Review of the *Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA)*

NSW Department of Attorney General and Justice and Ministry for Police and Emergency Services

2013

CONTENTS

[redacted]
Published by the NSW Department of Attorney General and Justice
Tel: (02) 8688 7777
Fax: (02) 8688 7980

EXECUTIVE SUMMARY

The *Law Enforcement (Powers and Responsibilities) Act 2002* (**LEPRA**) was assented to on 29 November 2002 and commenced in stages in 2004 and 2005. LEPRA consolidates and restates the law relating to police and other law enforcement officers' powers and responsibilities giving effect to the consolidation process envisaged by the Royal Commission into the NSW Police Service.

Section 243 of LEPRA requires the Attorney General and the Minister for Police to conduct a review of the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

Submissions were received from stakeholders in the criminal justice system. The submissions identified a number of possible issues with the legislation, relating to various areas such as search powers, the application of safeguards to persons in police custody, and a lack of clarity and/or unnecessary complexity in parts of the legislation. This Report considers these and other issues, and makes a number of consequential recommendations. These recommendations relate to both amendments to legislation, and to NSW Police practices.

This Report also takes into account two Reports of the NSW Ombudsman; the 2009 *Review of the Law Enforcement (Powers and Responsibilities) Act 2002* (**Ombudsman's LEPRA Review**), and the 2006 *Review of the Police Powers (Drug Detection Dogs) Act 2001* (**Ombudsman's drug dog review**). The issues and recommendations discussed in the Ombudsman's LEPRA Review are considered in detail in this Report, and this Report's recommendations represent the Government's response.

As noted, the legislation requires the review to be conducted by both the Attorney General and the Minister for Police. Consequently, this Report has been prepared jointly by the Department of Attorney General and Justice and the Ministry for Police and Emergency Services, with input from the NSW Police Force (NSWPF).

In October 2013, the Premier commissioned former Shadow Attorney General Mr Andrew Tink and former Police Minister the Hon Paul Whelan to conduct an independent review of parts of LEPRA. In particular, Mr Tink and Mr Whelan reviewed:

- *the arrest powers under s.99 of LEPRA*
- *the safeguards under s.201*
- *aspects of personal searches*
- *the investigation and questioning provisions contained in Part 9.*

In order to assist their review, Mr Tink and Mr Whelan were provided with all substantive submissions to this review, and have produced reports and recommendations on the relevant provisions independently of this Report. Consequently, this Report does not address or make recommendations in relation to those areas of LEPRA.

While a number of issues have been identified in submissions going to the balance of matters considered in this joint review, and in the two Ombudsman's reviews, the Report concludes that the policy objectives of LEPRA remain valid and that, on the whole, the terms of the Act are appropriate to securing those objectives. Combined with the recommendations of the reports produced by Mr Tink and Mr Whelan, the amendments recommended by this Report will ensure that those objectives can be more effectively met by the Act with increased clarity.

Recommendations

Recommendation 1: That existing police educational and training material be reviewed, and, if necessary, amended, to ensure that police are aware that powers to request identity under LEPRA are situational, not general, and to ensure that the extent of the powers conferred by Part 3 are properly understood and applied.

Recommendation 2: That LEPRA be amended to provide a two-tier system of searches, amalgamating existing provisions relating to ordinary and frisk searches.

Recommendation 3: That s.32(8) be amended to clarify that while no questioning relating to any offence the person is suspected of having committed is to be conducted during a search, questions may be asked which serve only to facilitate the safety of the officer, the offender, or any other person during the search.

Recommendation 4: That LEPRA be amended to provide that when police seek to search a person by consent they must:

- Seek the person's consent to the search; and
- Apply Part 15 to the search

And in the conduct of the search, apply the safeguards in Division 4 of Part 4 of LEPRA.

Recommendation 5: That s.24 of LEPRA be amended so as to clarify that the power to conduct searches under the section applies in situations where a person is in custody following arrest, and may be exercised at specified custody locations (including a police station, and/or other relevant custody locations, or immediately before or during transport to or between such locations).

Recommendation 6: That LEPRA be amended so that a strip search is only authorised:

- in the field, if a police officer suspects on reasonable grounds that it is necessary to conduct a strip search for the purpose of the search, and the seriousness and urgency of the circumstances make it necessary to conduct a strip search in the field
- in custody at a police station or equivalent custody location, if it is necessary to conduct a strip search for the purposes of the search.

Recommendation 7: That LEPRA be amended so that any reference to 'same sex' or 'opposite sex' in the Act is defined in line with s.3(7) of the *Crimes (Forensic Procedures) Act* i.e.:

(7) In this Act (other than subsection (6)), a reference:
(a) to a member of the opposite sex of a person means, if the person is a transgender person, a member of the opposite sex to the sex with which the transgender person identifies, and
(b) to a member of the same sex as a person means, if the person is a transgender person, a member of the same sex as the sex with which the transgender person identifies.

Recommendation 8: That LEPRA be amended to clarify that s.33(1)(b) does not prevent a parent, guardian, or other support person of the opposite sex to the person being strip searched from being present, provided that the presence of the person is acceptable to the person being searched.

Recommendation 9: That LEPRA be amended to restrict the situations in which a strip search on a young person or those with impaired intellectual functioning could be conducted in the absence of a support person, to situations where the officer reasonably suspects that delaying the search is likely to result in evidence being concealed or destroyed or an immediate search is necessary to protect the safety of a person.

Recommendation 10: That LEPRA be amended to require police to record whether a strip search of a young person or a person with impaired intellectual functioning has been conducted in the presence of a support person, and if not, the steps that were taken to locate one.

Recommendation 11: That 'body cavity' be defined in LEPRA to exclude the mouth.

Recommendation 12: That LEPRA be amended to clarify that searches of a person's mouth constitutes an ordinary/frisk search for the purposes of applying relevant safeguards.

Recommendation 13 – That LEPRA be amended to clarify that, in situations where LEPRA requires a search to be conducted by a Police officer of the same sex as the person being searched, and no such officer is available, Police may delegate their search powers to a person of the appropriate sex who belongs to a class of persons prescribed by the Regulations.

Recommendation 14: That Part 4 of LEPRA be amended to provide for a three level approach to triggering search powers, with existing s.21 and s.26 powers enlivened on suspicion on reasonable grounds, existing s.23 powers enlivened upon arrest on suspicion on reasonable grounds that it is prudent, and the broad s.24 powers enlivened upon arrest and in custody. This could be given effect by moving Division 3 before Division 2.

Recommendation 15: That the Regulations be amended to clarify that receipts of items seized during the execution of a covert search warrant need to be kept, and provided to the occupier of the premises when notification of the search is made. The amendments would allow the receipts to be withheld at the time of notification where an eligible issuing officer was satisfied that if the receipts were disclosed, they could disclose a person's identity, and that the disclosure of the person's identity would jeopardise that or any other person's safety, or seriously compromise the investigation of the matter.

Recommendation 16: That s.53 and 54 be amended to state that:

- a police officer may apply to an issuing officer for a notice to produce documents where he or she believes on reasonable grounds that an

authorised deposit taking institution holds documents that may be connected to an offence committed by someone else, and;

- the issuing officer may issue a notice to produce if satisfied there are reasonable grounds for doing so, having considered (without being limited to considering) the reliability of the information on which the application is based, including the nature of the source of the information, and— whether there is sufficient connection between the documents sought and the offence.

Recommendation 17: That LEPRA be amended to:

- *expand the powers that can be exercised under s.92(1) to include those contained in s.95(1)(g)-(l).*
- *state that where the power to open locked items under s.95(i) is exercised under s.92(1) rather than s.92(2) or under a warrant, the item can only be opened if it is possible to do so without causing any damage to the item or lock.*

Recommendation 18: That s.91 be amended so as to clarify that it does not restrict the ability to establish a subsequent crime scene at the same premises for the purposes of investigating a separate offence, meaning subsequent offences which are unrelated to the original offence(s), or subsequent offences which are related to the original offence(s) but are sufficiently removed temporally from those offences to be considered separate offences.

Recommendation 19: That s.94 be amended to enable a crime scene warrant to be issued in respect of multiple premises.

Recommendation 20: That in light of Recommendation 19 above, cl.10(6)(a) of the Law Enforcement (Powers and Responsibilities) Regulation 2005 be amended so that in circumstances where one crime scene warrant has specified multiple premises, the occupier's right to inspect relevant documents under the clause is limited to documents relating to their own premises, not those of others.

Recommendation 21: That s.92(3) be amended so as to allow police to exercise crime scene powers under the section for a period of four hours until a crime scene warrant is obtained, or six hours for rural LACs prescribed under the Regulation.

Recommendation 22: That s.95 of LEPRA be amended to clarify that where crime scene powers are exercised by consent, that consent must be informed, and that consent will be considered to be informed where the occupier consents after being informed of the powers that police want to exercise on their premises, the reason for exercising the powers and that they have a right to refuse consent.

Recommendation 23: That s.95 of LEPRA be amended to specify that the occupier's consent to exercise crime scene powers must be obtained in writing where reasonably practicable.

Recommendation 24: That Part 6 of LEPRA be amended to provide police with the power to remain on premises and preserve the scene prior to obtaining a warrant under s.83 of LEPRA where they suspect a domestic violence offence is being or may have been recently committed.

Recommendation 25: That Form 20 of the Law Enforcement (Powers and Responsibilities) Regulation 2005 be amended so that police officers must record the address where the crime scene warrant was executed.

Recommendation 26: That Part 7 of LEPRA be amended to provide that in circumstances where a crime scene warrant has been issued for private premises, the occupier of the premises may apply to an authorised officer to review the grounds on which the crime scene warrant was issued in line with the Queensland model, and that the occupier's right to do so should be included in the Occupier's notice under Form 19 of the Regulation. An application for a review will not stay the execution of the warrant.

Recommendation 27: That s.108E of LEPRA be repealed.

Recommendation 28: That conversations between police captured on ICV be exempt from the *Surveillance Devices Act 2007*.

Recommendation 29: That LEPRA be amended to empower the Commissioner to order the destruction of fingerprints, palm prints and photographs relating to an offence where satisfied that the circumstances justify it, with that power being entirely discretionary.

Recommendation 30: That pending the outcome of the Review of the Crimes (Forensic Procedures) Act 2000, s.138 be relocated to the *Crimes (Forensic Procedures) Act 2000*.

Recommendation 31: That the NSWPF review guidelines setting out the factors that may be considered by a police officer when forming a reasonable suspicion to stop, search and detain a person during drug detection dog operations, noting that reasonable suspicion to search a person cannot be formed based solely on a drug detection dog indication.

Recommendation 32: That the NSWPF collect data on drug detection dogs, including:

- The number of operations conducted
- Geographic locations and type of premises involved
- The number of people indicated by a drug detection dog
- The number of people searched as a result of an indication
- The result of each search
- The quantities of prohibited drugs seized
- The nature and number of charges and other legal processes resulting from operations.

Recommendation 33: That the provisions of Part 12 be moved to relevant Roads and Transport legislation.

Recommendation 34: That a Code of Practice be prescribed in the Regulation, which clearly articulates the rights of citizens and the powers of police in relation to

Part 14 powers, and incorporates the elements identified in the Ombudsman's 1999 report.

Recommendation 35: That existing police training material be reviewed, and, if necessary, amended, to ensure there is a proper understanding of the situations in which the use of force is reasonably necessary.

Recommendation 36: That provisions which currently use the word 'request' be re-drafted to use the word 'require', if failure to comply constitutes an offence.

Introduction

Terms of reference for the review

Section 243 of LEPRA provides as follows:

Review of Act

(1) The Attorney General and the Minister for Police are to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be carried out (and is taken to have always been required to be carried out) as soon as possible after the period of 3 years from 1 December 2005.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 3 years.

LEPRA was assented to on 29 November 2002 and commenced operation on 1 December 2005.

Conduct of the Review

The Review was conducted by the Department of Attorney General and Justice, in consultation with the Ministry for Police and Emergency Services and the NSWPF.

Consultation was conducted in relation to the operation of LEPRA and whether the policy objectives remain valid. Key stakeholders were invited to make submissions in relation to the Review and an advertisement was placed on the Department of Attorney General and Justice website. A schedule of persons and organisations that made submissions is at **Appendix 1.**

In October 2013, the Premier commissioned former Shadow Attorney General Mr Andrew Tink and former Police Minister the Hon Paul Whelan to conduct an independent review of parts of LEPRA ("**the Tink/Whelan Review**"). To assist their review, Messrs Tink and Whelan were provided with all substantive submissions to this Review.

The Review process involved a detailed evaluation of the operation of LEPRA, reforms introduced by LEPRA, and the objectives of those reforms. Between this Review and the Tink/Whelan review, careful consideration has been given to the submissions of stakeholders and members of the public.

Background to LEPRA

Background to the introduction of the Act

In May 1994, a Royal Commission into the NSW Police Service (as it was then known) was established authorising His Honour Justice James Wood (as he then was) to investigate corruption in the NSW Police Service. In particular, the Royal Commission examined the existence of systematic or entrenched corruption within the Service, and the impartiality of the Service in relation to the investigation and prosecution of criminal activities.

The final report is in six volumes, and sets out the Royal Commission's findings on police corruption and recommendations for reform. Among the conclusions contained in the final report of the Royal Commission was a recommendation to consolidate the police powers contained in legislation in order to:

> "...help strike a proper balance between the need for effective law enforcement and the protection of individual rights; assist in ensuring clarity in areas where uncertainty exists, and reduce the possibility of abuse of powers through ignorance; and assist in the training of police." (Volume II at paragraph 7.20)

In accordance with this recommendation, the Government of the day set up a task force in March 1998 to review and consolidate law enforcement powers in a single Act, which led to the introduction of the LEPRA. LEPRA brings together and restates the law relating to police and other law enforcement officers' powers and responsibilities, and sets out the safeguards applicable in respect of persons under investigation.

In his second reading speech to Parliament in relation to LEPRA (NSW Legislative Assembly Hansard, 17 September 2002, page 4846), the then Attorney General, the Hon. Robert Debus MP stated:

> The bill represents the outcome of the consolidation process envisaged by the Royal Commission into the New South Wales Police Service to help strike a proper balance between the need for effective law enforcement and the protection of individual rights. This bill constitutes significant law reform. It radically simplifies the law in relation to law enforcement powers, setting out in one document the most commonly used criminal law enforcement powers and their safeguards...While generally the bill simply re-enacts existing legislation, it does in some circumstances make amendments intended to more accurately reflect areas of the common law or to address areas in the existing law where gaps have been identified...

LEPRA also attempts to enact some elements of the common law, such as the powers of entry to prevent a breach of the peace, use of force to effect arrest, and the principle of arrest as a last resort. Additionally, LEPRA also creates some new powers in response to incidents such as the 2005 Cronulla riots, as well as new safeguards and guidelines[1]. Not all police powers have been transferred to LEPRA[2], or are now contained in LEPRA.[3]

---

[1] Such as the requirement for police to provide information when exercising certain powers, and rules that must be followed when conducting personal searches.

[2] E.g. forensic procedures and some traffic related powers.

[3] E.g. powers to detain a person for the purpose of making or serving provisional orders or apprehended violence orders under ss.89 and 90 of the *Crimes (Domestic and Personal Violence) Act 2007*.

Objectives of the Act

The objectives of LEPRA are to consolidate, restate and clarify the law relating to police and other law enforcement officers' powers and responsibilities; set out the safeguards applicable in respect of persons being investigated for offences; and make provision for other police powers, including powers relating to crime scenes, production of bank documents and other matters.

One of the intended objectives of LEPRA was to ensure that all relevant police powers and safeguards were prescribed under the one legislative instrument, rather than existing as piecemeal provisions in various NSW Acts. This was intended to, and has, created greater clarity and ease of access for police and members of the community. In turn, the nature and extent of police powers and responsibilities are better known to individuals and more effectively monitored by relevant Government agencies and Departments.

Summary of the provisions of the Act

The key Parts of LEPRA are summarised below:

- Part 2 – Powers of entry
- Part 3 – Powers to require identity to be disclosed
- Part 4 – Search and seizure powers without warrant
- Part 5 – Search and seizure powers with warrant or other authority
- Part 7 – Crime scenes
- Part 8 – Powers relating to arrest
- Part 8A – Use of police in-car video equipment
- Part 9 – Investigations and questioning
- Part 11 – Drug detection powers
- Part 12 – Powers relating to vehicles and traffic
- Part 13 – Use of dogs to detect firearms and explosives
- Part 16 – Powers relating to detention of intoxicated persons
- Part 18 – Use of force

Part 2 covers the power to enter premises in emergencies; the power to enter to arrest or detain someone; or execute a warrant. The Part authorises a police officer to enter premises in the event of a breach of the peace or in cases of significant physical injury to persons inside. Police presence in the premises is allowed only as long as reasonably necessary in the circumstances.

Part 3 covers powers to require identity to be disclosed, and makes provisions regarding the general power to require identity to be disclosed (Division 1), the power to require identity of suspected AVO defendants to be disclosed (Division 1A), powers to require identity of drivers and passengers to be disclosed (Division 2) and the power to request proof of identity (Division 3). In particular, the Part prescribes the various circumstances in which disclosure of identity may be required and also prescribes the penalties for failure to disclose identity when requested, or for provision of false or misleading information about identity.

Part 4 covers search and seizure powers without warrant, and makes provisions regarding general personal search and seizure powers (Division 1), searches of persons on arrest or while in custody (Division 2), additional powers to search for,

and seize, knives and dangerous implements in public places and schools (Division 3), provisions relating generally to personal searches (Division 4), vehicle stop, entry, search and roadblock powers (Division 5) and vessel and aircraft entry and search powers (Division 6).

Part 5 covers search and seizure powers with a warrant or other authority, and makes provisions regarding police and other law enforcement officers' powers relating to warrants, such as the power to apply for search warrants and the general authority conferred by warrants (Division 2), notices to produce documents (Division 3), and provisions relating generally to warrants and notices to produce documents (Division 4). Amendments to this Part include the introduction of anti-gang measures permitting police to remove alarms and surveillance devices and to pacify dogs when entering premises to execute a search warrant.[4] Other powers under this Part include the ability to apply for covert search warrants, organised crime warrants (which are valid for seven days) and powers related to accessing and copying data located on equipment at premises that are subject to a search warrant.

Part 6 covers search, entry and seizure powers relating to domestic violence offences and includes provisions regarding police entry by invitation and by warrant, obstruction or hindrance of person executing warrant, and police powers upon entry, and extending search and seizures. In particular, the Part outlines the circumstances in which police officers may enter a dwelling by invitation but also prescribes when such officers must not remain on the premises. Further, police officers are also given powers to enter a dwelling with a warrant to prevent or investigate the occurrence of a domestic violence incident.

Part 6A covers emergency powers (public disorder) and makes provisions regarding liquor restrictions (Division 2), and special powers to prevent or control public disorders (Division 3). In particular, the Part prescribes the requirements as to when such powers can be exercised, the target and giving of authorisations and related powers of search and seizure.

Part 7 covers crime scenes and includes provisions regarding when crime scene powers may be exercised, when and how crime scenes are to be established and related powers concerning warrants and searching premises.

Part 8 covers powers relating to arrest, and includes provisions regarding powers of police officers and others to arrest without a warrant, and the power of police officers to arrest with a warrant. In particular, s.99 presently provides that a police officer may, without a warrant, arrest a person if:

- the person is in the act of committing an offence, has just committed an offence or has committed a serious indictable offence for which they have not been tried, or
- if the police officer suspects on reasonable grounds that the person has committed an offence under any Act or statutory instrument.[5]

---

[4] See below '2.4.1 Anti-gang measures'.

[5] Section 99 will be amended by the *Law Enforcement Powers and Responsibilities Amendment (Arrest without Warrant) Act 2013*. This Act was assented to on 27 November 2013 and will commence on proclamation.

The section also provides that a police officer must not arrest a person for the purpose of taking proceedings for an offence against the person unless the police officer suspects on reasonable grounds that it is necessary to arrest the person to achieve one or more of the following purposes:

- to ensure the appearance of the person before a court in respect of the offence,
- to prevent a repetition or continuation of the offence or the commission of another offence,
- to prevent the concealment, loss or destruction of evidence relating to the offence,
- to prevent harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence,
- to prevent the fabrication of evidence in respect of the offence,
- to preserve the safety or welfare of the person.

Finally, the section provides that a police officer who arrests a person under the section must, as soon as is reasonably practicable, take the person, and any property found on the person, before an authorised officer to be dealt with according to law.

Part 8A covers the use of police in-car video (ICV) equipment, including provisions regarding the situations in which the use of ICV equipment is mandatory (provided that the police vehicle is adequately equipped), and the requirement to inform persons that conversations will be recorded.

Part 9 covers investigations and questioning, including provisions regarding investigation and questioning powers (Division 2) and safeguards relating to persons in custody for questioning (Division 3). In particular, the Part covers powers relating to detention of persons after arrest for the purposes of investigation, as well as provisions concerning the maximum duration of the investigation period and the process through which the investigation period may be extended. Importantly, the Part outlines safeguards such as the requirement for custody managers to caution detained persons that the person does not have to say or do anything but that anything the person does say or do may be used in evidence, and to provide a summary of Part 9 to the detained person. The Part also contains some of the rights of detained persons, such as the right to communicate with certain others, and the right to be provided with an interpreter should one be required.

Part 10 covers other powers relating to persons in custody and to other offenders and makes provisions regarding the taking of identification particulars from persons in custody (Division 1), examination of persons in custody (Division 2), and the taking of identification particulars from other offenders (Division 3). In particular, the Part enables a police officer to take or cause to be taken identification particulars necessary to identify a person who is in lawful custody and who has been or is intended to be charged with an offence.

Part 11 covers drug detection powers and makes provisions regarding police powers in relation to drug premises (Division 1) and the use of drug detection dogs (Division 2). In particular, the Part outlines provisions regarding the issuing and execution of search warrants on suspected drug premises, search and arrest of persons pursuant

to search warrants, and the penalties for obstructing police officers executing such warrants. The Part also makes provisions regarding the use of dogs for general drug detection by warrant, as well as providing Police a general authority to use drug detection dogs without a warrant at certain places, including premises primarily used for the consumption of liquor, public places where sporting events, concerts or other events are being held, and on public transport.

Part 12 covers powers relating to vehicles and traffic, and makes provisions regarding the regulation of traffic (Division 1), other police powers relating to vehicles (Division 2) and powers to prevent intoxicated drivers from driving (Division 3). In particular, the Part empowers police to give reasonable directions for traffic regulation, close roads or road related areas, use deflation devices, trace stolen vehicles or parts, as well as to prevent driving by persons who are under the influence of alcohol or other drugs, or who have failed and/or refused to give fluid tests.

Part 13 covers the use of dogs to detect firearms and explosives, and includes provisions regarding the general authority to use dogs for such detection and the regulations concerning the use of dogs to detect firearms and explosives. In particular, the Part does not confer powers of entry or detention, but does prescribe the general authority to use dogs for detecting firearms or explosives and outlines the safeguards on the power. This includes the need for police officers to take all reasonable precautions to prevent a dog touching a person.

Part 16 covers powers relating to detention of intoxicated persons and outlines certain acts or omissions for which police and others are not liable. In particular, the Part enables a police officer to detain an intoxicated person found in a public place if the person is behaving in a disorderly manner or is in need of physical protection because the person is intoxicated.

Part 16A covers powers relating to fortified premises, and includes provisions regarding the making and enforcement of fortification removal orders by the Local Court (on application by the Police Commissioner). The Part also outlines the penalties applicable for hindering removal or modification of fortifications, and excludes Crown liability for damage to property resulting from the enforcement of a fortification removal order.

Part 17 covers property in police custody and makes provisions regarding confiscated knives and other dangerous articles and implements (Division 1), and other property in police custody (Division 2). In particular, the Part allows for an application to be made to the Local Area Commander of Police in the area in which an article or implement was seized or confiscated for the return of the article or implement.

Part 18 covers use of force, and makes provisions regarding the use of force generally by police officers, and the use of force in making an arrest. In particular, section 230 provides that it is lawful for a police officer, exercising a function under LEPRA or any other Act or law, and anyone helping the police officer, to use such force as is reasonably necessary to exercise the function. Section 231 outlines a

similar test of 'reasonable necessity' in relation to making an arrest or preventing the escape of a person after arrest.

Amendments to LEPRA prior to consultation

Numerous amendments have been made to LEPRA since enactment, including the insertion of emergency powers to deal with public disorders (Part 6A), the insertion of ancillary personal search powers (s.21A and 23A), and move on powers to disperse intoxicated persons (s.198).

More significant changes have included the introduction of anti-gang measures permitting police to remove alarms and surveillance devices as well as pacifying dogs when entering premises to execute a search warrant (s.70), powers relating to the removal of fortifications around premises (Part 16A), and the introduction of covert search warrants, organised crime warrants and computer search powers (Part 5).

Emergency powers to deal with public disorders

Part 6A covers emergency powers (public disorder) and makes provisions regarding liquor restrictions (Division 2), and special powers to prevent or control public disorders (Division 3). More specifically, the Part provides that a senior police officer may authorise an emergency closure of licensed premises (or a prohibition on the sale or supply of liquor from any such premises) in an area if it will reasonably assist in preventing or controlling a large-scale public disorder. Such a closure or prohibition is limited to a maximum total period of 48 hours. Further, the Part allows a senior police officer to establish an emergency alcohol-free zone (in which drinking or the immediate possession of liquor is prohibited) to assist in preventing or controlling a large-scale public disorder. The establishment of such a zone is limited to a maximum total period of 48 hours.

Ancillary personal search powers

The ancillary power to search persons in section 21A supplements section 21, which provides for the power to search persons and seize and detain things without a warrant. Section 21A allows a police officer, who suspects on reasonable grounds that something is concealed in a person's mouth or hair, to request the person to open his or her mouth or to shake, or otherwise move his or her hair. The section does not however, allow a police officer to forcibly open a person's mouth.

Similarly, section 23A supplements section 23, which provides for the power to carry out a search on arrest. Section 23(1) allows a police officer who arrests a person for an offence or under a warrant, or who is present at the arrest, to search the person at or after the time of arrest, if the officer suspects on reasonable grounds that it is prudent to do so in order to ascertain certain information.

Further section 23(2) provides that a police officer who arrests a person for the purpose of taking the person into lawful custody, or who is present at the arrest, may search the person at or after the time of arrest, if the officer suspects on reasonable grounds that it is prudent to do so in order to ascertain whether the person is carrying anything that would present a danger to a person, or that could be used to assist a person to escape from lawful custody.

Move on powers to disperse intoxicated persons

Section 198 allows a police officer to give a direction to an intoxicated person who is in a public place to leave the place and not return for a specified period (not exceeding six hours[6]). The officer must only give such a direction if he or she believes on reasonable grounds that the person's behaviour in the place, as a result of the intoxication, is likely to cause injury to any other person or persons or damage to property, or otherwise gives rise to a risk to public safety, or is disorderly.[7] The provision specifies that a direction given by a police officer under the section must be reasonable in the circumstances for the purpose of preventing that injury or damage or reducing or eliminating that risk, or for preventing the continuance of disorderly behaviour in a public place.

Anti-gang measures

Section 70, covering the use of force etc to enter and search premises, gives police certain powers for the purposes of administering anti-gang measures. Specifically, the section permits a person authorised to enter premises pursuant to a warrant to use such force as is reasonably necessary for the purpose of entering the premises. Further, an executing officer is empowered to remove alarms and surveillance devices as well as to pacify dogs when entering premises to execute a search warrant, where it is reasonably necessary to do so.

Additionally, the section allows an executing officer to do anything reasonably necessary for the purpose of preventing the loss or destruction of, or damage to, any thing connected with an offence that the executing officer believes on reasonable grounds to be at those premises. The section also permits a person authorised to search premises pursuant to a warrant to do anything that is reasonably necessary to render safe any dangerous article found in or on the premises.

Removal of fortifications around premises

Part 16A, covering powers relating to fortified premises, includes provisions regarding the making and enforcement of fortification removal orders by the Local Court (on application by the Police Commissioner). The Part also outlines the penalties applicable for hindering removal or modification of fortifications, and excludes Crown liability for damage to property resulting from the enforcement of a fortification removal order.

Covert search warrants

A significant amendment to LEPRA[8] permits the making of covert search warrants that are intended to be executed without the occupier's knowledge.

In his second reading speech to Parliament in relation to LEPRA (NSW Legislative Council Hansard, 24 March 2009, page 13530), the then Attorney General, the Hon. John Hatzistergos MLC stated:

> The use of covert search warrants is not intended to be an everyday event. In addition to the legislative restrictions of the scheme ... covert search warrants will not be necessary in many cases ... the new scheme recognises that there may be cases in which law enforcement

[6] Section 198(3)
[7] Section 198(1)
[8] *Law Enforcement (Covert Search Warrants) Act 2009*, ('**Covert Search Warrants Act**')

> agencies would benefit from obtaining covert access to premises to obtain intelligence or evidence in relation to a serious criminal offence. By conducting a covert search, the police could monitor the organisation and development of criminal activity without notifying the suspects that they are under surveillance.

In relation to the basis for such amendments, the Hon. John Hatzistergos stated:

> [the covert search warrants] scheme is based on the existing scheme for covert search warrants for terrorism offences and incorporates the same safeguards and protections, in particular, the need to seek approval from a senior officer prior to making an application and the need to seek a warrant from the Supreme Court. The scheme also draws upon the operation of covert search warrants in other Australian jurisdictions.

The essential feature of the covert search warrant is the power to enter and search premises without the occupier's knowledge and delay the subsequent notification to the occupier. More specifically, the authority conferred by covert search warrants allows for entry to premises without the occupier's knowledge, impersonation of another person, and the doing of anything else that is reasonable to conceal anything done in the execution of the warrant, as well as the placement of things in substitution for seized things.

Importantly, section 62 provides that the issuing judge must be satisfied that it is necessary for the entry and search of the premises to be conducted without the knowledge of the occupier, and specifically give consideration to the nature and gravity of the searchable offence and the extent to which the privacy of any person not believed to be knowingly concerned in the commission of the offence is likely to be affected. New provisions have also been made in relation to service of an occupier's notice, allowing an issuing judge to authorise service to be delayed for up to six months at a time. Service may be delayed beyond 18 months only in exceptional circumstances and may not be delayed beyond three years in total.

Unlike other search warrants, covert search warrants expire 10 days after the date of issue. As additional safeguards, provisions are made requiring law enforcement agencies to report certain matters to the issuing judge following execution of the covert search warrant, and a copy to be furnished to the Attorney General. Further, sections 242 and 242A provide that agencies are required to report annually on the exercise of covert search warrant powers. The Ombudsman is also required to report regularly and has an ongoing oversight role in relation to the scheme.

Provisions have also been made allowing computers and other similar devices to be searched and removed from premises for up to seven working days, or longer on application, for examination.

Organised crime warrants

LEPRA was also amended[9] to create a search warrant for organised crime offences. The application must be approved by an officer of the rank of superintendent or above, be made to the Supreme Court on the basis of reasonable suspicion, and will be valid for seven days. In her second reading speech to Parliament in relation to the amendments (NSW Legislative Council Hansard, 13 May 2009, page 15142), the Hon. Penny Sharpe MLC, on behalf of the Hon. John Hatzistergos MLC stated 'the

[9] Amending legislation –*Criminal Organisations Legislation Act 2009*

new class of search warrant is necessary in order to combat the highly sophisticated and organised criminal activity perpetuated by criminal gang networks.'

The powers conferred by criminal organisation search warrants are the same as for existing search warrants, with the only differences being that the threshold for applying for the warrant is the applicant's 'reasonable suspicion', rather than a belief; and warrants are available for a period of seven days, rather than 72 hours. Section 46D(2) provides that a criminal organisation search warrant may be applied for if there are reasonable grounds to suspect that there is, or within seven days will be, in or on premises a thing connected with an organised crime offence.

For the purposes of organised crime warrants, section 46A(2) provides that an organised crime offence is a serious indictable offence arising from, or occurring as a result of, organised criminal activity. Section 46AA provides that organised criminal activity means any activity that is carried out with the objective of committing serious violence offences or gaining material benefits from conduct constituting serious indictable offences, and is carried out in such a manner as to indicate that the activity is carried out on more than one occasion and involves more than one participant.

Importantly, section 62(2A) prescribes the information to be provided in the application for a criminal organisation search warrant. This includes the name of the occupier (if known) of the premises, and any person believed to have committed, or to be intending to commit, the searchable offence in respect of which the application is made; and whether the occupier is believed to be knowingly concerned with the commission of the searchable offence.

By way of safeguards, sections 242(3A) and (3C) provide for the Ombudsman to inspect the records of the NSWPF every two years and report on the results of that inspection to ensure that the requirements of LEPRA are being complied with in relation to the new form of warrant. Similarly, section 242A(1A) provides for the making of annual reports by the Commissioner of Police on the exercise of the new search powers.

Law Enforcement (Powers and Responsibilities) Amendment (Detained Persons Property) Act 2008

The *Law Enforcement (Powers and Responsibilities) Amendment (Detained Persons Property) Act 2008* received assent in Parliament on 19 November 2008. The aim of the legislation was to save police time by removing the requirement to record all property taken from a prisoner and to replace it with a requirement to place the property in a clear, tamper-proof bag. Proclamation of the Act was delayed to allow Police to trial the new procedures. Following negative feedback from police regarding the trial, the Act was repealed on 24 September 2012.

Amendments to the Act made after consultation

A number of amendments have been made to LEPRA after consultation. These are detailed below.

Courts and Crimes Legislation Amendment Act 2009

The *Courts and Crimes Legislation Amendment Act 2009* amended LEPRA to:

- remove a superfluous definition of authorised officer in section 46(1) of the Act;

- make it clear that the eligible applicant for a covert search warrant need not intend to personally execute the warrant;
- remove the power of the Attorney General to revoke the declaration of an eligible judge and provide instead for the automatic revocation of the declaration if the judge revokes consent, resigns or the Chief Justice of the Supreme Court advises the Attorney General that the declaration should not continue. The amendments also clarified that the selection of eligible judges to exercise any particular function under the Act is not done by the Attorney General or other Minister nor is the exercise of the functions of an eligible judge one subject to the control or direction of the Attorney General or relevant Minister.

Crimes Legislation Amendment (Possession of Knives in Public) Act 2009
The *Crimes Legislation Amendment (Possession of Knives in Public) Act 2009* amended section 27 of LEPRA by increasing the penalty for failure to comply with requests relating to search and dangerous implements from 5 to 50 penalty units.

Law Enforcement (Powers and Responsibilities) Amendment (Move On Directions) Act 2011
The *Law Enforcement (Powers and Responsibilities) Amendment (Move On Directions) Act 2011* provided that move on directions could be issued to individuals. Prior to amendment, such directions could only be made to people in a group of three or more intoxicated persons.

Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011
The *Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011* amended section 198 of LEPRA to allow Police to make move on directions for intoxicated and disorderly behaviour. Prior to the amendment, move on directions could only be made where there was a likelihood of injury or property damage, or some other risk to public safety.

Identification Legislation Amendment Act 2011
The *Identification Legislation Amendment Act 2011* inserted s.19A into LEPRA, giving police officers the power to require a person to remove any face covering where the person has been lawfully required to provide identification.

Tattoo Parlours Act 2012
The *Tattoo Parlours Act 2012* amended s.148 of LEPRA to allow police to use dogs to conduct general drug detection in relation to persons at, or seeking to enter or leave any part of premises they are permitted to enter under the *Tattoo Parlours Act 2012*.

Law Enforcement (Powers and Responsibilities) Amendment (Kings Cross and Railways Drug Detection) Act 2012
The *Law Enforcement (Powers and Responsibilities) Amendment (Kings Cross and Railways Drug Detection) Act 2012* amended s.148 of LEPRA to authorise the use of drug detection dogs for general drug detection in relation to any persons at a public place in the Kings Cross precinct. It also amended the Regulation to expand the use of drug dogs for general drug detection to all Sydney train lines.

Discussion of Submissions

Submissions Received

The Department of Attorney General and Justice sent out consultation letters for the current review to key stakeholders in August 2009. Written submissions to the Review were invited, particularly with respect to any comments on the provisions of LEPRA. The Ombudsman's review was also noted, with the expectation that comments would be provided in response to the recommendations made in that report as well.

The following submissions made substantive recommendations for amendments to LEPRA:

- Aboriginal Legal Service (NSW/ACT) Limited
- Australian Federal Police
- Australian Human Rights Commission
- Community Legal Centres NSW
- Community Relations Commission
- Legal Aid NSW
- Department of Human Services
- Juvenile Justice NSW
- Law Society of NSW
- Police Association of NSW
- Public Interest Advocacy Centre Limited
- Shopfront Youth Legal Centre
- The NSWPF and the Ministry for Police and Emergency Services

This Review outlines the submissions made to the Attorney General's Division of the Department of Attorney General and Justice (**AGD**) by reference to each Part of LEPRA that was commented upon. The recommendations contained in the Ombudsman's LEPRA Review are also discussed in this section. The discussion follows the structure of LEPRA and the Ombudsman's recommendations are discussed under the parts of LEPRA to which they relate.

Part 3 – Powers to require identity to be disclosed

The submissions concerning Part 3 were primarily focused on the operation of the powers relating to juveniles. The main concern related to juveniles being uncertain of their rights in situations involving a police request for identity, or for permission to search their belongings for proof of identity.

The Shopfront Youth Legal Centre[10] (**'Shopfront'**) submitted that there was a general lack of understanding by police that while they were entitled to *request* proof of identity, citizens were only required to provide documentary identification to police in a small range of situations. Shopfront expressed the view that police commonly asked young people for identification in situations where they had no authority to do so, potentially as an intelligence gathering exercise.

[10] Shopfront is a free legal service for homeless and disadvantaged young people aged 25 and under that is located in Darlinghurst and whose primary client base is in the inner city area.

Further, Shopfront and the Legal Aid Commission of NSW (**'Legal Aid'**) raised concerns that some police held the erroneous belief that they were entitled to physically search persons for identification. Shopfront recommended that police requesting identity should be required to state whether compliance is compulsory or voluntary, and Legal Aid also considered that clearer limits needed to be established.

The Law Society of NSW (the **'Law Society'**) echoed many of the concerns raised by Shopfront and Legal Aid, noting that while police are rightly required to state when a failure to provide identification is an offence, it was a concern that there was no converse requirement to state when giving the information was voluntary. The Law Society suggested legislative amendment to clarify that in the absence of power to demand an individual's details, the police should inform individuals that they are under no obligation and that the provision of information is voluntary. The Law Society suggested that such an obligation could be limited to children. Further, the Law Society suggested a clarification that there is no power in LEPRA to require a person to produce documentary identification.[11] Finally, the Law Society recommended further education of police to clarify that there is no express power in LEPRA to physically search for identification.

Discussion

The powers within Part 3 of LEPRA are one of the most commonly used in day-to-day contact between police and members of the public. It is for this reason that the powers, responsibilities and limitations contained in Part 3 must be known and complied with by police officers. Similarly, members of the community (especially young people) should be aware of their rights and responsibilities when dealing with police.

The Review acknowledges that there are a limited number of circumstances in which individuals are required by law to produce identification. Despite the slightly misleading title of Division 1 of Part 3 (General powers to require identity to be disclosed), there is no general right for police officers to request proof of identity in all circumstances, and there is no general right for police to physically search individuals' bags for identification. Part 3 allows police to request that a person's identity be disclosed where:

- the person may be able to assist in the investigation of an offence due to the person's proximity to the scene of the offence,
- the officer proposes to make a move-on direction under Part 14,
- the person is suspected of being an AVO defendant, or
- the person is in a car that is suspected of having been used in connection with an indictable offence.

It is an offence to fail to comply with such requests. Section 19 provides that where police request the disclosure of identity in accordance with the above, they may request proof of identity. However, there is no offence for failing to provide proof of identity. Under s.19A, Police may also require a person to remove any face covering if the person has been lawfully required to disclose their identity. Failure to comply

[11] Section 19 provides that where police have the authority to request the disclosure of identity, they may also request proof of identity. However, while in very limited circumstances the failure to disclose identity is an offence, there is no similar offence for the failure to provide documentary identification.

where the request is made under a power to require the driver or passenger of a car suspected of being used in connection with an indictable offence is an offence carrying 50 penalty units or 12 months imprisonment, or both. In all other circumstances the maximum applicable penalty is 2 penalty units.

Based on issues raised in submissions from Legal Aid and the Law Society, it is recommended that existing police educational and training material be reviewed to ensure that police are aware that there is no general power under LEPRA to request identification, and to ensure that the extent of the powers conferred by Part 3 are understood and applied by police officers. While police already receive significant training in this area, a review is appropriate given the concerns expressed by agencies that deal directly with citizens who are affected by the provisions, that training may need to be reviewed, or additional training provided, including whether compliance with a request is compulsory or voluntary. However, given that a request for identification is one of the most common interactions between police and members of the public, and that such a request has minimal consequences for the person when compared to searches (discussed later in this Report), the Review does not recommend legislative amendment to require police to inform people whether the provision of identification is required or voluntary in all cases.

Recommendation 1: *That existing police educational and training material be reviewed, and, if necessary, amended, to ensure that police are aware that powers to request identity under LEPRA are situational, not general, and to ensure that the extent of the powers conferred by Part 3 are properly understood and applied.*

Part 4 – Search and seizure powers without a warrant

Personal searches

The Police Association of NSW (**'Police Association'**), submitted that police officers found the decision making process regarding personal searches complicated, with a myriad of different search powers being available in any given circumstance. The Police Association noted that NSW is the only jurisdiction to follow the three-tiered model of personal searches (frisk, ordinary and strip searches) and submitted that this system was excessively complex. The Ombudsman's LEPRA Review also noted the three-tier system, and recommended that Parliament consider amending LEPRA to provide a simpler two-tier system.

Further criticism was made regarding s.32(8) of LEPRA, which requires questioning to be suspended while a search is being conducted. The submissions noted at least one situation where an officer was injured by a sharp object held in a pocket of the person being searched, and that such an incident could have been avoided had the officer been able to ask questions about dangerous implements. Finally, the Police Association noted that section 26 knife and dangerous implement powers could overlap with other search powers, creating a confusing and difficult situation.

Discussion

When compared to a two-tier system, a three-tier system has the potential to better ensure that the level of invasiveness of a search is proportionate to the reasons for the search. However, as noted in the Ombudsman's LEPRA Review, when

considering the powers contained in LEPRA, the relevant safeguards, and the way they are executed in the field by police, there is currently little to separate ordinary searches and frisk searches.[12] They both provide the same safeguards, and there is little difference between the searches other than small differences in the amount of outer clothing that may be removed for the search (only a coat or jacket may be removed for a frisk search, while gloves, shoes, socks and hats can be removed for an ordinary search) and the degree of compellability (a person may only be requested to remove an item of clothing for a frisk search, while they may be required to do so for an ordinary search).

The Ombudsman also noted, without any criticism of police practices, that the way in which the searches were carried out in the field by police further blurred the lines between the two types of searches, with little practical difference in the way searches were conducted.

The only significant impact on the legislation if ordinary and frisk searches were to be amalgamated would be an increase in powers in relation to knife searches under s.26, which are currently limited to frisk searches. However, the Ombudsman's LEPRA Review notes that while they would not argue for any expansion of police powers in relation to such searches, the practical differences between frisk and ordinary searches were so slight that any increase in powers would be minimal.

In light of these considerations, the Review recommends that LEPRA be amended to provide a two-tier system of searches, consistent with other Australian jurisdictions.

The concerns raised by the Police Association regarding the occurrence of police injuries during searches due to questioning restrictions appear to pose a clear threat to the occupational health and safety of police officers.

The intent of s.32(8) is to prohibit questioning for the purposes of investigation. This is plain from the second reading speech for the legislation.[13] A search, particularly a strip search, may be stressful for the person being searched, and it would be undesirable for answers provided by the person while in a state of distress to be used in the case against them. However, the Review does not consider that it is the intent of the legislation to prohibit police from asking questions purely for the purpose of facilitating the search, including questions as to whether the person has anything in their possession that could injure the person conducting the search. According to the Ombudsman's LEPRA Review, the NSWPF *Searching Manual* specifically advises officers to ask the suspect if he or she has anything that may cause danger or injury.

Any existing ambiguity could be eliminated by amending s.32(8) to clarify that no questioning relating to any offence the person is suspected of having committed is to take place during a search, other than questioning which serves to facilitate the safety of the officer, the offender, or any other person. The Ombudsman's LEPRA Review also contained a recommendation to this effect.

---

[12] NSW Ombudsman, *Review of the Law Enforcement (Powers and Responsibilities) Act 2002*, p.57

[13] The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.

Recommendation 2: *That LEPRA be amended to provide a two-tier system of searches, amalgamating existing provisions relating to ordinary and frisk searches.*

Recommendation 3: *That s.32(8) be amended to clarify that while no questioning relating to any offence the person is suspected of having committed is to be conducted during a search, questions may be asked which serve only to facilitate the safety of the officer, the offender, or any other person during the search.*

Personal searches by consent

Legal Aid and Shopfront raised concerns regarding the personal search and seizure powers under LEPRA. Shopfront submitted that young people were commonly searched without reasonable suspicion or genuine consent. Shopfront submitted that it was common for young people to consent to a police request to search their bags under the misapprehension that consequences such as arrest could flow from a refusal. Shopfront recommended that police be required to inform people whether they are legally required to comply.

The Law Society similarly submitted that consent was often given to a search under the misunderstanding that compliance was required by law, and not voluntary, and called for a legislative obligation on police to inform individuals whether a search was voluntary or compulsory.

Part 4 of LEPRA dictates when police may search a person without a warrant. Under s.21, Police are able to search a person without a warrant based on reasonable suspicion that the person has in his or her possession an unlawfully obtained item, an item used, or to be used, in connection with a relevant offence, a dangerous article (in a public place) or a prohibited drug. However, reasonable suspicion is not necessary where the person voluntarily consents to a search of their belongings, as this is not covered by LEPRA.

Except for the crime scene warrant provisions discussed later in this review, there does not appear to be any provision in LEPRA dealing with searches by consent. In relation to crime scene powers, s.95(3) states that nothing in the Part prevents a police officer from exercising crime scene powers where the occupier provides his or her consent.

The Review considers that there should be a statutory basis for conducting a consensual search as the legislation is currently silent in this area. The Review therefore recommends that 'consensual searches' be included in the legislation, and that appropriate safeguards should apply to these searches.

In relation to the issue of informed consent, the Review notes that in the case of *DPP v Leonard (2001) NSWSC 797,* the court found that a person may validly consent to a search even if they are not aware of the right to refuse.

NSWPF advised that a process of informed consent would add an additional layer of complexity to the decision making process police have to undertake before conducting a search. They advise that police practice, both before and since the introduction of LEPRA, has always been that if the required threshold is not reached

(of suspecting on reasonable grounds that the search is necessary), then the search will only be conducted by consent. Current police practice involves asking the person if they will allow a search, for example of their car, or bag or pockets, and if the person agrees, they are searched. Where there is no agreement, the police officer does not conduct the search.

The Review considers that in providing for consensual searches the legislation should require that police seek the consent of the person before conducting the search. However, in light of the decision in *DPP v Leonard* and the concerns expressed by NSWPF it is not proposed to include a legislative requirement to advise a person that they do not have to consent to a search when seeking their consent.

In terms of safeguards, Part 4 includes requirements to maintain the privacy and dignity of a person during a search (s.32) as well as rules to be followed during the conduct of strip searches (s.33). Part 15 of LEPRA, particularly s. 201, also includes safeguards in relation to the exercise of certain powers (including search powers) such as the requirement that a police officer provides evidence that he or she is a police officer, as well as the name of the police officer, his or her place of duty, and the reason for the exercise of a power.

The Law Society submitted that it was unclear whether Part 4 and s.201 safeguards applied to searches by consent, with it being open to interpretation that a search by consent did not constitute a search under LEPRA. Legal Aid echoed concerns regarding the lack of clarity around the applicability of these safeguards, and opined that consideration should be given to amending LEPRA to ensure that searches by consent cannot be used to undermine the safeguards included in the Act.

The Review considers that it would be inappropriate to deny the legislative safeguards provided by LEPRA to individuals who facilitate law enforcement in NSW by voluntarily agreeing to searches.

There is benefit in applying the Part 4 and Part 15 safeguards to searches by consent, as they provide a clear and applicable structure for the execution of the search, thereby ensuring that all parties have a clear understanding of what will take place. This is critical given the variety of people that search powers will be used on, and mitigates the concerns that arise where the consent to a search is questionable.

The Review therefore recommends that in amending LEPRA to provide for consensual searches, the provisions should make clear that the Part 4 and Part 15 safeguards also apply to those searches.

The practical effect of applying the Part 15 safeguards to consensual searches will be that the police officer carrying out the search is required to provide to the person:
a) evidence that he or she is a police officer (unless in uniform), and
b) his or her name and place of duty.
There will be no need to explain the reason for the exercise of the power as a search conducted with consent is not an exercise of power.

Recommendation 4: *That LEPRA be amended to provide that when police seek to search a person by consent they must:*

- *Seek the person's consent to the search; and*
- *Apply Part 15 to the search*

And in the conduct of the search, apply the safeguards in Division 4 of Part 4 of LEPRA.

Searches while in 'lawful custody'

Section 24 provides police with the power to search a person who is in lawful custody, and to seize and detain anything found during that search. The term 'lawful custody' is defined in s.3 as the "lawful custody of the police", and s.24 states that lawful custody may be at a police station or at any other place.

The Ombudsman's LEPRA Review notes that the ordinary meaning of 'lawful custody' operates to ensure the broad scope of police responsibility for people while in custody, and refers to a report of the NSW Law Reform Commission, which stated that 'lawful custody' should be defined broadly "to include all of those cases in which the police are, in reality, in control, and have effective custody of the person, regardless of whether the person has been formally arrested."[14]

In the Ombudsman's view, the interpretation of s.24 by the NSWPF and the Parliamentary intent as evinced in the Attorney General's comments during the Bill's introduction both indicate that s.24 serves to provide broad powers that apply in limited circumstances of 'lawful custody', where a person has been arrested and then taken into custody, and not to provide such wide search powers when a person is in 'lawful custody' in the ordinary sense. The more limited interpretation is logical in the context of the search powers in Part 4; it would be incongruous for s.23 to provide limited search powers upon arrest, but for s.24 to provide far broader search powers under a definition of 'lawful custody' that is much broader than arrest.

The Ombudsman does not raise any concerns that s.24 powers have been misused by the NSWPF in accordance with a broad definition of 'lawful custody', only noting that since the term 'lawful custody' is capable of having a broader meaning for other purposes, that term should be defined more precisely for the purpose of a search under s.24 so that the extent of police powers to search in 'lawful custody' is not misunderstood and misapplied.[15]

During the conduct of this review, the Deputy State Coroner made a number of recommendations arising from an inquest into the death of Jason Lee Plum, who died from a self-inflicted gunshot wound while in police custody. Two of the recommendations related to searches in custody. First, the Deputy State Coroner recommended that the NSWPF should adopt a policy of searching all persons taken into police custody before placing those persons in police vehicles or transporting them to a place of custody, unless there are sound reasons not to do so.

---

[14] NSW Law Reform Commission, *Criminal Procedure: Police Powers of Detention and Investigation After Arrest*, Report 66, (1990), par. 3.33, referred to in NSW Ombudsman, *Review of the Law Enforcement (Powers and Responsibilities) Act 2002* p.50

[15] NSW Ombudsman, *Review of the Law Enforcement (Powers and Responsibilities) Act 2002* p.51

Second, the Deputy State Coroner recommended that the definition of 'lawful custody' in s.24 of the Act should be precisely defined to remove ambiguity.

Discussion

The Review agrees with the view of the Ombudsman. While there is no evidence that s.24 powers have been interpreted broadly, and while such a broad interpretation is inconsistent with Part 4 in general, the term 'lawful custody' should be defined for the purposes of s.24 to provide greater clarity, or a different phrase used in the section. The Ombudsman noted that in submissions to its review, the NSWPF indicated that for operational purposes, police interpret s.24 as empowering police to conduct a search when a person is in 'custody at a police station or other similar custody point'. Accordingly, the Review supports the reasoning behind the Ombudsman's recommendation that LEPRA be amended to define the term 'lawful custody' for the purposes of the s.24 power, so as to make it clear that the power permits searches *after* arrest, and only at specified custody locations, such as a police station. However, the Review notes that as the term 'lawful custody' occurs multiple times throughout LEPRA, it may cause unnecessary confusion to redefine 'lawful custody' for the purpose of s.24 only. Consequently, the Review recommends that the Ombudsman's concerns be addressed by amending s.24 to make clear that the power is enlivened in lawful custody *after arrest,* and in specified locations.

The Review notes that the NSWPF have indicated the s.24 power is often utilised for safety reasons, for example, where a person is arrested and must be transported a long distance. The person may be transferred halfway by police from one station to officers from the receiving station. The receiving officers need to be able to search the person to ensure he or she has not picked up any items during the journey that could be used as a weapon. Consequently, this Review proposes that the recommended amendment to s.24 be capable of including circumstances such as transport to or between custody locations.

The AGD considers that the proposed amendment to s.24 will substantially address the recommendations of the Deputy State Coroner, by providing greater clarity as to the meaning of 'lawful custody' for the purpose of exercising the s.24 powers, and ensuring that the NSWPF has a statutory basis for implementing the recommendation that police search all persons as a matter of course before placing them in police vehicles for transport. The Attorney General will further consider whether additional reform is required to address the Coroner's proposal in the course of implementing the Review's recommendations.

Recommendation 5: *That s.24 of LEPRA be amended so as to clarify that the power to conduct searches under the section applies in situations where a person is in custody following arrest, and may be exercised at specified custody locations (including a police station, and/or other relevant custody locations, or immediately before or during transport to or between such locations).*

Strip searches

Under s.31 of LEPRA, the test for conducting a strip search is the same regardless of whether the search is conducted in the field, or in custody. A police officer or other person who is authorised to search a person may conduct a strip search of the person if the police officer or other person suspects on reasonable grounds that it is

necessary to conduct a strip search of the person for the purposes of the search and that the seriousness and urgency of the circumstances require the strip search to be carried out.

As the primary reason for conducting strip searches in custody was for the safety of the person being searched as well as police, the Ombudsman's LEPRA Review noted that the requirement relating to the seriousness and urgency of the circumstances was more pertinent to searches in the field rather than in custody, and recommended that the additional requirement be dropped for searches in custody.[16] The Ombudsman also observed that while the requirement under s.31 for police to suspect on reasonable grounds that conducting a strip search was necessary for the purposes of the search was sound, unlike personal search powers under s.21 and 23, the power to search a person in custody under s.24 did not provide any guidance as to the types of items police were able to search for. Consequently, there was ambiguity as to the purpose of a search in custody for the purpose of applying the threshold test for a strip search. The Ombudsman recommended an amendment to LEPRA clarifying the purpose of a search in custody; noting that police often conducted such searches due to external agencies, such as Corrective Services, refusing to accept prisoners unless such a search had been completed.

Section 32(6) of LEPRA states that a police officer or other person undertaking a strip search must not search the genital area of the person searched, or in the case of a female or a transgender person who identifies as a female, the person's breasts unless the police officer or person suspects on reasonable grounds that it is necessary to do so for the purposes of the search. The Ombudsman recommends that protections in relation to transgender persons, as defined in ss.32(11), should be extended to the requirement under ss.32(7) that search must be conducted by a police officer or other person of the same sex as the person searched. The Ombudsman also recommends that 'genital area' be defined for the purposes of the legislation.

Section 33(1)(b) of LEPRA states that a strip search must not be conducted in the presence or view of a person who is of the opposite sex to the person being searched, as far as is reasonably practicable. Section 33(7) allows a strip search to be conducted in front of a medical practitioner of the opposite sex, provided the person being searched does not object. The Ombudsman recommends that s.33(7) be amended so as to permit a medical practitioner of the opposite sex to be present *without qualification*. The Ombudsman also recommended that s.33(1)(b) clarify that in addition to medical practitioners, other people who may be present for a strip search under the section, such as parents, guardians, and other support persons, may also be of the opposite sex to the person being searched. In addition, the Ombudsman recommended that s.33(2) should include a positive requirement for Police to inform people who are neither minors nor of impaired intellectual functioning of their right to have a support person present.

The Ombudsman's LEPRA Review also noted that some police had a practice of asking persons to squat, as this allowed them to see if the person was secreting anything in the groin area without touching or even visually inspecting that area

[16] NSW Ombudsman, Review of the Law Enforcement (Powers and Responsibilities) Act 2002 p.63

directly, as the action of squatting would cause items to fall to the ground.[17] LEPRA currently provides no power for police to require persons to squat for the purpose of a strip search. The Ombudsman neither criticised nor condoned such a practice, merely recommending that Parliament consider reviewing this practice in order to determine what safeguards were required to regulate the practice.

In general, Shopfront commended the safeguards in LEPRA relating to searches and seizures without warrant, but suggested further strengthening in some areas, raising specific concerns regarding reports from young people and youth workers that the use of strip searches in public view and strip searches without a support person were common, and that such searches conducted without reasonable suspicion continued to be a problem. Shopfront noted that such problems arose from the application of the powers of LEPRA, rather than the provisions of the Act itself, and that the improved training of police, increased accountability measures, as well as monitoring by the Ombudsman was necessary.

The Law Society also noted that safeguards for strip searches were commendable, but submitted that they did not appear to have affected actual search practices. In particular, the Law Society noted that there was no accountability to ensure compliance with the safeguards. As such, the Law Society suggested that police should be required to record that a search has been conducted in compliance with sections 31 and 33 (omitting the searched individual's name for privacy reasons).

The Community Relations Commission (**'CRC'**) raised similar concerns regarding strip searches. In particular, CRC supported the Ombudsman's recommendation that police be required to inform people that they may have a support person present for a strip search.

The Department of Human Services (**'Human Services'**) noted that, unlike under Commonwealth provisions, there is no separate threshold test for conducting a strip search on juveniles or those with impaired intellectual functioning (The Review notes that submissions used various terms for the latter category of persons, such as 'mentally impaired'. For consistency, the Review has used the term 'impaired intellectual functioning' and that is the term used in LEPRA). Further, Human Services noted that police are not currently obligated to inform a juvenile or an individual with impaired intellectual functioning that they are entitled to have a support person present during a strip search and recommended amendments to address this issue. Human Services held the view that a support person *must* be present unless it is not reasonably practical. Attention was drawn to the Ombudsman's LEPRA Review, which revealed that the presence of a support person during a strip search was rare. Further, Human Services referred to the Queensland jurisdiction approvingly, noting that it allows persons to remain partially clothed during strip searches.

Human Services recommended amendments to place a positive obligation on police to inform individuals of their right to a support person and to prescribe an additional threshold for strip searches of children and those with impaired intellectual functioning. Alternatively, if this additional threshold recommendation was not

[17] NSW Ombudsman, Review of the Law Enforcement (Powers and Responsibilities) Act 2002 p.111

followed, they submitted that there should be a requirement for approval to be given by a senior officer prior to the conducting of strip searches on such individuals. Additionally, Human Services recommended the development of guidelines for when the support person requirement may be dispensed with and a requirement to note what steps have been taken to secure an appropriate person. In turn, police should be required to record whether a support person was present and what steps were taken to secure the presence of one. In regard to children in particular, Human Services recommended that they should be offered the opportunity to remain partly clothed and should not be asked to stand with their legs apart and bend forward during a strip search. Human Services formally supported recommendations 7, 16, 17, 23, 24, 27, 28, 29, 30, 31, 32, 33, and 60 from the Ombudsman's LEPRA Review.[18]

The Police Association, on the other hand, recommended that NSW should follow the Western Australian model, which allows strip searches based on a reasonable suspicion that it is necessary, compared to the requirement under s.31 of LEPRA that the police officer suspects on reasonable grounds that a strip search is necessary, having considered the seriousness and urgency of the circumstances.

In addition, the Police Association suggested that some consideration of the level of urgency be introduced to the 'as far as is practicable' test under s.33(3) in relation to strip searches of juveniles and those with impaired intellectual functioning. This would reduce the threshold at which police could proceed in the presence of a support person who is not acceptable to the child.

Subsection 33(3) of LEPRA states

> A strip search of a child who is at least 10 years of age but under 18 years of age, or of a person who has impaired intellectual functioning, must, unless it is not reasonably practicable in the circumstances, be conducted in the presence of a parent or guardian of the person being searched or, if that is not acceptable to the child or person, in the presence of another person (other than a police officer) who is capable of representing the interests of the person and who, *as far as is practicable* in the circumstances, is acceptable to the person.

The submissions appear to suggest that many of the alleged problems with the operation of Part 4 of LEPRA stem from the misapplication of the provisions by the police, rather than the actual provisions. However, it is also clear that there is legislative ambiguity about the operation of certain provisions, and in particular, the interrelationship between for example, the type of search conducted and the applicable safeguards.

Discussion

The Review supports the Ombudsman's recommendation that the "seriousness and urgency" test for a strip search not apply to searches in custody, as such searches are generally conducted for the safety of the person being searched as well as the safety of others, and such a search may frequently be a requirement before external agencies will accept prisoners. The Review also supports the Ombudsman's recommendation in relation to an amendment to s.24, which will clarify the purposes

[18] See Appendix 2

for which a search may be conducted in custody. This will allow the threshold test for a strip search under s.31 to be meaningfully applied.

The Ombudsman's LEPRA Review offers no justification for removing the qualification that the person must not object to a medical practitioner of the opposite sex being present under ss.33(7). The Review does not consider amendment to be necessary in this regard. However, the Review does support amending s.33 to clarify that s.33(1)(b) does not prevent a parent, guardian, or other support person of the opposite sex to the person being strip searched from being present. As such people must be acceptable to the person being searched, the Review does not consider the recommendation will affect the privacy or dignity of persons being searched.

The Review supports an amendment to ss.32(6) so as to accommodate the gender identity of transgender persons. As noted in the Ombudsman's LEPRA Review, there was evidence to suggest that some police officers had already adopted such an approach, and the review also notes that transgender persons tended to inform police what gender they were comfortable being searched by. The Ombudsman's LEPRA Review notes that search provisions in ACT legislation specifically provide that a transgender or intersex person 'may require that the search be conducted by either a male or a female'. The Review recommends that a similar provision be introduced into ss.32(6).

While 'genital area' may appear to be a sufficiently descriptive term so as not to impede common sense application, the Ombudsman's LEPRA Review states:

> "In terms of strip searches, information from our Local Court survey suggests a number of practices that may constitute searches of genital areas. This included survey responses suggesting that police asked the person to lift their breasts or testicles, or conducted a visual search of their anus or vagina. In addition, a number of people reported that they were required to squat, bend over, or spread their buttocks, as part of a strip search. While it is less clear whether a search within these categories would necessarily constitute a search of the person's genital area, the incidence of these types of searches indicates how varied a search of a person's 'genital area' can be in the absence of any clear definition or guidelines."[19]

On its face, the practice of asking persons to squat during a search clearly has the potential to compromise the dignity of a person during a strip search. However, the practice also allows the search of certain areas with minimal visual observation or physical contact, and thus has the potential to reduce embarrassment in situations where a search of the genital area might otherwise have been conducted under ss.32(6) on reasonable suspicion. On balance, the Review does not consider that specifically defining "genital area" is required, nor that a review is required of the practice of requesting that people squat for the purpose of such a search.

In relation to strip searches, the AGD is concerned about the frequency and nature of such searches, especially where children or those with impaired intellectual functioning are involved. While strip searches constitute a small fraction of personal searches overall (2% of searches in the field, 5% of searches in custody), there were still some 14,154 strip searches conducted by the NSWPF between December 2005

[19] NSW Ombudsman, Review of the Law Enforcement (Powers and Responsibilities) Act 2002 p.106

and November 2007 according to the Ombudsman's LEPRA Review. The Review recommends that the right to have a support person present during a strip search should be strictly observed in the case of children and those with impaired intellectual functioning. The Ombudsman's LEPRA Review states:

> For section 33(3) to meet Parliament's stated aims, a support person must be present for the conduct of a strip search at the very minimum in most circumstances. However, our review indicates that this is not occurring[20]

According to the Ombudsman's LEPRA Review, nine of the 10 respondents under 18 years of age who described a strip search in the field indicated that they were not offered a support person.[21] In a street survey conducted for the same review, two of six young people who described a strip search in the field indicated that a support person had been present during their search, and in neither case had the presence of the support person been initiated by police. In one of the two cases, a support person was only present because a youth worker with independent knowledge of the support person provisions had chanced across the incident.[22]

As for strip searches in custody, 50 of 847 strip searches performed on young people in custody were conducted with a support person present, and of the 797 cases in which no support person was present, only 6 cases commented on the absence of a support person. The Ombudsman's LEPRA Review added that some police seemed to be under the impression that it was possible to 'opt out' of the support person provision where the young person consented to a strip search.[23]

The Ombudsman's LEPRA Review noted that while many young people preferred not to have a support person present, the notion that a person who may not be able to protect their own interests could waive such a safeguard was inconsistent with the stated aims of Parliament.[24]

Section 33(3) already states that support persons must be present during the strip search of such persons unless it is not reasonably practicable in the circumstances. This could be further bolstered by amendments replacing the 'not reasonably practicable' exception with a positive requirement to make all reasonably practicable efforts to find an appropriate support person. Alternatively, as recommended by the Ombudsman's LEPRA Review, s.33(3) could more strictly define the situations in which a strip search on a young person or those with impaired intellectual functioning could be conducted in the absence of a support person, in line with comparable provisions in Queensland. Section 631 of the *Police Powers and Responsibilities Act 2000* (Qld) states that the strip search of a 'child' or person with 'impaired capacity' can only be done in the absence of a support person if the officer reasonably suspects that delaying the search is likely to result in evidence being concealed or destroyed or an immediate search is necessary to protect the safety of a person.

---

[20] NSW Ombudsman, Review of the Law Enforcement (Powers and Responsibilities) Act 2002 p.116
[21] NSW Ombudsman, Review of the Law Enforcement (Powers and Responsibilities) Act 2002 p.120
[22] NSW Ombudsman, Review of the Law Enforcement (Powers and Responsibilities) Act 2002 p.121
[23] NSW Ombudsman, Review of the Law Enforcement (Powers and Responsibilities) Act 2002 p.123
[24] NSW Ombudsman, Review of the Law Enforcement (Powers and Responsibilities) Act 2002 p.126

While the Review supports the Ombudsman's recommendations which are intended to ensure that support persons are more widely utilised in the conduct of strip searches where practicable, it does not consider it necessary to amend s.33(2) to include a positive requirement on police officers to inform people who are neither minors nor of impaired intellectual functioning of their right to have a support person present.

***Recommendation 6**: That LEPRA be amended so that a strip search is only authorised:*

- *in the field, if a police officer suspects on reasonable grounds that it is necessary to conduct a strip search for the purpose of the search, and the seriousness and urgency of the circumstances make it necessary to conduct a strip search in the field*
- *in custody at a police station or equivalent custody location, if it is necessary to conduct a strip search for the purposes of the search.*

Recommendation 7: *That LEPRA be amended so that any reference to 'same sex' or 'opposite sex' in the Act is defined in line with s.3(7) of the Crimes (Forensic Procedures) Act i.e.:*

(7) In this Act (other than subsection (6)), a reference:
(a) to a member of the opposite sex of a person means, if the person is a transgender person, a member of the opposite sex to the sex with which the transgender person identifies, and
(b) to a member of the same sex as a person means, if the person is a transgender person, a member of the same sex as the sex with which the transgender person identifies.

***Recommendation 8**: That LEPRA be amended to clarify that s.33(1)(b) does not prevent a parent, guardian, or other support person of the opposite sex to the person being strip searched from being present, provided that the presence of the person is acceptable to the person being searched.*

***Recommendation 9**: That LEPRA be amended to restrict the situations in which a strip search on a young person or those with impaired intellectual functioning could be conducted in the absence of a support person, to situations where the officer reasonably suspects that delaying the search is likely to result in evidence being concealed or destroyed or an immediate search is necessary to protect the safety of a person.*

***Recommendation 10**: That LEPRA be amended to require police to record whether a strip search of a young person or a person with impaired intellectual functioning has been conducted in the presence of a support person, and if not, the steps that were taken to locate one.*

Mouths and body cavities

Sections 21A and 23A of LEPRA allow police to require a person to open his or her mouth when a search is being conducted. Under LEPRA, however, searches cannot be conducted of a person's body cavities, but "body cavity" is not defined in the Act.

The Ombudsman's LEPRA Review notes that there is consequent ambiguity as to whether "body cavity" includes the mouth. If "body cavity" did include the mouth, ss.21A and 23A could be interpreted as providing a power to request that a person open his or her mouth, but not to search those areas. The Ombudsman recommended that the term 'body cavity' be defined to clarify what areas of the body this term excludes for the purpose of a strip search as defined in section 3 and the strip search safeguard in section 33(4).

The Ombudsman also recommended that LEPRA be amended to combine ss.21A and 23A into a single standalone provision outlining what powers police have to search a person's mouth, and whether such a search constitutes an ordinary search or strip search for the purpose of applying safeguards. The Ombudsman noted that in Western Australia, the power to search a person's mouth is provided within the context of a strip search.

In addition, the Ombudsman recommended that the need for an offence for failure to comply with the powers under s.21A and 23A be reviewed.

Finally, the Ombudsman recommended amendments to LEPRA ensuring that these powers would be reviewed appropriately.

Discussion

While it is unlikely that the term 'body cavity' would be interpreted in such a way as to limit the powers that may be exercised under ss.21A and 23A, the Review agrees that the term should be defined in order to provide greater clarity.

The Review does not consider that there is a need to amalgamate ss.21A and 23A; general personal search powers and powers for searching persons under arrest or custody are contained in separate Divisions under Part 4, and it is appropriate that the ancillary powers to search a person's mouth are also contained under the relevant divisions. The Review agrees that the provisions should be amended to clarify whether such searches constitute ordinary or strip searches for the purpose of applying safeguards, as ss.32 and 33 provide a number of safeguards that apply to strip searches, but not ordinary searches. The Review considers that searching a person's mouth is less invasive than a strip search, and should be categorised as an ordinary search.

In relation to the Ombudsman's recommendation that the need for a 'failure to comply' offence be revised, the Review considers that such an offence is consistent with offences attaching to comparable powers under LEPRA, and it would therefore be inconsistent with other provisions to remove the offence.

Finally, the Review does not support the Ombudsman's recommendation that LEPRA be amended to ensure a review of the powers under s.21A and 23A. As noted above, the Review considers that the search of a person's mouth is less invasive than other forms of searches, and should be considered an ordinary search. The Review considers that these powers are not as invasive as powers which are subject to review by the Ombudsman under the Act, such as covert search warrants. Nor do these powers raise issues of cultural sensitivity such as the powers to require removal of face coverings, which are also subject to review by the Ombudsman.

***Recommendation 11**: That 'body cavity' be defined in LEPRA to exclude the mouth.*

***Recommendation 12**: That LEPRA be amended to clarify that searches of a person's mouth constitutes an ordinary/frisk search for the purposes of applying relevant safeguards.*

Delegation of search powers

The Ombudsman's LEPRA Review notes that there is ambiguity as to whether Police are able to delegate their search powers. While the provisions of Divisions 1-3 of Part 4 only confer search powers on police, s.29 indicates that the Division 4 safeguards apply to a "police officer or other person", implying that search powers could be delegated.[25]

Discussion

In submissions to the Ombudsman's LEPRA Review, police in rural areas indicated that female officers from Corrective Services, female ambulance officers, or a nurse might be called upon to search a female where no female police officer was on duty at the time.

The Ombudsman noted that the legislation should clarify whether police were able to delegate their search powers to civilians. This requires the risks and benefits of the following options to be considered: a) allowing a police officer of the opposite sex to conduct a search, b) delaying or not conducting a search due to lack of suitable personnel, or c), having a civilian conduct a search.

The Review considers that unduly delaying a search, or not conducting a search, due to the lack of a police officer of the appropriate sex is not a desirable outcome. Allowing a police officer of the opposite sex to conduct the search in such circumstances ensures that the person conducting the search has the requisite training to adhere to relevant safeguards. However, it may significantly undermine the dignity and comfort of the person being searched. Consequently, the Review considers that LEPRA should be amended to explicitly state that police officers may delegate search powers to a person of the appropriate sex in such situations.

As noted, it is already strongly implied in Division 4 of LEPRA that the intent of the legislature was to permit the delegation of search powers. However, the Review considers that search powers should not be delegated to any individual. Police submissions to the Ombudsman's LEPRA review stated that female Corrective Services officers, ambulance officers, or nurses might be called upon to conduct searches of women where a female police officer was not available. The Review considers that the ability to delegate search powers should be limited to such classes of persons, who have training in conducting searches or in healthcare. These classes should be prescribed by the Regulations.

It is noted that s.32(1) states that the requirements must be complied with "as far as is reasonably practicable in the circumstances". This means that someone other than

[25] NSW Ombudsman, Review of the Law Enforcement (Powers and Responsibilities) Act 2002 p.65

a prescribed person may conduct a search if no one from the prescribed class is available or can reasonably be made available.

Recommendation 13 *– That LEPRA be amended to clarify that, in situations where LEPRA requires a search to be conducted by a Police officer of the same sex as the person being searched, and no such officer is available, Police may delegate their search powers to a person of the appropriate sex who belongs to a class of persons prescribed by the Regulations.*

Searches in general

The Ombudsman's LEPRA Review notes that the understanding of the search powers in Part 4 is hampered by its current structure, with search powers "which graduate from a lower level search and detention power in section 21, to the highest level of search while in custody in section 24, then drop back down to a search on detention power in section 26."[26]

Consequently, the Ombudsman recommends that Part 4 be simplified, based on the person's status (in the field/arrested/in custody), the threshold requirement (reasonable suspicion/reasonable suspicion that it is prudent/in custody), the officer's duty of care, and/or the extensiveness of the power to conduct a search.

Discussion

The Review notes that the elements relating to the person's status, the threshold requirement, and the extensiveness of the power to conduct a search are already contained in the legislation. Consequently, adopting the Ombudsman's recommendation would not have a significant effect on search powers, nor on the tests already employed by police when employing them; in substance, the amendments would amount to a re-structure of existing powers and tests, and serve only to improve clarity. The Review supports the Ombudsman's recommendation on this basis, and recommends that this be given effect by moving Division 3 of Part 4 before Division 2.

Recommendation 14*: That Part 4 of LEPRA be amended to provide for a three level approach to triggering search powers, with existing s.21 and s.26 powers enlivened on suspicion on reasonable grounds, existing s.23 powers enlivened upon arrest on suspicion on reasonable grounds that it is prudent, and the broad s.24 powers enlivened upon arrest and in custody. This could be given effect by moving Division 3 before Division 2.*

Part 5 – Search and seizure powers with warrant or other authority

Some of the most commented on provisions in Part 5 are those concerning powers related to covert search warrants. In this regard, the Law Society noted that such searches posed a significant trespass on privacy and property. Similarly, the Australian Human Rights Commission (the 'AHRC', formerly the Human Rights and Equal Opportunity Commission, or HREOC) drew attention to international law, noting that article 17 of the International Covenant of Civil and Political Rights

[26] NSW Ombudsman, Review of the Law Enforcement (Powers and Responsibilities) Act 2002 p.64

prohibits unlawful or arbitrary interferences with a person's privacy and home. The AHRC submitted that covert search warrants that authorise the entry and search of people's homes without their knowledge necessarily interfere with the right to privacy and home, and that such interference must be justified and proportionate to avoid arbitrariness.

The AHRC noted the trend towards the extension to other crimes of extraordinary police powers initially provided to assist the investigation of terrorism, without a 'solid evidentiary basis being demonstrated'. It was suggested further consideration be given to whether the covert search power provisions are necessary and whether there are less restrictive means for achieving the same benefits. The AHRC also observed that the police powers under covert search provisions go far beyond the powers available to the police under the *Crimes Act 1914* (Cth).

The Public Interest Advocacy Centre (**PIAC**) expressed general concern about the trend of extending the extraordinary powers granted to police to general policing including the *Law Enforcement (Covert Search Warrants) Act 2009,* (**'Covert Search Warrants Act'**). This amended LEPRA to extend the regime of covert searches set out in the *Terrorism (Police Powers) Act 2002* (**'Terrorism Act'**) to other areas of general policing and allows such searches to be carried out in the neighbouring premises of persons not suspected of any criminal activity (in breach of privacy).

Furthermore, PIAC expressed general displeasure over the lack of evidence provided by NSW government to justify the enactment of the Covert Search Warrants Act and criticised its hurried introduction. PIAC recommended that the covert search warrant provisions of LEPRA be repealed immediately.

PIAC submitted that the Acts that introduced such amendments are not subject to the same review mechanisms as similar powers granted under the Terrorism Act. In particular, concern was expressed that the office of the National Security Legislation Monitor (**NSLM**), the creation of which was recommended by the Senate Finance and Public Administration Legislation Committee Report, would fulfil a supervisory function of state and territory terrorism laws, but would not have oversight of the non-terrorism related extraordinary powers created by the Covert Search Warrants Act. PIAC submitted that the same level of supervision should be provided and this should be done through the creation of a specialist Public Interest Monitor in NSW to act as an independent and specialist supervisory body of anti-terrorism and all extraordinary police powers, rather than having the function fulfilled by generalist agencies such as the Ombudsman.

PIAC noted, however, that the NSW Ombudsman did not support the creation of such a body, recommending instead that those responsibilities be conferred on his office. That being the case, PIAC recommended that LEPRA be amended to include a provision similar to those in the Terrorism Act, requiring periodic monitoring of the covert search warrant provisions by the Ombudsman, as well as reviews by the Minister. Similarly, the Law Society submitted that future reviews should include the Ombudsman, to avoid the perception that the NSWPF was reviewing itself.

The Review notes that s.242 of LEPRA already requires the Ombudsman to report annually on the exercise of powers with respect to covert search warrants to

ascertain whether the requirements of the legislation are being met by the NSWPF, the NSW Crime Commission and the Police Integrity Commission.

Search of homes without the occupier's knowledge

The AHRC also expressed concern about s.67A, which allows notice of execution of the warrant on the occupier to be postponed for a potential total period of up to three years. This means individuals whose houses have been searched will not be able to challenge searches that are unreasonable, not based on proper grounds, or are excessive because, in some cases, they will not know that a search has occurred for up to three years. This was seen as inconsistent with statements from the European Court of Human Rights that stress the importance of ensuring that people are given enough information about searches of their homes to 'enable them to identify, prevent and challenge any abuse'.

The AHRC also submitted that removing the need to keep receipts of things seized in the case of covert search warrants was of concern. Under cl.8 of the *Law Enforcement (Powers and Responsibilities) Regulation 2005,* police are required to provide the occupier of premises a receipt acknowledging the seizure of any items if the occupier is present and it is reasonably practicable to do so. A copy of any such receipt is to be attached to a report on the execution of the warrant. However, such receipts need not be issued for covert search warrants.

While it is logical that where covert search warrants are concerned, a receipt should not need to be provided to the occupier at the time of seizure, the current wording of the Regulation makes it unclear whether there is any requirement to keep receipts of items seized for record keeping purposes. The AHRC noted that in the case of a delayed notice, it was even more important than in other cases that detailed records were kept and made available to individuals so that they could monitor the scope of the search when they are eventually notified of it. The AHRC recommended that amendments be made to mirror the previous Commonwealth proposals[27], which expressly required occupiers' notices to include a description of all things seized.

Discussion

On the subject of delayed notification, the Review notes that the default position for notification for a covert search warrant is for it to occur as soon as is practicable after execution of a warrant. The legislation merely provides an avenue for an eligible judge to postpone notification where there are reasonable grounds for doing so.

The Review notes the concerns of the AHRC in relation to the requirement to keep records of items seized during the execution of a covert search warrant. A description of items seized during the execution of a covert search warrant must be included in the report to the eligible issuing officer upon the execution of the warrant, and the form of the occupier's notice as prescribed by the Regulation informs the occupier that relevant documents may be inspected at the Supreme Court registry. Nevertheless, it appears incongruous that there is no requirement for receipts for things seized to be provided directly to occupiers at the time of notification. The

[27] Section 3SQ of the *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006.* This bill lapsed when Parliament was prorogued in 2007, although elements of it were incorporated into the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009,* which received assent in February 2010.

Review recommends that the Regulations be amended to clarify that receipts of items seized during the execution of a covert search warrant need to be kept, and be provided to the occupier when notification eventually takes place.

The NSWPF does not object in principle to recommendation 15, provided that a safeguard exists to enable police to apply to withhold service of the property record where issues of public interest immunity arise.

Police's State Crime Command has advised that in the majority of instances, providing a record of property seized during the execution of a covert search warrant to an occupier when required to provide notification of the search, would not disclose methodology, prejudice an investigation nor identify the source of information on which the warrant application is founded. However, there will be circumstances where service of such a record of property seized would infringe on the grounds which would normally be considered for public interest immunity.

The Regulation provides a safeguard that can prevent the disclosure of items seized when records are inspected at the registry but this would be of no assistance in preventing disclosure at the time of notification, should the recommendation be adopted.

An occupier may inspect certain documents relating to the warrant, including the report on the execution of the warrant (clause 10). LEPRA requires that this report include a brief description of anything seized (section 74A(1)(c)(v)). However, the documents will not be available for inspection if they are subject to a certificate issued by an eligible officer (under clause 11) to the effect that the officer is satisfied that a document or part of a document contains matter:

(a) that could disclose a person's identity, and
(b) that, if disclosed, is likely to jeopardise that or any other person's safety, or
(c) that, if disclosed, may seriously compromise the investigation of the matter.

A similar safeguard enabling police to apply to an eligible issuing officer for authority to withhold the property record at the time of notification would address the concerns raised by State Crime Command. It would also avoid the more cumbersome alternative of making a public interest immunity claim in the Supreme Court, which would occur in response to proceedings brought by an occupant seeking to enforce the requirement of the Regulation, in circumstances where police had failed to disclose details of items seized at the time of notification.

Recommendation 15: *That the Regulations be amended to clarify that receipts of items seized during the execution of a covert search warrant need to be kept, and provided to the occupier of the premises when notification of the search is made. The amendments would allow the receipts to be withheld at the time of notification where an eligible issuing officer was satisfied that if the receipts were disclosed, they could disclose a person's identity, and that the disclosure of the person's identity would jeopardise that or any other person's safety, or seriously compromise the investigation of the matter.*

Broad grounds for applying for and granting covert search warrants

In relation to the grounds for applying for and granting covert search warrants, the AHRC submitted that covert searches constituted a disproportionate interference with the right to privacy and home if the information that is sought could reasonably be obtained by less intrusive means. A recommendation for amendment was made to ensure the powers are available only where there is a legitimate purpose; and there are no other less intrusive means of achieving the same end.

Other recommendations were made regarding specific provisions within LEPRA. In relation to section 62(1)(b), which deals with the grounds on which an application is based, the AHRC recommended an amendment requiring applications specifically to include the reasons why a search must be carried out covertly. This should include canvassing other less restrictive means and why these would not be suitable in the particular circumstances of the case.

In relation to section 62(4) (matters that issuing judge must consider), the AHRC recommended amendments based on the Commonwealth system to ensure that an issuing judge:

- is satisfied that the information could not be obtained through alternative, less restrictive means.
- is satisfied that the exercise of the powers under the warrant will assist the prevention of, or investigation into, the relevant offences to which the application for the warrant relates.
- is satisfied that there is no practicable way to enter the subject premises or conceal the investigation without entering the adjoining premises.
- considers the outcome of any previous application for a covert search warrant in respect of the subject premises.
- is satisfied that there is likely to be a thing of the kind connected with the offence in or at the subject premises.

Further, recommendations for amendment were made to ensure that an eligible judge must record in the warrant that he or she is satisfied as to the matters to be made out in the application and has had regard to the matters that must be considered when determining whether to grant the warrant.

In relation to section 63(1) (false or misleading information in applications), the AHRC recommended amendment to include a penalty for being reckless or negligent regarding the truthfulness or accuracy of the information given in support of an application for a covert search warrant.

The AHRC also submitted that the current threshold requirements for the applications for covert search warrants were insufficient and recommended that they be tightened so that an officer must not merely suspect but must have a 'reasonable belief' that there will be a thing of the kind connected with the offence in or on the premises. Further, the following additional criteria should be included:

- evidence that one or more relevant offences have been, are being, are about to be or are likely to be committed;
- that the sight or retrieval of the thing should substantially assist the investigation of the crime.

Discussion

In relation to the AHRC's concerns over the information to be included in an application for a covert search warrant and the matters of which an eligible judge must be satisfied before issuing such a warrant, the Review notes that s.62(4) requires a judge to consider, among other things:

- the extent to which it is necessary for the entry and search of those premises to be conducted without the knowledge of any occupier of the premises,
- the nature and gravity of the searchable offence in respect of which the application is made, and
- the extent to which the privacy of a person who is not believed to be knowingly concerned in the commission of the searchable offence is likely to be affected.

The Review considers that these represent adequate safeguards, and implicitly encompass considerations such as alternative means through which relevant evidence may be obtained.

As for the AHRC's concerns on police being reckless or negligent regarding the accuracy of information provided to an issuing officer in support of an application for a warrant, the Review notes that the information relied upon by police to support an application for a warrant may have been obtained from sources such as criminal informants, or messages exchanged between suspects in code. Given the circumstances, the inclusion of a penalty for being reckless or negligent regarding the accuracy of information relied upon could give rise to the risk, however unlikely, of police officers being penalised for relying on information obtained in good faith.

Further, the Review considers that the risk of inaccurate information being recklessly or negligently provided to an issuing officer is significantly mitigated by existing procedures. Applications for warrants are considered by judges of the Supreme Court, and information given by the applicant in or in connection with the application must be verified before the eligible issuing officer on oath or affirmation or by affidavit. Further, the issuing officer is required by the legislation (s.62(3)) to consider the reliability of the information on which the application is based, and this requirement is assisted by s.62(5), which allows the issuing officer to request the applicant to provide further information.

The Review notes that the safeguards that apply to covert search warrants under the Terrorism Act have been incorporated into LEPRA, partly in recognition of the fact that the threshold for the issue of such warrants is lower than for other warrants, and consequently necessitates more stringent protections.

At the time that the Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009 was introduced, it was noted in Parliament that in addition to the legislative checks on their use, a natural check on the overuse of covert search warrants would be the sheer logistical difficulty involved in executing them. The use of surveillance teams to ensure the occupier is not present, the making of covert entry to the premises, and monitoring of the occupier's whereabouts during the search are all resource intensive procedures. This expectation appears to have been accurate, with an Ombudsman's Report on the use of covert search warrants indicating that only 13 covert search warrants were granted to the NSWPF in the 12

months ending 28 May 2012. The Ombudsman was satisfied that the use of covert search warrants by the NSWPF was substantially compliant with LEPRA.

While the AHRC raises concerns about the covert search warrant provisions, many of their criticisms are founded on unfavourable comparisons to a Commonwealth bill, which ultimately was not passed.

Oversight of the scheme

In relation to the safeguards of the covert search warrant provisions, the AHRC noted that the model proposed by the Commonwealth Bill[28] included the additional safeguard of keeping a register of delayed notification warrants. The AHRC recommended that such a register be kept under the NSW covert search warrants scheme. Similar to the scheme proposed by the Commonwealth, this register could be inspected by the Ombudsman, who would be required to report on compliance with the provisions every six months.

More specifically, in relation to the safeguards offered through judicial oversight, the AHRC raised concerns that the existing scheme may undermine the capacity for independent oversight by the judiciary in at least three ways. First, the AHRC submitted that the wording of s.65(1A), which requires an eligible issuing officer who refuses to issue a warrant to record the grounds relied on to justify the refusal, suggested that warrants should be granted unless circumstances existed which justified refusal. The AHRC's view was that this was not consistent with the scheme of LEPRA which requires judges to be satisfied that reasonable grounds exist for issuing a covert warrant. However, the Review notes that s.65(1A) follows on from s.65(1), which specifically requires a similar record of the grounds relied on to justify the issue of a warrant.

Second, in relation to section 46B(6), the AHRC submitted that revocation of a declaration should only be possible where a Judge has withdrawn his or her consent under section 46B as there would otherwise be potential for interference with the independence of the judiciary in its role of overseeing the exercise of these extraordinary powers. This concern has already been addressed through legislative amendment.[29]

Third, the AHRC commented upon section 62(6) which provides that an applicant is not required to disclose the identity of a person from whom information was obtained if the applicant is satisfied that to do so might jeopardise the safety of the person. The AHRC submitted that this may make it difficult for Judges to assess the reliability of the information. As noted above the Review considers that existing procedures are adequate to ensure the reliability of evidence used to support applications.

Notices to produce

The Police Association made submissions on the provisions for Notices to Produce, arguing that senior police rather than Magistrates and registrars of Local Courts, as is currently required, should be able to authorise notices to produce, to save time.

---

[28] Section 3SJ of the *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006*

[29] *Courts and Crimes Legislation Amendment Act 2009*

In response to a draft of the Ombudsman's LEPRA Review, the NSWPF provided comments proposing that senior police be given the power to authorise a notice to produce, noting that senior police officers are already entitled to authorise more significant powers such as Controlled Operations Authorities. The NSWPF stated this would represent a reduction in red tape by delivering significant benefits for police in savings of resources, paperwork and unnecessary travel. These comments were resubmitted to this Statutory Review. On this subject, the Ombudsman's view was that notices to produce should be issued by authorised officers such as a magistrate or children's magistrate, clerk of a local court or an employee of the AGD authorised by the Attorney General as an authorised officer for the purposes of LEPRA.

The Police Association also stated that the requirement to prepare an application to an issuing officer for a Notice to Produce resulted in police having to duplicate work, as all relevant information is already contained in police case management data obtainable on COPS. The Police Association also drew unfavourable comparisons between Notices to Produce in NSW and comparable powers available under Queensland and Western Australian provisions. Notices to Produce in NSW can be issued on financial institutions, whereas Qld provisions allow similar notices to be issued against a wider range of agencies, including casinos, bookmakers and currency exchanges. Similar provisions in Western Australia allow Police to apply to a Justice of the Peace for an order to produce a business record, which can be issued against any business.

The NSWPF has previously provided comments to the Ombudsman favouring an expansion of the range of institutions to which notices to produce apply. These comments were resubmitted to this Statutory Review. In the final report, the Ombudsman recommended that consideration be given to broadening the range of institutions to which notices to produce apply. This could assist police in the conduct of their investigations and would protect agencies that could provide specifically requested documents rather than being currently subject to a broader search of the organisation's entire premises by search warrant.

In order to obtain an order to produce a business record under s.52 of the *Criminal Investigations Act 2006* (WA), the application must:

- *state the applicant's full name and official details;*
- *state the offence that is suspected to have been committed and in relation to which the order is wanted;*
- *state the grounds on which the applicant suspects that the offence has been committed;*
- *state the name of the person to whom the order wanted will apply;*
- *state that the person is not suspected of having committed the offence;*
- *describe with reasonable particularity the business record or class of business record that the applicant wants the person to produce;*
- *state the grounds on which the applicant suspects that the business record or class of business record is a thing relevant to the offence;*
- *state whether the original or a copy of the business record or class of business record is required;*

- *state whether a paper, electronic or other version of the business record or class of business record is required; and*
- *include any other information that is prescribed.*

Notably, s.53 requires that for each ground under s.52 that requires the applicant to hold a suspicion, the issuing officer must be satisfied that there are reasonable grounds for the applicant to have that suspicion. This is a far more rigorous test than that imposed on the NSWPF in order to obtain Notices to Produce. Section 54 of LEPRA merely requires the issuing officer to be satisfied that there are reasonable grounds to suspect that a deposit-taking institution holds documents that may be connected with an offence, and that the institution is not a party to the offence.

Apart from the issue of whether senior police should be able to authorise notices to produce, the Ombudsman's LEPRA Review raises another issue regarding the thresholds for applying for and authorising notices to produce. Currently, s.53 of LEPRA provides that the threshold for applying for a notice to produce is that the applicant *believes on reasonable grounds* that an authorised deposit-taking institution holds documents that may be connected with an offence committed by someone else. In contrast, s.54 provides that an authorised officer may issue a notice to produce documents *if satisfied there are reasonable grounds to suspect* that an authorised deposit-taking institution holds documents that may be connected with an offence committed by someone else. The Ombudsman concluded that there was 'no demonstrable basis for [this] apparent anomalous situation' and recommended that the inconsistency be addressed by legislative amendment. Based on Parliamentary briefing papers from the introduction of LEPRA, the Ombudsman suggested that it may have been Parliament's intention that both tests be set at a threshold of reasonable belief. However, it did not make a recommendation on the way in which the existing inconsistency should be addressed.

Discussion

Regardless of whether they are issued under NSW, Qld, or WA legislation, Notices to Produce and like documents may only be issued on entities that are not suspected of having committed the offence being investigated. As such, while the invasion of privacy is significantly lesser in the case of Notices to Produce when compared to search warrants, the impact on privacy is nevertheless significant, particularly in light of the fact that the entity that is required to comply with the order is not suspected of any wrongdoing.

Further, there are significant privacy implications for third parties, such as account holders or customers of such entities, who are also not suspected of any wrongdoing. Considering the above, the AGD consider it would be inappropriate for a senior member of police to be given the authority to issue these Notices, particularly where, as the Police Association proposes, the requirement for a written application is dispensed with. The independent issuing authority is a necessary safeguard to ensure that civil liberties are not unnecessarily impinged upon. For similar reasons, even with far more rigorous safeguards such as those found in the WA legislation, the Review does not support the expansion of the application of Notices to Produce to businesses in general.

Some consideration could be given to expanding the application of Notices to Produce along the lines of the *Police Powers and Responsibilities Act 2000* (Qld). However, while production notices can be issued against a narrower range of entities under Qld legislation when compared to WA, the AGD is of the view that these powers are still too broad. Under the Qld legislation, the types of businesses against which production notices can be issued is defined by reference to the definition of 'cash dealer' under the *Financial Transaction Reports Act 1988* (Cth). While the Review is not opposed to some expansion of the entities against which Notices to Produce can be issued, any such amendment should be subsequent to further consultation with relevant stakeholders.

On the Ombudsman's concerns regarding the inconsistent thresholds for the issue of notices to produce, the NSWPF has indicated that the inconsistency could be removed by adopting the same threshold for search warrants, under which the applicant must 'believe on reasonable grounds', and the issuing officer must be 'satisfied there are reasonable grounds for doing so'.

***Recommendation 16**: That s.53 and 54 be amended to state that:*

- *a police officer may apply to an issuing officer for a notice to produce documents where he or she believes on reasonable grounds that an authorised deposit taking institution holds documents that may be connected to an offence committed by someone else, and;*
- *the issuing officer may issue a notice to produce if satisfied there are reasonable grounds for doing so, having considered (without being limited to considering) the reliability of the information on which the application is based, including the nature of the source of the information, and— whether there is sufficient connection between the documents sought and the offence.*

Part 6A – Emergency Powers – public disorder

In relation to Part 6A, the Law Society expressed general disappointment regarding the repeal of the sunset clause, as it could see no demonstrated need for the Part to remain in the legislation. The Law Society's main concern with the Part was that it allows any person in a target area to be searched without reasonable suspicion. The Law Society noted the Ombudsman's 2007 *Review of Emergency Powers to Prevent or Control Disorder,* which recommended that Parliament should consider inserting a 'reasonable suspicion' test into s.87K.

Under the existing powers, mere presence in a target area is sufficient grounds to stop and search a person, which is inconsistent with other powers under Part 6A. For example, requesting identification from someone in a target area requires the police officer to reasonably suspect that the person has been, or is likely to be, involved in a public disorder. The Law Society supported the Ombudsman's recommendation, on the grounds that it would encourage better targeting of police powers, reduce the likelihood that people such as residents and workers in the target area who have no involvement in wrongdoing would be searched, introduce a threshold test that police are already familiar with, and help address concerns about the potential for police to use the search powers arbitrarily.

Finally, the Law Society drew attention to the fact that the powers to disperse groups under s.87MA did not include any exceptions for peaceful assembly, and noted that

the Ombudsman had recommended that reform be considered to provide an assurance of the right to peaceful assembly. Shopfront also echoed the Law Society's concerns regarding the removal of the sunset clause.

Similarly, Legal Aid expressed support for the recommendations made in the Ombudsman's 2007 Review, namely:

- *consideration of further safeguards to ensure Part 6A powers do not impact unduly on the right of lawful assembly;*
- *a requirement for reasonable suspicion when exercising search powers under the Part;*
- *greater legislative guidance on items that can be seized and on retuming communication devices seized under the Part;*
- *a review of the penalties under section 87MA for failing to move on (these are out of proportion with other move on powers);*
- *better means of communicating to the public where a declaration is made or powers are authorised under the Part;*
- *setting a maximum time frame for using emergency powers under section 87N before an authorisation must be sought and requiring documentation of the reasons for invoking the section;*
- *improved Police procedures for record keeping.*

Discussion

The Review notes that the exercise of powers under this Part occurs only in instances of large-scale public disorders. Furthermore, it is important to note that the powers are only enlivened upon authorisation by the Commissioner or by a Deputy or Assistant Commissioner of Police. For this reason, the Review considers that the repeal of the sunset clause does not represent a significant threat to civil liberties. Given the possibility for large-scale unrest and community disturbances that can occur during public disorder incidents, it is necessary to give police powers which allow effective law enforcement but are limited to circumstances of such emergency.

The Review notes that the Ombudsman's recommendation in relation to 'reasonable suspicion' and s.87K was not supported by the previous Government in its response to the Ombudsman's 2007 Review.

The powers under this Part have been rarely used and are subject to a number of safeguards, including the Ombudsman's oversight role. The powers are restricted to a target area and must not exceed 48 hours unless extended by the Supreme Court. The Ombudsman's 2007 review of the use of Part 6A powers, *Review of Emergency Powers to Prevent or Control Disorder,* concluded that "review of the few occasions that police have used these extraordinary powers to date has found that police acted in a responsible and appropriate manner. The available evidence indicates that authorisations to use the powers were only granted in circumstances where senior police were genuinely of the view that other, less intrusive policing measures would be insufficient to restore order or prevent further attacks." Furthermore, the former Government repeatedly stated, including in the second reading speech on 21 December 2007 for the Law Enforcement and Other Legislation Amendment Bill 2007, that the emergency powers "are intended to be used only in the most extreme circumstances and cannot be used for assemblies that are peaceful."

Given that currently under LEPRA an authorisation cannot be given unless there is, or there is threatened in the near future, a large-scale riot or other civil disturbance that gives rise to a serious risk to public safety, rendering the exercise of the special powers reasonably necessary to prevent or control the public disorder, it seems that the absence of a guarantee of the right to peaceful assembly in the legislation is not problematic.

Part 7 – Crime Scenes

Under s.88 – 90 of LEPRA, a police officer can establish a crime scene where the officer reasonably suspects that an offence connected to a serious traffic accident, or a serious indictable offence, is being, or was, or may have been, committed on the premises, or that there may be evidence on the premises related to a serious indictable offence that was committed elsewhere.

Crime scene warrants are a relatively new legislative regime introduced when LEPRA commenced in 2005. Prior to the introduction of Part 7, police powers to establish and manage crime scenes were implied in common law. The intention when LEPRA was created was to clarify and codify these common law powers.

Police officers in the majority of Australian jurisdictions continue to rely on common law to establish and control crime scenes, preserve evidence and conduct criminal investigations. This is still the case in the ACT, Northern Territory, South Australia, Tasmania, Victoria and the Commonwealth. The only other states with crime scene provisions are Queensland and Western Australia.

The Police Association submitted that Part 7 had resulted in an increase in the amount of time and resources spent guarding crime scenes and applying for crime scene warrants. The Police Association suggests that Police should be able to investigate under 'investigative warrants' rather than crime scene warrants.

The existing provisions in LEPRA in relation to powers at a crime scene are clear; police officers may exercise limited powers under s.95(1)(a)-(f) to preserve a crime scene until a crime scene warrant has been obtained from a authorising officer. Once such a warrant has been obtained, police are able to exercise the other, more significant investigative powers under the whole of s.95(1). The Review does not consider that introducing an intermediate step between establishing a crime scene and making an application for a crime scene warrant would aid investigations.

The Police Association have argued for an 'investigative warrant' on the grounds that while not all scenes investigated end up being crime scenes, police are not able to make such a determination until the scene is investigated. However, a crime scene warrant is issued on *reasonable suspicion* that crime scene powers need to be exercised, not on the grounds that there is concrete evidence at the scene. Upon consideration of COPS data included in the Ombudsman's LEPRA Review, the vast majority of applications for crime scene warrants appear to be made for offences such as robbery, break and enter, homicide and sexual assault, where it should be

reasonably straightforward for police to reach the level of suspicion required to satisfy the issue of a warrant.[30]

The existing process for establishing and investigating crime scenes cannot be said to unnecessarily delay police investigations. In appropriate circumstances, Police are not required to wait for the issue of a crime scene warrant before beginning investigations; s.92(2) states that if a police officer suspects on reasonable grounds that it is necessary to immediately exercise the full investigative powers under s.95(1) in order to preserve evidence of an offence, he or she may do so, provided that a crime scene warrant has been applied for by the police officer or another officer. While the requirement to obtain a crime scene warrant may impose an administrative burden on police, it represents a necessary safeguard to ensure that property rights are not being unnecessarily impinged upon.

The Ombudsman's LEPRA Review includes statistics on the time taken to process applications for crime scene warrants, and these are overwhelmingly suggestive of a highly efficient process. For applications made during office hours, there was only 1 application between 1 December 2005 and 30 November 2007 that took longer than 30 minutes to process, and the average time taken to process an application was 8 minutes.[31] Of applications made outside office hours, 81% were processed within 30 minutes of the application being received. The average time taken to process an application after hours was 17 minutes.[32] The majority of the samples examined by the Ombudsman were made by fax (64%).[33] With applications so commonly made by fax, and applications being processed in under 30 minutes in the vast majority of cases, it appears difficult to sustain an argument that the crime scene warrant application process places an undue burden on the time and resources of police. However, there is no data available showing the time it takes a police officer to prepare a warrant and get it to an authorised officer.

The AGD view is that what little burden the process does represent is far outweighed by the public interest in ensuring that the rights of occupiers are not unduly trespassed upon.

Crime scene powers that may be exercised without a warrant

Section 92(1) currently provides that the crime scene powers that can be exercised without a warrant are those contained in section 95(1)(a)-(f), provided police suspect on reasonable grounds that it is necessary to exercise the power to preserve evidence. These powers are directed towards preserving evidence – no investigative or forensic, or related, functions can be performed without a warrant, or an application for a warrant having been made. Once a warrant is applied for, and without having to wait for the warrant to be issued, police can exercise any of the powers in section 95(1) for up to three hours from the time the crime scene was established (section 95(2)) *providing* police suspect on reasonable grounds that it is necessary to exercise the power immediately to preserve evidence of the commission of an offence.

---

[30] NSW Ombudsman, *Review of the Law Enforcement (Powers and Responsibilities) Act 2002* p.170
[31] NSW Ombudsman, *Review of the Law Enforcement (Powers and Responsibilities) Act 2002* p.166
[32] NSW Ombudsman, *Review of the Law Enforcement (Powers and Responsibilities) Act 2002* p.168
[33] NSW Ombudsman, *Review of the Law Enforcement (Powers and Responsibilities) Act 2002* p.170

The NSWPF have noted that scene of Crime Officers (**"SOCOs"**) do not attend a crime scene until a warrant has been issued. The most important reason for this is that SOCOs cannot legally exercise any of the forensic investigation powers in s 95(1)(g)-(p) without a warrant unless all three arms of s 92(2) have been met:

a) a crime scene has been established;
b) a warrant has been applied for; *and*
c) police suspect on reasonable grounds that it is necessary to immediately exercise the power to preserve evidence of the commission of an offence.

If an investigative power is exercised before the warrant is issued, there is a risk that a court will subsequently determine that this was not necessary to preserve evidence and therefore contrary to section 92(2)(c), resulting in vital forensic evidence being inadmissible. This risk is eliminated by simply waiting for a warrant to issue.

If SOCOs attend a crime scene before the warrant has been issued and determine that there is no basis for exercising the investigation powers immediately, they either wait at the scene while a warrant is obtained, or leave and return later, either way, wasting valuable time. Furthermore, SOCOs are understandably reluctant to cause substantial and intrusive upheaval, such as pulling up carpets, digging up floors/gardens, and so forth, in case a warrant is ultimately refused.

The NSWPF submit that there can be substantial delays commencing crime scene investigations while a warrant is applied for and issued. This means that numbers of police officers are required to remain waiting at the crime scene, which is an inefficient use of police resources.

The NSWPF submit that there are two amendments that could remedy this:

1. remove the requirement in section 92(2)(c) that the section 95(1)(g)-(p) powers can only be exercised immediately if police suspect on reasonable grounds that this is necessary to preserve evidence of the commission of an offence; and
2. limit the section 95(1) powers that can be exercised without a warrant to subsections (1)(a)-(l), that is, exclude (m) and the more intrusive powers in subsections (1)(n) and (o) of digging up anything, or removing wall or ceiling linings or floors of a building, or panels of a vehicle.

The exercise of the power in subsection (1)(i) without a warrant could be restricted to the power to open anything at the crime scene that is locked provided it does not damage the thing or the lock. That is, something could be opened with a key, but the lock could not be forced or the thing damaged in any way to gain access.

Discussion

The requirement to obtain a crime scene warrant recognises the basic right of occupiers to not have their property rights unduly impinged upon. The legislation in its current form recognises that there may be situations where it is necessary to impinge on those property rights before a warrant is issued, due to the risk that evidence may be lost in the intervening period.

Police may, without a warrant, do any of the things in s.95(1)(a)–(p). They can exercise the 'preservation' powers before a warrant is even sought if it is necessary to preserve the evidence. They can only exercise the investigative powers, however, if the warrant has been sought and it is necessary to immediately exercise them to preserve the evidence. The delineation between the two sets of powers appear to a large degree to rest upon their level of intrusiveness. The existing 'preservation' powers allow police to:

a) direct a person to leave the crime scene or remove a vehicle, vessel or aircraft from the crime scene,
b) remove from the crime scene a person who fails to comply with a direction to leave the crime scene or a vehicle, vessel or aircraft a person fails to remove from the crime scene,
c) direct a person not to enter the crime scene,
d) prevent a person from entering the crime scene,
e) prevent a person from removing evidence from or otherwise interfering with the crime scene or anything in it and, for that purpose, detain and search the person,
f) remove or cause to be removed an obstruction from the crime scene,

The existing 'investigative' powers allow police to:

g) perform any necessary investigation, including, for example, search the crime scene and inspect anything in it to obtain evidence of the commission of an offence,
h) for the purpose of performing any necessary investigation, conduct any examination or process,
i) open anything at the crime scene that is locked,
j) take electricity, gas or any other utility, for use at the crime scene,
k) direct the occupier of the premises or a person apparently involved in the management or control of the premises to maintain a continuous supply of electricity at the premises,
l) photograph or otherwise record the crime scene and anything in it,
m) seize and detain all or part of a thing that might provide evidence of the commission of an offence,
n) dig up anything at the crime scene,
o) remove wall or ceiling linings or floors of a building, or panels of a vehicle,
p) any other function reasonably necessary or incidental to a function conferred by this subsection.

Some of these investigative powers are less intrusive than others and could be limited to ensure they are exercised in a way that is not detrimental or damaging. It is therefore proposed that s.92(1) be expanded to include the powers in (g) – (l). This would limit the application of the s.92(2) threshold to only the most intrusive and potentially damaging powers.

In the AGD's view, this will ameliorate to some degree police concerns that police officers are wasting time waiting at crime scenes for warrants, while ensuring that more intrusive investigation powers will still be limited to situations where a warrant has been issued, or the test in s.92(2) has been met.

***Recommendation 17**: That LEPRA be amended to:*

- *expand the powers that can be exercised under s.92(1) to include those contained in s.95(1)(g)-(l).*
- *state that where the power to open locked items under s.95(i) is exercised under s.92(1) rather than s.92(2) or under a warrant, the item can only be opened if it is possible to do so without causing any damage to the item or lock.*

Recommendation 17 will have the following effect; where a crime scene has been established and a warrant has been applied for, Police would be able to exercise all but the most intrusive crime scene powers, before the warrant has been issued.

Issue of crime scene warrant by a senior police officer

The Police Association submits that a senior police officer of the rank of inspector or above should be able to declare a crime scene in order to allow investigations to take place immediately. The Police Association has supported this submission with anecdotal evidence of a situation in which, in their view, a crime scene warrant was incorrectly refused by a magistrate.

The NSWPF has also submitted that police at the rank of Superintendent or higher should have the power to issue a crime scene warrant, on the grounds that existing procedures are time consuming and resource intensive.

Crime scene investigation powers include opening locked things, seizing and detaining items, digging up items, removing walls, ceilings, floors. To enable the NSWPF to declare crime scenes, thereby allowing significant breaches of occupier's rights without independent third party oversight as a safeguard, could send an unfavourable message to the community. The anecdotal evidence of an adverse outcome provided is an example of what may or may not have been judicial error, rather than support for legislative amendment. The statistics provided by the Ombudsman indicate that the vast majority (92%) of crime scene warrant applications are granted, and a review of 57 applications from the 8% of situations in which warrants were refused indicate that the top five reasons for refusal were as follows:

- *No evidence of a serious indictable offence having occurred (51%)*
- *Crime scene not established (16%)*
- *Insufficient information in application (7%)*
- *Crime scene warrant not required — public place (5%)*
- *Not satisfied address is where offence occurred/insufficient link between address and serious indictable offence (5%)*[34]

The Ombudsman's LEPRA Review did not indicate that the incorrect refusal of crime scene warrants by authorised officers was a problem.

It must be acknowledged that the time taken by an issuing authority to process an application is only part of the administrative burden involved in obtaining a crime scene warrant; police officers at the scene must spend considerable time preparing

[34] NSW Ombudsman, Review of the Law Enforcement (Powers and Responsibilities) Act 2002 p.163

the application. Although the exact procedure is not clear from its submission, the Police Association appears to support a system where a senior police officer of the rank of Inspector or above would be able to issue a crime scene warrant based on information contained on COPS, with no need for a written application. The requirement to make a written application for crime scene warrants provides a level of accountability that cannot easily be matched by other processes, and the AGD is strongly of the view that it should not be replaced. From this position, with statistics included in the Ombudsman's LEPRA Review suggesting a very high level of efficiency on the part of issuing authorities when processing applications, any efficiency gained by transferring authority to senior police would be minimal. Indeed, given the statistics on the average processing time of crime scene warrants, there are doubts as to whether senior police would be able to issue warrants with greater efficiency than current issuing authorities.

Compared to the negligible gains in efficiency afforded by such a transfer of authority, there would be significant problems with vesting senior police officers with the responsibility for issuing crime scene warrants. As noted in the Ombudsman's LEPRA Review, the senior police officer concerned could become one of the people heavily involved in any prosecution that eventuates from the execution of a crime scene warrant. As noted in submissions to the Ombudsman's LEPRA Review, the independence of the issuing officer is essential in the interests of natural justice and the protection of individual rights. Further, in serious indictable matters the basis for the issue of crime scene warrants, and the evidence obtained under those warrants, may be subject to challenges in the Supreme Court. It would not be in the public interest for trials to miscarry due to the incorrect issue of crime scene warrants.[35] The Review agrees with these views.

As noted by the Ombudsman's LEPRA Review, at least part of the burden on investigations caused by crime scene warrants appears to be related to the caution exercised by police and the Forensic Services Group (**FSG**). While approaches across NSW appeared to be inconsistent, the Ombudsman's LEPRA Review noted that some FSGs refused to attend at a crime scene until a crime scene warrant had been obtained, even where the occupier's consent has been obtained, or where the circumstances required immediate investigation while the warrant was being processed. This was, in part, due to a belief that the admissibility of evidence collected under a crime scene warrant was less likely to be questioned, and in part due to the workload on FSGs, which made them reluctant to attend at a scene to investigate with the occupier's consent where the consent may be withdrawn, leading to wasted time while a warrant was obtained. These concerns, however, are a matter for police, and not best resolved by legislative amendment.

NSWPF views on the issue of warrants

A crime scene warrant is currently obtained by a police officer applying to an "authorised officer" (being a Magistrate, Children's Magistrate, registrar of a Local Court or an employee of the Department of Attorney General and Justice authorised by the Attorney General as an authorised officer). The application must be made in person and in writing (section 60). A warrant can only be issued by telephone if it is

[35] NSW Ombudsman, *Review of the Law Enforcement (Powers and Responsibilities) Act 2002* p.196

required urgently and it is not practicable for a police officer to apply in person (section 61(2)).

Data analysed by the NSW Ombudsman has not revealed undue delays in the time taken by an authorised officer to grant a warrant from the time he or she receives the application.[36] However, there is no data available showing the time it takes a police officer to prepare a warrant and get it to an authorised officer. It is these delays that are causing concerns, particularly for police in rural or remote areas where the closest Local Court can be long distances away from the crime scene and timely access to a court registry, Extended Registry or After Hours Panel, is difficult and/or restricted.

Police officers are frequently left standing around at a crime scene waiting for a warrant to be issued. If they have been allowed to enter by the occupier, they can often do little more than preserve the scene (see the discussion regarding crime scene powers above). If they have been denied entry, they are powerless to prevent any tampering with, or deterioration or destruction of, the evidence inside the premises while they wait for a warrant.

As noted above, Police's preferred position remains for a police officer of the rank of Superintendent or above to have the power to issue a crime scene warrant. Failing this, however, crime scene investigations could be expedited by allowing applications to be made by telephone or other electronic means, such as fax or email, in all instances.

A telephone application could be supported by a written application being provided to the authorised officer as soon as practicable thereafter. For example, the Northern Territory legislation allows a search warrant to be issued by telephone, providing that an information on oath, and a supporting affidavit if required, has been prepared either before making the telephone application, or, if necessary, after making the application. Not later than the day after the warrant expires, the police officer must forward to the justice who issued the warrant, the form of warrant prepared by the officer, the information and any affidavit in support.[37]

The AGD does not support all crime scene warrants being issued by telephone. The requirement to provide a written application as soon as is practicable thereafter will not address concerns regarding the importance of transparency, as the key factor is the applying officer's state of mind prior to establishing a crime scene. The AGD considers that where a written application is submitted after a warrant has already been obtained by telephone, the information contained therein may be unintentionally coloured by evidence found on the scene after the crime scene has been established.

---

36 NSW Ombudsman, *Review of the Law Enforcement (Powers and Responsibilities) Act 2002* (2002), 166-168. During court hours, from the time an authorised officer received a warrant application, it took an average of eight minutes to grant the warrant. The maximum time taken was 30 minutes. After hours, from the time an authorised officer received a warrant application, it took an average of 17 minutes to grant the warrant. The maximum time taken was 55 minutes.

37 *Police Administration Act 2007* (NT) s 118.

Expanded powers of entry

Section 88 of LEPRA provides that a crime scene may be established, and crime scene powers exercised, by a police officer "who is lawfully on premises". Part 7 does not give a power of entry to establish a crime scene. The power given to a police officer to enter premises is confined, in section 9, to two emergency situations: those concerning breaches of the peace; and where the police officer believes on reasonable grounds that a person has suffered, or there is imminent danger to a person of, significant physical injury, and immediate entry is necessary to prevent further such injury.

A police officer cannot enter premises under section 9 to establish a crime scene, but must be lawfully on the premises, that is, having the consent of the owner/occupier to enter. The NSWPF has submitted that there are reasonably frequent scenarios where there is a deceased victim on the premises, or suspects or occupants who cannot or will not give permission to enter.

In one such case, police attended premises in response to a "000" call where there was a woman who had died from multiple stab wounds. The house was occupied by two persons, one of whom was too affected by alcohol to give consent to entry, and the other of whom refused to allow police inside the house. Police had no basis for exercising the emergency power under section 9 as there was neither a breach of the peace occurring nor was immediate entry necessary to prevent further serious injury, the woman having already died. The police were unable to enter the house to establish what they reasonably suspected to be a crime scene. In such cases, police have no reasonable alternative but to wait at the scene for a warrant enabling them to enter the premises to issue, thereby wasting police time and depleting the resources available for other operational duties, and with the risk that evidence will be tampered with or destroyed.

Both Queensland and Western Australia's legislatures have seen fit to allow police to enter a place that they reasonably suspect is a crime scene (Queensland), or reasonably suspect that there is something relevant to a serious offence in the place, or a serious offence has been or is being committed in the place (Western Australia).[38] There are, of course limits on these powers,[39] but at least the powers exist.

The NSWPF submits it is reasonable to give NSWPF officers a similar right of entry, and made acceptable by the inclusion of safeguards to the exercise of the power: in order to enter premises, police must reasonably suspect a crime scene in respect of a serious indictable offence or a traffic accident offence that has resulted in the death of, or serious injury to, a person. If, after entering, police could not justify remaining on the premises (their suspicions were proved wrong) it would be illegal for them to stay.

---

38 "Serious offence" means an offence carrying a penalty of imprisonment for 5 years or more or life.

39 In Queensland, the definition of a "crime scene" limits it to offences involving a penalty of seven years' imprisonment or deprivation of liberty, or a serious violent offence that occurred somewhere else. In Western Australia, police may only enter the premises and establish a protected forensic area if they reasonably suspect that in the time it would take to get a search warrant evidence is likely to be concealed or disturbed; or the safety of a person in, or who may enter, the place is likely to be endangered.

The NSWPF recommends that a police officer have the power to enter premises that he or she reasonably suspects is a crime scene (as defined in LEPRA) or on which he or she reasonably suspects there is a deceased person.

In the AGD's view, it is difficult to envisage a situation in which police suspected a deceased person who was the victim of a violent crime was on the premises, where the emergency entry powers would not be enlivened. If police knew with a degree of certainty that the person was deceased, police ought to have reasonable grounds to believe that the perpetrator may still be on premises, and that an additional breach of the peace (such as a further attack on someone else) may occur. Where police did not know with any degree of certainty that the person was already deceased, then the power to enter to prevent significant injury would be enlivened.

The Police Association has also submitted that police should have expanded powers of entry along the lines of those afforded to police in Queensland and Western Australia. On the face of the Qld and WA provisions, police do appear to have slightly wider powers of entry than NSW. However, in Qld, a crime scene may only be established in relation to places where a *seven-year imprisonment offence* or an offence involving deprivation of liberty has happened, or a place where evidence of *significant probative value* relating to a serious violent offence[40] that occurred somewhere else may be found.

In Western Australia, a protected forensic area may only be established if the police officer reasonably suspects that a thing relevant to the serious offence that is in the place is likely to be concealed or disturbed, or the safety of a person who is in or may enter the place is likely to be endangered. In effect, a comparable threshold to that contained in s.92(2) of LEPRA must be met by WA police merely to establish a protected forensic area. In all lesser circumstances, WA police must obtain a search warrant in order to investigate premises. Consequently, while Qld and WA legislation may offer police wider powers of entry for the purpose of establishing crime scenes than comparable provisions in NSW, they both require a significantly higher threshold to be satisfied before crime scenes may be established.

Given the already broad powers of entry granted to the NSWPF to enter premises, and the significantly wider powers available to the NSWPF to establish crime scenes when compared to Qld and WA, the AGD considers that the existing provisions under LEPRA strike the right balance between enabling police to investigate potential crime scenes while protecting the rights of occupiers.

Variations to warrants

The Police Association also noted that only the issuing authorising officer can vary a warrant. This causes problems where new circumstances arise (usually as a result of investigations at the scene) that require a variance, but the issuing authorising officer is unavailable. In that case police have to make a new application for a warrant, but the Police Association submits that the current legislation prevents police from making a new application for a crime scene warrant at the same premises for a 24-hour period. This is not accurate. Under s.91(3), a crime scene may not be established in respect of the same premises more than once in a 24 hour period

[40] An offence involving the deprivation of liberty, or a 7-year imprisonment offence involving violence or the threat of violence.

unless a crime scene warrant is obtained in respect of the second and any subsequent occasion. As noted in the Ombudsman's LEPRA Review, an unintended consequence of this provision is that Police are unable to establish a crime scene to investigate a subsequent, unrelated crime that occurs on the same premises, or a subsequent offence which arises from the same circumstances as the first offence, but is sufficiently removed temporally from that offence to be considered a distinct offence. The Ombudsman's LEPRA Review suggests that this mechanism was intended to prevent police artificially extending the three-hour window by re-establishing a crime scene, but the concern raised by the Ombudsman regarding the potential consequences of this provision seems valid.

***Recommendation 18**: That s.91 be amended so as to clarify that it does not restrict the ability to establish a subsequent crime scene at the same premises for the purposes of investigating a separate offence, meaning subsequent offences which are unrelated to the original offence(s), or subsequent offences which are related to the original offence(s) but are sufficiently removed temporally from those offences to be considered separate offences.*

Multiple crime scenes

The Police Association also submitted that one crime scene warrant should be able to include multiple scenes that relate to the underlying offence. The Ombudsman's LEPRA Review included the following example:

> You have a robbery incident in a shop. Someone has done an armed hold up with a firearm. They run out. Someone's tried to stop them a hundred metres down the road, there's been a shooting or a stabbing or a punch up, so you've got blood and bodily fluids there. They run and get into a car, they end up crashing the car or trying to burn it out. So you've got three separate crime scenes, three separate places, they're all critically important, they're all going to have evidence that I can't afford to lose. It's just very time and labour intensive if you cover all those things.[41]

The Ombudsman's LEPRA Review noted that in such circumstances, police are currently required to make multiple applications for crime scene warrants relating to different addresses, but relying on the same facts. The Ombudsman was of the view that the current provisions resulted in unnecessary paperwork for the police, as well as forcing issuing officers to consider multiple, identical applications, and recommended that one crime scene warrant be able to specify a number of related private premises on which crime scene powers could be exercised. The Review agrees with this recommendation.

The Ombudsman also recommended that Parliament consider amending the Regulation so that in circumstances where one crime scene warrant has specified multiple premises, and the occupier seeks to inspect documents under cl.10(6)(a) of the Regulation, they should not be able to view the details of premises other than their own. The Review agrees with this recommendation.

[41] NSW Ombudsman, *Review of the Law Enforcement (Powers and Responsibilities) Act 2002* p.199

***Recommendation 19**: That s.94 be amended to enable a crime scene warrant to be issued in respect of multiple premises.*

***Recommendation 20**: That in light of Recommendation 19 above, cl.10(6)(a) of the Law Enforcement (Powers and Responsibilities) Regulation 2005 be amended so that in circumstances where one crime scene warrant has specified multiple premises, the occupier's right to inspect relevant documents under the clause is limited to documents relating to their own premises, not those of others.*

Extension of investigation window

Although this issue was not included in the Police Association's submission, the Ombudsman's LEPRA Review states that police officers consulted by the Ombudsman had commonly suggested that the three-hour window for the exercise of crime scene powers without a warrant was too short. This was particularly true of regional police officers, who could find themselves a considerable distance away from the nearest police station while investigating a crime scene. The Ombudsman recommended that the time frame be increased to four hours. The Review agrees with this recommendation. Police have indicated that a six-hour window would be preferable. However, the Ombudsman concluded that there was no evidence justifying such a long investigation window. The Review considers that it would be appropriate for the investigation window to be extended to four hours, with an added provision making allowance for a six-hour investigation window for rural LACs that are prescribed under the Regulation. Any such LAC would be prescribed individually on a case-by-case basis, based on empirical evidence from Police that on multiple occasions, a four-hour window has proven insufficient for that LAC.

***Recommendation 21:** That s.92(3) be amended so as to allow police to exercise crime scene powers under the section for a period of four hours until a crime scene warrant is obtained, or six hours for rural LACs prescribed under the Regulation.*

Exercise of crime scene powers by consent

On the subject of the exercise of crime scene powers by consent, the Community Relations Commission (**the CRC**) expressed support for the Ombudsman's recommendation 43 which suggested Parliament consider amending LEPRA to provide that in circumstances where a police officer has relied upon the occupier's consent to enter premises and exercise crime scene powers, the consent should be informed.

While LEPRA does not make detailed provision for the exercise of crime scene powers by consent, s.95(3) states that nothing in Part 7 prevents a police officer from exercising a crime scene power or doing any other thing with the consent of the occupier. The Ombudsman considered that consent in these circumstances would be informed if the occupier consented after being informed of the powers that the officer wanted to exercise on their premises, the reason for exercising these powers and that they had the right to refuse consent to police entering the premises and exercising powers. The Ombudsman's LEPRA Review states that in its response to a consultation draft of the review, the NSWPF did not support obtaining a person's informed consent through legislation but conceded that if the amendments progressed they would not unduly inconvenience police. Consequently, the Review recommends such clarification.

The Ombudsman also recommended that LEPRA be amended to require that the occupier's consent be obtained in writing, noting that in their direct observations, detectives obtained written consent to enter and investigate premises on all occasions, and the majority of officers consulted indicated that they preferred to obtain written consent from occupiers.[42] Consequently, such a requirement is unlikely to introduce unnecessary red tape, and is supported.

***Recommendation 22**: That s.95 of LEPRA be amended to clarify that where crime scene powers are exercised by consent, that consent must be informed, and that consent will be considered to be informed where the occupier consents after being informed of the powers that police want to exercise on their premises, the reason for exercising the powers and that they have a right to refuse consent.*

***Recommendation 23**: That s.95 of LEPRA be amended to specify that the occupier's consent to exercise crime scene powers must be obtained in writing where reasonably practicable.*

Notification of crime scenes

In regards to section 91, the Law Society noted that there appears to be no provision on how the officer exercising crime scene powers is to notify the public when a crime scene has been established, or when premises cease to be a crime scene.

Section 91(2) of LEPRA states "A police officer who establishes a crime scene must, if reasonably appropriate in the circumstances, give the public notice that the premises are a crime scene." The Review considers that it is neither necessary, nor practical, to prescribe the precise steps that must be taken in order to notify the public of the establishment of a crime scene. There may be situations in which the terrain makes it difficult to employ appropriate barricades, or where due to the circumstances the items typically used to establish a crime scene are not available. While it is important that members of the public be aware that they are crossing into a crime scene, police should retain the flexibility to give this notification in the most appropriate form in the circumstances. The Review notes that comparable provisions in WA and Qld legislation utilise similarly broad requirements.[43]

Compensation for damage caused

The Law Society noted that there was no provision for compensation for damage in the course of exercising crime scene powers. However, as observed in the Ombudsman's LEPRA Review of these powers, the NSWPF appears to have a well-established practice of compensating occupiers for damage caused during the exercise of crime scene powers, with a possible exception where the person claiming compensation was the person who committed the offence being investigated.

Private premises with public access

The Law Society also considered the crime scene powers under s.95 to be draconian, and flagged the potential for these powers to be exercised without

[42] NSW Ombudsman, Review of the Law Enforcement (Powers and Responsibilities) Act 2002 p.182

[43] Section 46(2) *Criminal Investigations Act 2006* (WA), s.165 *Police Powers and Responsibilities Act 2000* (Qld)

warrants in areas such as business premises or apartment building common areas, which could be viewed as 'simultaneously public and private', that is, private but accessible to the public. The Law Society called for legislative amendment to clarify police powers in relation to these areas.

In relation to these private areas that are accessible to the public, it appears plain on the face of the legislation that the kinds of places described by the Law Society would be areas in which police could exercise crime scene powers without a warrant. The definition of 'public place' in s.3 of LEPRA includes an important safeguard in relation to the overlap between a public and private place, by specifying that only those parts of privately owned premises that are open to, or are used by the public, are considered public places. For example, in relation to a business such as a pub, police would be able to exercise crime scene powers without a warrant in relation to those parts of the premises that are open to the public, but would require a warrant in order to investigate areas that are accessible only to the occupier or employees, such as areas behind the bar, or storerooms and kitchens. While this undeniably represents an intrusion into the occupier's rights, the Review considers the provisions to be appropriate, especially given the established practice of compensating occupiers for any damage caused.

Failure to comply with directions of police

The Law Society made comments regarding s.96, which makes it an offence carrying a maximum penalty of ten penalty units for a person, without reasonable excuse, to fail or refuse to comply with a request made or direction given by a police officer pursuant to the exercise of crime scene powers at a crime scene. The Law Society noted that there appears to be no threshold requirement that the request or direction must be reasonable in the circumstances, and recommended an amendment creating such a requirement.

The Review considers, however, that the fact that a direction was unreasonable in the circumstances can itself be raised as a reasonable excuse, and does not propose to make any amendment to s.96.

Extension of crime scene powers

The issues paper released by the Ombudsman in the lead up to the Ombudsman's LEPRA Review enquired whether the crime scene powers under Part 7 should be extended to cover offences other than serious indictable offences or offences committed in connection with a traffic accident resulting in death or serious injury. The Ombudsman noted that police generally responded in the negative, but that some officers had indicated that crime scene powers should be extended to the investigation of domestic violence offences.[44]

According to the Ombudsman's LEPRA Review, a common problem police encounter when responding to domestic violence incidents is that having entered premises by invitation, they are asked to leave by the occupier after it becomes apparent that it may be necessary to remain in order to investigate a suspected offence. This commonly occurs where the victim is not the occupier of the premises,

[44] NSW Ombudsman, Review of the Law Enforcement (Powers and Responsibilities) Act 2002 p.173

or cohabits with the occupier and feels pressured to ask the police to leave. Under such circumstances, police are currently required to leave as requested.

While police have the option of re-entering premises in such cases, either in order to arrest the perpetrator or with a warrant obtained under s.83 of Part 6 of LEPRA (which deals with search, entry and seizure powers relating to domestic violence offences), the Ombudsman's LEPRA Review noted that there were concerns that vital evidence could be lost or destroyed in the intervening period.

The Ombudsman noted that rather than extending Part 7 powers to domestic violence offences, Parliament should give consideration to amending Part 6 to enable the preservation and investigation of domestic violence incident sites. The Review supports this recommendation. Most of the offences that fall under the definition of "domestic violence offence" are serious indictable offences, and existing crime scene preservation powers may already be exercised in respect of them. However, Police have noted that common assaults and breaches of AVOs are the most common forms of domestic violence. As the maximum penalty for these offences is 2 years imprisonment, existing crime scene preservation powers are not available for their investigation. As s.83 already provides for warrants in relation to the investigation of domestic violence incidents, the Review recommends that Part 6 be amended to include provisions based on s.95(1)(a)-(f) to allow the preservation of a domestic violence site until such a warrant can be obtained.

***Recommendation 24**: That Part 6 of LEPRA be amended to provide police with the power to remain on premises and preserve the scene prior to obtaining a warrant under s.83 of LEPRA where they suspect a domestic violence offence is being or may have been recently committed.*

Forms

The Ombudsman noted that Form 20 under the Regulation did not require the address where the crime scene warrant was executed to be recorded, and recommended that the Form be amended to address this. The Review supports this recommendation.

***Recommendation 25**: That Form 20 of the Law Enforcement (Powers and Responsibilities) Regulation 2005 be amended so that police officers must record the address where the crime scene warrant was executed.*

Occupier's rights to challenge the use of Part 7

The Ombudsman's LEPRA Review notes that in Queensland and Western Australia, states with comparable legislative schemes to Part 7 of LEPRA, occupiers of premises have limited rights to challenge the use of crime scene warrants or comparable provisions.

In Queensland, the occupier must be given notice of the making of an application for a crime scene warrant, if reasonably practicable, but not if the police officer reasonably suspects giving the notice would hinder the investigation of the offence. If present at the time of the application, the occupier may make submissions to the issuer, but not submissions that would unduly delay the consideration of the

application.[45] If the application was made in the absence of, and without the knowledge of the occupier, or the occupier had a genuine reason for not being present, the occupier may apply to the issuer for an order revoking the warrant.[46]

In Western Australia, as already noted above, police are able to establish a Protected Forensic Area (**PFA**) in relation to certain classes of offences, to protect evidence until a search warrant can be obtained. A person aggrieved by the establishment of a PFA can apply to the Magistrate's Court to review the grounds for the continued establishment of a PFA.[47] In effect, the right to challenge the use of crime scene powers in Western Australia is limited to the preservation powers of police.

The Ombudsman recommends that Parliament consider amending LEPRA to provide occupier's rights to apply for a review of the grounds on which a crime scene warrant was issued in line with the Queensland model, with this information to be included in the Occupier's notice for a crime scene warrant.

In their response during consultation, police expressed the legitimate concern to the Ombudsman that the right to review might stall an investigation. The Ombudsman notes, however, that this issue can easily be addressed by stipulating that an application for review does not stay the effect of the crime scene warrant, as provided in section 174(3) of the *Police Powers and Responsibilities Act 2000* in Queensland. Based on this, as well as evidence presented in the Ombudsman's LEPRA Review that any such challenges are likely to be extremely rare (the Queensland Police Legal Service and the Western Australian Police Legal Services both indicated that no applications had ever been made by occupiers since the provisions were introduced), the Review agrees with this recommendation. It is noted that the NSWPF have resource concerns. However, as has been the Qld and WA experience, applications are not expected to be frequent.

Recommendation 26: *That Part 7 of LEPRA be amended to provide that in circumstances where a crime scene warrant has been issued for private premises, the occupier of the premises may apply to an authorised officer to review the grounds on which the crime scene warrant was issued in line with the Queensland model, and that the occupier's right to do so should be included in the Occupier's notice under Form 19 of the Regulation. An application for a review will not stay the execution of the warrant.*

Part 8 – Powers of arrest

The powers relating to arrest contained in Part 8 of LEPRA and submissions to this Review which relate to them are discussed in the Tink/Whelan Review.

---

[45] *Police Powers and Responsibilities Act 2000* (QLD) s.170.

[46] *Police Powers and Responsibilities Act 2000* (QLD) s.174.

[47] *Criminal Investigation Act* (WA) s.49

Part 8A Use of police in-car video equipment

A decision of the NSW Court of Criminal Appeal has raised questions regarding s.108E of LEPRA. Part 8A of the Act deals with the use of police in-car video equipment (ICV). Section 108E states: "a conversation between a police officer and a person must not be recorded under this Part after the person has been arrested."

In *Carlton v R* [2010] NSWCCA 81, the appellant had been convicted of supplying a prohibited drug based on the possession of a quantity of methamphetamine, discovered upon searching the appellant's car. Following the appellant's arrest, the police officers left the ICV recording, for reasons unknown, and recorded the following exchange:

Police Officer: Is it ice?
Appellant: No, it's not ice, it's speed that's all it is.
Police Officer: How much is in there?
Appellant: Two ounces.

It is noted that this exchange occurred after Police had appropriately cautioned the appellant regarding questioning. It was asserted on appeal that the audio recording was inadmissible as it was unlawfully obtained in contravention of s.108E. Due to the weight of other evidence in the case, the outcome of the matter was unaffected by the contravention of s.108E. However, in his judgment, Howie J made a number of observations as follows:

> "There is nothing in the [second reading] speech that explains the policy behind s 108E. I can only conjecture that it was thought that the police officer should not interrogate a suspect at the scene rather than take the person to a police station to be formally dealt with as a person under arrest. However, there would have been no prohibition upon the officer turning off the microphone that was part of the ICV but recording the conversation on a separate recording device. There is no prohibition on a police officer arresting a person and then asking questions provided that the person is given a caution as occurred here. In fact, if the officer had not electronically recorded the conversation that followed after arrest, the evidence would prima facie be inadmissible: see s 281 of the *Criminal Procedure Act*. If the recording by ICV of the conversation were admissible, it would have complied with s 281.
>
> I do not appreciate why, if there is a general requirement on police to electronically record conversations with suspected persons and in particular after arrest, the recording of such a conversation cannot be made by use of the ICV. If the police officer acts inappropriately in questioning the person after arrest, for example by failing to give the suspect a caution or by continuing to question after the suspect indicates an unwillingness to be interrogated, it is better that this conduct be electronically recorded than not. Objections can be taken to the recorded conversation based upon the impropriety of the police questioning.

> The result of the prohibition seems to me to be very curious indeed. A recording of the conversation made by a separate tape recorder would not only have been lawful but would have been required for the conversation to be admitted into evidence. Yet a recording of the same conversation by the ICV system is unlawful and liable to be rejected for that reason alone" (paras 14-16)

The Review agrees with Howie J's observations and recommends that s.108E be repealed.

Following representations from the NSWPF, the Review also recommends that LEPRA be amended to make it clear that conversations between Police officers that are captured by ICV are exempt from the *Surveillance Devices Act 2007*. This will ensure greater accountability in relation to investigating police activities during police pursuits.

***Recommendation 27**: That s.108E of LEPRA be repealed.*

***Recommendation 28**: That conversations between police captured on ICV be exempt from the Surveillance Devices Act 2007.*

Part 10 – Other powers relating to persons in custody and to other offenders

Only two submissions were made in regards to Part 10. Legal Aid commented upon the destruction of fingerprints and argued that the discretionary power to destroy prints in a wider range of circumstances should be incorporated in Division 3.

Section 137A allows a person to request the destruction of fingerprints taken where an offence is ultimately not proved, and s.138A requires the destruction of fingerprints taken at the time of issue of a penalty notice once the penalty notice has been paid. However, Legal Aid submitted that it was no longer clear whether other discretionary powers to destroy prints that existed prior to LEPRA continued to operate. Prior to LEPRA, the Commissioner exercised a discretionary power, relying on the authority provided by s.579 of the *Crimes Act 1900*[48], to destroy prints upon application by a person who had been convicted of an offence, was placed on a bond, and had completed 15-years of crime free behaviour. The Commissioner also used to rely on a similar authority under the *Criminal Records Act 1991* in relation to spent convictions.

Similarly, the Law Society submitted that section 137A should go further in regards to the discretion to destroy fingerprints. The Law Society noted that s.38 of the *Children (Criminal Proceedings) Act 1987* gives the Children's Court a discretion to order the destruction of fingerprints where the court believed the circumstances justifies it, and that LEPRA provides no such discretion. The Law Society provided the following case study in support of such a discretion being introduced into LEPRA:

[48] The section deals with evidence of proceedings dealt with by way of bond, where 15 years lapses without the convicted person breaching the bond or committing any offences punishable by imprisonment.

> "An 18-year old man was pulled over for a RBT, which was negative. The police officer noticed a non-standard modification to his vehicle and started issuing him a penalty notice. An argument ensued and the young man was arrested, taken to the police station, fingerprinted and photographed. He was charged with offensive language and resist police, and was ultimately found not guilty of these offences, but pleaded guilty to the "vehicle not comply with standard" offence. Had he been dealt with appropriately at the outset, police would not have his fingerprints and photograph on record. The solicitor wrote to the Commissioner requesting that this material be destroyed, but this request was declined as there was no legislative basis for it."

It further submitted that s.137A should be amended to include reference to photographs and any other records other than records of the Court relating to the alleged offence.

Procedurally, the Law Society noted that section 138 should be moved to the *Crimes (Forensic Procedures) Act 2000*. Section 138 states that a medical practitioner acting at the request of a police officer of the rank of sergeant or above, and any person acting in good faith in aid of the medical practitioner and under his or her direction, may examine a person in lawful custody for the purpose of obtaining evidence as to the commission of an offence if the person in custody has been charged with an offence, and there are reasonable grounds for believing that an examination of the person may provide evidence as to the commission of the offence.

The AGD supports both of these recommendations. In relation to s.138, any amendment should await the outcome of the Review of the *Crimes (Forensic Procedures) Act 2000*. In April 2010, the Forensic Procedures Working Group (**the Working Group**) was established to undertake a comprehensive review of the regulation of forensic procedures and forensic evidence in New South Wales (NSW). Acting Justice Graham Barr (Acting Judge of the Supreme Court) was appointed to chair the Working Group. In relation to a discretion to destroy fingerprints and other records, the AGD supports the extension of s.137A to any records collected under LEPRA, i.e. finger-prints, palm-prints and photographs. The extension of s.137A to 'any other records other than records of the court' is beyond the scope of this Review. The NSWPF have indicated that the circumstances in which such records could be destroyed by the Commissioner should be defined. However, in the AGD's view, the discretion should be left as broad as possible so as to capture situations such as the case study provided by the Law Society.

Recommendation 29: That LEPRA be amended to empower the Commissioner to order the destruction of fingerprints, palm prints and photographs relating to an offence where satisfied that the circumstances justify it, with that power being entirely discretionary.

Recommendation 30: *That pending the outcome of the Review of the Crimes (Forensic Procedures) Act 2000, s.138 be relocated to the Crimes (Forensic Procedures) Act 2000.*

Part 11 – Drug detection powers

There have been significant developments in the area of drug detection dogs in the years preceding this review, as well as during the course of this review.

In the 2001 matter of *Police v Darby*, the magistrate held that the drug detection dog's 'sniffing' and 'nudging' Darby before making the indication amounted to an 'illegal search' because it was conducted without police having a reasonable suspicion. The magistrate did not admit the evidence of the search and dismissed both charges.

The decision was appealed to the Supreme Court and then again to the Court of Appeal. The Court of Appeal, after determining various questions of law, sent the matter back to the Local Court for further hearing of the facts. However, the Director of Public Prosecutions withdrew all charges against Mr Darby.

The Government of the day responded by introducing the *Police Powers (Drug Dog Detection) Act 2001*.

The *Police Powers (Drug Detection Dogs) Act 2001* commenced on 22 February 2002. Section 13 of that Act required the NSW Ombudsman to review the exercise of the powers conferred on police for a period of two years from the commencement of the legislation. The *Review of the Police Powers (Drug Detection Dogs) Act 2001* (**Ombudsman's drug dog review**), was published in 2006, with the majority of the review having been completed before the commencement of LEPRA on 1 December 2005. The drug detection powers are now contained in LEPRA.

The second reading speech on the *Police Powers (Drug Detection Dogs) Bill 2001*, stated that '[t]he bill is drafted to recognise the need for police to use drug detection dogs to assist in identifying persons involved in the illicit drug trade and particularly those supplying prohibited drugs.'

During the second reading speech for the original *Police Powers (Drug Detection Dogs) Bill 2001,* the (then) Minister for Police, the Hon. Michael Costa MLC stated:

> "General drug detection will also operate on transport lines, as prescribed in the regulation-making power under the bill. This is a vital tool for police to follow the drug trade as it moves around. If need be, the lines prescribed will change as the circumstances change. As Minister for Police, I will monitor the effectiveness of the localities prescribed by regulation, and the Attorney General, on the basis of police intelligence, will be in a position to draft the regulations as to what transport locations need to be designated."[49]

At the time of the Ombudsman's drug dog review, eight CityRail train routes were prescribed in the Regulation.

All CityRail metropolitan train routes are now prescribed in the Regulation for the purpose of general drug detection. As noted by the Attorney General when the *Law Enforcement (Powers and Responsibilities) Amendment (Kings Cross and Railways*

[49] The Hon Michael Costa, NSW Legislative Council Hansard, 6 December 2001, p.19745

Drug Detection Bill 2012 was second read, the current Government "...does not judge the effectiveness of drug detection dogs solely based on the apprehension of drug traffickers. Apart from the benefit of using these dogs for specific operational objectives, their use offers many policing benefits, including creating a general deterrence and providing a visible response to drug-related crime."[50]

Submissions to the Review

Only three submissions were made regarding Part 11. Shopfront referred to the Ombudsman's recommendations and recommended that the use of drug detection dogs be discontinued, at least for general drug detection in public areas. The Law Society noted the Ombudsman's recommendations regarding whether drug detection legislation should be retained at all, although its submission did not state whether it was of the view that the provisions should be repealed.

The NSWPF submission to this review on this issue and its response to the Ombudsman's drug dog review are discussed in more detail below.

The Ombudsman's Drug Dog Review

The NSW Ombudsman's views on the drug detection powers are clear. The summary of the report on the Ombudsman's website states that drug detection dogs have proven to be an ineffective tool for detecting drug dealers, and have overwhelmingly led to public searches of individuals in which no drugs were found. The Ombudsman's drug dog review raised significant concerns about the accuracy of drug detection dogs and the impact on civil liberties, and made several recommendations for legislative amendment. The Ombudsman recommended the repeal of the drug detection dog powers on the basis that they had failed to meet the legislative intent of the provisions, which was to combat the trafficking of prohibited drugs.

The sources relied on by the Ombudsman's drug dog review were wide-ranging, including data and records kept by the Dog Unit, records maintained on COPS, court documents, and observational research (including covert observations). Consultation with NSW Police included interviews with senior police involved in the implementation and operational planning of drug detection dog operations, as well as junior officers directly involved in field operations, and consultation with NSW Police on the final report. Significant community consultation also took place.

The Ombudsman found that during the review period, 73% of positive indications by drug dogs did not result in illegal drugs being found on the person searched.

The drug dog provisions do not empower police to search people. Instead, police rely on the standard search power under s.21 of LEPRA, with a positive indication by a drug dog ("**an indication**") helping to form the reasonable suspicion which enlivens that power. While police practices and training may have changed since the Ombudsman's drug dog review, the Ombudsman stated that during the review period, it was clear that in practice, indications provided the *sole basis* for police forming a reasonable suspicion to search. This, combined with the high number of positive indications not resulting in any drugs being found, led the Ombudsman to

[50] The Hon Greg Smith, NSW Legislative Assembly Hansard, 19 September 2012 p.24

question whether it was appropriate to rely on indications to form reasonable suspicion.

The Ombudsman noted that he had sought the opinion of a senior counsel on whether an indication of itself provides a sufficient basis for a police officer to form a reasonable suspicion that the indicated person may be in possession of a prohibited drug. The senior counsel considered that while an indication was clearly a relevant factor in forming a reasonable suspicion, the indication itself, which had only a 26% chance of finding a prohibited drug, could not justify reasonable suspicion.[51]

In submissions to the Ombudsman's drug dog review, NSW Police and the Police Association indicated that they consider that a figure which better represents the accuracy of drug detection dogs would be 70-80%, reached by including cases where no drug is found, but some explanation (such as residual scent) could be provided.[52] However, the Ombudsman was advised by senior counsel that the possibility of dogs making indications based on residual scents undermined, rather than bolstered, the formation of reasonable suspicion, as it provided a plausible reason for a dog's indication other than drug possession.

The Ombudsman's drug dog review includes significant discussion of civil liberties concerns related to the use of drug detection dogs. The Ombudsman notes that "Privacy and embarrassment issues are raised by both the initial indication by the drug detection dog and the subsequent search by police."[53] This is particularly so as searches are in public. People are also more likely to feel that the intrusion on their privacy is unwarranted or unfair when no drugs are found. This is a particular concern as 73% of searches resulted in no drugs being found.

The Ombudsman's drug dog review noted that in 26% of indications, a drug was located. Successful prosecutions for drug supply during the two year review period represented 0.19% of all indications, and were made up of young, first-time offenders involved in the supply of small amounts of drugs to friends or partners for a specific event, such as a party. On this measure, the Ombudsman concluded that drug detection dogs were not effective for the original stated primary objective of the provisions, which is to detect persons involved in the supply of prohibited drugs.

NSW Police Force views on drug detection dogs

General drug detection

The NSWPF submitted that drug dogs should be treated as if they are standard pieces of police 'equipment', which may be used wherever police officers can lawfully be: that is, in any public place and on private property for which police have a search warrant. Furthermore, to overcome any potential *Police v. Darby* issues, the NSWPF considers that amendments should be made to ensure the legality of police detection operations using drug dogs, including the screening of people.

---

[51] Review of the Police Powers (Drug Detection Dogs) Act 2001, NSW Ombudsman, p.200

[52] Review of the Police Powers (Drug Detection Dogs) Act 2001, NSW Ombudsman, p.49

[53] Review of the Police Powers (Drug Detection Dogs) Act 2001, NSW Ombudsman, p.141

Police can use drug detection dogs without warrant in licensed premises, prescribed public transport routes, the Kings Cross Precinct and public places at which a sporting event, concert or other artistic performance, dance party, parade or other entertainment is being held. All other uses of drug detection dogs whether on private property or in public places require a warrant e.g. in order to conduct a routine sweep of high drug use areas (e.g. Redfern), Police must attend the local court and apply for a warrant based on evidence of recent drug activity in the area. The NSWPF considers this to be an inefficient use of the time of both police and the courts.

2006 Ombudsman's Review

In its submission, the NSWPF responded to the Ombudsman's view on the low accuracy of drug dogs. The NSWPF considers drug dogs are more accurate than 26% once the approximately 50% of people who are not found in possession of drugs, but who admit recent contact with drugs are accounted for. NSWPF also notes that as the police are only empowered to conduct a fairly light search of the person, in some cases there may be concealed drugs which are not located.

Significantly, the NSWPF questions the need for reform in response to the Ombudsman's review, which is now seven years old.

The NSWPF notes that the majority of person searches conducted by NSW Police are in circumstances that do not involve the use of a drug detection dog. In those situations, police are guided by the Code of Practice for Crime – Stop Search and Detain. This document provides guidance for all police when forming a reasonable suspicion to stop, search and detain individuals. In addition, the NSWPF notes that prior to all operations involving drug detection dogs, the handler assigned to the operation conducts a briefing during which it is explained that a dog's indication is not sufficient to form a reasonable suspicion to stop and search someone, and that other observations must work in conjunction with the dog's indication to form the reasonable cause.

Discussion

As noted, there has been a significant shift in the policy focus of drug dog powers in recent years. There has also been a complimentary expansion of powers to use drug dogs without a warrant in the Kings Cross precinct.

The Ombudsman's Review and its findings are now seven years old. This Review has carefully considered the Ombudsman's Review, the evidence in it and the concerns it raises. The repeal of the provisions is not, however, recommended.

The legislative reforms expanding the use of drug detection dogs to Kings Cross and all rail lines only commenced operation in October 2012 and their impact is yet to be assessed. To expand the use of drug detection dogs to an entire area such as the Kings Cross precinct is unprecedented since the *Police Powers (Drug Detection Dogs) Act 2001* was introduced in 2001. In light of the concerns expressed in the Ombudsman's Review of drug dog powers, the Review considers that the appropriate course is to monitor the use of the new powers with a view to assessing their impact. To facilitate this, the Review recommends that police gather data on the use of drug detection dogs, including data on:

- The number of operations conducted
- Geographic locations and type of premises involved
- The number of people indicated by a drug detection dog
- The number of people searched as a result of an indication
- The result of each search
- The quantities of prohibited drugs seized
- The nature and number of charges and other legal processes resulting from operations.

Based on data made available to the Ombudsman, it is likely that such information is already being gathered, in which case this Review formally recommends that the NSWPF continue to collect such data.

***Recommendation 31**: That the NSWPF review guidelines setting out the factors that may be considered by a police officer when forming a reasonable suspicion to stop, search and detain a person during drug detection dog operations, noting that reasonable suspicion to search a person cannot be formed based solely on a drug detection dog indication.*

***Recommendation 32** – That the NSWPF collect data on drug detection dogs, including:*

- *The number of operations conducted*
- *Geographic locations and type of premises involved*
- *The number of people indicated by a drug detection dog*
- *The number of people searched as a result of an indication*
- *The result of each search*
- *The quantities of prohibited drugs seized*
- *The nature and number of charges and other legal processes resulting from operations.*

Part 12 – Powers relating to vehicles and traffic

Only the Law Society commented upon this Part, submitting that Part 12 should be moved to the relevant road transport legislation, as most police powers in relation to traffic are in the *Road Transport Act 2013*.

Part 12 contains powers relating to the regulation of traffic, the use of tyre deflation devices, and powers to prevent driving by intoxicated persons or persons who have failed oral fluid tests. The Review agrees with the Law Society's submission. There appears to be nothing about the road powers in Part 12 that makes them more appropriate for inclusion in LEPRA rather than the road legislation. For example, while Part 12 states that police have the power to prevent driving by people who have failed oral fluid tests, the power to conduct these tests, and the definition of oral fluid tests are contained in the *Road Transport Act 2013*. One of the key objectives of LEPRA is to facilitate the public's understanding of police powers by collecting relevant statutory provisions under a single Act. In circumstances such as these, however, it seems that the inclusion in LEPRA of provisions that would be more appropriately contained in other legislation is likely to create confusion rather than increase clarity for the public.

***Recommendation 33**: That the provisions of Part 12 be moved to relevant Roads and Transport legislation.*

Part 14 – Powers to give directions

Under s.197, Police have powers to give directions to a person in a public place where they believe on reasonable grounds that the person's behaviour or presence in the place constitutes certain prescribed relevant conduct, such as harassment of other persons and supplying or soliciting unlawful drugs.

Section 199(1) provides a penalty for failure to comply with such a direction. With reference to statistics from the Judicial Information and Research Service (**JIRS**), Legal Aid submitted that the greatest number of convictions and findings of guilt for any offence under LEPRA had been recorded for this section.

Referring to the 1999 review conducted by the Ombudsman on similar powers under the *Summary Offences Act 1988,* Legal Aid submitted that monitoring and consultation should take place in relation to directions in public places, given that disadvantaged people, including homeless people, were more likely to be on the street. Shopfront echoed these concerns, noting that there continued to be significant problems with inappropriate directions being given by police, particularly to young people, indigenous people and drug users. The Law Society also noted the use of inappropriate directions, going on to observe that while the provisions contained safeguards and require proof of a number of elements in order to make out the offence, the majority of cases for this offence are dealt with by way of infringement notices, which are rarely contested.

Shopfront and the Law Society also made reference to the Ombudsman's LEPRA Review, and submitted that the legislature had done nothing to address most of the problems identified in the review.

The only recommendation made in that review in relation to the power to give directions that required some legislative amendment was as follows:

27. 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. Such a code should:
    - *emphasise that the 'reasonable directions' power is not limited to directions to 'move on';*
    - *set out those factors (such as age, racial appearance, manner of dress and antecedents) that can not form the basis of a direction in the absence of other factors;*
    - *provide guidance to police regarding the situations in which a person's presence alone may warrant police intervention.*[54]

Given the continuing concerns expressed by Legal Aid, the Law Society, and Shopfront, the Review recommends that renewed consideration be given to the creation of such a Code of Practice.

---

[54] NSW Ombudsman, *Policing Public Safety* 1999 pg.279

The NSWPF does not support this proposal, on the grounds that it could lead to arguments that a code be developed for every common law or statutory power exercised by police. However, this concern could be addressed by amending the recommendation that the proposed code be prescribed by Regulation.

Recommendation 34: *That a Code of Practice be prescribed in the Regulation, which clearly articulates the rights of citizens and the powers of police in relation to Part 14 powers, and incorporates the elements identified in the Ombudsman's 1999 report.*

Part 18 – Use of force

Only the Law Society commented in relation to Part 18 and submitted that police need training on what is 'force as is reasonably necessary'. The Law Society suggested that there be some legislative guidance on this issue, possibly requiring police to consider factors such as seriousness of offence, age, gender, cultural background of the person being arrested, any disability and other related matters before using force.

The Law Society did not indicate whether, in its opinion, there was a problem with police officers utilising force in inappropriate solutions, only that training and legislative guidance were required.

While the Law Society raises valid concerns about the use of force by police, the Review does not consider that legislative amendment would assist in this area; it does not seem realistic that police in the field will always be in a position to systematically consider numerous factors prescribed in legislation before exercising force. This area appears to be one that may be best addressed by the review of existing police training modules, or the introduction of new training modules to ensure there is a proper understanding of the situations in which the use of force is reasonably necessary, particularly given the difficult circumstances under which such force may be exercised.

Recommendation 35: *That existing police training material be reviewed, and, if necessary, amended, to ensure there is a proper understanding of the situations in which the use of force is reasonably necessary.*

Request vs. require

Under LEPRA, police officers have a number of powers to require persons to do certain things. Currently, such provisions are drafted so as to allow police to request that a person take a certain action, with an offence provision which applies were the person fails to comply with that request.

For example, under s.11 of LEPRA, a police officer may request a person whose identity is unknown to the officer to disclose his or her identity if the officer suspects on reasonable grounds that the person may be able to assist in the investigation of an alleged indictable offence based on the person's vicinity to a place where the alleged indictable offence occurred. It is an offence under s.12 of LEPRA to fail or refuse to comply with such a request without reasonable excuse.

Notably, the heading for s.11 is "Identity may be required to be disclosed".

Conversely, under s.19 of LEPRA, police have the power to request proof of identity when making a request under the Part, but it is not a requirement; there is no offence provision which applies to a failure to comply.

The Parliamentary Counsel has recommended that to remove any unnecessary ambiguity, the word 'require' should be used instead of 'request' in s.11 and all similar provisions where failure to comply constitutes an offence. The Review supports this recommendation.

***Recommendation 36**: That provisions which currently use the word 'request' be re-drafted to use the word 'require', if failure to comply constitutes an offence.*

Conclusion

Section 243 of LEPRA requires that the Attorney General and the Minister for Police to review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

In general, the policy objectives of LEPRA remain valid, and the terms of the Act remain appropriate to achieve those objectives. As recommended by the Review there are a number of ways LEPRA could be amended to provide greater clarity, or to address concerns expressed by members of the community in their submissions.

Appendix 1 - List of Submissions

Submissions to the Review were received from the following individuals and organisations:

- Aboriginal Legal Service (NSW/ACT) Limited
- Australian Federal Police
- Australian Human Rights Commission
- Community Legal Centres NSW
- Community Relations Commission
- Legal Aid NSW
- Department of Human Services
- Juvenile Justice NSW
- Law Society of NSW
- Police Association of NSW
- Public Interest Advocacy Centre Limited
- Shopfront Youth Legal Centre
- the NSWPF and the Law Enforcement Policy Branch, Department of Premier and Cabinet

Appendix 2 – Operational responses to 2009 Ombudsman's recommendations

Rec No	Recommendation	NSW Police Force response
Personal searches		
2.	The NSW Police Force ensure that officers are aware of those circumstances in which police may search a person who has been arrested in order to be taken into lawful custody to ensure that police properly understand the circumstances in which they cannot search for evidence.	Police powers of search are covered extensively in the Associate Degree in Policing, including the difference between searches undertaken under s 23(1) and s 23(2). This is reinforced through assessment and training. Search powers are also covered in the Police Powers Handbook; Constables Pocket Guide; Police Powers Online Module; ongoing journal articles; recent updates to the Computerised Assessment System; and release of Six Minute Intensive Training Scenarios (SMITS). Comprehensive Mandatory Continuing Police Education - Police Powers Training Package was released for the 2012/13 training year. The NSW Police Force (NSWPF) are also undertaking a review of the Code of Practice for CRIME and will consider this issue as part of that review.
7.	The NSW Police Force ensure that all strip searches are properly recorded in COPS and audit those records on a regular basis. a. For strip searches in the field, the event record should include: i. a compulsory free text entry detailing the reasons why the officer considered it necessary to conduct a strip search, including the factors that made it serious and urgent to conduct a strip search immediately, and ii. all persons present during the strip search, and additionally in	The *Crime Recording Standard* reinforces that LEPRA requires police to have reasonable cause to conduct a search and that every search must be recorded and justified in COPS. Detailed guidance is provided on how to record searches. Every COPS event created must be verified by an officer's supervisor, who is to ensure that sufficient detail is included in the event narrative and Primary Reason for Search field to justify the use of police powers. In this way, every COPS record is audited by a senior officer. Details of police reasons for conducting a strip search are presently recorded in the "event narrative" in COPS (which is "free text entry"), the arresting officer's notebook or in the custody management record. In relation to recommendation 7(b)(ii), the question of whether a support person was present during a strip search is contained in the COPS custody system ("Was a support person present during Strip Search?)"

Rec No	Recommendation	NSW Police Force response
	the case of a person with impaired intellectual functioning or a child: (a) action taken to obtain a support person, (b) if none could be obtained in time for the search – the reasons why; b. For strip searches while in custody, the custody management record should include: i. a compulsory free text entry detailing the factors that made it necessary to conduct a strip search, and ii. all persons present during the strip search, and additionally in the case of a person with impaired intellectual functioning or a child: (a) action taken to obtain a support person, (b) if none could be obtained in time for the search – the reasons why.	Support person details can be entered in the Custody Management System, which contains a number of questions about support persons. If a support person cannot be located, details of steps taken to contact a support person can be added as a general comment, including reasons as to why the person was unable to be contacted.
12.	The NSW Police Force provide guidance to officers on how to plainly state the reason(s) for the exercise of a power.	The Associate Degree in Policing education materials and practical training provide guidance to police and emphasise the importance of communicating in plain English. Police training reinforces that police must state the reason for exercising their power and why such action is required of them. This is also reinforced in the field based subjects of the Associate Degree in Policing, which involves assessment of a student's application of policing skills,

Rec No	Recommendation	NSW Police Force response
		especially the exercise of powers under LEPRA. After leaving the Academy, a Probationary Constable is placed under the supervision of an experienced Field Training Officer for approximately 12 weeks. For the remainder of the 12 month probationary period, an officer is closely supervised by his or her Field Supervisor. Regardless of rank, whenever a police officer creates a COPS event, the actions in that event must be verified by a supervising officer. This ensures that the exercise of powers under LEPRA is monitored and appropriately reinforced.
13.	The NSW Police Force provide further guidance to officers to clarify when warnings are required and the offences that apply to relevant powers.	As per the response to recommendation 12, NSWPF training reinforces that police must state the reason for exercising their power and why such action is required of them. In addition to the training that they undertake as part of the Associate Degree in Policing, and the supervision that Probationary Constables are subject to upon their graduation from the Police Academy, further guidance on the application of warnings is provided to all operational police officers through the Powers of Police Workshop, which covers in detail how and when to give warnings. Additionally, the Code of Practice for CRIME provides further guidance on warnings.
14.	The NSW Police Force ensure that all future training packages encourage officers to use plain English confidently and effectively in all aspects of their work.	Throughout the Associate Degree in Policing, the use of plain English is emphasised and encouraged, and communication skills are monitored during simulated training. Students are taught barriers to communication along with effective verbal and non-verbal communication skills. Skills to overcome communication barriers are also a focus of the course. Students are assessed in a written examination and through practical assessment of communication skills.
15.	The NSW Police Force consider ways of streamlining the reporting practices of officers so that details of searches on arrest are consistently recorded and duplicate records are	The Ombudsman appears to conflate "powers – person search incident" created in COPS (which is used for operational analysis) and what is recorded as "search details" against a person of interest in an event or on a custody management record. Each "search details" entry is not the same record as used by BOCSAR or NSWPF for the indication of "person searches".

Rec No	Recommendation	NSW Police Force response
	not created.	A person search incident recorded on COPS is not created for each and every search of a person. Details of a search of a person can be recorded in the POI screen and the custody management system but would not be a "person search" for the purpose of operational analysis or BOCSAR data. Person Search details can be recorded in both the Event System and the Custody System. They are easily identifiable in the Person Search Download, as the reference numbers for Events start with "E" and for Custody they start with "U". The discrepancy that the Ombudsman cites between the event system and the custody system is something that may need rectifying. The usual process when a prisoner is presented to a custody area is that the arresting/conveying police are required to complete a field arrest form. This form when completed contains information that assists the custody officer to create the custody entry on COPS. The field arrest form contains a section for recording property details of the detained person. There is no area to indicate what type of search was conducted by the arresting police. The Field Arrest Form allows for recording of "Property of Detained Person", which includes details of the searching officer and the location of the search. Amendments to the Field Arrest Form to include search type may assist along with education of police to record the same search consistently. The NSWPF will investigate whether such an amendment will address the concerns expressed by the Ombudsman and the feasibility. COPS amendments may assist however, the cost associated with such changes is likely to be prohibitive.
16.	The NSW Police Force ensure that all officers are aware of and understand their obligations in relation to protection of privacy under Part 4, Division 4 in particular: a. examples of locations where searches may be conducted in order to fulfil the 'private area' requirement in section 33(1)(a)	The Associate Degree in Policing instructs police officers in techniques to ensure they are able to conduct thorough and systematic searches. Examples are given of private areas in which strip searches may be conducted to ensure that they comply with s 33(1) of LEPRA, i.e. in an area removed from the view of the general public. This is reinforced in *Police Powers Handbook*, *SMIT PA002* and *Police Powers Online Module*.

Rec No	Recommendation	NSW Police Force response
	both in the field and while in custody, b. factors to consider in assessing the reasonable practicability of conducting a search in a private area, and c. measures that police can take to ensure that strip searches are not conducted in the presence or view of people who are not necessary to the search.	
17.	The NSW Police Force consider revising the CCTV standard operating procedures or providing guidance for stations that have continuous digital surveillance to ensure that the privacy and dignity of the person subject to the search are protected.	The SOPs on Video Surveillance in Police Charge Rooms and Other Locations in Police Stations provide that strip searches should be carried out in an area not covered by CCTV and in accordance with the Code of Practice for CRIME. The NSWPF is in the process of rolling out digital CCTV and updated SOPs are being developed as part of the CCTV upgrade project. The NSWPF will evaluate options for best practice in relation to the recording of strip searches as part of this process.
18.	The NSW Police Force consider reviewing the quality of all CCTV surveillance and recording equipment and revising the funding required to ensure that Local Area Commands are provided with adequate resources to maintain appropriate and useful surveillance of charge rooms.	Digital CCTV rollout is currently underway.
22.	The NSW Police Force consider providing additional guidance on the definition of 'transgender person' in	The NSWPF *Policy on Sexuality and Gender Diversity 2011-2014: Working with gay, lesbian, bisexual, transgender and intersex people* formally acknowledges gay, lesbian, bisexual, transgender and intersex people as groups vulnerable to prejudice related violence. The policy

Rec No	Recommendation	NSW Police Force response
	the *Code of Practice for CRIME* and other policy and educational material.	aims to ensure that these diverse communities are treated with respect, courtesy and fairness in all their interactions with police. The definition of "transgender person" in s 32(11) of LEPRA is the definition adopted in the Code of Practice for CRIME. The Code also describes the difference between a transvestite person and a transgender person. The Code is currently under review and it is anticipated that further guidance will be provided to officers in relation to search and custody of transgender and intersex persons.
24.	The NSW Police Force provide further guidance and advice to officers about: a. the questions permitted (and not permitted) to be asked during a search, and b. when it is appropriate to suspend questioning in order to conduct a search and how this should be carried out.	The Associate Degree in Policing provides police officers with clear guidance regarding best practice and the appropriate time to caution a person of interest. The Associate Degree's curriculum covers requirements before, during and after a search is conducted. In addition, students are required to submit a brief of evidence for assessment. Appropriate search and questioning techniques form part of the brief of evidence. Guidance is also provided through the Powers of Police Workshop. Recommendation 3 of the statutory review proposes an amendment to s 32(8) of LEPRA to clarify that questioning relating to an offence is not to be conducted during a search, although questions may be asked for the purpose of ensuring the safety of the police officer, the person being searched and any other person during the search.
26.	The NSW Police Force provide further guidance and advice to officers about the section 32(2) requirement that people be advised if it is necessary to remove clothing and why it is necessary.	The office of the Ombudsman conducted a survey of Local Court and Children's Court respondents, which is the basis for this recommendation. The Ombudsman concludes from the results of this survey that there is low police compliance with s 32(2) that requires urgent redress. The NSWPF considers that the survey was not sufficiently rigorous to support the conclusions drawn by the Ombudsman about police compliance. The survey results do not appear to constitute a strong enough evidence based sample to reach conclusions about police compliance. For example, of the 148 respondents surveyed in the Local Court who reported being subject to an ordinary/frisk search in the field, only 49 answered the question whether they had been given a reason for the search. Of this 49, just 15 reported that no

Rec No	Recommendation	NSW Police Force response
		reason was given. In this category, only 33.1% of the respondents provided a response to this question and 30.6% indicated that they had not been given reasons. While the response rates and no reason given were higher for strip searches in custody, especially for respondents in the Children's Court, the cohort of those who provided a response is not considered to be large enough to reach a satisfactory conclusion as to police's compliance with s32(2) of LEPRA. Nonetheless, the NSWPF provides guidance through education materials and practical training on how to conduct searches in the Associate Degree in Policing, which is reinforced through the *SMIT PA002 – Strip Search* and in the *Police Powers Handbook*.
27.	The NSW Police Force: a. provide further guidance and advice to officers about their responsibility under section 32(10) to ensure that the person is adequately clothed if clothing is seized, and b. ensure that all charge rooms are properly equipped to provide appropriate clothing when clothes are seized.	a. Further guidance can be provided to police officers by amending the Code of Practice for CRIME, to state that if a decision is made to seize a suspect's clothing, police are to ensure arrangements are made to retrieve or provide alternative clothing. The issue can also be included in the Safe Custody Course. b. The NSWPF does not consider practicable a suggestion that all police stations have available an array of clothing ranges and sizes in the event that police seize a suspect's clothing. If police seize a suspect's clothing, alternative arrangements are made. For example, individuals may be provided with disposable clothing (forensic overalls) until the completion of crime scene examinations and/or until more suitable arrangements can be made, e.g. a family member retrieving alternative clothing or police retrieving clothing by other means. Police make all efforts to ensure persons in custody are adequately dressed in circumstances where clothing is seized.
30.	The NSW Police Force ensure that all officers are aware of their obligations to ensure the presence of a support person when it is necessary to conduct a strip search a young person or a person with impaired	The NSWPF provides guidance to police about the obligation to ensure that a support person is present when conducting a strip search on a young person or a person with impaired intellectual functioning. This is emphasised in the: • Associate Degree in Policing – study guide and practical tutorials; • Police Powers Handbook; and

Rec No	Recommendation	NSW Police Force response
	intellectual functioning.	• Mental Health Intervention Team (MHIT) – 4 day training course includes modules dealing with the *Mental Health Act 2007* and the Emergency NSW Mental Health MOU. This relates to recommendation 10 of the report into the statutory review, which recommends that LEPRA be amended to more strictly define the situations in which a strip search on a young person or intellectually impaired person could be conducted in the absence of a support person, along the lines of s.631 of the *Police Powers and Responsibilities Act 2000* (Qld).
31.	The NSW Police Force consider providing police officers with regular, practical training on the identification and proper treatment of people with impaired intellectual functioning.	The NSWPF provides the following training and guidance on the identification and appropriate treatment of people with impaired intellectual functioning : • Associate Degree in Policing – study guide and tutorials, especially in relation to vulnerable suspects; • Detectives Education Program (interviewing suspects, victims and witnesses with impaired intellectual functioning); • Investigators Course (victims and witnesses); • Adult Sexual Assault Course (victims and witnesses); • Mandatory Continuing Police Education (MCPE) Training Package titled *Disability Awareness.* ; and • MHIT – 4 day training course.
32.	The NSW Police Force consider COPS enhancements to record whether a person has been previously identified as a person with impaired intellectual functioning to alert subsequent police to the fact that support should be provided for that person.	The NSWPF is in the process of investigating how impaired intellectual functioning can be better recorded on COPS through the Interagency Service Principles and Protocols on Intellectual Disability in the Criminal Justice System.
Crime scenes		

Rec No	Recommendation	NSW Police Force response
35.	The NSW Police Force develop standard operating procedures to provide guidance in relation to the crime scene provisions in LEPRA.	**The NSWPF does not support the development of SOPS for crime scenes.** The provisions contained in Part 7 of LEPRA are sufficiently clear to provide guidance to police in relation to the exercise of crime scene powers and the establishment of crime scenes. Considerable information on crime scene warrants is also provided in the Operations Manual, Police Handbook and the Code of Practice for CRIME. The NSWPF considers that SOPS would not be of any further assistance, and may instead serve to fetter the discretion of individual police officers. Nonetheless, the NSWPF intends to prepare an article on crime scenes for publication in the *Police Monthly*.
36.	The NSW Police Force ensure that any standard operating procedures developed for crime scenes provide guidance on the appropriate application of the *Coroner's Act 1980* and subsequent Coroner's direction in circumstances where a person is alone on premises and possibly deceased.	Police may enter private premises where the sole occupant appears to be dead (and the death appears suspicious) by applying to the Coroner for a coronial investigation scene order: s 23D of the *Coroner's Act 1980*. The Coroner has written to the NSWPF advising that, if a person is unconscious or dead but the circumstances are not suspicious, police are not required to apply for a coronial investigation order. They may enter premises by invoking s 9 of LEPRA, which permits police to enter if a person has suffered significant physical injury. The Ombudsman refers to this as the "Coroner's direction" and states that it was emailed to all police.
37.	The NSW Police Force provide training to police officers on the following: a. the effect of the amendments to the *Coroner's Act 1980* and the Coroner's direction on the investigation of a deceased person, fire or explosion where a reasonable suspicion is not available, and b. the options available to police to	The Ombudsman concludes, through its observations and consultation, that most police officers are uncertain about how to enter premises without exercising investigative powers where a sole occupant is unconscious. There are currently materials covering these matters, including the Policing Issues & Practice Journal (July 2005). The Associate Degree of Policing curriculum includes an overview of the *Coroners Act*, specifically police's role in investigating and preparing coronial matters. This component of the course was reviewed by the State Coroner in April 2012. Probationary constables are not to investigate deaths or fires.

Rec No	Recommendation	NSW Police Force response
	lawfully enter premises in emergencies where a person is alone and unconscious.	
38.	The NSW Police Force, in consultation with NSW Health Sexual Assault Services, should ensure that standard operating procedures developed for crime scenes provide guidance on dealing with victims of sexual assault with sensitivity, while still ensuring a thorough police investigation of the offence.	The NSWPF provides extensive guidance on dealing with victims of sexual assault. This topic is included in the: • Associate Degree in Policing; • Investigators Course; • Detectives Education Program; • Adult Sexual Assault Course; • Joint Investigative Interviewing of Children Course; • two MCPE Training Packages – Investigating Adult Sexual Assault and Victims of Adult Sexual Assault; • Domestic and Family Violence SOPs; and • Charter of Victims Rights.
39.	The NSW Police Force, in consultation with NSW Health Sexual Assault Services, amend its standard operating procedures dealing with the investigation and management of sexual assaults to provide specific guidance on the sensitive establishment of crime scenes when investigating sexual assault offences.	The following NSWPF training and materials provide extensive guidance on the sensitive establishment of crime scenes when investigating sexual assault offences: • Duty Officers' manual; • Police Handbook; • Charter of Victims Rights – addresses sensitivity of the investigation, particularly victim management; and • Domestic and Family Violence SOPs.
40.	The NSW Police Force provide training to police officers on the sensitive establishment of crime scenes in circumstances of an	As the response to recommendations 38 and 39 indicate, comprehensive training is already provided to Police in this area. Hence the development of additional training materials is not supported.

Rec No	Recommendation	NSW Police Force response
	alleged sexual assault.	
41.	The NSW Police Force should ensure that standard operating procedures developed for crime scenes clarify the following: a. the circumstances, if any, in which police should apply for a crime scene warrant, regardless of occupier's consent, and b. the circumstances in which Forensic Services Group attend crime scenes.	**This recommendation is not supported** a. The NSWPF previously advised the Ombudsman (on the Issues Paper) that the need to obtain a crime scene warrant is an operational decision to be made by the investigator. It should not be a requirement to obtain a crime scene warrant when an occupier has already consented to the exercise of crime scene powers. If an occupier withdraws consent, police are still on the premises lawfully and therefore can invoke Part 7 crime scene powers and can remain on site for up to 3 hours while a crime scene warrant application is made. b. The Senior Investigation Officer is responsible for determining when forensic investigators attend crime scenes.
44.	The NSW Police Force should ensure that standard operating procedures developed for crime scenes include guidance on: a. the factors that must be considered by police when obtaining occupier's consent, and b. obtaining occupier's consent in Indigenous communities where a concept of communal ownership is common.	In instances where communal ownership applies, the consent of any legitimate occupier should suffice. Occupier's consent should not be dependent on cultural background.
45.	That the NSW Police Force ensure that standard operating procedures developed for crime scenes provide guidance on what constitutes a public	There is no evidence of confusion among police officers about the distinction between public and private areas of licensed premises. The definition of "public place" in s 3 of LEPRA is clear. The NSWPF intends publishing an "Understanding LEPRA" article in the *Police Monthly*, dealing with crime scenes and will consider whether to address this issue in the article.

Rec No	Recommendation	NSW Police Force response
	and private part of a licensed premises.	
48.	The NSW Police Force should ensure that standard operating procedures developed for crime scenes provide guidance on dealing with family members of deceased people at crime scenes with a focus on the sensitive handling of these situations and, as far as reasonably possible, consideration of the diverse religious and cultural practices that exist around dealing with deceased people.	The Associate Degree in Policing provides police with guidance on cultural and religious sensitivity when dealing with victims and families. The Australasian Police Multicultural Bureau's A *Practical Reference to Religious Diversity for Operational Police* alerts police to a range of religious and cultural observances concerning deceased persons. This publication is available on the NSWPF Intranet. The NSWPF is developing a training course in Islamic Cultural Awareness, which will cover this issue. The sensitive handling of crimes scenes, especially when dealing with incidents in which a person has died, is also covered in the MCPE training package Coronial Investigations: Issues for Police.
49.	The NSW Police Force ensure that standard operating procedures developed for crime scenes provide guidance on the removal of animals from premises to enable preservation of the crime scene and the appropriate care of any animals removed from premises in these circumstances.	**The NSWPF does not support this recommendation** as the Ombudsman does not indicate that there is any confusion or lack of clarity among police about their responsibilities.
50.	The NSW Police Force give consideration to alternative means of completing crime scene warrant applications by police officers, including portable technology devices and remote access internet, to allow	As the Ombudsman notes in the report, LEPRA makes provision for urgent applications, including for crime scene warrants, by telephone. Section 60 provides that an application for a warrant must be made in writing and in person by the person seeking the warrant. However, application can be made by telephone, which includes any communication device, if the warrant is required urgently: s 61. Further, if it is not practicable for the

Rec No	Recommendation	NSW Police Force response
	the most efficient use of police resources.	officer applying for the warrant to make the application directly to a magistrate (or other authorised officer) by telephone, another person can make the application on the officer's behalf. The current fleet of Police Mobile Data Terminals has the capability and the software installed to enable the completion of crime scene warrant Microsoft Word documents. However, the actual link to the document templates is currently not available when in mobile (3G) mode. The NSWPF is investigating the feasibility of enabling access to the forms from the MDT Portal Page. It also has a link to iNotes, which would enable police to email the completed warrant application to a court where a warrant is required urgently. There is no capability to print from a Mobile Data Terminal but the document could be emailed to a court or a police station for printing, then be signed by the police officer and lodged. This may be a viable option when there is considerable travel time involved, allowing police to have the document prepared before arriving at a location where it can be printed and signed upon arrival. However, this option does not provide any significant advantages in terms of efficiency or time saving for non-urgent applications.
53.	The NSW Police Force provide refresher training in completing all documentation relating to crime scene warrant applications.	This is covered in Investigators Courses and the Detectives Education Program. The NSWPF intends to prepare an article for the *Police Monthly* on crime scenes and will consider whether this issue should be included in the article.
55.	The NSW Police Force circulate a reminder to police officers that a report must be made to authorised officers following the execution of a crime scene warrant, in the form prescribed by the *Law Enforcement (Powers and Responsibilities) Regulation 2005.*	As per the response to recommendation 53, the NSWPF intends to prepare an article for the *Police Monthly* on crime scenes and will consider whether this issue should be included in the article.

Rec No	Recommendation	NSW Police Force response
56.	The NSW Police Force ensure that standard operating procedures developed for crime scenes include guidance on reporting to authorised officers following the execution of crime scene warrants and the appropriate completion of documentation relating to crime scene warrant applications.	This is covered in Investigators Courses and the Detectives Education Program. The NSWPF intends to prepare an article for the *Police Monthly* on crime scenes and will consider whether this issue should be included in the article.
58.	The NSW Police Force ensure that standard operating procedures developed for crime scenes include guidance on the scope of crime scene warrants to authorise seizure of evidence of unrelated offences and the circumstances where the use of a search warrant is preferable or required, and provide ongoing training in this regard.	**The NSWPF does not support this recommendation.** The Ombudsman's report relies on survey responses from authorised officers to establish that there is confusion among police about the circumstances in which a crime scene warrant or a search warrant is appropriate. However, it appears that the response from one authorised officer demonstrates misunderstanding of the crime scene warrant, ie refusing applications for crime scene warrants on the basis that the relevant offence was not committed on the premises but the items sought were on the premises and therefore a search warrant was considered more appropriate. Section 90(1)(c) provides for crime scene warrants in respect of premises where there may be evidence of a serious indictable offence that may have been committed elsewhere. A crime scene warrant allows for search and seizure of a thing in the same way that a search warrant does, with certain differences. A crime scene warrant does not expire on execution, as does a search warrant, so there can be multiple entries to the subject premises during the life of a crime scene warrant. A crime scene warrant can be issued on the basis of a reasonable suspicion, whereas a search warrant requires reasonable grounds to believe that the thing is, or will be, on the subject premises. However, the lower threshold for a crime scene warrant is offset by the fact that it is only available for a serious indictable offence, or a motor vehicle crash involving death or grievous bodily harm. A

Rec No	Recommendation	NSW Police Force response
		search warrant, on the other hand, is available for any indictable offence and a number of defined summary offences (e.g. drug and firearms offences). It is not feasible to draw an inflexible distinction between the two types of warrant because the powers they provide overlap to some extent. Further, it would be contrary to the public interest to direct police to refrain from seeking the most effective and flexible investigative tool (if that is available). The NSWPF does not consider it necessary to provide additional guidance to police in the absence of any evidence that police are regularly making inappropriate applications for warrants that are refused by the court.
59.	The NSW Police ensure that standard operating procedures developed for crime scenes provide guidance on the different assistance options police officers can and should provide to people whose home is inaccessible due to the establishment a crime scene and who require alternate accommodation.	**The NSW Police Force does not support this recommendation.** The Ombudsman's report states that the NSWPF and the Department of Housing appear to be fulfilling their duty to assist in finding alternative accommodation for people affected by crime scenes but that the approach appears to be ad hoc. The NSWPF notes there is no obligation on police to arrange alternative accommodation. However, police will continue to assist people who are unable to return to their homes, as appropriate in the circumstances. The "ad hoc" approach referred to by the Ombudsman in his report is appropriate given that the circumstances of each investigation will vary. The officer in charge of the investigation is therefore in the best position to assess what assistance is required and available. For example, the government agencies, resources and facilities such as refuges and shelters will vary according to location.
60.	The NSW Police Force ensure that standard operating procedures developed for crime scenes reinforce that police need to consider the needs of children affected by crime scenes and provide guidance on the	The Police Handbook sets out the responsibilities of police for a child's safety and wellbeing in circumstances where a child is in police care, e.g. the child's parent or guardian has died, has been hospitalised or arrested. The Domestic and Family Violence SOPs also provide extensive guidance to police in relation to children at risk of harm.

Rec No	Recommendation	NSW Police Force response
	matter. In particular, any standard operating procedure should make clear that police officers have a duty to ensure the safety of children affected by crime scenes, particularly if they are unaccompanied.	
61.	The NSW Police Force ensure that standard operating procedures developed for crime scenes provide guidance on how police officers should deal with damage caused to premises as a result of the exercise of crime scene powers LEPRA.	**The NSWPF does not support this recommendation.** See Recommendation 62.
62.	The NSW Police Force provide occupiers with an information sheet outlining the options available to them to restore premises following any damage caused as a result of a crime scene being established or crime scene powers being exercised.	**The NSWPF does not support this recommendation.** The circumstances where police enter premises or surrounds to establish a "crime scene" or exercise "crime scene" powers or other powers may include: 1. search warrants; 2. forensic procedure orders; 3. established as a result of an emergency situation (accident, siege etc); 4. in exercising common law powers or powers under LEPRA to address the commission of an offence or when an offence is imminent or when a breach of the peace may occur; 5. to conduct an investigation into the safety and well being of an individual. There is a large variety and divergence of circumstances where police enter and exercise powers. The general rule with regard to damage occasioned in the reasonable exercise of police duties or when lawfully executing a court order if no liability arises is referred to as an investigator's

Rec No	Recommendation	NSW Police Force response
		immunity. There are, however, occasions when error, acting outside of the order and/or failing to comply with SOPs may give rise to liability despite the immunity. Further, even in circumstances where the immunity is relevant, it may be appropriate to provide an ex gratia payment to a third party who has suffered detriment as a result of the workings of government through no fault of their own. This is ultimately a matter of discretion for the Minister or his delegates. There are difficulties in drafting an information sheet as recommended by the Ombudsman. There is a risk that the posting of such an information sheet could be interpreted as an acceptance of liability for any damage. Further, from a claims management perspective, such information sheets may invite spurious claims.
64.	The NSW Police Force: a. amend the directions in the COPS LEPRA User Guide to more accurately reflect the circumstances in which police officers should activate the screen 'Crime scene established for less than 3 hours Action', and b. remind all police officers that the use of the crime scene provisions in the *Enforcement (Powers and Responsibilities) Act 2002* be recorded, in accordance with the COPS LEPRA User Guide.	The COPS LEPRA User Guide has been amended. A Nemesis message was sent in July 2012 to all NSWPF education and development officers about the change to the COPS LEPRA User Guide. These officers were requested to bring this change to the attention of staff within their Commands.
Notices to produce		
68.	The NSW Police Force ensure that standard operating procedures	The NSWPF will develop SOPs to provide guidance on notices to produce.

Rec No	Recommendation	NSW Police Force response
	developed for notices to produce include guidance on the definition of a 'document' in the context of notice to produce documents.	
70.	The NSW Police Force ensure that standard operating procedures developed for notices to produce include guidance about the expiry of a notice to produce and also highlight that an authorised officer may specify a timeframe within which documentation must be provided to police following the execution of a notice.	The NSWPF will develop SOPs to provide guidance on notices to produce.
71.	The NSW Police Force ensure that standard operating procedures developed for notices to produce include guidance about the types of institutions that may be subject to these notices.	The NSWPF will develop SOPs to provide guidance on notices to produce.
73.	The NSW Police Force ensure that standard operating procedures developed for notices to produce provide guidance about requesting documentation from ADIs, including advice on the appropriate scoping and detailing of requests.	The NSWPF will develop SOPs to provide guidance on notices to produce.

Rec No	Recommendation	NSW Police Force response
74.	The NSW Police Force hold discussions with representatives from major ADIs with a view to developing a fact sheet outlining the key aspects of the notice to produce provisions and guidelines for ADIs for supplying documentation via notices to produce.	The NSWPF will undertake consultation with ADIs and develop guidelines for supplying documentation in respect of notices to produce.

Appendix 3 – Summary of the Review's response to the balance of the Ombudsman's 2009 recommendations

Ombudsman's Recommendation	Discussion in Report	Government response
1. Parliament consider amending the *Law Enforcement (Powers and Responsibilities) Act 2002* by defining the term 'lawful custody' for the purpose of the section 24 power to conduct searches while in custody following arrest — to limit the power to specified custody locations (such as a police station, and/or other relevant custody locations).	p. 29-30	Supported. This issue was considered by the Review and Recommendation 5 proposes relevant reforms.
3. Parliament consider amending the *Law Enforcement (Powers and Responsibilities) Act 2002* by: a. Defining the term 'body cavity' to clarify what areas of the body this term excludes for the purpose of a strip search as defined in section 3 and the strip search safeguard in section 33(4). b. Clarifying what if any authority police have to search a person's mouth once they have requested that a person open their mouth. If provision is made to allow police to search a person's mouth and make requests to facilitate the search that Parliament consider: *i. repealing sections 21A and 23A, and developing a stand alone provision that clearly outlines what power police have to search those parts of a person's body and what type of search (ordinary or strip) it constitutes (for the purpose of applying safeguards)*	p. 36-38	Supported in part. These issues were considered by the Review and Recommendations 11 and 12 propose relevant reforms. 'Body cavity' will be defined and LEPRA will be amended to make clear that searches of a person's mouth constitute an ordinary search. The balance of the Ombudsman's proposals were considered but are not supported.

Ombudsman's Recommendation	Discussion in Report	Government response
ii. revising the need for an offence for failure to comply. c. Ensuring an appropriate review of any legislative powers authorising police to request that a person open their mouth and to search the mouth.		
4. Parliament consider amending the *Law Enforcement (Powers and Responsibilities) Act 2002* to provide a simpler two tiered personal search regime consisting of ordinary searches (amalgamating existing provisions relating to frisk and ordinary searches) and strip searches.	p.25-27	Supported. This issue was considered by the Review and Recommendation 2 proposes relevant reforms.
5. Parliament consider amending the *Law Enforcement (Powers and Responsibilities) Act 2002* so that a strip search is only authorised: a. in the field, if a police officer suspects on reasonable grounds that it is necessary to conduct a strip search for the purpose of the search, and the seriousness and urgency of the circumstances make it necessary to conduct a strip search in the field b. in custody at a police station or equivalent custody location, if a police officer suspects on reasonable grounds that it is necessary to conduct a strip search for the purpose of the search.	p. 30-36	Supported in part. This issue was considered by the Review and Recommendation 6 proposes relevant reforms. However, no reasonable suspicion will be required for searches conducted in custody.
6. Parliament consider amending the *Law Enforcement (Powers and Responsibilities) Act 2002* to clarify the purpose of a search in custody under section 24 for the purpose of applying the threshold test of necessity to conduct a strip search under section 31.	p. 30-36	This issue was considered by the Review but the proposed reform is not supported.

Ombudsman's Recommendation	Discussion in Report	Government response
8. Parliament consider simplifying Part 4. In conjunction with recommendation 4, one option may be to take a three level approach to triggering the exercise of the search powers, based on the person's status (detained/arrested/in custody), the threshold requirement (reasonable suspicion/reasonable suspicion that it is prudent/in custody), the officer's duty of care, and/or the extensiveness of the power to conduct a search.	p. 39	Supported. This issue was considered by the Review and Recommendation 14 proposes relevant reforms.
9. Parliament consider amending the *Law Enforcement (Powers and Responsibilities) Act 2002* to clarify whether or not police are authorised to delegate their search powers, and if so, whether it should be restricted to circumstances where they cannot reasonably comply with the safeguards without doing so.	p. 38-39	Supported. This issue was considered by the Review and Recommendation 13 proposes relevant reforms.
10. Parliament consider amending the *Law Enforcement (Powers and Responsibilities) Act 2002* to clarify ambiguity in relation to the extent to which section 201 applies (if at all) to: a. requests that a person open their mouth or move their hair under section 23A b. searches for knives or dangers implements under section 26.		Clarification and simplification of section 201 was considered in the independent review conducted by Mr Andrew Tink and the Hon Paul Whelan on certain parts of LEPRA in 2013 ("**the Tink/Whelan Review**").
11. Parliament consider ways of reducing the complexity that currently exists in relation to the application of section 201 particularly in relation to timing requirements and safeguards for exceptional powers.		Considered in the Tink/Whelan Review.
19. Parliament consider amending the section 33(7) strip search safeguards to permit the presence of a medical	p. 30-36	Supported in part. This issue was considered by the Review. Recommendation 8 proposes clarifying

Ombudsman's Recommendation	Discussion in Report	Government response
practitioner of the same or opposite sex and confirm that section 33(1)(b) allows for the presence of people of the same or opposite sex who are necessary for the strip search under sections 33(2), 33(3) or 33(7).		section 33 to specify that people of the opposite sex to the person who is being searched who are fulfilling a function under s.33(2) and 33(3) may be present for the search if acceptable to the person being searched. The recommendation that a medical practitioner of the opposite sex can be present regardless of whether the person being searched approves is not supported.
20. Parliament consider applying the definition of 'transgender person' in section 32(11) to the same sex safeguard in section 32(7) to ensure that transgender people are afforded the same safeguards in relation to who conducts the search.	p. 30-36	Supported. This issue was considered by the Review and Recommendation 7 proposes relevant reforms.
21. Parliament consider defining the term 'genital area' for the purpose of LEPRA in order to clarify what search practices this safeguard applies to.	p. 30-36	This issue was considered by the Review but the proposed reform is not supported
23. NSW Parliament consider amending section 32(8) of the *Law Enforcement (Powers and Responsibilities) Act 2002* to clarify that a person must not be questioned about any offence that he or she is suspected of having committed while a search is being conducted	p. 27-29	Supported. This issue was considered by the Review and Recommendation 4 proposes relevant reforms.
25. Parliament consider reviewing the police practice of asking people to squat in order to search for secreted items and determine what if any further safeguards are required to regulate this practice if not adequately covered by existing safeguards.	p. 30-36	This issue was considered by the Review but the Ombudsman's proposal is not supported
28. Parliament consider amending section 33(3) of the *Law Enforcement (Powers and Responsibilities) Act*	p. 30-36	Supported. This issue was considered by the Review and Recommendation 9 proposes relevant reforms.

Ombudsman's Recommendation	Discussion in Report	Government response
2002 to more strictly define the circumstances where a strip search of a child or person with impaired intellectual functioning can be conducted if a support person is not present. Those circumstances may include instances where the officer suspects on reasonable grounds that it is necessary to strip search the person in the absence of a support person to protect the safety of a person, prevent escape from lawful custody or to ensure evidence is not concealed or destroyed, in which case the urgency and any efforts to obtain a support person must be recorded as outlined in recommendation 7.		
29. Parliament consider reviewing how the various law enforcement and criminal justice Acts affecting people with impaired intellectual functioning or those who may not be able to protect their own interests can be made more consistent and accessible to all people including police.	Outside ambit of Statutory Review	Support in principle. The Government supports consistency between statutory instruments where possible, and work in this area is ongoing. In relation to people with impaired intellectual functioning in particular, the NSW Law Reform Commission has published two reports on people with cognitive and mental health impairments in the criminal justice system, and the Government will develop a response to the recommendations of those reports in due course.
33. Parliament consider amending section 33(2) so that police are required to inform people that they may have a support person present for a strip search in circumstances where it is reasonably practicable.	p. 30-36	This issue was considered by the Review but the proposed reform is not supported.
34. Parliament consider amending Part 6 of the *Law Enforcement (Powers and Responsibilities)*	p. 62-63	Supported. This issue was considered by the Review and Recommendation 24 proposes relevant reforms.

Ombudsman's Recommendation	Discussion in Report	Government response
Act 2002 to provide police with the power to preserve premises prior to obtaining a warrant under section 83 of LEPRA where they suspect a domestic violence offence is being or may have been recently committed.		
42. Parliament consider amending the *Law Enforcement (Powers and Responsibilities) Act 2002* to provide that in circumstances where a police officer has relied upon occupier's consent to enter premises and exercise crime scene powers, the consent be obtained in writing unless it is impracticable to do so.	p. 60-61	Supported. This issue was considered by the Review and Recommendation 23 proposes relevant reforms.
43. Parliament consider amending the *Law Enforcement (Powers and Responsibilities) Act 2002* to provide that in circumstances where a police officer has relied upon occupier's consent to enter premises and exercise crime scene powers, the consent be informed. The legislation should specify that consent in these circumstances is informed if the occupier consents after being informed of the powers that the officer want to exercise on their premises, the reason for exercising these powers and that they have the right to refuse consent to police entering the premises and exercising powers.	p. 60-61	Supported. This issue was considered by the Review and Recommendation 22 proposes relevant reforms.
46. Parliament consider amending the *Law Enforcement (Powers and Responsibilities) Act 2002* so that a crime scene may not be established in the same premises more than once in a 24 hour period without a crime scene warrant unless the crime scene relates to a separate and unrelated offence.	p. 58-59	Supported. This issue was considered by the Review and Recommendation 18 proposes relevant reforms.
47. Parliament consider amending section 92(3) of the *Law Enforcement (Powers and Responsibilities) Act 2002* so that a police officer may exercise the crime	p. 60	Supported. This issue was considered by the Review and Recommendation 21 proposes relevant reforms. The proposed reform will also allow investigation for

Ombudsman's Recommendation	Discussion in Report	Government response
scene powers conferred by section 92 for a period of not more than four hours, commencing when the crime scene is established, unless the police officer or another police officer obtains a crime scene warrant.		up to six hours for LACs prescribed by regulation, such as LACs in rural areas that may benefit from a longer investigation window.
51. Parliament consider amending the *Law Enforcement (Powers and Responsibilities) Act 2002* so that in circumstances where evidence of an offence has extended over a number of private premises, one crime scene warrant can allow police to establish a crime scene and exercise crime scene powers on each of these premises.	p. 59-60	Supported. This issue was considered by the Review and Recommendation 19 proposes relevant reforms.
52. Parliament consider amending the *Law Enforcement (Powers and Responsibilities) Regulation 2005* so that in circumstances where one crime scene warrant has specified multiple premises, the occupier's inspection of documents under clause 10(6)(a) be allowed on the grounds that the occupier not be able to view the details of premises, other than their own	p. 59-60	Supported. This issue was considered by the Review and Recommendation 20 proposes relevant reforms.
54. The responsible Minister consider amending Form 20 of the *Law Enforcement (Powers and Responsibilities) Regulation 2005*, so that police officers can record the address where the crime scene warrant was executed	p. 62-63	Supported. This issue was considered by the Review and Recommendation 25 proposes relevant reforms.
57. That the Attorney General and Minister for Police in conducting their review of the policy objectives of the Act, give consideration to the reporting requirements imposed on police officers following the execution of crime scene warrants and other warrants with a view to ensuring that the reporting requirements do not become unnecessarily onerous.		Not supported. The reporting requirements in relation to warrants under LEPRA are minor when compared to comparable requirements under other Acts, such as for warrants under the *Surveillance Devices Act 2007*. While the Government does not support this particular recommendation, it has made a number of

Ombudsman's Recommendation	Discussion in Report	Government response
		recommendations relating to crime scene warrants to ensure that administrative burdens on the NSW Police Force are lessened.
63. Parliament consider amending the *Law Enforcement (Powers and Responsibilities) Act 2002* to provide that in circumstances where a crime scene warrant has been issued for private premises, the occupier of the premises may apply to an authorised officer to review the grounds on which the crime scene warrant was issued in line with the Queensland model. In conjunction, Form 19 — Occupier's notice for crime scene warrant, should be amended to include information on the occupier's right to have the grounds for the issue of the crime scene warrant, executed on their premises, reviewed by an authorised officer.	p. 63-64	Supported. This issue was considered by the Review and Recommendation 26 proposes relevant reforms.
65. Parliament consider whether any further external scrutiny is required of the recent amendment to section 73A of the *Law Enforcement (Powers and Responsibilities) Act 2002* that allows crime scenes connected with terrorism offences to be extended for a period of up to 30 days in certain circumstances to ensure that the NSW Police Force comply with their legislative obligations in the exercise of these powers.	Outside the ambit of the Review.	Not supported. No significant issues were raised in relation to this provision in submissions to the Review. Further, the Ombudsman has general oversight over the functions of the NSW Police Force. As noted in the recent statutory review of the *Terrorism (Police Powers) Act 2002*, powers relating to terrorism are rarely used, and the Government does not consider that a review of this one specific provision is justified.
66. DAGJ provide refresher training for authorised officers on the crime scene provisions in the *Law Enforcement (Powers and Responsibilities) Act 2002*.		Supported. Following implementation of the reforms contained in the Review, education will be provided to authorised officers on the crime scene powers.

Ombudsman's Recommendation	Discussion in Report	Government response
67. Parliament consider amending section 54 of the *Law Enforcement (Powers and Responsibilities) Act 2002* to address the inconsistency in the threshold requirements imposed on police officers and authorised officers when applying for and issuing a notice to produce documents.	p. 45-48	Supported. This issue was considered by the Review and Recommendation 16 proposes relevant reforms.
69. DAGJ ensure that advice and guidance is provided to authorised officers on the definition of a 'document' in the context of the notice to produce provisions.		Supported. Following implementation of the reforms contained in the Review, education will be provided to authorised officers on the definition of 'document'.
72. DAGJ ensure that advice and guidance is provided to authorised officers about the types of institutions that may be subject to these notices		Not supported. The Government considers that it is clear on the face of the legislation who may be subject to notices.
75. Review to consider whether broadening notices to produce would be appropriate.		Supported. The Review notes that further consideration would be subject to further consultation with stakeholders.