Minister said that the internally concealed drugs law would be ‘proclaimed at a later date so police are satisfied they have the appropriate protocols in place to facilitate the operation of the legislation’.<sup>201</sup> The Act is not likely to commence therefore before 2002.

#### **4. THE DRUG PREMISES ACT 2001**

##### **4.1 Background**

As noted, the Premier’s Ministerial Statement of 27 March 2001 outlined a strategy to combat drug use in Cabramatta. This was part of what Mr Carr described as ‘an evidence-based plan, to be mounted in three stages, which will apply statewide – not just at Cabramatta. Stage one is a criminal justice plan. Stage two is a plan for compulsory treatment and stage three is a plan for prevention and early intervention’. The proposed criminal justice reforms included:

- The introduction of laws permitting police to arrest anyone who acts as a lookout, guard, or who raises the alarm for others in a suspected drug house; anyone who enters or leaves a suspected drug house unless they can establish a legal purpose; anyone who knowingly allows the premises to be used as a drug house; and anyone who organises or assists in the organisation of a drug house. Each of these offences would carry a penalty of one year in gaol for the first offence and five years for the second offence, with these penalties applying even if no drugs are found.
- In effect, these proposed new powers to charge people associated with drug houses are designed to close a legal loophole preventing police from laying charges unless drugs are found on the premises.
- Under these proposed offences, anyone found in a drug house ‘will have to prove that he or she has a legal purpose for being there’, thereby reversing the onus of proof.<sup>202</sup> To enter the premises, police will require a search warrant, which means, in the Premier’s words, ‘that police will enter the drug house with the approval of the court’.<sup>203</sup>
- In addition, police would have the power to force owners of a building to take steps to prevent the supply of drugs at the premises, or to take action to close or confiscate the premises.

These proposals were a response to the changing nature of the drug trade in Cabramatta, in relation to which the Premier said:

Police blitzes in Cabramatta have first, reduced the supply of heroin so that the price has increased by about 1,000 per cent. Second,

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<sup>201</sup> NSWPD (Hansard proof, LA), 30 May 2001, p 32.

<sup>202</sup> NSWPD (Hansard proof, LA), 28 March 2001, p 38.

<sup>203</sup> Ibid.

they have forced many dealers into fortified premises or so-called drug houses and, third, they have forced dealers to use go-betweens who do not carry drugs. Police intelligence indicates that there are now about 40 so-called drug houses in south-western Sydney.<sup>204</sup>

The varied responses to the Premier's announcement were outlined in the Parliamentary Library's Briefing Paper No 6/2001, *Police Powers and Drug Law Enforcement*. As ever in the law and order debate, concerns were expressed in some quarters, notably in the legal fraternity where the proposal to reverse the onus of proof was singled out for comment. On the other hand, the Police Association of NSW was among stakeholders who welcomed the Premier's announcement, saying that the plan 'will deliver a major blow to those who are

<sup>205</sup> Many of the controversies raised by the proposed legislation were encapsulated in the briefing note on the Bill prepared by the NSW Law Society's Criminal Law Committee where it was said:

Much has been said about a perceived imbalance between the interests of justice and the rights of citizens but there is a grave danger that the reason why the rights and protections were first put in place will be forgotten.<sup>206</sup>

The Criminal Law Committee observed in addition that 'The legislation will expand police powers and remove protections so that convictions can be obtained more easily'. In opposing the proposed legislation it argued, 'it is not necessary to legislate specific search warrants powers for "drug premises" because most of the ancillary search warrants powers sought are contained within the existing *Search Warrants Act 1985*, at common law or under the *Crimes Act 1900*'.<sup>207</sup> Its general concern was that 'only minor players in the drug trade and users, many of them young people, will be caught in the legislation's wide

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The Police Powers (Drug Premises) Bill 2001 was introduced into Parliament on 30 May as cognate legislation with the Police Powers (Internally Concealed Drugs) Bill 2001. In the Second Reading speech the Attorney General echoed the Premier's statement, stating that

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<sup>204</sup> Ibid, p 37.

<sup>205</sup> Police Association of NSW, Drug crime in Cabramatta, *Media Release*, 27 March 2001.

<sup>206</sup> NSW Law Society Criminal Law Committee, *Briefing Note to Members of Parliament on the Police Powers (Drug Premises) Bill 2001*, 4 June 2001, p 3.

<sup>207</sup> Ibid, p 1. The Committee recommended that any necessary or appropriate extension to existing powers can be accommodated by amending the *Search Warrants Act 1985*. The *Search Warrants Act* is currently under review by the Attorney General's Department Criminal Law Review Division and the amendments sought should be considered in the context of that review.

<sup>208</sup> Ibid, p 5.

...are often heavily fortified and utilise look-outs to keep the occupiers protected from interference by police. Drugs are dealt and used on these premises, but such is the professional criminality of the occupiers that they are able to rid themselves of the actual prohibited drugs before police can enter. Sometimes there are piles of syringes, or other evidence that demonstrates that the premises are being used for purposes of manufacture or supply of prohibited drugs.<sup>209</sup>

Of the proposed Drug Premises legislation the Attorney General said: 'This measure will give force to the announcement by the Premier in this House in March this year that the Government is committed to giving law enforcement officers the powers they need to stop the drug trade in Cabramatta'.<sup>210</sup> The legislation was assented to on 27 June 2001<sup>211</sup> and proclaimed to commence on 1 July 2001.<sup>212</sup> The first arrests under the new law were made on 18 July 2001.<sup>213</sup>

#### 4.2 Main provisions of the Drug Premises Act 2001

In the main the Drug Premises Act 2001 is concerned with the extension in specific circumstances of police powers of entry and search. Closest to the Drug Premises Act 2001 in purpose and language is the *Disorderly Houses Act 1943* and the similarities between the two are noted at various points in the ensuing discussion. The main provisions of the Drug Premises Act 2001 are as follows:

***What are drug premises?*** These are defined as 'any premises that are used for the unlawful supply or manufacture of prohibited drugs'. The terms 'supply', 'manufacture' and 'prohibited drug' all have the same meaning as in the *Drug Misuse and Trafficking Act 1985*, except that 'prohibited drug' does not include cannabis leaf, cannabis oil or cannabis resin.<sup>214</sup> It has been explained that 'supply' is defined broadly under the *Drug Misuse and Trafficking Act 1985* and that a person found in possession of a traffickable quantity of a prohibited drug is deemed to be in possession for supply.<sup>215</sup>

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<sup>209</sup> NSWPD (Hansard proof, LA), 30 May 2001, p 30.

<sup>210</sup> Ibid.

<sup>211</sup> NSW Government Gazette, No 108, 6 July 2001, p 5220.

<sup>212</sup> NSW Government Gazette, No 106, 29 June 2001, p 5207.

<sup>213</sup> New drug laws claim first victims', *The Sydney Morning Herald*, 20 July 2001.

<sup>214</sup> Section 3, *Drug Premises Act 2001*.

<sup>215</sup> Schedule 3, *Drug Premises Act 2001*. Under section 7 of the *Drug Misuse and Trafficking Act 1985* a prohibited drug in the order or disposition of a person shall be deemed to be in the possession of the person! To this the Drug Premises Act 2001 has added br that is in the order or disposition of the person jointly with another person by agreement between the persons! In other words, the concept of joint possession' has been added to this deemed

In any event, the point to make is that the identification of drug premises and the application of the Drug Premises Act 2001 generally are tied in with the complex provisions of the *Drug Misuse and Trafficking Act 1985* and the jurisprudence relating to these.

***Under what circumstances may police enter and search suspected drug premises?*** This may be done where an authorised justice has issued a search warrant on the application of a police officer of or above the rank of sergeant who has reasonable grounds for believing that the premises are being used for the unlawful supply or manufacture of any prohibited drug.<sup>216</sup>

Search warrants are to be issued under the terms set out in Part 3 of the *Search Warrants Act 1985*.<sup>217</sup> In urgent cases application may be made by telephone.<sup>218</sup> Penalties apply for the giving of false or misleading information in any application for a search warrant.<sup>219</sup>

Note the view of the NSW Law Society's Criminal Law Committee that, if police powers were deficient in regard to the entering and searching of premises suspected of being used for the unlawful supply or manufacture of a prohibited drug, then 'a relatively simple amendment could be made to the *Search Warrants Act*'.<sup>220</sup> Indeed, the Committee's criticisms of many of the specific provisions of the Drug Premises Act 2001 turn on the argument that the powers it grants are in many cases already available under the *Search Warrants Act 1985*.

***What are police empowered to do in the execution of a search warrant?*** In language reminiscent of the *Disorderly Houses Act 1943*, in the execution of a warrant police may, for the purpose of entering a drug premise, pass through any other land or building, 'break open doors, windows or partitions' and 'do such other acts as may be necessary'.<sup>221</sup> Police are also empowered to: search and arrest any person on the premises; seize any firearm or other thing believed to be connected with an offence; seize any prohibited drug or drug-related equipment; and to demand the names and addresses of any person found on the premises.<sup>222</sup> Failure, without reasonable excuse, to comply with such a demand will

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possession provision. This can be said to reflect and clarify the common law on possession NSWPD (Hansard proof, LA), 30 May 2001, p 31. For a commentary see *R v Dib* (1991) 52 A Crim R 64; R Watson, n 39 at [4.420]-[4.480].

<sup>216</sup> Section 5, *Drug Premises Act 2001*.

<sup>217</sup> Section 8, *Drug Premises Act 2001*.

<sup>218</sup> Section 12, *Search Warrants Act 1985*.

<sup>219</sup> Section 12B, *Search Warrants Act 1985*. The maximum penalty is 100 penalty units or imprisonment for 2 years, or both.

<sup>220</sup> NSW Law Society's Criminal Law Committee, n 206, p 4.

<sup>221</sup> Section 6 (1), *Drug Premises Act 2001*.

<sup>222</sup> Section 7, *Drug Premises Act 2001*.

constitute an offence punishable by a fine of up to 50 penalty units (\$5,500).<sup>223</sup>

***Is express provision made for compensation?*** No. An amendment was passed by the Legislative Council providing an express entitlement to compensation to an owner for any damage caused by police action if a court later finds that the relevant premises were not ‘drug premises’ at the time the power was exercised. The amendment’s sponsor explained that it would ‘afford protection to people treated unfairly under the legislation generally’.<sup>224</sup> For the Government, voting against the amendment, it was said: ‘The common law has always allowed for compensation for persons who suffer civil law consequences or actions that are wrongful. There is no reason, in every case where new criminal laws are created, to specify some civil remedy that may be available’.<sup>225</sup>

Subsequently, the Minister for Police moved that the Legislative Assembly disagree to this amendment, stating:

The amendment undermines the basic principle of our criminal law that people should co-operate with police and should not obstruct them when they are performing their duty. The amendment makes a new law about compensation for damage caused by police exercising a valid drug premises search warrant...This is a significant and fundamental change in respect of liability for the execution of a search warrant...The Attorney General’s Department has confirmed that the amendment unnecessarily complicates a civil legal concept. The amendment means that people may be entitled to compensation even if police act properly in executing the search warrant. That is not consistent with current police guidelines for compensation which require an element of unjustified or negligent action by police.<sup>226</sup>

The motion was carried with Opposition support, ‘On the basis of the Minister’s assurance that compensation will be payable when a genuine mistake has been made or where there has been negligence on the part of police...’.<sup>227</sup> Back in the Upper House the amendment’s sponsor noted that it had support of the NSW Law Society.<sup>228</sup> In the event, however, the

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<sup>223</sup> Section 9 (2), *Drug Premises Act 2001*.

<sup>224</sup> *NSWPD* (Hansard proof, LC), 21 June 2001, p 36.

<sup>225</sup> *Ibid*, p 37.

<sup>226</sup> *NSWPD* (Hansard proof, LA), 26 June 2001, p 28. See also *NSWPD, Legislative Council General Purpose Standing Committee No 3, Budget Estimates – Police* (Hansard proof, LC), 25 June 2001, p 19; R Morris, Drug raid ‘victims’able to sue under proposed laws, *The Daily Telegraph*, 26 June 2001.

<sup>227</sup> *NSWPD* (Hansard proof, LA), 26 June 2001, p 29.

<sup>228</sup> *NSWPD* (Hansard proof, LC), 26 June 2001, p 61. In fact the Society’s President, Nicholas

Legislative Council did not insist on its amendment and there is therefore no express reference to compensation in the legislation.

***What are the new offences involving drug premises?*** Three new offence categories are created under the Drug Premises Act 2001. These are as follows: (a) entering or being on drug premises; (b) an owner or occupier knowingly allowing premises to be used as drug premises; and (c) organising, conducting or assisting in the operation of drug premises. For each of these offences there is a penalty of 50 penalty units or 12 months imprisonment, or both, for a first offence. On a second or subsequent conviction there will be a penalty of 500 penalty units or five years imprisonment, or both.<sup>229</sup>

Directors and/or managers of corporations may be held liable in the event the corporation has contravened the legislation.<sup>230</sup>

***Must drugs be found for an offence to have been committed?*** No. For an offence to be committed under the *Drug Misuse and Trafficking Act 1985* prohibited drugs have to be found on a person or the premises. Whereas under the Drug Premises Act 2001 it is not necessary for the prosecution to prove that prohibited drugs were found either on a person's possession or on the premises in question.<sup>231</sup> It is enough for the prosecution to prove 'beyond a reasonable doubt' that a person is found on 'drug premises' without a lawful purpose or excuse, with the Act specifying various indicia which a court may have regard to in determining whether premises are of this kind.<sup>232</sup> These indicia include evidence of: the obstruction of police; the fortification of the premises; the presence of a 'lookout'; and the presence of equipment relating to the administration, supply or manufacture of a prohibited drug.<sup>233</sup> The provision is in fact modelled on section 12 of the *Disorderly Houses Act 1943*.

***Where does the onus of proof lie for persons found on drug premises?*** If found on, or entering or leaving, drug premises it is for the accused person to satisfy the court that he or she was there 'for a lawful purpose or with a lawful excuse'.<sup>234</sup> In other words, the onus is on the accused to provide a lawful excuse. This is perhaps the most contentious aspect of this legislation. It certainly attracted most comment when the legislation was foreshadowed by the Premier and continued to prove controversial during the parliamentary debate.

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Meagher, said the Criminal Law Committee supported an amplification' of the amendment to ensure that compensation can be claimed for damage caused to any other land or premises during the execution of a drug premises warrant' *Letter to the Hon R Jones MLC*, 26 June 2001.

<sup>229</sup> Sections 12-14, *Drug Premises Act 2001*.

<sup>230</sup> Section 16, *Drug Premises Act 2001*.

<sup>231</sup> Section 10, *Drug Premises Act 2001*.

<sup>232</sup> Section 11 (1), *Drug Premises Act 2001*.

<sup>233</sup> Section 11 (2), *Drug Premises Act 2001*.

<sup>234</sup> Section 12 (2), *Drug Premises Act 2001*.



Several amendments to the section were moved by cross-benchers in the Legislative Council but none were successful.<sup>235</sup> For the Government, the Attorney General argued in the Second Reading speech: ‘It is a characteristic of drug premises that they are not used for lawful or domestic purposes, so it is reasonable to expect persons to show why they are there once it is proven that they are premises used for the manufacture and supply of prohibited drugs’. He continued:

As it stands, the law provides for a number of specific situations where there is an onus on an accused to provide a lawful excuse. ‘Goods in custody’ is the classic example, whereby people are required to establish how they came into possession of stolen goods. Another is ‘dangerous driving occasioning grievous bodily harm or death’, where the prosecution has to show under section 52A (1) of the Crimes Act that the person driving was intoxicated or driving at a dangerous speed or in a manner dangerous to persons. Once that offence is established the defence must demonstrate a defence as per subsection 8 that the death or harm was not attributable to the factors just outlined. This is the same kind of requirement to raise a defence. I am satisfied that intelligent policing will have to establish that premises are drug premises in the first instance, and that it is the appropriate safeguard to ensure this power will not be compromised.<sup>236</sup>

A more direct precedent than those cited by the Attorney General is section 7 of the *Disorderly Houses Act 1943* which provides that any person found:

(a) in, or on, or entering, or leaving such premises, or  
(b) in, or on, or entering, or leaving any land or building used as a means of access to or to exit or escape from the same,  
such person, *unless the person proves that he or she was in, or on, or entering, or leaving as aforesaid for a lawful purpose*, shall be guilty of an offence against this Act and shall on summary conviction be liable to imprisonment for a term not exceeding six months (emphasis added).

Several of the unsuccessful amendments moved to section 12 in the Legislative Council sought to establish that a person must know that he or she is on drug premises for an offence to be committed,<sup>237</sup> or relatedly that a person is not guilty of an offence if the accused can satisfy the court that he or she did not know that the premises were drug premises.<sup>238</sup> In response, it was said on behalf of the Government that: ‘It is a matter for the

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<sup>235</sup> NSWPD (Hansard proof, LC), 21 June 2001, pp 43-46.

<sup>236</sup> NSWPD (Hansard proof, LA), 30 May 2001, p 30.

<sup>237</sup> In other words, knowledge would be an element of the offence to be proved by the prosecution.

<sup>238</sup> In other words, lack of knowledge could be raised as a defence.

courts to ascertain the level of knowledge of a particular accused person. The Government takes the view that if the court is satisfied that a person who has been accused was not likely to know that a place is a drug premises, then that is a classic case of a lawful excuse. All the person has to do is show that he or she had no knowledge that the premises were drug premises'.<sup>239</sup>

Of this aspect of the legislation, the NSW Law Society's Criminal Law Committee said it was concerned that:

...the legislation will not be used against "fortified drug houses" alone. It could be used in shared home situations (even in family homes) where one party is dealing in drugs such as amphetamines or ecstasy, without the knowledge of some or all of the other residents. In such circumstances, the reversal of the onus of proof will (more often than not) require the court to assess an accused's knowledge or intent based solely on its assessment of the person's credibility. The ability of one person to assess another's credibility is hardly an exact science.<sup>240</sup>

Note that an owner or occupier who allows premises to be used as drug premises under section 13 must do so 'knowingly'. The accused's knowledge is therefore an element of the offence to be proved by the prosecution. Alternatively, in relation to the offence of organising drug premises under section 14, it is a defence if the accused can satisfy the court that he or she 'did not know, and could not reasonably be expected to have known, that the premises were being organised or conducted as drug premises'.

***Are arrangements made for forfeiture to the Crown?*** Yes. The legislation amends the *Criminal Assets Recovery Act 1990* to have criminal asset confiscation provisions apply to owners who operate drug premises.

***Is the Act to be monitored or reviewed?*** Yes. The same arrangements apply as for the Internally Concealed Drugs Act 2001.

#### **4.3 The extension of police powers to give reasonable directions in public places**

As noted earlier in the paper, the Drug Premises Act 2001 amends section 28F of the *Summary Offences Act 1988* which provides police with a power to give reasonable directions to a person in a public place. Prior to the amendment, this move-on power only applied where the police officer had 'reasonable grounds to believe that the person's behaviour or presence in the place' constituted an obstruction, harassment, intimidation or caused fear. The amendment extends the range of relevant behaviour or presence in a public place to the supply of, or soliciting others to supply, prohibited drugs, or to obtain, procure or purchase prohibited drugs. Move-on directions must now be reasonable in the circumstances for the purpose of 'stopping' the supply or purchase of drugs, or for the

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<sup>239</sup> NSWPD (Hansard proof, LC), 21 June 2001, p 46.

<sup>240</sup> NSW Law Society's Criminal Law Committee, n 164, p 5.

purpose of reducing or eliminating the obstruction, harassment, intimidation or fear in question.

Reflecting the now familiar polarities in the drug law enforcement debate, the Hon Ian Cohen MLC said of the amendment:

That power sweeps a health and social issue under the carpet. It will not help the street drugs problem. Experience has shown that the move-on power is almost exclusively used on young people, Aboriginal people and disadvantaged people. This provision is a knee-jerk reaction to a very complex problem. It will not reduce drug use, it will simply ensure that the previously mentioned groups are continually harassed by the police for what is essentially a health and social issue. Again, this provision will not deter organisers or principal drug dealers as they are hardly likely to be dealing drugs in public places. That is left to the drug users and small fish.<sup>241</sup>

Explaining the amendment, the Attorney General said it was:

...designed specifically to assist police in places such as Cabramatta, where it is known that persons congregate to supply and possess prohibited drugs, to clear an area. Cabramatta railway station is one such example currently, but the drug trade will remain mobile to try and subvert the law and this amendment allows police to keep pace with it and destroy it wherever it emerges.<sup>242</sup>

The NSW Law Society's Criminal Law Committee said this expansion of the 'directions' power was 'unnecessary'. It did 'not accept that police are unable to order people loitering for the purpose of supplying or soliciting the supply of drugs, or obtaining drugs, to "move-<sup>243</sup>

## **5. THE LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) BILL 2001**

### **5.1 Background – consolidation of police powers in England and Wales<sup>244</sup>**

The question of the consolidation of police powers is one that has been discussed over many

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<sup>241</sup> NSWPD (Hansard proof, LC), 21 June 2001, p 50. The Attorney General said in his Second Reading speech, It is a significant feature of the bill that it is aimed at major and organised criminals, and that is why cannabis and derivatives are excluded from it' -NSWPD (Hansard proof, LA), 30 May 2001, p 31.

<sup>242</sup> NSWPD (Hansard proof, LA), 30 May 2001, p 31.

<sup>243</sup> NSW Law Society's Criminal Law Committee, n 164, p 6.

<sup>244</sup> This account is based on L Jason-Lloyd, *An Introduction to Policing and Police Powers*, Cavendish Publishing Ltd 2000.

years in NSW and other comparable jurisdictions. Very influential in this discussion is the landmark legislation in England and Wales, the *Police and Criminal Evidence Act 1984* (PACE) which came into effect in 1986. PACE constituted the greatest single reform of police powers in the UK in the twentieth century. Passed in the aftermath of the 1981 inner-city riots and based on the report of the Royal Commission on Criminal Procedure, the Act marks a key moment in the movement towards consolidation and clarification of police powers in the common law world. This is not the place to present a detailed account of PACE. However, its main elements can be summarised as follows:

- Powers to stop and search (Part 1)
- Powers of entry, search and seizure (Part II)
- Arrest (Part III)
- Detention (Part IV)
- Questioning and treatment of persons by police (Part V)
- Codes of Practice (Part VI)
- Documentary evidence (Part VII)
- Evidence in criminal proceedings (Part VIII)
- Police complaints and discipline (Part IX)

While reference to the Codes of Practice is made in the Act itself, these Codes exist as a separate publication and are designed to assist in the interpretation and clarification of the relevant provisions of PACE, in addition to providing guidance to those who use its powers. Since 1986 the Codes have been revised many times, especially the Codes affecting powers of stop and search. The latest edition was published in 1999 and consists of the following five Codes under a single consolidated booklet: (A) Code of Practice for the exercise by police officers of statutory powers of stop and search; (B) Code of Practice for the searching of premises by police officers and the seizure of property found by police officers on persons or premises; (C) Code of Practice for the detention, treatment and questioning of persons by police officers; (D) Code of Practice for the identification of persons by police officers; and (E) Code of Practice on tape recording of interviews with suspects.

These Codes of Practice are issued by the Home Secretary and brought into force by a statutory instrument approved by resolution in both Houses of Parliament. A breach of any of the Codes amounts to a disciplinary offence and may be penalised as such. Criminal or civil proceedings may only be brought against an officer who breaches the Codes if the breach is also a breach of the criminal or civil law. Section 67 (11) of PACE provides that in all criminal and civil proceedings the Codes ‘shall be admissible in evidence; and if any provision of such a Code appears to the court or tribunal conducting the proceedings to be relevant to any question arising in the proceedings it shall be taken into account in determining that question’.

PACE is not a truly comprehensive consolidation of police powers. Other Acts passed as a result of the law and order debate in the 1990s also impact on this busy area of the law. These later developments started with the *Criminal Justice and Public Order Act 1994*, in part a response to the recommendations of the 1993 report of the Royal Commission on Criminal Justice headed by Lord Runciman. This was followed by the *Criminal Procedure and Investigations Act 1996*, the *Prevention of Terrorism (Additional Powers) Act 1996* and

the *Offensive Weapons Act 1996*. In 1997 the *Knives Act* was passed, plus the *Confiscation of Alcohol (Young Persons) Act 1997*. The powers available to the police were then further augmented by a number of provisions under the *Crime and Disorder Act 1998*.

Police stop and search powers have been particularly affected by these later additions. Notably, section 60 of the *Criminal Justice and Public Order Act 1994* (as amended by the *Knives Act 1997* and the *Crime and Disorder Act 1998*) empowers police inspectors to make a written authorisation enabling uniformed police officers to exercise stop and search powers in places within their police area where incidents of serious violence are anticipated, or where potential troublemakers are passing through. Such an authorisation may be in force for up to 24 hours, unless extended by a further 24 hours by a police officer of at least the rank of superintendent. Most controversial is section 60 (5) which appears to confer almost unfettered stop and search powers under an authorisation. However, this must be read in the context of PACE Code of Practice A which requires all searches to conform to the same general procedures as those applicable to sections 1-3 of PACE, including the requirement: for police officers to state their name, their station and the grounds of authorisation of the search and its object; that the selection of those searched or questioned must be based on objective factors; and that searches in public must be restricted to a superficial examination of outer clothing, there being a power only to remove an outer coat, jacket or gloves in these circumstances.<sup>245</sup>

These police stop and search powers have come under intense public scrutiny in recent years, particularly following the release in 1999 of the *Report of the Inquiry into the Matters Arising from the Death of Stephen Lawrence* (sometimes referred to as the Macpherson Inquiry). In response to the Report, the Home Office's Policing and Reducing Crime Unit was commissioned to carry out a program of research on stops and searches, the results of which were summarised in a Briefing Note published in September 2000. The full text of that note is set out at Appendix A to this paper.

The *Human Rights Act 1998*, which came into effect on 2 October 2000, should also be mentioned in this context. That Act requires UK courts and tribunals to take account of the case law relevant to the European Convention on Human Rights and Fundamental Freedoms. It also requires all UK legislation to be interpreted and given effect as far as possible compatibly with the Convention rights, including those rights which are to be applied in the criminal justice system.<sup>246</sup>

## **5.2 Background – consolidation of police powers in Australia**

Since the 1970s there has been a more or less constant interest in the reform of police powers in the common law world. Every Australian jurisdiction has undertaken some kind of review of one or more aspects of police powers. Brief comment is made on the review process in three jurisdictions, namely, Victoria, the Commonwealth and Queensland.

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<sup>245</sup> L Jason-Lloyd, n 244, pp 42-45.

<sup>246</sup> Notably Articles 5, 6 and 7 of the European Convention on Human Rights and Fundamental Freedoms.

In Victoria, the Coldrey Committee<sup>247</sup> was set up in 1985 and reported on a number of areas between 1986 and 1989. This resulted in several important legislative reforms, including the *Crimes (Custody and Investigations) Act 1988* and the *Crimes (Blood Samples) Act 1989*. Both Acts have proved to be influential for other jurisdictions in the reform of the law on criminal investigations and conducting forensic procedures respectively.

At the Commonwealth level, the review process had started as early as 1975 when the Australian Law Reform Commission delivered its report titled *Criminal Investigation*. Then in 1987 the Gibbs Committee<sup>248</sup> was established to review generally the Commonwealth criminal law. It issued 21 Discussion Papers, five Interim Reports and its Final Report in December 1991 and its recommendations formed the basis of several legislative reforms, including the *Crimes (Investigation of Commonwealth Offences) Amendment Act 1991* and the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994*. The influence of the latter Act on the Draft Police Powers Consolidation Bill 2001 is evident in the provision the latter makes for searches after arrest. Also influential at the national level for police powers generally is the Model Criminal Code project, especially as this has related to the attempt to establish uniform laws on forensic procedures, including for the taking of DNA samples. In February 2000, the Model Criminal Code Officers Committee released its final report titled, *Model Forensic Procedures Bill and the Proposed National DNA Database*. For the establishment of such a database the Commonwealth *Crimes Act 1914* was soon after amended by the *Crimes Amendment (Forensic Procedures) Act 2001* (Cth).

In Queensland the review of police powers was initiated by a recommendation of the Fitzgerald Inquiry in 1989. It included the release of a multi-volume report by the Criminal Justice Commission in 1993-1994, followed by the release in 1995 of a multi-volume Parliamentary Committee Report on the Review of the Criminal Justice Commission's Report on a Review of Police Powers in Queensland. Subsequently, the first move towards consolidating police powers into a single Act was begun by the *Police Powers and Responsibilities Act 1997*, a process which later culminated in the passing of the *Police Powers and Responsibilities Act 2000*.<sup>249</sup> Almost before the ink was dry, that Act was amended to include, among other things, a comprehensive DNA regime.<sup>250</sup>

The general point to make about this Queensland consolidation Act is that it is unusually comprehensive in scope, in that it seeks to incorporate into one piece of legislation everything from police powers of arrest, stop and search to surveillance powers, the power to conduct medical procedures and to undertake controlled operations. Indeed, it was claimed in the Second Reading speech for the legislation that Queensland 'will be the only

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<sup>247</sup> The Consultative Committee on Police Powers of Investigation in Victoria.

<sup>248</sup> The Review Committee of Commonwealth Criminal Law.

<sup>249</sup> That Act completed the process begun by the *Police Powers and Responsibilities Act 1997* (Qld) to consolidate into one Act all police powers.

<sup>250</sup> *Police Powers and Responsibilities and Other Acts Amendment Act 2000*.

jurisdiction in Australia, if not the Western World, with such a comprehensive police powers and responsibilities statute'.<sup>251</sup>

### 5.3 Background – consolidation of police powers in NSW

Clearly, therefore, the need for consolidation, and with it an elucidation, of police powers has been discussed over a long period in many jurisdictions. In this State that debate can be traced at least as far back as the release in December 1990 of the NSW Law Reform Commission Report titled, *Police Powers of Detention and Investigation After Arrest*. However, the reform process gained its main impetus from the Wood Royal Commission into the NSW Police Service which handed down its final report in May 1997. Responding to this, in the following year the Government established the Consolidation of Police Powers Working Party to examine, clarify and consolidate police powers into one piece of legislation. A second spur to reform was the NSW Drug Summit of 1999 which called for 'A review of all the legislation relating to police powers in drug law enforcement to remove any ambiguities which may impede effective police action'. It was a recommendation the Government supported, stating that it would add it to the Working Party's brief 'as an additional task for implementation'.<sup>252</sup>

In November 1999 the Ombudsman added her voice to this debate. In her report on the *Crimes Legislation Amendment (Police and Public Safety) Act 1998* the Ombudsman commented that police powers to search persons without a warrant are not all governed by the same procedural requirements. Moreover, the Ombudsman's investigations found that, in many cases, it was not clear under which statutory power a police search had been conducted. According to the Ombudsman:

A preferable approach would be to consolidate the various stop and search provisions into a single legislative instrument, and for the use of those powers to be regulated by a single set of principles governing all such searches. Both the community and police would benefit from the creation of a code of practice (made pursuant to a Regulation) that clearly articulates the rights of citizens as well as the powers of police.<sup>253</sup>

Subsequently, in June 2000, the Minister for Police said he did not agree with the recommendation for a code of practice to govern the use of police powers. At same time, he confirmed the Government was committed to the consolidation of police stop and search powers and foreshadowed that draft legislation would be released for public comment later that year.<sup>254</sup> In fact, the Minister had previously said that the *Crimes Legislation Amendment*

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<sup>251</sup> QPD, 29 February 2000, p 50.

<sup>252</sup> NSW Drug Summit 1999: Government Plan of Action, July 1999, p 109.

<sup>253</sup> NSW Ombudsman, *Policing Public Safety: Report under section 6 of the Crimes Legislation Amendment (Police and Public Safety) Act*, November 1999, p 145.

<sup>254</sup> Minister for Police, *Police and Public Safety Review*, June 2000, p 12.

*(Police and Public Safety) Act 1998* was ‘stage one of the Carr Government’s plan to increase and consolidate police powers’. Stage two, he went on to say, was the *Police Powers (Vehicles) Act 1998* and ‘Stage three of the plan will be introduced in the next sitting of the Parliament’. The Minister continued: ‘The Government will consolidate police powers into a single, coherent piece of legislation to ensure that they are clear and consistent. Work has already begun and is progressing well’.<sup>255</sup>

The exposure draft of the Draft Police Powers Consolidation Bill was released on 8 June 2001. The Minister told Parliament that four months have been set aside for the consultation process, with a view to introducing legislation in 2002. Describing the initiative to codify and consolidate general police powers into a single statute as ‘historic’, the Minister said that ‘The ability for police to refer to one Act to find out about their powers to search and to arrest someone will be of immense benefit. Clarifying the limits of those powers and procedural safeguards will also assist police and the general community’. Explaining the Bill’s antecedents, the Minister explained:

Honourable members would recall that Justice Wood, in his final royal commission report, recommended that legislative consolidation of police powers take place. He concluded that this would: help strike a proper balance between the need for effective law enforcement and the protection of individual rights; ensure clarity of the law; reduce the possibility of abuse of powers through ignorance; and assist in the training of police. Police powers currently are scattered across a number of different statutes and are found also in common law. That is because police powers continue to change in response to particular social problems.<sup>256</sup>

The Minister also explained that the Draft Police Powers Consolidation Bill 2001 would create ‘new law’ in four significant areas: establishing crime scenes; safeguards applying to searches of persons after arrest; police assistants; and notices to produce documents. ‘Police currently exercise powers in those areas’, the Minister said, ‘but the precise nature and extent of the powers is not clearly defined’.<sup>257</sup>

#### **5.4 Overview of the Draft Police Powers Consolidation Bill 2001**

Unlike the Queensland *Police Powers and Responsibilities Act 2000*, the Draft Police Powers Consolidation Bill is not entirely comprehensive in scope. In particular, powers to carry out forensic procedures, to conduct controlled operations, as well as surveillance powers generally would remain under separate pieces of legislation. Thus, such Acts as the *Crimes (Forensic Procedures) Act 2000*, the *Law Enforcement (Controlled Operations) Act 1997* and the *Listening Devices Act 1984* would not be affected by the proposed

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<sup>255</sup> NSWPD, 12 November 1998, p 9902.

<sup>256</sup> NSWPD (Hansard proof, LA), 6 June 2001, p 36.

<sup>257</sup> Ibid, p 36.



Note that proposed section 126 Power to examine' re-enacts section 353A (2) of the *Crimes Act 1900*, thereby retaining for police a power of medical examination which is independent of the *Crimes (Forensic Procedures) Act 2000*, but does not extend to the taking of blood, saliva and hair samples.

- Power relating to vehicles and traffic (Part 11) – re-enacting sections 50 and 51 of the *Road Transport (General) Act 1999* and sections 30 and 74 of the *Road Transport (Safety and Traffic Management) Act 1999*;
- Powers to give directions (Part 12) – re-enacting section 28F of the *Summary Offences Act 1988*.<sup>261</sup> But note that the Bill does not reflect the changes made to the section by the *Police Powers (Drug Premises) Act 2001*, as discussed earlier in this paper; and
- Powers relating to intoxicated persons (Part 15) – which re-states existing police powers by reference to the *Intoxicated Persons Act 1979*.

## 5.5 Safeguards

Although found in Part 13 of the Draft Police Powers Consolidation Bill 2001, the safeguard provisions are discussed first. This is because they would apply to many of the earlier Parts of the Bill and, by any measure, they constitute a very significant aspect of the consolidation process. As explained earlier in this paper, many of the current statutory powers, including the general search powers under sections 357-357E of the *Crimes Act 1900*, as well as the power of arrest without warrant found in section 352 of the same Act, are not subject to any of the procedural safeguards which have characterised more recent developments in police powers. Though not mentioned in these terms by the Minister, the Bill would in this respect create ‘new law’ intended to provide consistent procedural rules for the safeguarding of civil liberties. It is also the case that safeguards in relation to search and seizure are found in different parts of the Bill and, for the purpose of comparison, it may be useful to bring these together.

**General safeguard provisions:** Under proposed section 144 (2) the safeguard provisions relate to the following police powers:

- to search a person;
- to arrest a person;
- to enter and search premises (not being a public place);
- to seize any property;
- to stop or detain a person;<sup>262</sup>
- to request disclosure of a person’s identity or the identity of another person;
- to establish a crime scene on premises (not being a public place);
- to give directions in a public place; and
- to request the production of knives and other dangerous implements.

Various exceptions relating to urgent or exigent circumstances are provided for,<sup>263</sup> but generally when exercising any of the above powers a police officer must provide the person subject to the exercise of the power with the following: unless in uniform, evidence that he/she is a police officer; the officer’s name and place of duty; the reason for the exercise

<sup>261</sup> A new feature is that proposed section 140 (3) makes it clear that no person of reasonable firmness need actually be, or be likely to be, present at the scene for the power in proposed section 140 (1)(c) to apply.

<sup>262</sup> The power to detain under the *Intoxicated Persons Act 1979* is excluded.

<sup>263</sup> Proposed sections 145 and 146.

of the power; and a warning that failure to comply may be an offence.<sup>264</sup>

A note to the Bill states that this provision is based on section 563 of the *Crimes Act 1900* (the power to demand name and address) and section 6 of the *Police Powers (Vehicles) Act 1998* (the power to request disclosure of driver or passenger identity). In fact, it is also modelled on section 28A of the *Summary Offences Act 1988* (the power to search for knives and other dangerous implements) and section 28F of the same Act (the power to give reasonable directions in public places). This reflects the consistency of approach in recent legislation in respect to these procedural safeguards. They have their common origins in section 2 (2) of PACE.<sup>265</sup>

***Detention period for a search:*** The detention period for a search is limited to no ‘longer than is reasonably necessary for the purposes’.<sup>266</sup> Thus, unlike where a person is detained for investigation under proposed sections 96 and 97, no maximum detention period is specified, and there is no guidance as to what might constitute a ‘reasonable’ period of time. Instead, it is left to the courts to decide what, in the circumstances, is a ‘reasonably necessary’ search period. This is consistent with the position in England and Wales under section 3.3 of Code of Practice A.

***Specific safeguards for searches conducted under the knife laws?*** Search and seizure powers without warrant are dealt with in proposed Part 4 of the Draft Police Powers Consolidation Bill 2001. The ‘knife law’ provisions in Division 4 retain the specific restrictions on police search powers currently found in section 28A (1) and (2) of the Summary Offences Act. For example, police cannot ask a person to remove ‘any item of clothing being worn by the person other than a hat, gloves, coat or jacket’,<sup>267</sup> and search procedures must be limited to such things as ‘quickly running the hands over the person’s’<sup>268</sup> Conversely, it remains the case that other searches without warrant attract none of these specific statutory safeguards and restrictions. Instead, the safeguards for other searches without warrant are confined to those found in proposed section 144 (‘Supplying police officer’s details and giving warnings’) and proposed section 148 (‘Detention period for search limited’). The question is whether searches without warrant generally, at least as these affect persons, should be made subject to more specific statutory conditions?

As noted, at present the *Code of Practice for CRIME* advises that, usually, only frisk searches should be conducted. The question is whether the Bill should replicate in some form the advice of the now superseded *Commissioner’s Instructions* that: ‘Personal searches of the body in the absence of an arrest are confined to “frisk” type searches unless the

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<sup>264</sup> Proposed section 144 (1).

<sup>265</sup> L Jason-Lloyd, n 244, p 33.

<sup>266</sup> Proposed section 148.

<sup>267</sup> Proposed section 29 (1).

<sup>268</sup> Proposed section 28 (2).

seriousness and urgency of the circumstances require and justify a more intrusive search of the surface of the body'.<sup>269</sup>

The position under the Draft Police Powers Consolidation Bill 2001 can be contrasted with that in England and Wales under sections 1-3 of PACE. The restrictions on searches to be undertaken under the NSW 'knife laws' are, in fact, very similar to the restrictions which apply under the PACE regime. The difference is that the PACE regime applies across the board to all searches carried out on suspects. Section 2 (9)(a) of PACE provides that a suspect must not be required to remove any clothing in public other than a outer coat, jacket or gloves. Further guidance is then provided under section 3 of Code of Practice A which states, among other things, that:

3.5 Searches in public must be restricted to superficial examination of outer clothing. There is no power to require a person to remove any clothing in public other than an outer coat, jacket or gloves.<sup>270</sup> Where, on reasonable grounds, it is considered necessary to conduct a more thorough search (for example, by requiring a person to take off a T-shirt), this shall be done out of public view, for example, in a police van or police station if there is one nearby.<sup>271</sup>

***Specific safeguards applying to searches of persons on arrest and in custody:*** On the other hand, the Bill does set out specific safeguards for searches of persons on arrest and in police custody. These are set out in proposed Part 10, 'Powers in relation to persons in custody'. The Minister commented in this regard:

The Government proposes a new three-tier search model based on the Commonwealth Crimes Act, which provides for frisk, ordinary and strip searches. It is not intended that police search powers currently be extended. However, it is intended to extend the safeguards for each type of search. The power to strip search on arrest is an important measure for the safety of police. It is a sad fact that there are prohibited weapons specifically designed to be concealed...Rules for the general conduct of strip searches will also be set out.<sup>272</sup>

Proposed Part 10 starts by defining its key terms. Thus, the terms 'frisk search', 'ordinary search' and 'strip search' are defined in a way that is consistent with section 3C of the Commonwealth *Crimes Act 1914*. The Draft Police Powers Consolidation Bill 2001 then permits certain searches to be carried out in the following circumstances: (a) on or after

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<sup>269</sup> Instruction 37.03.

<sup>270</sup> Note that for guidance section 3A under Code A states although there is no power to require a person to do so, there is nothing to prevent an officer from asking a person to voluntarily remove more than an outer coat, jacket or gloves'...

<sup>271</sup> L Jason-Lloyd, n 244, p 33.

<sup>272</sup> NSWPD (Hansard proof, LA), 6 June 2001, p 37.

<sup>276</sup> As noted, special safeguards would apply to the knife laws' search powers.

<sup>277</sup> Code of Practice for CRIME, n 14, p 14. A strip search must be recorded along with the reason for it.

<sup>278</sup> For a discussion of the common law position see Queensland Criminal Justice Commission, *Police Strip Searches in Queensland: An Inquiry Into the Law and Practice*, June 2000, p 17. It is said that The common law has for a long timesupported the right of a police officer to search a person under arrest and in custody, provided it is reasonable in all the

suspects generally and those under arrest. These conditions are reflected in the Bill,<sup>279</sup> which could indicate that there is no extension of police powers as such, but rather a consolidation of powers already conferred by common law. However, there are likely to be different perceptions on that score. One point to make in respect to suspects who are in custody but not under arrest is that the ‘suspects’ regimes introduced in recent legislation have created grey areas not contemplated by the common law. It is also the case that the picture is further complicated by the ‘deemed arrest’ provision which is reflected in proposed section 91 (2) of the Bill.<sup>280</sup> Furthermore, if the proposed regime is not even restricted to post-arrest detention, then, by granting the power to strip search suspects before arrest, it would involve a definite extension of police powers. One thing is clear, a definition of what is meant by ‘lawful custody’ under the Bill would be of value.

Under the Draft Police Powers Consolidation Bill 2001, a frisk search can be carried out on or after arrest. On the other hand, ordinary and strip searches can be carried out either on or after arrest, or when a person is in lawful custody.

- On or after arrest, frisk searches may be carried out if a police officer reasonably suspects that ‘*it is prudent to do so in order to ascertain*’ whether the person is carrying anything that would be a danger to anyone, that would assist a person to escape, or that is connected with an offence.<sup>281</sup>
- On or after arrest ordinary searches may be carried out in the same circumstances, except that the police officer must suspect on reasonable grounds ‘*that the person is carrying anything*’ dangerous etc.<sup>282</sup>
- On or after arrest strip searches may be carried out, again in the same circumstances, except that a police officer must reasonably suspect it is ‘necessary’ to conduct such a *opinion that the seriousness and urgency of the circumstances require the strip search to be carried out*.<sup>283</sup> Detailed rules for the carrying out of strip searches are set out in proposed section 122, including the requirement that it must be in private and must not involve a search of a person’s body cavities. Strip searches cannot be conducted on children under 10.<sup>284</sup> Also, for such searches to be carried out on children between 10 and 18, as well as on adults who are incapable of managing their own affairs, either the child or person concerned must have been arrested and charged

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circumstances’. See also part 2.8 above of this paper.

<sup>279</sup> Proposed section 121.

<sup>280</sup> Currently section 355 (2)-(4) of the *Crimes Act 1900* –see part 2.6 above of this paper.

<sup>281</sup> Proposed section 116.

<sup>282</sup> Proposed section 117.

<sup>283</sup> Proposed section 118.

<sup>284</sup> Proposed section 122 (1)(e).

or a Magistrate's order must have been made.<sup>285</sup> As well, the search must be conducted in the presence of a parent or guardian, or a person capable of representing the person's interests.<sup>286</sup>

In all three cases, property found in a search may be seized. If practicable, all searches are to be conducted by a police officer of the same sex as the person being searched.<sup>287</sup> Only in the case of strip searches is express provision made for the use of a reasonable degree of force.<sup>288</sup> However, any potential deficiency in respect to frisk or ordinary searches would be covered by the general provision relating to the police use of force against individuals in proposed section 175, which in turn begs the question why the express provision exists in relation to strip searches?

As indicated by the Minister, the regime proposed by the Bill is basically consistent with that operating under the Commonwealth Crimes Act since 1994.<sup>289</sup> One point of difference to note is that the Commonwealth Act stipulates that strip searches may only be conducted after an arrest if authorised by a police officer of the rank of superintendent or higher.<sup>290</sup> This requirement is not reflected in the Draft Police Powers Consolidation Bill 2001. Another point of difference is that the Commonwealth regime only appears to apply to persons under arrest, with no distinction being made between searches conducted 'on or after arrest' and when a person is in 'lawful custody'.

***Safeguards relating to persons in custody for questioning:*** These are found in Part 9, Division 3 of the Bill and they are a direct consolidation of the existing arrangements under Part 10A of the Crimes Act.<sup>291</sup>

***The right to silence:*** The right to remain silent – 'to refuse to answer questions' - would not be affected by the Draft Police Powers Consolidation Bill 2001.<sup>292</sup>

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<sup>285</sup> Proposed section 123 (1).

<sup>286</sup> Proposed section 123 (2).

<sup>287</sup> Proposed section 120 (frisk and ordinary searches) and proposed section 122 (1)(b) read with section 122 (3) (strip searches).

<sup>288</sup> Proposed section 118 (3).

<sup>289</sup> For the background to these reforms see –Review of Commonwealth Criminal Law (The Gibbs Committee), *Fifth Interim Report*, June 1991, chapter 4.

<sup>290</sup> Section 3ZH (2)(c), *Crimes Act 1914* (Cth).

<sup>291</sup> See part 2.6 above of this paper.

<sup>292</sup> Proposed section 149.

## 5.6 Reasonable suspicion and reasonable belief

The concept of ‘reasonable suspicion’ was discussed earlier in this paper.<sup>293</sup> It is used extensively in the Draft Police Powers Consolidation Bill, as is the related notion of ‘reasonable belief’. To be precise, the Bill refers either to where ‘the police officer suspects on reasonable grounds’, or to where ‘the police officer believes on reasonable grounds’. These formulae are pivotal to the Bill, as they embody the tests that define and control the legality of the use of police powers. To explain further, in the nature of things police must exercise their discretion in deciding, for example, who to search or move-on. However, this discretion is not at large but controlled by the reasonable suspicion or belief that a person is committing, has committed, or will commit an offence. If the test of reasonable suspicion or belief is not satisfied then the police can be found to have operated beyond their legal powers.

At least three issues arise from this. One concerns the distinction between ‘reasonable suspicion’ and ‘belief’ and, further to this, there is the question of the places where one formulation is preferred over another in the Draft Police Powers Consolidation Bill 2001. As to the distinction, basically a higher test is set when the exercise of police powers require reasonable belief, rather than suspicion. Belief is therefore closer to certainty than suspicion. As the High Court observed: ‘The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown’.<sup>294</sup> It is not necessary to have substantial proof before one can be said to believe, but the existence of a belief implies that there is more information available which turns conjecture or surmise into an acceptance that something is true.<sup>295</sup> From this it can be inferred that those police powers requiring reasonable belief impose a greater restriction upon the liberty of those against whom they are being used. Either that or, it is suggested, powers requiring reasonable belief are those which are exercised following decisions made as a result of consultation and reflection, whereas many powers requiring reasonable suspicion are often made in street situations, calling for quick decisions.<sup>296</sup>

Which, then, are the powers under the Draft Police Powers Consolidation Bill 2001 requiring the higher test of ‘reasonable belief’? They are as follows:

### Reasonable belief

- Power of entry in emergencies (proposed section 9 (1));
- Power to enter a dwelling to arrest or detain a person (proposed section 10 (2));
- Power to apply for a warrant for particular offences (proposed section 32 (1));
- Power to apply for a notice to produce documents (proposed section 38 (1));

<sup>293</sup> See part 2.8 above of this paper.

<sup>294</sup> *George v Rockett* (1990) 170 CLR 104 at 115. Of belief it was said -Belief is an inclination of the mind towards assenting to, rather than rejecting a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.’

<sup>295</sup> Queensland Criminal Justice Commission, n 12, p 43.

<sup>296</sup> L Jason-Lloyd, n 244, p 29.



- Power of entry by invitation in relation to domestic violence offences (proposed section 75 (1)); and
- Power to give reasonable directions in public places (move-on power) (proposed section 140 (1)).<sup>297</sup>

There will be times when the choice between suspicion and belief will be a fine one. The new power to apply for a crime scene warrant, which may for example result in the removal of a wall from a house or in the digging up of its foundations, must satisfy the ‘reasonable suspicion’ test. On the other hand, the new power to apply for a notice to produce documents from banks is subject to the more stringent ‘reasonable belief’ test. There can be no doubt that this last power, by which police can inquire into a person’s financial assets, is one that constitutes an intrusion into the privacy of the individual and is not to be exercised without consultation and a degree of reflection which may not be available when a police officer is deciding to establish a crime scene. Generally, in its preference for one formula over another, the Bill appears to reflect some aspect of the rationale outlined above.

A third issue is whether the Bill or some related statutory instrument should seek to provide guidance as to what constitutes the objective and subjective requirements of ‘reasonable’ suspicion or belief? The approach taken to this difficult matter in the 1998 Code of Practice for CRIME was discussed earlier.<sup>298</sup> As things stand at present, the guidance found there would not be reflected in the new statutory regime proposed under the Draft Police Powers Consolidation Bill 2001. In Britain, PACE Code of Practice A seeks to offer quite detailed guidance in this regard. However, the fact that recent Home Office research points to the need for further clarification and refinement<sup>299</sup> may suggest that this is one area where controversy is likely to endure.

### 5.7 Powers of entry

Part 2 of the Draft Police Powers Consolidation Bill 2001 proposes a consolidation and clarification of police powers of entry. At present, these powers are found in the 1998 Code for CRIME, but not in an authoritative statutory form.<sup>300</sup> Essentially, this part of the Bill covers two areas of the law.

***In emergencies:*** First, proposed section 9 would confirm the power to enter premises in emergencies, that is, where a police officer *reasonably believes* that: (a) ‘a breach of the peace is being or is likely to be committed, or a person has suffered physical injury or there is imminent danger of injury to a person’; *and* (b) ‘it is necessary to enter the premises immediately to prevent a breach of the peace, or to protect life’. This would effectively preserve the common law power of entry to deal with or prevent a breach of the peace. It

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<sup>297</sup> Note, too, the ‘deemed arrest’ provision for the purpose of questioning after arrest (proposed section 91(2));

<sup>298</sup> See part 2.8 above of this paper.

<sup>299</sup> See Appendix A.

<sup>300</sup> See part 2.5 above of this paper.

is said in this respect that a breach of the peace is not simply noisy or exuberant behaviour, but that there must be violent conduct or the apprehension of it. A breach of the peace has been found to occur ‘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’.<sup>301</sup> Breach of the peace is not an offence as such, although it is an element of the common law offences of unlawful and riotous assembly. Proposed section 9 is based on section 349C of the ACT *Crimes Act 1900*, the main difference being that proposed section 9 states expressly that it does not authorise a police officer to give directions in relation to: an industrial dispute; a genuine protest; a procession; or an organised assembly. This ‘freedom of peaceful and lawful assembly’ limitation on the exercise of police power is in identical terms to section 28G of the *Summary Offences Act 1988*.<sup>302</sup>

Another point of comparison is section 17 of PACE in England and Wales: sub-section (6) preserves the common law power of entry to deal with or prevent a breach of the peace; and sub-section (1)(e) provides a power of entry in order to save life or limb, or to prevent serious damage to property. Of section 17 (6) it has been said that police may be reluctant to use the power in ‘private premises unless a breach of the peace is actually occurring’. In one case the Court of Appeal warned that police officers must be sure that, before they enter private premises against the will of the owner or occupier, a real and imminent risk of a breach of the peace exists.<sup>303</sup> That, in effect, is the tenor of proposed section 9 (1), the purpose of which is to permit entry in exigent circumstances – where ‘it is necessary to enter the premises immediately to prevent a breach of the peace, or to protect life’. That ‘reasonable belief’ is required on the part of the police officer for the exercise of the power is evidence that the draftsman intends a stringent test to be applied by the courts in this context.

Note that the general common law power of police officers to deal with breaches of the peace is preserved by proposed section 173. It has been held in this regard that ‘At common

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<sup>301</sup> *R v Howell* [1982] QB 416; [1981] 3 All ER 383. While the authority is not binding on Australian courts, it has been followed in a number of cases.

<sup>302</sup> That provision is reflected in proposed section 143 of the Draft Police Powers Consolidation Bill 2001.

<sup>303</sup> L Jason-Lloyd, n 244, p 72. The case is *McLeod v Commissioner of Police for the Metropolis* [1994] All ER 553. In this case, in anticipation of a dispute, two police officers, together with a solicitor, accompanied a man to the home of his former wife in order to collect property under a court order. The wife’s mother opened the door to them, let all four in and the property was removed. Later, the wife claimed that the mother had not given them permission to enter and that they were all trespassers. The Court of Appeal held that the presence of the police officers (but not the husband or solicitor) was legitimised by section 17 (6) of PACE. The case was subsequently referred to the European Court of Human Rights (*McLeod v UK* [1997] Application No 72 / 1997/856/1065). The European Court found there had been a violation of Article 8 of the European Convention on Human Rights and Fundamental Freedoms (the right to respect for private and family life). It found the police should not have entered the applicant’s home, as there were insufficient grounds to apprehend a breach of the peace.

law every citizen has a right, and every constable the duty to take reasonable steps to prevent a breach occurring in their presence’.<sup>304</sup>

***To arrest or detain someone or execute a warrant:*** Secondly, proposed section 10 confirms the power of a police officer to enter premises to arrest or detain someone, or to execute a warrant. The model for the provision is section 19 of the Queensland *Police Powers and Responsibilities Act 2000*, including the identical definition of ‘arrest of a person named in a warrant’ found in section 19 (5) of that Act. The limitation in proposed section 10 (2) which states that, to enter *a dwelling*, a police officer must have a *reasonable belief* that the person to be arrested or detained is in the dwelling, is also based on the Queensland Act, except that the latter makes this a condition of entering ‘without consent’. No reference to ‘consent’, or the lack of it, is found in proposed section 10 (2). It can be inferred that the drafter of the Draft Police Powers Consolidation Bill 2001 reasoned that its subject is exclusively ‘policing by law’. Presumably, therefore, the view was taken that the distinction between what can be done by law, on one side, or by consent, on the other, is not one that the Bill is required to address.

## **5.8 Powers to require identity to be disclosed**

Part 3 of the Draft Police Powers Consolidation Bill 2001 is a consolidation of existing powers to demand name and address (section 563 of the *Crimes Act 1901*),<sup>305</sup> and to request disclosure of driver and passenger identity (sections 6-9 of the *Police Powers (Vehicles) Act 1998*).<sup>306</sup> Proposed sections 11-13 of the Bill deal with the power to demand name and address, plus associated offences. Proposed sections 14-17 deal with the power to request disclosure of driver or passenger identity, together with the associated offences. The existing penalties for these categories of offences are also maintained. The maximum penalty for demand name and address offences is 2 penalty units, whereas the maximum for the vehicle related offences is 50 penalty units or 12 months imprisonment, or both. Quite why these similar offences carry such different penalties may be re-visited in the forthcoming Second Reading speech. In August 2000, the Ombudsman discussed the issue of the relative severity of the penalties found under the *Police Powers (Vehicles) Act 1998*, and cited submissions from both Privacy NSW and the Attorney General’s Department to that effect. ‘It is understood’, the Ombudsman said at that time, ‘that the range and levels of penalties for criminal offences is being considered in the context of the proposed consolidation of criminal laws’.<sup>307</sup>

Note that proposed section 14 refers to a vehicle used ‘*in connection with an indictable offence*’, whereas section 6 (1) of the *Police Powers (Vehicle) Act* currently refers to a vehicle ‘used in the commission of an indictable offence’. This new formulation reflects the Ombudsman’s recommendations for changes to section 6 (1) (the power to request

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<sup>304</sup> *Albert v Lavin* [1982] AC 546.

<sup>305</sup> See part 2.11 above of this paper.

<sup>306</sup> See part 2.12 above of this paper.

<sup>307</sup> NSW Ombudsman, n 111, p 61.

disclosure of driver or passenger identity). According to the Ombudsman, if a narrow interpretation of ‘commission’ is to be avoided, then the provision should also refer to ‘or in connection with the commission’.<sup>308</sup> The Ombudsman’s concern was that a narrow approach would restrict section 6 (1) to where a vehicle was used as a weapon or tool in an offence, rather than as a means of transport to and from an offence. In the event, the draftsman has opted for the phrase ‘in connection with’ and omitted any reference to the

### 5.9 Search and seizure powers without warrant<sup>309</sup>

Part 4 of the Draft Police Powers Consolidation Bill 2001 re-enacts existing statutory provisions found in the *Crimes Act 1900* (sections 357-357E), in the *Police Powers (Vehicles) Act 1998* (sections 10-11) and in the *Summary Offences Act 1988* (section 28A and section 28B). In essence, the Part tidies and clarifies the law, but does not alter it in any substantial way. As noted, the Bill would also make search powers generally subject to the safeguards proposed under Part 13.

**General search and seizure powers:** Proposed section 18 re-defines the general search and seizure powers found at present in sections 357 and 357E of the Crimes Act. A stop, search, detain and seizure power is granted where a police officer reasonably suspects that a person is in possession or control of stolen property. Likewise, the same powers apply where a police officer reasonably suspects that a person is in possession or control of ‘anything used or intended to be used in *or in connection with* the commission of an offence’. The reference to ‘or in connection with’ the commission of an offence in proposed section 18 (1)(b) is arguably an amendment to the law which at present refers to ‘the commission of an offence’. As discussed above, the proposed formulation is consistent with the Ombudsman’s recommendations for changes to section 6 (1) of the *Police Powers (Vehicle) Act* (the power to request disclosure of driver or passenger identity).<sup>310</sup> Again, the concern of the new formulation is to avoid too narrow an interpretation of ‘commission’. This approach is also reflected in proposed section 21 (1)(b)(c) and (d) which reformulates police powers to search vehicles.

**Searches in public places and schools:** Proposed Part 4 also contains distinct provisions for the power of stop, search and seizure in public places and schools. There are two aspects to this. First, proposed section 18 (1)(c) relates to where a police officer reasonably suspects that a person who is in a public place or school is in possession or control of a ‘dangerous<sup>311</sup> (such as a firearm) which ‘is being, or was, or may have been, used in or in connection with the commission of an offence’. Secondly, Division 4 of proposed Part 4 substantially re-enacts the existing ‘knife laws’ (sections 28A and 28B of the *Summary*

<sup>308</sup> Ibid, p 42.

<sup>309</sup> See part 2.8 above of this paper.

<sup>310</sup> NSW Ombudsman, n 111, p 42.

<sup>311</sup> The definition of ‘dangerous article’ is identical to that found at present in section 357 (5) of the *Crimes Act 1900*.

*Offences Act*). These provide additional search and seizure powers in public places and schools where a police officer reasonably suspects that a person has a 'dangerous implement' in his or her custody. Unlike proposed section 18 (1)(c), no suspicion that the implement was, or may have been, used in connection with an offence is required.

The different safeguards which apply to the 'knife law' provisions and the proposed section 18 powers have been discussed.

***Vehicle entry, search and roadblock powers:*** Division 2 of proposed Part 4 consolidates the existing law as this relates to the power to enter and search vehicles and establish roadblocks. The power to 'stop vehicles and erect roadblocks' (the 'vehicle search power' under section 10 of the *Police Powers (Vehicles) Act 1998*) is now defined to expressly include schools. However, this is only required because the definition of 'public place' under the Draft Police Powers Consolidation Bill 2001 would expressly exclude a school.<sup>312</sup> The law itself is not changed.<sup>313</sup>

#### **5.10 Search and seizure powers with warrant or other authority**

Subject to a few minor stylistic changes the search warrant powers proposed in Part 5 of the Draft Police Powers Consolidation Bill 2001 are a direct consolidation of existing search warrant powers. These refer to the search warrant powers related to particular offences (sections 357EA and 578D of the *Crimes Act 1900*, and Part 2 of the *Search Warrants Act 1985*) and warrants under other NSW Acts (Part 3 of the *Search Warrants Act 1985*).

***Notices to produce documents:*** As indicated by the Minister this is an area where the Draft Police Powers Consolidation Bill 2001 would create new law. Following the example of Queensland, proposed sections 38-43 of the Bill would establish a regime where, upon application to an authorised justice, a police officer could give notice to an 'authorised <sup>314</sup> to produce documents which the officer believes on reasonable grounds may be connected with an offence 'committed by someone else'.<sup>315</sup> In other words, if a person has placed in a bank safe deposit box, for example, documents connected to a fraud he or she has committed, then a police officer would have a direct power to require the production of such documents. At present, application would have to be made for a search warrant for these purposes, the limitations of which from an investigative standpoint are noted below.

For an application for a notice to produce documents to be made, an authorised justice must be satisfied that the institution in question holds documents connected to an offence and that

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<sup>312</sup> On the other hand, the *Police Powers (Vehicles) Act* defined 'public place' to include a school.

<sup>313</sup> See part 2.13 above of this paper.

<sup>314</sup> This phrase is defined in section 21 of the *Interpretation Act 1987* to mean an 'authorised deposit-taking institution within the meaning of the *Banking Act 1959* of the Commonwealth'.

<sup>315</sup> Proposed section 38 (1).

it is not itself a party to the offence.<sup>316</sup> The maximum penalty for an authorised deposit-taking institution for failing or refusing to comply with a notice is 100 penalty units or 2 years imprisonment, or both.<sup>317</sup>

An application for a notice to produce documents may be made instead of an application, as at present, for a search warrant. However, the option of also applying for a search warrant remains.<sup>318</sup> Generally, the safeguards relating to search warrants in Division 4 of Part 5 of the Bill, such as the recording requirements for applications and the penalties against the use of false information in the making of applications, also apply to notices to produce documents.<sup>319</sup> Special provisions would apply where the documents contain privileged communications.<sup>320</sup>

Comparing this NSW proposal with that operating under section 97 of the Queensland *Police Powers and Responsibilities Act 2000*, a major difference relates to the range of institutions to which the NSW provision would apply. In Queensland, the term used is 'cash dealer' which is defined in relation to the Commonwealth's *Financial Transaction Reports Act 1988*. 'Cash dealer' there refers to financial institutions, but also to (among others) insurers, securities dealers, persons operating gambling houses or casinos and bookmakers. The net is a wide one therefore.<sup>321</sup> Under the proposed NSW scheme, on the other hand, the power to apply for notices to produce documents would only relate to banks, as defined under section 9 (3) of the Commonwealth *Banking Act 1959*. Presumably the purpose of the proposed NSW provision is to facilitate the gathering of evidence held specifically in banks, something which would apply in connection with a large range of offences, but especially perhaps in respect to fraudulent financial transactions, the evidence for which might be in electronic form. A similar purpose lay behind the original 1997 version of the equivalent Queensland provision. It was explained in that context that:

...a requirement when seeking a warrant is that police must be in a position to specify both the document and its exact location. Quite often, numerous search warrants will need to be obtained. This process is both time consuming and inefficient. For example, to obtain documents which are held at six different branches of the same bank, police must obtain six search warrants.<sup>322</sup>

<sup>316</sup> Proposed section 39 (1).

<sup>317</sup> Proposed section 42 (2).

<sup>318</sup> Proposed section 38 (2).

<sup>319</sup> The exceptions are proposed sections 52 (Notice to occupier of premises entered pursuant to warrant) and section 53 (Announcement before entry).

<sup>320</sup> Proposed section 41. Application to a Magistrate for an order for access would have to be made.

<sup>321</sup> To complicate matters, originally in the Queensland *Police Powers and Responsibilities Act 1997* this notice to produce documents power related only to financial institutions'-section 32.

<sup>322</sup> Queensland Government, *Review of Police Powers Discussion Paper*, 1997, p A 20.

Like its proposed NSW counterpart, the Queensland provision as it is now formulated is designed to overcome these administrative hurdles in respect to banks, but also it seems (in the case of Queensland) to facilitate evidence gathering against any persons or institutions who may be involved in money laundering activities generally.

In NSW ‘money laundering’ offences are provided for under Part 5 of the *Confiscation of Proceeds of Crime Act 1989*. The same legislation also includes specific information gathering powers, which are in addition to the search warrants power in section 36 of the Act. For example, a police officer can apply to the Supreme Court for a production order for a person to produce ‘property-tracking documents’ relating to a serious offence.<sup>323</sup> In the absence of the consent of the occupier, searches of premises for such documents must be authorised by a section 67 warrant. Note, however, that these production orders cannot ‘be made in respect of ‘bankers’ books’, a term defined to include ‘cash-books and account  
<sup>324</sup> More relevant, perhaps, is the power of a police officer to apply to the Supreme Court for a ‘monitoring order’ directing a ‘financial institution’ to give information ‘about transactions conducted through an account held by a particular person with the institution’.<sup>325</sup> It is an offence for a financial institution to contravene a monitoring order, or to provide false or misleading information. The maximum penalty is 1,000 penalty units,<sup>326</sup> which can be contrasted with the maximum penalty under proposed section 42 (2) of the Bill. The requirement that application must be made to the Supreme Court for production and monitoring orders can also be contrasted with the requirement under the Draft Police Powers Consolidation Bill 2001 to apply to an ‘authorised justice’, a term which is defined to include a Magistrate, or a justice employed in the Attorney General’s Department.

The proposed notice to produce documents power can also be compared with related investigatory powers found in other NSW legislation, notably section 22 of the *Independent Commission Against Corruption Act 1988* (‘Power to obtain documents etc’) by which a person can be required, for the purposes of an investigation, to produce a document or thing specified in a written notice. A similarly broad power is found in section 17 of the *NSW Crime Commission Act 1985*. Relevant, too, is section 18 (1) of the *Royal Commissions Act 1923* which gives a commissioner the power to compel the production of documents and other things, with section 17 of that Act also stating that grounds of privilege or the protection against self-incrimination are not lawful excuses for refusing to produce documents.<sup>327</sup>

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<sup>323</sup> Section 58, *Confiscation of Proceeds of Crime Act 1989*.

<sup>324</sup> Section 59 (2) and (4), *Confiscation of Proceeds of Crime Act 1989*.

<sup>325</sup> Section 68, *Confiscation of Proceeds of Crime Act 1989*.

<sup>326</sup> Section 69 (4), *Confiscation of Proceeds of Crime Act 1989*.

<sup>327</sup> The admissibility of documents is also dealt with under this section. For section 17 to apply, the letters patent by which the commission is issued must state that that is the case –section 17 (4) *Royal Commissions Act 1923*. Similar arrangements apply under section 18B privilege

*Search, entry and seizure powers related to domestic violence offences*: Subject to stylistic changes and to some content rearrangement, Part 7 of the Draft Police Powers Consolidation Bill 2001 re-enacts the existing NSW law found at present in sections 357F-357I of the *Crimes Act 1900*. Warrants issued under proposed Part 7 of the Bill would be subject to the requirements of Part 5, Division 4.<sup>328</sup>

### 5.11 The power to establish crime scenes

This is another area mentioned by the Minister in which the Draft Police Powers Consolidation Bill 2001 would create new law. The Minister commented:

...at present, police powers to establish and manage crime scenes are implied from the common law. The problem with implied powers is that they can sometimes be vague and imprecise. We intend to clarify police powers to establish and manage a crime scene, so that evidence can be preserved and investigations can proceed unhindered.<sup>329</sup>

The model for the proposed regime is the Queensland consolidation Act. In fact, the crime scene powers were a feature of Queensland's *Police Powers and Responsibilities Act 1997* and were afterwards incorporated into the *Police Powers and Responsibilities Act 2000*. These powers relate to the establishment of a crime scene, the examination of the crime scene and the exclusion of persons from entering and/or dealing with the evidence at the crime scene.

Proposed Part 6 of the Draft Police Powers Consolidation Bill 2001 does not confer additional power to enter premises, except in accordance with a crime scene warrant. It does, however, confer on a police officer who is lawfully on premises the power to establish a crime scene, to exercise crime scene powers and to stay on the premises for those purposes.<sup>330</sup> The conditions required for the establishment of a crime scene are set out in proposed section 67; provision for the initial actions that may be taken are then detailed in proposed section 68, including that crime scene powers can only be exercised for 2 hours, unless the police officer obtains a crime scene warrant or the crime scene is in a public place. Provision for the issuing of crime scene warrants is found in proposed section 69.<sup>331</sup>

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concerning answers and documents' of the *NSW Crime Commissions Act 1985*, but note that section 18 (3) makes it clear that any document produced by a corporation (which would include all banks) are admissible in criminal and civil proceedings. Privilege and self-incrimination are dealt with under sections 24 and 26 respectively of the *ICAC Act 1988*. See generally –S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry*, Butterworths 2001, Ch 2.

<sup>328</sup> However, proposed section 52 (Notice to occupier of premises entered pursuant to warrant) and proposed section 53 (Announcement before entry) would not apply.

<sup>329</sup> NSWPD (Hansard proof, LA), 6 June 2001, p 36.

<sup>330</sup> Proposed section 66.

<sup>331</sup> The requirements of Part 5, Division 4 would apply to crime scene warrants.



Based on sections 93 and 94 of the Queensland *Police Powers and Responsibilities Act 2000*,<sup>332</sup> the Bill then sets out the crime scene powers which a police officer may exercise. Some of these (proposed section 70 (1)(a)-(f)) may be exercised without a crime scene warrant if necessary to preserve evidence of the commission of an offence,<sup>333</sup> but others must be authorised by such a warrant.<sup>334</sup> Examples of the former include the power to: remove a person from the crime scene; prevent people from entering the crime scene; prevent the removal of evidence; and remove an obstruction from the crime scene. Examples of crime scene powers requiring a warrant include the power to: search the crime scene; photograph it; dig up anything at the crime scene; and ‘remove wall or ceiling linings or floors of a building, or panels of a vehicle’. Of this last crime scene power, the explanatory note to 1997 Queensland Act presented the following example of the need for this type of power:

In the case of the backpacker murders in the Belangelo State Forest, it was necessary for police to remove a wall in the suspect’s house in order to search for property to link the suspect to the murders. Property was found as a result of the search.<sup>335</sup>

One aspect of the Queensland model which is not directly reflected in the NSW proposal is the express provision requiring a crime scene warrant issued by a Supreme Court judge to specifically authorise anything that may cause structural damage to a building.<sup>336</sup> In respect to this provision the explanatory note to the 1997 Queensland Act commented: ‘In a recent multiple murder case in England, police were required to conduct an excavation under the house of the suspect in order to search for and recover bodies of the victims. As a result of the excavation, structural damage was caused to the house’.<sup>337</sup>

## 5.12 Powers relating to arrest<sup>338</sup>

These are set out in proposed Part 8 of the Draft Police Powers Consolidation Bill 2001. This reflects the distinction traditionally made between the power to arrest with and without warrant, presently found in sections 352 of the NSW *Crimes Act 1900*. The present requirement to take a person arrested, with or without warrant, ‘before an authorised justice

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<sup>332</sup> Re-enacting section 20 of the *Police Powers and Responsibilities Act 1997* (Qld).

<sup>333</sup> Proposed section 68 (3).

<sup>334</sup> But note that police can also apply for a search warrant under proposed Part 5 of the Bill – proposed section 73.

<sup>335</sup> *Queensland Explanatory Notes for Bills Passed in 1997*, Vol 2, Acts Nos. 36-83, p 1709.

<sup>336</sup> Section 93 (2), *Police Powers and Responsibilities Act 2000* (Qld).

<sup>337</sup> *Queensland Explanatory Notes for Bills Passed in 1997*, Vol 2, Acts Nos. 36-83, p 1709.

<sup>338</sup> See part 2.4 above of this paper.

to be dealt with according to law' is also reflected in the Bill.<sup>339</sup> So, too, is the prohibition against private citizens arresting a person on the mere 'reasonable suspicion' that an offence has been committed. Thus, proposed section 81 of the Bill confirms the power of police or private citizens to make an arrest without warrant where a crime has been committed; on the other hand, proposed section 82 limits to police officers the power to arrest on the reasonable suspicion that a person has committed an offence. The specific police power, at present under section 352 (2)(b) of the Crimes Act, to arrest without warrant any person loitering at night who is suspected of having committed a serious indictable offence does not feature in the Bill.

No new law as such is created. However, an important innovation to be noted is that, in keeping with the approach taken in the 1998 Code of Practice for CRIME, proposed sections 81 (2) and 82 (2) direct police only to arrest a person where it is clear that a summons or attendance notice would not achieve certain purposes, for example, preventing the fabrication of evidence.<sup>340</sup> These conditions are based on section 3W of the Commonwealth *Crimes Act 1914*. The fact that a police officer (or other person) may use 'such force as is reasonably necessary to make the arrest' is also expressly stated.<sup>341</sup>

A further innovation under the Bill is a provision expressly stating that an arrest *may* be discontinued 'at any time',<sup>342</sup> for example, 'if the arrested person is no longer a suspect or the reason for the arrest no longer exists for any other reason'. This power to 'unarrest' a person is an issue which has been discussed many times over the years, notably in the context of the consolidation process in Queensland where an express provision exists placing a positive 'duty' on a police officer to release an arrested person 'at the earliest possible opportunity if the person is no longer reasonably suspected of committing the offence for which the person is arrested'.<sup>343</sup> The NSW proposal, on the other hand, provides that 'A police officer may discontinue an arrest at any time'. As to the purpose of such a provision, the Queensland Criminal Justice Commission reported in 1993 that it was aware:

...from anecdotal evidence that police fear possible civil action against them if, following arrest, the person arrested is not subsequently charged with an offence. This has the unintended consequence that persons may be kept in custody unnecessarily

<sup>339</sup> Proposed sections 81 (3) and 82 (3).

<sup>340</sup> The alternatives to arrest are also spelt out in proposed section 89.

<sup>341</sup> Proposed section 88. This is in addition to proposed section 175 Use of force against

<sup>342</sup> Proposed section 87.

<sup>343</sup> Section 208 (1), *Police Powers and Responsibilities Act 2000* (Qld). This duty is qualified by sections 208 (2) and (3) where, for example, release is not required if a person is reasonably suspected of another offence.

until they can be taken before a magistrate for the charges to be withdrawn.<sup>344</sup>

The Commission went on to discuss the ‘uncertainty about whether police can “unarrest” a person’ and, on this basis, recommended a specific legislative provision ‘requiring’ a police officer to release an arrested person where the officer no longer has reasonable grounds for suspecting that the person committed the offence. Whether similar concerns to those expressed by the Queensland Criminal Justice Commission can be said to apply at present in NSW is unclear. The validity of those concerns might also be queried. Are they the product of a mistaken belief that arrested persons must be charged? If so, would an ‘unarrest’ power serve any useful purpose? In any event, the Draft Police Powers Consolidation Bill 2001 would expressly provide for an ‘unarrest’ power.

Proposed section 84 (‘Power to arrest persons who are unlawfully at large’) and section 85 (‘Warrant for arrest of persons unlawfully at large’) reflects the existing law under section 352AA of the NSW *Crimes Act 1900*. Likewise, proposed section 86 (‘Power to arrest for interstate offences’) reflects the existing law under section 352A of the same Act.

### 5.13 Property in custody

Division 1 of proposed Part 14 of the Draft Police Powers Consolidation Bill 2001 relates to confiscated knives and other dangerous articles and implements seized by the police. It is based substantially on the relevant sections of the knife laws (sections 28C-28E of the *Summary Offences Act 1988*) which set out the time frame within which an application may be made for the return of seized or confiscated articles, for appeals where such applications are refused and for forfeiture to the Crown.<sup>345</sup> At present, the seizure of firearms and other dangerous articles is also provided for under Division 1 of Part 10B of the *Crimes Act 1900*. This would be repealed under the Draft Police Powers Consolidation Bill 2001.<sup>346</sup> However, it seems that Division 4 of Part 10B of the *Crimes Act* which is headed, ‘Disposal of property in the custody of police’, is not to be repealed. It is not clear why. One feature of that Division is incorporated into the proposed section governing appeals to the Local Court, with the Bill providing that the Court cannot order the return of property if proceedings against the person have not been withdrawn or finally determined by a finding of guilt.<sup>347</sup>

Division 2 of proposed Part 14 of the Draft Police Powers Consolidation Bill 2001 deals with other property in police custody. The provisions relating to livestock are a direct consolidation of sections 140-144 of the *Criminal Procedure Act 1986*. More novel features

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<sup>344</sup> Queensland Criminal Justice Commission, *Report on a Review of Police Powers in Queensland – Volume III: Arrest Without Warrant, Demand Name and Address and Move-On Powers*, November 1993, pp 611-612.

<sup>345</sup> Proposed sections 150-153.

<sup>346</sup> Proposed Schedule 4.

<sup>347</sup> Proposed section 152 (4). See section 358B, *Crimes Act 1900*.

are the proposed sections establishing a right to inspect seized documents<sup>348</sup> and for the return of seized things.<sup>349</sup> Both are based on the Queensland model, sections 381 and 423 respectively of the *Police Powers and Responsibilities Act 2000* (Qld). One difference to note is that the NSW Bill does not reflect the requirement under section 423 (2) of the Queensland Act for police, where appropriate, to take steps ‘to minimise the need to retain the thing as evidence’ by, for example, photographing it as soon as practicable.

The common law principle relevant to seized property is that, once evidence has been seized, police are entitled to retain it for as long as is ‘reasonably necessary’, having regard to the interests of justice. According to Tronc, Crawford and Smith, ‘In general this will mean that they may retain it until the prosecution and trial of the offence in relation to which it was seized’.<sup>350</sup>

Further statutory arrangements are also made at present in NSW under Part 3 of the *Confiscation of Proceeds of Crimes Act 1989*. Section 40 of the Act makes the Commissioner of Police responsible for seized property and section 41 makes arrangements for the return of property seized pursuant to a search warrant issued under section 36 of the Act. Prima facie there would seem to be some scope for overlap between these arrangements and those proposed in the Draft Police Powers Consolidation Bill 2001. However, any cross reference is limited to Schedule 2 of the Bill which provides that search warrants issued under section 36 of the *Confiscation of Proceeds of Crimes Act 1989* are to conform to the conditions set out in Division 4 of Part 5 of the Draft Police Powers Consolidation Bill 2001. Otherwise, it seems, the arrangements for property seized pursuant to section 36 warrants are to be separate from those proposed under Part 14 of the Bill. This can be justified on the basis that the *Confiscation of Proceeds of Crimes Act 1989* is a distinctive and self-contained regime designed to achieve specific purposes.

#### 5.14 Police assistants

The fourth area noted by the Minister in his statement of 6 June 2001 in which the Bill would create new law is that relating to police assistants. It has been held, although not in Australia, that all citizens are required to assist police in the execution of their duty in preventing a breach of the peace. To refuse a request without lawful excuse, when the request is reasonably necessary, is to commit a common law misdemeanour.<sup>351</sup> On this view of the law, a private citizen may be called upon to assist in the arrest of a person in these circumstances, and may even be required to use a degree of force for that purpose. However, it should be emphasised that the common law is not entirely clear on this issue. Historically, all citizens were legally responsible for enforcing the law and maintaining the peace, while in more recent times the courts have asserted that this is no more than a moral

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<sup>348</sup> Proposed section 156.

<sup>349</sup> Proposed section 157.

<sup>350</sup> K Tronc, C Crawford and D Smith, *Search and Seizure in Australia and New Zealand*, LBC Information Services 1996, p 21.

<sup>351</sup> *R v Brown* (1841) Carrington & Marshman 314; *R v Sherlock* (1866) LR 1 CCR 20.

obligation.<sup>352</sup> In some Australian jurisdictions the position has been clarified by statute. For example, sections 175 and 176 of the *WA Criminal Code Act Compilation Act 1913* establish a statutory duty on citizens to assist in aiding to suppress a riot or in arresting an offender. Of course ordinary citizens may be called upon to assist police in other situations, for instance, police may take an accountant or a computer expert onto a place to examine documents, or to find and unlock computer files relevant to an offence. A doctor or forensic scientist might also be taken onto premises to search for evidence of an offence.<sup>353</sup>

What if a person is found to have been wrongfully arrested? It is the case that, in the absence of legal authority, the imposition of physical restraint upon a person constitutes the crime and tort of false imprisonment, generally accompanied by assault and battery. For a police officer, acting in good faith, there is express statutory protection from personal liability.<sup>354</sup> But where does the private citizen stand in such a case, or indeed in the event that property has been destroyed at a crime scene where he or she was requested to assist police? Could someone assisting police be found personally liable in the tort of negligence, for example, for any damage caused?

At present there is no equivalent statutory protection from civil and criminal liability for the citizen who is called upon to assist police. Ordinary citizens and police officers alike may rely on what is called the defence of statutory authority. That is, where a person who is authorised to act under a statute does so, that person will not be liable in any action in tort.<sup>355</sup> In the case of an ordinary citizen this would apply, for example, in relation to an arrest made under proposed section 81 of the Draft Police Powers Consolidation Bill 2001 or the present section 352 of the *Crimes Act 1900*. For the defence to apply, the action would have to conform to the ambit of the statutory power at issue and, as the High Court has warned, 'statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language'.<sup>356</sup> A more pressing limitation in this context is that not every situation in which a citizen might be called upon to assist police is the subject of statutory law. One instance is that an ordinary citizen called upon to assist police to enter premises forcibly would be acting in reliance upon the common law, in which case the defence of statutory authority could not operate. In other words, the law at present appears to be deficient in the protection offered to ordinary citizens in such circumstances.

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<sup>352</sup> *Rice v Connolly* [1966] 2 QB 414; D Nicolson, 'The citizen's duty to assist the police' [1992] *Criminal Law Review* 611.

<sup>353</sup> These examples and others are set out in *Queensland Explanatory Notes for Bills Passed During the Year 1997, Volume 2, Acts Nos 36-83*, p 1779.

<sup>354</sup> Section 213, *Police Service Act 1990*.

<sup>355</sup> F Trindale and P Crane, *The Law of Torts in Australia*, 3<sup>rd</sup> edition, Oxford University Press 1999, p 292.

<sup>356</sup> *Coco v The Queen* (1994) 179 CLR 427 at 436.

The Bill would correct this omission and clarify the position of police assistants generally in three ways. First, the power of police to use such assistants as are reasonably necessary is acknowledged, along with the power to take them onto premises where this is lawful. In addition, the power of police to use equipment, vehicles, animals or other materials belonging to others is also acknowledged.<sup>357</sup> This power is defined to apply in relation to ‘this Act or any other law’, which would include the common law. Secondly, assistants acting ‘honestly and without gross negligence’ are granted protection from liability for any acts or omissions. By implication this can be said to apply to actions under ‘this Act and any other law’, but would exclude actions under ‘other Acts’. As in the equivalent Queensland provision, any civil liability attaching to an assistant is deemed to attach instead to the State.<sup>358</sup> Thirdly, general or umbrella provisions are proposed acknowledging that it is lawful for both police and ‘anyone helping’ them to use such force as is reasonably necessary against individuals or things (such as where the power of entry can only be exercised by the breaking down of a door).<sup>359</sup> In relation to ‘things’, this capacity to use force would apply broadly in relation to a police officer or ordinary citizen exercising a function under ‘this Act or any other Act or law’. Whereas the capacity to use force against individuals would only apply to the exercise of a function ‘under this Act or any other law’ (but not, by implication,

While stating the power of police to ‘use’ assistants, the Bill does not seek to reproduce any corresponding common law duty of private citizens to assist police in a statutory form. Perhaps this may be taken to indicate that in NSW there is no positive legal duty to assist police. If that is so, the obligation can be taken to be moral, not legal, in nature. Conversely, the existing offence of hindering or resisting a police officer, found in section 546C of the *Crimes Act 1900*, is reflected under proposed section 179 of the Bill. In other words, a distinction is made between a failure to assist police, on one side, and conduct which obstructs or hinders police, on the other. Only the latter constitutes an offence under the Bill.

### 5.15 Review of the Act

Proposed section 190 of the Draft Police Powers Consolidation Bill 2001 sets out the arrangements for the review of its legislative operation. This is to be undertaken ‘as soon as possible after the period of 3 year from the date of assent to this Act’ and is to be carried out by the Attorney General and the Minister for Police. A report is then to be tabled in both Houses of Parliament within a further 12 months.

Unlike other recent legislation in this area of law, including the *Police Powers (Vehicles) Act 1998* and the *Crimes Legislation Amendment (Police and Public Safety) Act 1998*, these

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<sup>357</sup> Proposed section 176.

<sup>358</sup> Proposed section 177. Note, however, that the level of protection under the Queensland provision is lower than that proposed in NSW. Thus, section 374 (1) of the Queensland *Police Powers and Responsibilities Act 2000* refers to where an assistant’s acts or omissions are done honestly and without negligence.

<sup>359</sup> Proposed sections 174 and 175. These are based on sections 375 and 376 of the Queensland *Police Powers and Responsibilities Act 2000*.

proposed arrangements do not include a role for an independent review by the NSW Ombudsman. The quality of the reports the Ombudsman produced in both those instances indicates there is value in this approach to legislative review. On the other hand, under section 356Y of the *Crimes Act 1900* the Attorney General is to report to Parliament on Part 10A ('Detention after arrest for purposes of investigation') of that statute 2 years after its commencement. The relevant amending Act was proclaimed to commence on 9 February 1998<sup>360</sup> but the Minister is yet to table his report in Parliament.

The arrangements under proposed section 190 can also be contrasted with those in operation under the *Crimes (Forensic Procedures) Act 2000*. For the first 2 years, the operation of the Act is to be monitored by the Ombudsman, who is to scrutinise the exercise of functions conferred on police officers. After 18 months the Act is to be reviewed by the Minister and a report tabled in Parliament within a further 12 months. In addition to this, the Legislative Council's Standing Committee on Law and Justice is to enquire into and report on the Act and its regulations as soon as possible after 18 months of the Act's date of assent.<sup>361</sup>

The Minister indicated that the new drug laws - the Internally Concealed Drugs Act 2001 and the Drug Premises Act 2001 – would be incorporated into the proposed consolidation Bill. It is worth restating in this context that both the drug laws include arrangements for the Ombudsman to report on the first 2 years of their operation.

## 6. CONCLUSIONS

Police powers will always inspire differing viewpoints and any mention of civil liberties in this context is likely to generate a host of countervailing arguments – for example, for the rights of victims of crime against those of criminals, for police to be allowed to get on with the job of law enforcement and not to be hindered by expensive and time-consuming procedures. Legitimate as these and other concerns are, it is the case that the relationship between police and their fellow citizens serves in part to define the kind of society we live in. It is, as Justice Michael Kirby said in 1979, a question of the balance which 'our society is prepared to strike between its need for effective law enforcement and the protection of individual rights'.<sup>362</sup> As to the value we place on the latter, the then Attorney General, Jeff Shaw, said in 1997:

Civil liberties are indeed expensive, troublesome, and time-consuming for the state and its manifestations, including the police and the prosecuting authorities. That is not the slightest argument for their reduction or removal.<sup>363</sup>

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<sup>360</sup> NSW Government Gazette, No 22, 6 February 1998, p 521.

<sup>361</sup> Sections 121-123, *Crimes (Forensic Procedures) Act 2000*.

<sup>362</sup> Quoted in Queensland Criminal Justice Commission, n 12, p 93.

<sup>363</sup> JW Shaw, Reforms in criminal justice' (2000) 26 *Commonwealth Law Bulletin* 571 at 576.

The need for a consolidation of police powers and, with it, for articulating the relationship between police and ordinary citizens in as clear and accessible a form as possible, has been recognised for many years. The exposure draft of the Draft Police Powers Consolidation Bill 2001 is the Carr Government's response. By making this available for comment the Government is saying that the draft will not constitute the last word on the consolidation process, and that there is room for amendments and improvements. It is indicated that the new drug laws – the Internally Concealed Drugs Act 2001 and the Drug Premises Act 2001 – will be incorporated in the future into the Bill. Both these Acts involve an extension of police search powers and, as with the Draft Police Powers Consolidation Bill 2001, this is always likely to prove a difficult issue, giving rise to very different outlooks and perspectives.

A general comment to make about the Bill is that it is something of a minimalist document. Unlike the equivalent Queensland Act it does not purport to be comprehensive in scope. In contrast to the British PACE Act, its provisions are not at this stage to be read against the backdrop of detailed codes of practice, concerning for example what may or may not constitute reasonable suspicion for the conducting of a strip search on arrest. As the Minister indicated on 6 June 2001, under the Bill new law would be created in certain areas, but these are relatively modest in scope. The new power to apply for notices to produce documents is largely an administrative measure, designed to facilitate the more efficient gathering of evidence from banking institutions. The police assistants provisions tidy up an area of law marked by some uncertainty and are to be welcomed on that account. A similar comment can be made about the power to establish crime scenes. On the other hand, the safeguards that are to apply to searches of persons after arrest are likely to generate more interest, as indeed are the Bill's safeguard provisions generally. These need to be stated in as clear, consistent and accessible a way as possible.

The Draft Police Powers Consolidation Bill 2001 does, of course, build on the extensive legislative changes made in this area of the law in recent years. If nothing else, bringing many of these changes under one piece of legislation should help make police powers more accessible to police officers and ordinary citizens alike. That of itself is an important development. Whether the Bill should be more comprehensive in scope, seeking to include the new forensic procedures legislation for example, so that all police powers to search and detain are found in one place, is a moot point. The list of Acts not affected by the proposed consolidation in Schedule 1 suggests just how limited a picture of police powers is presented in the Bill. Then again, the decision may have been to restrict its scope to those core powers normally associated in the public mind with police work – notably powers of entry, arrest, stop and search. By any reckoning these powers are of the utmost importance in defining the relationship between police and ordinary citizens. Their operation should be the subject of thorough research and review.



## **APPENDIX A**

J. Miller, P. Quinton & N. Bland, *Police Stops and Searches: Lessons from a Programme of Research*, Home Office Briefing Note, Police Research Papers 127-132, September 2000

127. The Impact of Stops and Searches on Crime and the Community. Joel Miller, Nick Bland and Paul Quinton. 2000.

Full Report: <http://www.homeoffice.gov.uk/rds/prgpdfs/prs127.pdf>

Summary Report: <http://www.homeoffice.gov.uk/rds/prgpdfs/polstop.pdf>

128. Upping the PACE? An evaluation of the recommendations of the Stephen Lawrence Inquiry on stops and searches. Nick Bland, Joel Miller and Paul Quinton. 2000.

Full Report: <http://www.homeoffice.gov.uk/rds/prgpdfs/prs128.pdf>

Summary Report: <http://www.homeoffice.gov.uk/rds/prgpdfs/polstop.pdf>

129. The Views of the Public on Stops and Searches. Vanessa Stone and Nick Pettigrew. 2000.

Full Report: <http://www.homeoffice.gov.uk/rds/prgpdfs/prs129.pdf>

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130. Police Stops, Decision-making and Practice. Paul Quinton, Nick Bland and Joel Miller. 2000.

Full Report: <http://www.homeoffice.gov.uk/rds/prgpdfs/prs130.pdf>

Summary Report: <http://www.homeoffice.gov.uk/rds/prgpdfs/polstop.pdf>

131. Profiling Populations Available for Stops and Searches. Joel Miller. 2000

Full Report: <http://www.homeoffice.gov.uk/rds/prgpdfs/prs131.pdf>

Summary Report: <http://www.homeoffice.gov.uk/rds/prgpdfs/polstop.pdf>

132. Managing the Use and Impact of Searches: A review of force interventions. Nick Bland, Joel Miller and Paul Quinton. 2000.

Full Report: <http://www.homeoffice.gov.uk/rds/prgpdfs/prs132.pdf>

Summary Report: <http://www.homeoffice.gov.uk/rds/prgpdfs/polstop.pdf>