NSW Ombudsman

Review of certain functions conferred on police under the *Law Enforcement (Powers and Responsibilities) Act 2002*

Personal searches

Crime scenes

Notices to produce

February 2009

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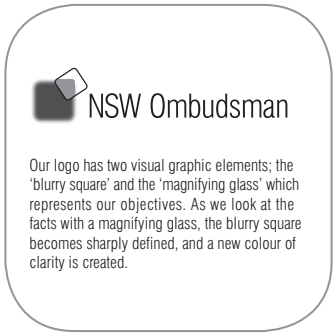

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LEPRA Review

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12 February 2009

The Honourable John Hatzistergos MLC
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Sydney NSW 2001

The Honourable Tony Kelly ALGA MLC
Minister for Police
Level 34, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2001

Dear Ministers

Pursuant to section 242(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), I have been required to keep under scrutiny the exercise of the powers relating to personal searches, crime scenes and notices to produce conferred on police by LEPRA.

The legislation also provides that as soon as practicable following the two year review period I am to provide the Attorney General, the Minister for Police and the Commissioner with a report about the activities undertaken to monitor the implementation and operation of LEPRA.

I am pleased to provide you with the final report of our review. In addition to reporting on our monitoring of the relevant legislative provisions I have made a number of recommendations identifying legislative and procedural changes, for your consideration.

I draw your attention to section 242(4) of LEPRA which requires the Attorney General to lay a copy of the report before both Houses of Parliament as soon as practicable after receipt.

Yours sincerely

Bruce Barbour
Ombudsman

NSW Ombudsman

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12 February 2009

Mr Andrew Scipione
Commissioner of Police
Level 14
201 Elizabeth Street
Sydney NSW 2000

Dear Commissioner

Pursuant to section 242(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), I have been required to keep under scrutiny the exercise of the powers relating to personal searches, crime scenes and notices to produce conferred on police by LEPRA.

The legislation also provides that as soon as practicable following the two year review period I am to provide a report to the Commissioner of Police, the Attorney General and the Minister for Police about the activities undertaken to monitor the implementation and operation of LEPRA.

I am pleased to provide you with the final report of our review. I note that you were provided with a draft of the report. Where appropriate, comments provided in response by the Ministry for Police have been incorporated into the report.

Yours sincerely

Bruce Barbour
Ombudsman

Foreword

The *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) represents an important development in the consolidation of law enforcement legislation in New South Wales. It incorporates many key policing functions, setting out both the powers and responsibilities incumbent on police in the exercise of those powers and making those laws more accessible to all members of the community.

In particular, LEPRA aims to: simplify laws relating to the conduct of personal searches; codify police powers in relation to crime scenes; and enable police to obtain documents held by financial institutions by means of a notice to produce. My office was required to review the exercise of these functions conferred on police for two years from commencement on 1 December 2005.

Our review of these functions indicates that while the objectives of LEPRA have largely been met, there is scope for further clarity and simplification of the legislation and opportunities to improve police practice in relation to these functions.

Consequently, we have recommended some legislative amendments for the consideration of Parliament, which aim to simplify the personal search regime and general safeguards and clarify occupier rights in relation to crime scenes. We have also made some procedural recommendations for the consideration of relevant agencies which are designed to further improve understanding and compliance with the LEPRA provisions, in particular, the development of standard operating procedures for crime scenes and notices to produce.

I trust this report will provide valuable assistance in the further development and application of these provisions.

Bruce Barbour
Ombudsman

Contents

Part 2 — Personal searches

Part 3 — Crime scenes

Part 4 — Notices to produce

Appendices

Executive summary

The *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) commenced on 1 December 2005. To date, it represents the most extensive codification and consolidation of law enforcement powers commonly used by police in New South Wales.

Introduction

In the second reading speech, the then Attorney General noted that LEPRA:

> *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.*[1]

The Attorney General went on to say that LEPRA consolidates existing statute law, codifies the common law and clarifies police powers — which included some amendments 'intended to more accurately reflect areas of the common law or address areas in the existing law where gaps have been identified'.

Three areas of significant reform were singled out by Parliament for review, namely, the powers and safeguards relating to:

- personal searches on arrest and in custody
- crime scenes
- notices to produce documents.

The Ombudsman was required to keep these provisions under scrutiny for a two year period from 1 December 2005 to 30 November 2007. This review implemented a comprehensive research strategy which included:

- analysis of police records relating to the use of the powers to conduct searches, establish crime scenes and issue notices to produce
- analysis of court documents relating to applications for crime scene warrants and notices to produce
- surveys of:
  - — prosecutors, defence solicitors and people facing charges in the Local Court and Children's Court in relation to personal searches
  - — authorised officers, prosecutors, defence solicitors and people affected by the establishment of a crime scene on their experience with the crime scene provisions
  - — authorised officers, prosecutors and authorised deposit-taking institutions with regard to the operation of the provisions concerning notices to produce documents
- consultation with specialist policing units and police officers who regularly use the personal search, crime scene and notice to produce powers
- field observations of NSW Police Force officers conducting searches in the field and in custody, establishing crime scenes, and exercising crime scene powers.

This report documents the Ombudsman's review in accordance with section 242 of LEPRA.

Searches

Part 4, Division 2 of LEPRA provides police with the power to conduct searches of people on arrest or while in custody. These powers are accompanied by specific safeguards for personal searches in Part 4, Division 4 and general safeguards in Part 15.

Key provisions

Prior to the introduction of Part 4, police powers to conduct searches could be found in the common law and legislation in certain circumstances. Part 4, Division 2 outlines the circumstances under which police may carry out a search of a person on arrest, and section 24 provides police with the power to search a person who is in lawful custody. Part 4, Division 4 provides safeguards designed to preserve the person's privacy and dignity during any

1 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.

personal search and additional safeguards for privacy, dignity and support during a strip search. Part 15 provides general safeguards that apply to a number of powers including the power to search.

Major findings

Our review of the personal search provisions found that in general, there is broad support for the consolidation and codification of personal search powers. In particular, our consultations revealed that most community stakeholders and members of the NSW Police Force believe the personal search safeguards are appropriate, and reasonable, however, there are differing levels of understanding and compliance amongst police officers. Consequently, our review identified a number of legislative and procedural issues for consideration by Parliament and made recommendations aimed at enhancing and improving police procedures in the area, as outlined below.

Issues relating to the powers to search

During the course of our review it became apparent that some elements of the personal search powers may not be clear. We recommend that Parliament consider amending Part 4, Division 2 of LEPRA to:

- Limit the scope of the power to search a person in 'lawful custody' by clearly defining that term and thereby ensuring that this broad power cannot be relied upon to conduct searches of people on arrest without meeting the criteria in section 23.
- Simplify the search powers by providing a two tiered search regime consisting of ordinary searches (amalgamating existing frisk and ordinary search provisions) and strip searches, and amend the threshold and recording requirements for strip searches in the field and in custody to support police in the performance of their duties while promoting greater accountability.
- Clearly state the purpose of a search in custody to give effect to the threshold test of necessity to conduct a strip search.
- Clarify what, if any, authority police have to search a person's mouth once they have requested that a person open their mouth, by developing a stand alone provision that clearly states the extent of police powers in this regard and what safeguards apply.
- Clarify what, if any, authority police have to delegate their search powers and if so, whether this does or should only occur if the safeguards are complied with.

Issues relating to the general safeguards

Our review of the general safeguards in Part 15 (insofar as they relate to personal searches) suggests that these safeguards are reasonable and appropriate, however numerous amendments have created some uncertainty and complexity. Consequently we recommend that Parliament consider amending Part 15 of LEPRA to simplify those safeguards and clarify the extent to which those safeguards apply to certain powers.

In our view compliance could also be improved by providing police officers with guidance regarding: the clear and appropriate expression of reasons and warnings; when warnings are required and the offences that apply to relevant powers; and the value of using plain English to communicate with the public.

Issues relating to the general search safeguards

While the majority of the safeguards aimed at preserving privacy and dignity in all searches appear to be reasonable and appropriate, our review of those provisions identified a few key safeguards that do not appear to be achieving their stated aims. In particular:

- Understanding and compliance with the privacy safeguards could be enhanced by providing police officers with further guidance on appropriate locations and factors to consider when assessing the reasonable practicability of conducting a search in a private area and 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.
- Upgrading of the closed circuit television facilities and associated policies could help ensure that searches are recorded and viewed in an appropriate way that encourages greater police accountability and public confidence.
- Guidance on the use and benefits of plain English could help police officers to develop effective ways of telling a person if they will be required to removing clothing and if so, why.
- The provision of appropriate garments and guidance could assist in ensuring that people are left with or provided with adequate clothing when clothes are seized as part of a search.

We also recommend that Parliament consider amending section 32 of LEPRA to:

- Clarify that a person must not be questioned about an offence that he or she is suspected of having committed while a search is being conducted.
- Define the term 'genital area' to assist in the application of the safeguard prohibiting searches of genital areas.
- Apply the definition of ' transgender person' to the safeguard which requires that a search be conducted by a person of the same sex as the person being searched to ensure that transgender people are searched by an officer of the appropriate sex where possible.

Our review also found that there is considerable scope to increase the accuracy and efficiency of record-keeping in the NSW Police Force.

Issues relating to the strip search safeguards

Most community stakeholders and police agreed that these safeguards are reasonable and appropriate. However, the low rate of compliance with the requirement that a strip search of a child or person with impaired intellectual functioning must be conducted in the presence of a parent, guardian or other support person and low rate of identification of people with impaired intellectual functioning is of particular concern.

Consequently, we recommended that Parliament consider amending section 33(3) to clarify that such a search must be conducted in the presence of a support person unless certain circumstances exist. In addition, those circumstances and efforts to obtain a support person must be documented. We also recommended that Parliament consider reviewing legislative definitions and provisions affecting people with impaired intellectual functioning in an effort to make those laws more consistent and accessible and that police consider changes to their recording systems to assist in the identification of people who may need support.

We also recommend that Parliament consider amending section 33 of LEPRA 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.
- The term 'body cavity' is defined to assist in the application of the safeguard prohibiting strip searches that involve a search of a person's body cavities and any power to search a person's mouth in Part 4, Division 2.

Conclusion

The stated objectives of Part 4, Divisions 2 and 4 of LEPRA were to simplify the personal search powers without reducing or increasing existing powers so that they could be readily understood by police and the community, and provide safeguards that better define police responsibilities when conducting personal searches. While these provisions represent a vast improvement on the rules and regulations governing the conduct of personal searches prior to LEPRA, there is still scope for improvement in the clarity of the legislation and compliance by police. These are common police powers, the exercise of which affects the lives of many people in New South Wales every day.[2] The rules governing the exercise of these powers must therefore be clear and practical to ensure effective law enforcement and the proper protection of civil rights. In our view our recommendations, if adopted, can assist in achieving these aims.

Crime scenes

Part 7 of LEPRA provides police with the power to establish 'crime scenes' and exercise 'crime scene powers' in certain circumstances.

Key provisions

Prior to the introduction of Part 7, police powers to establish and manage crime scenes were implied in common law. LEPRA was introduced to clarify and codify these common law powers. Part 7 outlines the circumstances in which a crime scene may be established and sets out the crime scene powers. In certain circumstances officers may have to apply for a crime scene warrant to establish a crime scene and exercise crime scene powers. Part 7 also provides safeguards and stipulates offences in relation to the exercise of crime scene powers. Part 7 does not prevent a police officer from exercising a crime scene power or doing any other thing on the premises if the occupier of the premises consents.

2 Data provided by the NSW Police Force and analysed for this report suggests that police conduct an average of 382 searches a day in New South Wales. See section 13.2 for further detail.

Major findings

Our review of the crime scene provisions found that in general, there is widespread support among a broad range of stakeholders for the codification of police powers at crime scenes. However, views are more diverse on the implementation of the provisions. Consultations with NSW Police Force officers revealed that some officers believed the provisions were straightforward to implement, while others found them overly complex and viewed the introduction of crime scene warrants as unnecessary.

Our review found that while crime scene warrants introduce an additional process for police officers investigating serious indictable offences, the crime scene warrant application process on the whole did not appear to be onerous to undertake and had not adversely affected the investigation of serious indictable offences. However, our review did identify a number of legislative and procedural issues for consideration by Parliament and relevant agencies and makes recommendations aimed at enhancing and improving police procedures in the area, as outlined below.

The introduction of standard operating procedures governing the crime scene provisions

To date there are no standard operating procedures governing how police should implement Part 7. We are of the view that standard operating procedures should be developed to provide clear guidance to officers about how the crime scene provisions should be implemented. Issues that would be appropriately included in standard operating procedures about the crime scene provisions include:

- the factors that must be considered by police officers when obtaining occupier's consent including the age, intoxication, physical health, mental state and language skills of the occupant. Standard operating procedures should also provide guidance on obtaining occupier's consent in Indigenous communities, where communal ownership of premises is common
- the circumstances, if any, in which police should apply for a crime scene warrant regardless of occupier's consent
- the circumstances in which the NSW Police Force, Forensic Services Group should attend a crime scene
- the establishment of a crime scene on licensed premises
- the investigation of premises involving a deceased person who is the sole occupant where there is no obvious indication that the death is as a result of a serious indictable offence
- dealing with victims of sexual assault with sensitivity, while still ensuring a thorough police investigation of the offence
- 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, recognition of the diverse religious and cultural practices that exist around dealing with deceased people
- removing animals from premises to enable preservation of the crime scene and appropriate care of these animals
- reporting to authorised officers following the execution of crime scene warrants
- the different circumstances in which a crime scene warrant and search warrant can be applied for and used
- assisting people whose home is inaccessible due to the establishment of a crime scene and who require alternative accommodation
- ensuring the safety of children affected by crime scenes, especially if they are unaccompanied
- dealing with damage caused to premises as a result of the exercise of crime scene powers.

Occupier's rights to challenge the use of Part 7

The crime scene provisions allow police to enter and investigate private premises which is a significant intrusion into the lives of private citizens and detracts from common law rights protecting people's homes and property from intrusion by anyone. There are very limited mechanisms available to occupiers to challenge this exercise of power. We are of the view that where occupiers are affected by the use of a crime scene warrant on their premises they should have a means available to them to challenge the use of the warrant. This right should be available to all people affected by the use of a crime scene warrant. We recommend that consideration be given to amending Part 7 of LEPRA 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 for issuing the warrant.

Occupier's consent

Under LEPRA, a police officer who is lawfully on premises may exercise crime scene powers or do any other thing if the occupier of the premises consents. However, the legislation does not codify the form that this consent should take. In particular, the legislation does not state whether consent needs to be informed, nor does it specify if consent should be written or verbal.

We believe that it is crucial that occupier's consent to police entry onto, and investigation of, private premises be informed. We also believe that obtaining written consent from occupiers to enter premises and investigate the premises is preferable to consent that is verbal. Written consent provides documented evidence of the consent. It also provides a stronger safeguard for an intrusion onto private premises than verbal consent as occupiers may be less willing to sign something they do not understand.

We recommend that consideration be given to amending LEPRA to state that occupier's consent must be explicit and in writing unless impracticable to do so. Explicit consent would involve informing people of the powers police wish to exercise on their premises, the reason for exercising these powers and that they have the right to refuse to consent to police entering the premises and exercising powers.

Other practical issues

During our review we identified a number of practical difficulties with the implementation of Part 7. These include:

- The difficulties officers have establishing more than one crime scene on the same premises in a 24 hour period. Currently, a crime scene may not be established on the same premises more than once in a 24 hour period unless a crime scene warrant is obtained in the second or any subsequent occasion.
- The process of applying for a crime scene warrant was complicated where evidence of an offence has extended across several premises. Currently, a separate crime scene warrant is required for each of the premises.
- It can be difficult for police to obtain a crime scene warrant within the three hour time limit on exercising crime scene powers to preserve evidence without a crime scene warrant.

We propose practical solutions to these concerns including amending the legislation to allow a crime scene to be established in the same premises more than once in a 24 hour period without a crime scene warrant in circumstances where the crime scene relates to an unrelated offence, the inclusion of multiple premises on one crime scene warrant where the evidence of an offence has extended across several premises, and extending the timeframe for exercising crime scene powers without a warrant from three to four hours.

Conclusion

The stated objective of Part 7 of LEPRA was to codify, consolidate and clarify police powers in relation to crime scenes. Our review has found that this objective has largely been achieved. We also recommend a number of legislative and procedural changes which, if adopted, should improve the operation of Part 7.

Notices to produce documents

The primary objective of Part 5, Division 3 of LEPRA was to provide police with an option other than a search warrant, to obtain financial records from authorised deposit-taking institutions (ADIs) in instances where an offence is committed by someone other than the ADI.

Key provisions

Prior to the introduction of this provision in LEPRA, police would apply to an authorised justice for a search warrant to obtain documents from an ADI. Search warrants generally authorise police to search premises, however, in practice ADIs would provide police with the specific documents they sought.

While police may still apply for a search warrant in order to obtain documents from an ADI, Part 5, Division 3 of LEPRA now provides them with the option of applying for a notice to produce documents instead. Such a notice requires the ADI to produce specific documents, such as those relating to a particular customer. The provisions are designed to allow police to more efficiently obtain relevant documentation from ADIs and formalises what had already been occurring in practice.

The Law Enforcement (Powers and Responsibilities) Regulation 2005 specifies that an application for a notice to produce requires police to detail within the notice the name of the institution from which it requires documents, a description of the documents required and the reasonable grounds on which it suspects the documents are related to the offence.

Major findings

Our review of the notice to produce provisions found that in general, the introduction of Part 5, Division 3 has provided police with a more appropriate means by which to obtain financial records from ADIs. While some police advised that little, if anything, has changed since the introduction of the notices to produce provisions, others recognised that the prevailing practice of obtaining documentation from ADIs by way of a search warrant was not entirely appropriate, stating that a notice to produce is a more relevant investigative tool and is a more palatable process for ADIs. This sentiment was echoed by various stakeholders.

However, our review did identify some procedural and legislative issues for consideration by Parliament and relevant agencies and made recommendations aimed at enhancing and improving procedures in the area, as outlined below.

Issues relating to the operation and interpretation of provisions

During the course of our review we became aware of apparent inconsistent threshold requirements imposed on police officers and authorised officers when applying for and issuing a notice to produce. We recommend that Parliament consider amending LEPRA to address this anomaly.

- Queries were raised during the course of the review concerning the definition of a 'document' within the context of the notice to produce provisions. In particular, the scope of the term document was raised in relation to the retrieval of closed circuit television footage filmed from bank premises. We recommend that the NSW Police Force and the Attorney General's Department provide guidance on the definition of a document within this context.
- Uncertainty amongst both police and ADIs regarding the terms of expiry for a notice to produce was also identified as an issue during our review. The confusion centred on whether a timeframe stipulated within the notice to produce referred to the time within which police are required to execute a notice to produce on an ADI, or whether it referred to the time within which the ADI was required to produce the documents to police. Some police were also uncertain as to what constituted a breach of a notice to produce, where no expiry date had been included on the notice. We therefore recommend that the NSW Police Force provide clarification and guidance about the expiry of a notice to produce and also highlight to police officers that an authorised officer may specify a timeframe within which documentation must be provided to police following the execution of a notice.
- Our analysis of a sample of notice to produce documents obtained from NSW Local Courts revealed five instances where police had inappropriately applied for a notice to produce documents from an institution other than an ADI. Three of these applications were refused by authorised officers and two appeared to be inappropriately granted. We have therefore made recommendations to both the NSW Police Force and the Attorney General's Department to provide guidance to relevant officers about the types of institutions that may be subject to these notices.
- Both ADIs and police officers advised us that there were a number of issues related to the request and delivery of notices to produce that had posed difficulties. For example, ADIs expressed concern that police often do not provide adequate details within the information request and it is often difficult to locate the officer requesting the information to clarify details. ADIs also stated that the documents requested sometimes span years, making it difficult for them to respond in a timely manner. Similarly, police expressed frustration that sometimes when they execute the notice expecting certain documentation to be available for collection, critical information is missing which requires the notice to produce to be re-issued, making the process unnecessarily lengthy and cumbersome. We are of the view that these types of problems can be addressed through the development of standard operating procedures for police outlining appropriate scoping of information requests. We also recommend that NSW Police Force conduct discussions with ADIs with a view to developing fact sheets to assist bank staff with notice to produce procedures.
- Police raised concerns about the requirement to submit a compliance report which they are required to submit to authorised officers within 10 days of a notice to produce being executed or expiring. Some officers commented that the reporting requirement is onerous and unnecessary. We recommend that reporting requirements of notices to produce and other types of warrants be subject to further review when the Minister for Police and the Attorney General conduct their review of the policy objectives of the Act.

Devolving the authority to determine notices to produce documents

During our consultations with police, a number of officers suggested that to expedite the process for obtaining documents from ADIs they should be able to seek authorisation for the issue of a notice to produce documents from a senior officer. Various arguments were put forward as impetus for devolving authority to senior police including:

- the requirement to appear before an authorised officer creates an unnecessary time impost
- it is difficult to explain to an independent authorised officer the complexities of some matters, such as specialist fraud investigations
- police can already authorise similar procedures, for example approval to conduct a controlled operation is given by the head of the law enforcement agency without reference to any external authority
- there are enough accountability mechanisms in place to prevent inappropriate determinations being made by police.

We carefully examined each of the arguments put forward in favour of devolving authority to senior police and found that there is no evidence of police experiencing difficulties under the current scheme. Moreover, given that a notice to produce allows police access to documents that can potentially intrude into a person's private life we believe that the decision to grant or deny approval should be made by an independent authority.

Extending the scope of notices to produce documents

During our consultations with police, it was suggested to us that police would be greatly assisted in their investigative work if they could require production of documents from bodies and instrumentalities other than ADIs. Police suggested that accessing a range of records from a variety of agencies, including medical and student records, records from Centrelink and the Roads and Traffic Authority by way of a notice to produce would be beneficial to the efficient conduct of their work.

It is unclear how police envisage such a scheme would operate in practice, as there are currently various ways in which police can obtain records or documents from organisations and individuals. Notwithstanding this, we are mindful that an extension of the scheme could be an effective investigatory tool provided that appropriate safeguards are put in place. We therefore recommend that the Minister for Police and the Attorney General give consideration to broadening the scheme when conducting the review of the policy objectives of the Act.

Conclusion

Some police commented to us that little, if anything, has changed with the introduction of the notice to produce provisions and many expressed disappointment that the authority to approve a notice had not been devolved to senior police. Others saw merit in the provisions and suggested that they should be implemented in regard to a broader range of organisations. On balance, it appears that the objective of the notice to produce provisions to refine the way that police can obtain financial documentation from ADIs has been met.

List of recommendations

Recommendations	Page
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 strip searches may be conducted in order to fulfil the 'private area' requirement in section (1)(a) 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 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.	97
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.	97
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.	97
19. Parliament consider amending the section 33(7) strip search safeguards to permit the presence of a medical 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).	98
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.	108
21. Parliament consider defining the term 'genital area' for the purpose of LEPRA in order to clarify what search practices this safeguard applies to.	108
22. The NSW Police Force consider providing additional guidance on the definition of 'transgender person' in the Code of Practice for CRIME and other policy and educational material.	108
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.	111
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 b. when it is appropriate to suspend questioning in order to conduct a search and how this should be carried out.	111
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.	112
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.	114
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 b. ensure that all charge rooms are properly equipped to provide appropriate clothing when clothes are seized.	116

Recommendations	Page
28. Parliament consider amending section 33(3) of the *Law Enforcement (Powers and Responsibilities) Act 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.	129
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.	129
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 of a child or a person with impaired intellectual functioning.	130
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.	130
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.	130
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.	130

Crime scenes

34. Parliament consider amending Part 6 of the *Law Enforcement (Powers and Responsibilities) 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.	174
35. The NSW Police Force develop standard operating procedures to provide guidance in relation to the crime scene provisions in the *Law Enforcement (Powers and Responsibilities) Act 2002*.	176
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.	176
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 b. the options available to police to lawfully enter premises in emergencies where a person is alone and unconscious.	176

Recommendations	Page
38. The NSW Police Force, in consultation with Department of Health — 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.	178
39. The NSW Police Force, in consultation with Department of Health — 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.	179
40. The NSW Police Force provide training to police officers on the sensitive establishment of crime scenes in circumstances of an alleged sexual assault.	179
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 b. the circumstances in which FSG attend crime scenes.	181
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.	183
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.	184
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 b. obtaining occupier's consent in Indigenous communities where a concept of communal ownership is common.	185
45. That the NSW Police Force ensure that standard operating procedures developed for crime scenes provide guidance on what constitutes a public and private part of a licensed premises.	186
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.	186
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 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.	191

Recommendations	Page
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 matter. In particular, any standard operating procedures should make clear that police officers have a duty to ensure the safety of children affected by crime scenes, particularly if they are unaccompanied.	207
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 under the *Law Enforcement (Powers and Responsibilities) Act 2002*.	211
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.	211
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.	213
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' b. remind all police officers that the use of the crime scene provisions in the *Law Enforcement (Powers and Responsibilities) Act 2002* be recorded in accordance with the COPS LEPRA User Guide.	216
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.	217
66. The NSW Attorney General's Department provide refresher training for authorised officers on the crime scene provisions in the *Law Enforcement (Powers and Responsibilities) Act 2002*.	217
Notices to produce	
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.	250
68. The NSW Police Force ensure that standard operating procedures developed for notices to produce include guidance on the definition of a 'document' in the context of notices to produce documents.	251

Recommendations		Page
69.	The NSW Attorney General's Department 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.	251
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.	252
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.	253
72.	The NSW Attorney General's Department ensure that advice and guidance is provided to authorised officers about the types of institutions that may be subject to these notices.	253
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.	254
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.	254
75.	That the Attorney General and Minister for Police in conducting their review of the policy objectives of the Act, give consideration to the views expressed by the relevant parties in relation to the broadening of the notice to produce provisions in determining whether a wider application of the notice to produce scheme would be appropriate.	267

Part 1 — Introduction

Chapter 1.
General overview

The *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) commenced on 1 December 2005. To date, it represents the most extensive codification and consolidation of the criminal law enforcement powers most commonly used by police in New South Wales. However, it does not comprehensively codify all police powers — other police powers can still be found in various pieces of legislation and the common law.[3]

LEPRA covers police powers that relate to: drugs; arrest; investigations and questioning; vehicles and traffic direction; the use of dogs to detect drugs, firearms and explosives; giving directions to people in public places; dealing with intoxicated persons; property in police custody; and the use of force.

The operation of some of these powers has been reviewed by the Ombudsman in other reviews, such as the *Crimes Legislation Amendment (Police and Public Safety) Act 1998,* the *Police Powers (Drug Premises) Act 2001*, the *Police Powers (Internally Concealed Drugs) Act 2001*, the *Police Powers (Vehicles) Amendment Act* 2001 and the public disorder powers in Part 6A of LEPRA.[4]

1.1. Our role

Section 242 of LEPRA provides that for two years from 1 December 2005, the Ombudsman is to keep under scrutiny the exercise of the following functions conferred on police officers:

- personal searches on arrest or while in custody[5]
- the establishment of crime scenes[6]
- notices to deposit-taking institutions to produce documents.[7]

The Ombudsman's review includes consideration of the safeguards in Part 15 of LEPRA as they apply to personal searches and the establishment of crime scenes.

To facilitate the monitoring role, the Ombudsman could require the Commissioner of Police or any public authority to provide information about the exercise of the powers.[8] After the expiration of the review period, the Ombudsman was required to prepare a report as soon as practicable on the exercise of the powers under LEPRA and to furnish a copy of this report to the Attorney General, the Minister for Police and the Commissioner of Police. The Attorney General is responsible for laying a copy of the report before both Houses of Parliament as soon as practicable after receiving it.

This report documents our findings resulting from the scrutiny of the exercise of the functions under review.

The report includes recommendations to be considered by Parliament about possible amendments to the legislation as well as recommendations aimed at enhancing and improving police practice.

1.2. The structure of this report

The report has been divided into four parts:

Part 1 — Introduction

Part 2 — Personal searches

Part 3 — Crime scenes

Part 4 — Notices to produce.

Additional relevant information is provided in appendices at the end of the report including the *Findings from the NSW Ombudsman's survey of people facing charges in the NSW Local and Children's Court* which was conducted for the purposes of the personal searches section of the review.

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3 *Law Enforcement (Powers and Responsibilities) Act 2002*, Schedule 1 details the Acts not affected by the legislation, for example, the *Crimes (Forensic Procedures) Act 2000*.
4 These reports can be accessed free of charge through the publications section of the NSW Ombudsman website, www.ombo.nsw.gov.au.
5 *Law Enforcement (Powers and Responsibilities) Act 2002,* Part 4, Divisions 2 and 4.
6 *Law Enforcement (Powers and Responsibilities) Act 2002*, Part 7 and Part 5, Division 4.
7 *Law Enforcement (Powers and Responsibilities) Act 2002*, Part 5, Divisions 3 and 4.
8 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.242 (2).

Chapter 2. Background

2.1. The Wood Royal Commission

As the then Attorney General indicated when introducing LEPRA, the Wood Royal Commission into the NSW Police Service,[9] which delivered its final report in May 1997, was central to the reform of police powers in New South Wales.[10] In discussing measures which could help reduce the incidence of corruption and misconduct within the Police Service, the Royal Commission recommended the consolidation of police powers, saying that this would:

- *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*
- *assist in the training of police.*[11]

Of the advantages of consolidation identified by the Royal Commission, it is the first point that has been most frequently referred to by Parliament when promoting LEPRA.[12]

2.2. Further influences

In the last 10 years there have been numerous other events, reports and statutory developments which have strengthened the argument that police powers should be consolidated.

LEPRA belongs to a raft of legislation which has been introduced in recent years to extend, refine and articulate police powers. The following are examples of a trend towards fuller statutory articulation of police powers: the new statutory scheme concerning investigations and questioning during detention after arrest established in 1997 under Part 10A of the *Crimes Act 1900* (now Part 9 of LEPRA); the 'knife laws' of 1998;[13] and the forensic procedures legislation introduced in 2000.[14] This trend was supplemented by the release in 1998 of the non-statutory Police *Code of Practice for Custody, Rights, Investigation, Management and Evidence* (The Code of Practice for CRIME).[15]

In 1998, the then Minister for Police described the Police Powers (Vehicles) Bill 1998 as the second stage of a three stage plan to consolidate police powers, and indicated that the third stage would involve consolidation of police powers into a 'single, coherent piece of legislation'.[16]

In 1999, the NSW Drug Summit called for a review of drug law enforcement powers in order to 'remove any ambiguities which may impede effective police action'.[17] In the same year, the NSW Ombudsman released *Policing Public Safety,* a report on the *Crimes Legislation Amendment (Police and Public Safety) Act 1998,* which found that it was not always clear which of the various statutory search powers an officer had used, and recommended the consolidation of various stop and search provisions.[18]

LEPRA brings many of these changes under one piece of legislation in order to make police powers clearer and more accessible for police officers and ordinary citizens. LEPRA defines the conditions and manner in which police powers can be exercised, thereby providing a range of procedural safeguards for the individual. This is in marked contrast to the situation in the past when the law provided little if any guidance to the police as to how they should exercise their common law or statutory powers.

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9 The 'NSW Police Service' was renamed 'NSW Police' in 2002 and was renamed the 'NSW Police Force' in 2006.
10 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
11 Royal Commission into the NSW Police Service, *Final Report*, May 1997, Vol. II, at par. 7.20.
12 See for example the second reading speech, the Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
13 *Crimes Legislation Amendment (Police and Public Safety) Act 1998*.
14 *Crimes (Forensic Procedures) Act 2000*.
15 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated May 2008. This document outlines non-statutory guidelines to govern police practices and details procedures associated with arrest, detention and investigation.
16 The Hon. Paul Whelan MP, NSWPD, Legislative Assembly, 12 November 1998, p.9902. Note that the first stage was the *Crimes Legislation Amendment (Police and Public Safety) Act 1998*.
17 Griffith G., *Police Powers in NSW: Background to the Law Enforcement (Powers and Responsibilities) Bill 2001*, NSW Parliamentary Library Briefing Paper No. 11/2001, August 2001, par. 5.1–5.3.
18 NSW Ombudsman, *Policing Public Safety: Report under s.6 of the* Crimes Legislation Amendment (Police and Public Safety) Act 1998, November 1999.

The issue of clarifying and consolidating police powers has also been considered for a number of years in other jurisdictions including the United Kingdom, the Commonwealth of Australia, Queensland and most recently, Western Australia. Whilst the main impetus for the NSW consolidation process was the Wood Royal Commission, the development of the legislation was clearly influenced by similar developments elsewhere.[19]

2.3. The development of LEPRA

The NSW Government established a taskforce in 1998 to examine, clarify and consolidate police powers into one piece of legislation.[20] The taskforce was comprised of representatives from the Parliamentary Counsel's Office, the Attorney General's Department, the NSW Police Force, the Ministry for Police, and the Cabinet Office. The Attorney General's Department chaired the taskforce.

In June 2001, the taskforce presented the government with an exposure draft of the Law Enforcement (Powers and Responsibilities) Bill 2001. Four months were set aside for consultation on the exposure draft Bill. The then Attorney General the Hon. Bob Debus, commented on the consultation process as follows:

> *In acknowledgment of the significance of this legislation, the Government has consulted widely in preparations for this Bill. Stakeholders and other potentially interested parties were afforded an opportunity to comment on the exposure draft of the bill.*[21]

The majority of amendments to the draft Bill were made in response to the 29 submissions received following consultation.

2.4. Objectives of the legislation

When the Act was first introduced into Parliament, the accompanying Explanatory Note indicated that the key objectives of the legislation were 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*
- *make provision for other police powers, including powers relating to crime scenes, production of bank documents and other matters.*[22]

The Law Enforcement (Powers and Responsibilities) Bill was introduced into the NSW Parliament in September 2002 and assented to on 29 November 2002.[23] On introduction of the Bill into Parliament, the then Attorney General commented:

> *This Bill represents the outcome of the consolidation process envisaged by the Royal Commission into the New South Wales Police Service to help strike a balance between the need for effective law enforcement and the protection of individual rights.*
>
> *Previously complex and diverse law enforcement powers and responsibilities once buried in numerous statutes and casebooks have been consolidated into the bill, so that the law is now easily accessible to all members of the community.*
>
> *Matters included in the bill represent either a codification of the common law, a consolidation of existing statute law, a clarification of police powers, or a combination of these.*[24]

19 See discussion in Griffith G., *Police Powers in NSW: Background to the Law Enforcement (Powers and Responsibilities) Bill 2001*, NSW Parliamentary Library Briefing Paper No. 11/2001, August 2001, at par. 5.1–5.3.
20 This taskforce was known as the Consolidation of Police Powers Working Party.
21 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
22 Law Enforcement (Powers and Responsibilities) Bill 2002, explanatory notes.
23 The LEPR Bill was introduced into the Legislative Assembly by the Hon. Bob Debus MP on 17 September 2002. It was passed by the Legislative Assembly on 14 November 2002. The Bill was introduced into the Legislative Council by the Hon. Michael Egan MLC, on 19 November 2002 and was passed in the Legislative Council on 21 November 2002.
24 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.

2.5. Parliamentary debate on LEPRA

The Opposition did not oppose the Bill, however, a number of members of Parliament raised concerns about particular provisions. This included concerns relating to the provisions on personal searches and crime scenes. In order to address these concerns, a number of amendments to the LEPR Bill were moved during committee which were ultimately not passed by Parliament.[25] These included proposals to strengthen the privacy, reporting and support safeguards for personal searches and proposals relating to structural damage and the care of unaccompanied children with regard to crime scenes.[26] None of the proposed amendments were passed by Parliament.[27]

2.6. Commencement of LEPRA

LEPRA commenced on 1 December 2005, some three years after assent.[28] This delay occurred due to the extensive nature of the changes requiring implementation. The NSW Police Force required time to develop and implement adequate systems across the organisation to ensure the smooth introduction and operation of the legislative changes, and to educate and train every police officer and other staff about these changes. For example the training considered necessary for the introduction of LEPRA occupied the entire Mandatory Continuing Police Education (MCPE) training units for a year.

The implementation activities undertaken by the NSW Police Force and other agencies are discussed in Chapter 6.

25 Committee is one of the stages in the passage of a bill. The standing orders provides for the following stages; first reading, second reading, committee of the whole and third reading. Committee stage on a bill is the stage where the text may be modified. Non-contentious bills proceed directly to the third reading without going through committee stage.

26 The Hon. Richard Jones MLC and the Hon. Ian Cohen MLC, NSWPD, Legislative Council, 21 November 2002, p.7260.

27 The Hon. Ian Macdonald MLC commented that the Bill was not changing police powers, merely consolidating them, the matters had already been adequately addressed in the Bill and that the safeguards contained in the Bill were of an appropriate level. NSWPD, Legislative Council, 21 November 2002 p.7260.

28 The exception to this was the in-car video provisions in Part 8A of LEPRA which commenced on 23 November 2004 and the public disorder powers in Part 6A which commenced on 15 December 2005.

Chapter 3.
Overview of the provisions under review

The then Attorney General, when introducing LEPRA into Parliament stated that LEPRA represents:

> *A codification of the common law, a consolidation of existing statute law, a clarification of police powers, or a combination of these.*[29]

However, he also noted that in some circumstances LEPRA makes amendments intended to 'more accurately reflect the common law' or address 'gaps' identified in existing law in order to clarify police powers. Thus in some respects, LEPRA includes 'new' law.[30] It is these aspects of LEPRA that the Ombudsman is responsible for reviewing — personal searches and their associated safeguards, crime scenes and notices to produce.

3.1. Searches of people on arrest or while in custody

Part 4 of LEPRA provides the circumstances in which police can search people and seize objects without a warrant. Our review covers personal searches conducted on arrest or in custody (as outlined in Part 4, Divisions 2 and 4).

Division 2 provides police with the power to search people on arrest or in custody. It allows police officers to search a person:

- on arrest for an offence or under a warrant if the officer suspects on reasonable grounds that it would be prudent to search the person for anything that would present a danger to the person, anything that could be used to assist a person to escape from lawful custody or anything that is related to the commission of an offence,[31] or
- if a person is in the lawful custody of police.[32]

Division 2 also provides police with:

- a new, limited search power that may be exercised if the police officer arrests a person in order to take them into lawful custody.[33] However, this power can only be applied where police reasonably suspect that it would be prudent to search the arrested person for anything that could be used to endanger a person or to escape from custody,[34] and
- a power to request that a person who is subject to a search on arrest open their mouth or move their hair if police suspect on reasonable grounds that a thing of a kind referred to in section 23 is concealed in the person's mouth or hair.[35]

Part 4, Division 4 contains a new three tier system of frisk, ordinary and strip searches.[36] Outer clothing can only be removed 'voluntarily' as part of a frisk search, however, the removal of outer clothing may be 'required' as part of an ordinary search, which can also extend to the removal of shoes and socks.

A strip search is defined as a search of a person or of articles in the possession of the person that may include requiring the person to remove all their clothes, a search of those clothes and a visual examination of the person's body. A strip search can only be conducted where a police officer suspects it is necessary for the purpose of the search and the seriousness and urgency of the circumstances require that a strip search be conducted.[37] LEPRA requires that the least invasive kind of search practicable in the circumstances should be used.[38]

LEPRA introduces a number of safeguards to protect the privacy and dignity of the person being searched. These safeguards require the officer to: inform the person of the nature of the search; request their cooperation; conduct the search out of public view and as quickly as possible; and not question the person in relation to a suspected offence while the search is being conducted. A search must be conducted by a person of the same sex as the person being searched and the genital area of the person or breasts, in the case of a female or transgender person who identifies

29 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
30 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
31 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.23(1).
32 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.24.
33 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.23(2). An example of an arrest in order to take a person into lawful custody that does not involve an offence would be arrest for a breach of bail conditions.
34 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.23(2).
35 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.23A.
36 *Law Enforcement (Powers and Responsibilities) Act 2002*, ss.30 and 31. Each search type is defined in section 3.
37 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.31.
38 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.32(5).

as female, must not be searched unless the officer suspects on reasonable grounds that it is necessary to do so for the purposes of the search.[39]

Further safeguards are provided in relation to strip searches. These safeguards must be complied with unless it is not reasonably practicable in the circumstances and require a strip search to be conducted in a private area, out of the view of people of the opposite sex and any other people not necessary for the purpose of the search and in the presence of a support person.[40] If it is necessary to conduct a strip search of a child between 10 and 17 years of age or a person with impaired intellectual functioning a support person must be present, unless it is not reasonably practicable.[41] A child under 10 may not be strip searched.[42] There are also mandatory safeguards which clarify that a strip search is a visual search and not an examination of the body by touch.[43]

Personal searches on arrest or in custody must also be performed in accordance with the general safeguards outlined in Part 15 of LEPRA.

3.2. Crime scene provisions

Part 7 of LEPRA expressly outlines the circumstances in which police can establish crime scenes, the powers that they can exercise at crime scenes and introduces crime scene warrants. Prior to the introduction of LEPRA, police powers around crime scenes were not codified.

A police officer can establish a crime scene in circumstances where they suspect on reasonable grounds that:

- an offence in relation to a traffic accident resulting in death or serious injury may have been committed on the premises, or
- a serious indictable offence may have been committed on the premises, or
- there is evidence on the premises of the commission of a serious indictable offence committed elsewhere.[44]

A police officer must be lawfully on the premises to establish a crime scene and exercise certain crime scene powers.[45] The crime scene powers operate on a two tiered system. The first tier of crime scene powers is concerned with preservation of evidence and can be exercised by police as soon as they have established a crime scene.[46] Preservation powers include the power to prevent people from entering, interfering with or removing items from a crime scene.[47] Failure to comply with officer directions in relation to crime scenes is a criminal offence.[48] Preservation of crime scene powers can be exercised for up to three hours on private premises without a crime scene warrant.[49]

The second tier of crime scene powers is concerned with the investigation of the premises and search and seizure of items.[50] Investigation crime scene powers include the power to photograph or otherwise record a crime scene and seize items from the premises. In general, investigation powers can only be exercised on private premises pursuant to a crime scene warrant. However, these powers can be exercised without a crime scene warrant where police have established a crime scene, applied for a crime scene warrant and suspect on reasonable grounds it is necessary to exercise their investigation powers immediately to preserve evidence, for example, to prevent rain from washing away evidence.[51]

All crime scene powers can be exercised on public premises without a crime scene warrant.[52]

A police officer can make a crime scene warrant application if there are reasonable grounds to suspect that it is necessary to exercise crime scene powers for the purpose of preserving, or searching for or gathering evidence.[53] A crime scene warrant application is determined by an authorised officer.[54] If granted, a crime scene warrant expires 72 hours after being issued, unless the authorised officer has specified otherwise,[55]and can be extended for a period of

39 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.32.
40 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.33(1)–(2).
41 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.33(3).
42 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.33(4)–(7).
43 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.34.
44 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.90.
45 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.88.
46 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.92(1).
47 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.95(1)(a)–(f).
48 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.96(2).
49 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.92(3).
50 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.95(1)(g)–(p).
51 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.92(2).
52 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.89(2).
53 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.94(1).
54 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.94(2).
55 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73(3)–(4). Telephone crime scene warrants expire 24 hours after issue.

144 hours after issue.[56] It is a criminal offence to obstruct or hinder a person executing a crime scene warrant[57] or to refuse to comply with a request or direction by a police officer relating to the exercise of crime scene powers.[58]

The general safeguards in Part 15 apply to the crime scene provisions.

Part 7 does not prevent police from establishing a crime scene and exercising crime scene powers with the consent of the occupier of the premises.[59]

3.3. Notice to produce provisions

Part 5, Division 3 of LEPRA introduces a new power which allows police officers to apply for a 'notice to produce documents' from banks and other financial institutions — referred to in LEPRA as authorised deposit-taking institutions (ADIs).

Prior to the introduction of LEPRA, police would need to apply for a search warrant if they wished to obtain documents from an ADI connected to an offence. It should be noted that these provisions do not replace search warrants. Police can still apply for a search warrant in relation to a deposit-taking institution where necessary.

Police officers can make an application for a notice to produce documents if they believe on reasonable grounds that the institution is holding documents that may be connected with an offence to which the ADI is not a party.[60] An authorised officer may grant a notice to produce documents if they are satisfied that there are reasonable grounds to suspect that the ADI holds documents connected with an offence to which it is not a party.[61] If granted, a notice to produce expires 72 hours after being issued, unless the authorised officer has specified otherwise, and can be extended up to 144 hours after issue.[62] Failure to comply with a notice to produce documents is a criminal offence.[63]

An ADI may claim that the documents identified in the notice to produce are privileged. In these circumstances police officers, should they want to enforce the notice, need to apply to a magistrate as soon as reasonably practicable for an order to access the documents, who must then determine whether the documents are to be produced.[64] LEPRA indemnifies institutions complying with notices to produce.[65]

The application procedures and safeguards for a notice to produce are the same as for search warrants.[66]

3.4. General safeguards

LEPRA provides general safeguards that apply to the exercise of certain powers including the power to search or arrest a person.[67] These safeguards concern information the police officer has to provide to a person. That is, police must:

- provide evidence of the fact that they are a police officer, if not in uniform
- provide their name and place of duty
- provide reasons for exercising the power.[68]

In general, the information must be provided before exercising the power or, if this is not practicable, as soon as is reasonably practicable after exercising the powers.[69]

Police officers are additionally required to warn a person that compliance with the request or direction is required by law in circumstances where the person may be committing an offence by failing or refusing to comply with the police request or direction.[70]

56 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(6)(a). Telephone crime scene warrants expire 24 hours after issue.
57 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.96(1). Maximum penalty: 100 penalty units or 2 years imprisonment or both.
58 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.96(2). Maximum penalty: 10 penalty units.
59 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.95(3).
60 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.53.
61 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.54.
62 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73(3) and (4). Telephone crime scene warrants expire 24 hours after issue. *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(6)(a).
63 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.57(2).
64 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.56(1) and (2).
65 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.57(1).
66 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.53(2) and Part 5, Division 4.
67 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(3).
68 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(1).
69 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(2A)–(2B).
70 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(2C).

3.5. Amendments to LEPRA

A number of amendments were made to the LEPRA provisions under review during the review period which:

- alter the crime scene and the general safeguard provisions[71]
- provide police with an ancillary power to search people's mouth and hair if exercising the power to search on arrest[72]
- made minor changes to the general safeguard provisions.[73]

More detailed information is provided on the specific amendments affecting personal searches and crime scenes in Appendices 2 and 3 and Part 2, 3 and 4 of this report respectively.

71 *Police Powers Legislation Amendment Act 2006*. Commenced 15 December 2006.
72 *Law Enforcement (Powers and Responsibilities) Amendment Act 2007.* Commenced 17 December 2007.
73 *Law Enforcement and Other Legislation Amendment Act 2007.* Commenced 21 December 2007.

Chapter 4.
Comparable legislation

The advantages of clarifying and consolidating police powers have been considered for a number of years in many other jurisdictions including the United Kingdom, the Commonwealth, Queensland, Western Australia and most recently New Zealand. While the main impetus for the New South Wales consolidation process was the Wood Royal Commission, the development of the legislation was clearly influenced by legislative developments in other jurisdictions, particularly the United Kingdom, the Commonwealth and Queensland.

The following discussion provides a brief overview of legislation comparable to LEPRA in other jurisdictions. Aspects of those laws that are specifically relevant to the provisions under review are discussed in detail in Parts 2, 3 and 4 of this report.

4.1. The United Kingdom

In 1977 the Philips Royal Commission on Criminal Procedure was established in the United Kingdom to examine how offences are investigated, specifically with regard to the powers and duties of police as well as the rights and duties of suspects. The principle recommendations relating to codification and consolidation of police powers, were that:

> *Police be given a uniform power to stop and search throughout England and Wales, and existing powers be clarified and redefined.*[74]

Based on the recommendations of the Philips Report, the *Police and Criminal Evidence Act 1984* (UK) (PACE) was introduced in 1986 with the general aim of standardising and professionalising police work, while protecting individual rights. On its introduction, the then Home Secretary suggested that the success of PACE would rely on:

> *The extent to which its provisions are generally understood by the public and to which its underlying philosophy (of balance between powers and safeguards) is reflected in the actions of the individual police officer.*[75]

Unlike LEPRA, PACE contains reviewable codes of practice for police which set out how PACE provisions and other nominated powers should be interpreted by police in the operation of their every day work. While a police officer cannot be prosecuted for a breach of the Code alone, the Code is admissible in evidence and, if relevant to any question arising in the proceedings, it may be taken into account.[76]

PACE was reviewed in 2002 with a focus on identifying possible changes to the rules that could (without compromising the rights of suspects) simplify police procedures, reduce procedural or administrative burdens on the police, save police resources and speed up the process of justice.[77] In 2007 the Home Office commenced a further review of police powers and procedures in PACE focusing on public consultation and bilateral discussions with stakeholders, government departments and practitioners.[78] It is expected that the final report generated from this process will be released at the end of 2008.

4.2. Commonwealth

In 1975 the Commonwealth review of police powers started with the release of the Australian Law Reform Commission's *Criminal Investigation* report.[79] This report recommended a single procedural code governing the conduct of all Australian police regardless of state, territory or the task being performed.[80] While this recommendation has not been fully implemented, a number of initiatives suggest that practices and procedures are moving towards consolidation.

In 1990 the Standing Committee of Attorneys-General established the Model Criminal Code Officers Committee (MCCOC) to develop a model criminal code. In the same year, all Australian Police Ministers agreed to establish the National Exchange of Police Information to combine resources and maximise the exchange of operational information between jurisdictions. Based on the Model Forensic Procedures Bill 1995 developed by the MCCOC,

74 Zander, M., *The* Police and Criminal Evidence Act 1984, Fifth edition, 2005, p.4. Note that prior to the *Police and Criminal Evidence Act 1984* (UK) there were at least 16 statutes conferring various powers on police to stop and search.
75 Leon Brittan, Home Secretary, cited, foreword to Zander, M., *The* Police and Criminal Evidence Act 1984, 1995, p.v.
76 *Police and Criminal Evidence Act 1984* (UK), s.67(11).
77 Report of the Joint Home Office/Cabinet Office Review of the *Police and Criminal Evidence Act 1984*, 2002.
78 Information obtained from the UK Home Office site. http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/PACE-Review, accessed 16 April 2008.
79 Australian Law Reform Commission, *Criminal Investigation*, Report No. 2, AGPS, Canberra, 1975.
80 Australian Law Reform Commission, *Criminal Investigation*, Report No. 2, AGPS, Canberra, 1975, par. 14 and 303.

the *Crimes Amendment (Forensic Procedures) Act 1998* was introduced Australia wide and was soon followed with the introduction of CrimTrac in 2000, designed to be a national central repository for police intelligence.[81]

Between 1988 and 1991 the Review of Commonwealth Law, a Committee chaired by the former Chief Justice, Sir Harry Gibbs made a range of recommendations to standardise and consolidate law enforcement provisions within Commonwealth legislation. Implementation of these recommendations resulted in significant amendments to the Commonwealth *Crimes Act 1914.* These included amendments to the *Crimes Act 1914* in 1993 to specify that federal police have the power to conduct a 'frisk search' or an 'ordinary search' of a person who has been arrested or an 'ordinary search' or a 'strip search' of a person in custody at a police station.[82] The three tiered system of searches adopted in LEPRA was based on this Commonwealth model.[83]

The Australasian Police Ministers' Council has also been instrumental in guiding a national approach to policing. In *Directions in Australasian Policing 2005–2008*, the Council identified cooperation and coordination as a key direction.[84] Cooperation across Australian jurisdictions to date has included standards and controls for firearm licensing, possession and sale, co-ordinated terrorism laws and efforts to standardise collection of DNA.

These initiatives have been influential in reviews of police powers in jurisdictions including New South Wales. Developments at the federal level have also promoted and achieved varying degrees of uniformity across Australia.

4.3. Queensland

In 1989 the Fitzgerald Inquiry into Police Corruption released its final report, which contained provisions for the establishment of the Crime and Justice Commission (CJC) which was charged with, amongst other tasks, conducting a review of police powers in Queensland.[85] As a result of the recommendations of that review, the *Police Powers and Responsibilities Act 1997* (PPRA) was introduced in Queensland. It is arguably the most comprehensive codification of police powers in Australia.

In order to further consolidate police powers, the PPRA was amended in 2000 to include provisions for, amongst other things: DNA testing and other forensic procedures; powers to give animal welfare directions; and covert evidence gathering powers.[86]

In 2000 the CJC published two reviews of the personal search provisions in the PPRA.[87] More recently in May 2007 the Queensland Police Minister announced a further review of the Act.[88] The initial terms of reference include assessing the adequacy of safeguards, consolidating and simplifying similar powers and assessing the benefit of dividing the PPRA into specific, purpose designed Parts or Acts. The review process comprises an internal police review followed by the establishment of a ministerial council which will call for public submissions. The review is expected to be completed in 2009/2010.

4.4. Western Australia

In 2001 a Royal Commission into whether there had been any corrupt or criminal conduct by Western Australian police officers was established following recommendations made by the Law Reform Commission of Western Australia in its 1992 report *Police Act Offences*.[89]

81 CrimTrac is still in the process of being fully implemented. To date, it includes DNA, fingerprinting, palm printing and a register of sex offenders. Information from the CrimTrac Agency website. http://www.crimtrac.gov.au, accessed 16 April 2008.

82 *Crimes Act 1914* (Cth), ss.3ZE, 3ZF and 3ZH.

83 Review of Commonwealth Criminal Law, a Committee chaired by the former Chief Justice, Sir Harry Gibbs. The Committee published five interim reports and a final report (1988–1991) [1st] interim report: computer crime 1988. PP 111/1989; [2nd] interim report: detention before charge 1989. PP 112/1989; [3rd] interim report: principles of criminal responsibility and other matters 1990. PP 195/1991; 4th interim report 1990. PP 319/1990. 5th interim report 1991. PP 194/1991; Final report 1991. PP 371/199.1.

84 Australasian Police Ministers' Council, *Directions in Australasian Policing 2005–2008: An Australasian Policing Strategy Issued by the Australasian Police Ministers' Council,* June 2005, pp.1–2.

85 In 2002 the Crime and Justice Commission merged with the Queensland Crime Commission and is now known as the Crime and Misconduct Commission.

86 *Police Powers and Responsibilities and Other Acts Amendment Act 2000.*

87 Criminal Justice Commission, *Police Powers in Queensland: Findings from the 1999 Defendants Survey*, May 2000, and *Police Strip Searches in Queensland: An inquiry into the law and practice*, June 2000.

88 Announced by the Minister for Police and Corrective Services the Hon. Judy Spence, 5 May 2007. http://www.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=51694, accessed 28 April 2008.

89 Law Reform Commission of Western Australia, *Police Act Offences Report*, Project No. 85, August 1992.

In November 2005 the Criminal Investigation Bill 2005 was introduced into the Parliament of Western Australia. The second reading speech indicated that, in developing the Bill, Western Australia drew from legislation in the United Kingdom, Queensland and New South Wales, but stressed that the Criminal Investigation Bill needed to take into account Western Australia's rurality, large area and small population.[90] This is reflected in the provisions which allow for greater use of telephone, fax, email and radio warrants and for justices of the peace to issue search warrants.[91]

Like LEPRA in New South Wales, the *Criminal Investigation Act 2006* has been described as the final instalment of a larger 'criminal law reform package'.[92] It does not purport to consolidate all police powers, however, it has codified many common law police powers, introduced new powers reflecting contemporary policing needs and redrafted existing provisions in other acts that required updating.

4.5. New Zealand

Following a review of the *Police Act 1958*, the Policing Bill 2008 was drafted to replace the Act. Similar to LEPRA, the Policing Bill represents a consolidation of police powers in that it includes updated provisions from the previous Act, excludes redundant sections and incorporates other relevant statutes.[93] It is currently before the Law and Order Committee of the Parliament of New Zealand.

The central focus of the Bill includes the principles of policing, governance and accountability, human resources, community engagement, police powers, relationships with police partners, administration and conduct and integrity.

90 The Hon. John Kobelke, MP, WAPD, Legislative Assembly, 23 November 2005, p.7639.
91 *Criminal Investigation Act 2006* (WA), s.13.
92 The Hon. John Kobelke, MP, WAPD, Legislative Assembly, 23 November 2005, p.7639.
93 As detailed on the New Zealand Police website for the Police Act review. http://www.policeact.govt.nz/, accessed 21 April 2008.

Chapter 5. Methodology

This chapter briefly outlines the research we undertook for our review and details the various information sources we have relied upon. The review adopted a multifaceted research strategy to allow for a broad range of perspectives to be obtained on the way the provisions under review were being implemented in New South Wales. More detailed information is supplied on the specific methodologies utilised for the personal searches, crime scenes and notices to produce sections in Parts 2, 3 and 4 of this report respectively.

5.1. Implementation Steering Committee observation

The LEPRA Implementation Project Steering Committee was established within NSW Police in 2003 to facilitate the implementation of LEPRA and met periodically between 2003 and 2006. It was facilitated by the NSW Police Force and comprised representatives from key units within the NSW Police Force, the Ministry for Police and the Police Association and focused primarily on the issues around the practical implementation of LEPRA. Our office was invited to attend committee meetings as an observer. This involvement provided us with valuable information about procedural issues relating to the implementation of LEPRA and other useful background material.

5.2. Information supplied by agencies with responsibilities

Section 242(1) of LEPRA authorises the Ombudsman to require and obtain information from New South Wales public authorities about the exercise of the functions under review.

5.2.1. The NSW Police Force

In the early stages of the review period, we established an information agreement with the NSW Police Force about the type of information we would require to conduct our review. This included:

- statistical information about searches, crime scenes and notices to produce
- training and communication documentation
- custody records
- documentation on crime scene warrant and notice to produce applications
- legal advice
- standard operating procedures (SOPs).

This agreement also stipulated that we would be conducting interviews, focus groups and observational research for the purposes of the review.

Throughout the review period information and access to officers was provided by the NSW Police Force in accordance with this agreement.

5.2.2. Attorney General's Department — NSW Local Courts

In 2006 we also forwarded a formal information request to the Attorney General's Department detailing the information we required for our review. This included information from NSW Local Courts as follows:

- details of all applications for crime scene warrants and notices to produce made during the review period and copies of applications and determinations where required
- information on the publication circulated, training conducted and any changes to court systems relating to the implementation of LEPRA
- copies of a sample of crime scene warrant and notice to produce applications were requested and provided from NSW Local Courts, including the Extended Registry at Parramatta and the After Hours Panel.

Throughout the review information was provided by the Attorney General's Department in accordance with our request.

We also obtained court transcripts and other relevant documents from NSW Local Courts about prosecutions for offences relating to the crime scene provisions that took place during the review period.

5.3. Data

5.3.1. COPS data

The Computerised Operational Policing System (COPS) is the primary computer system used by police officers to record and retrieve information for their day to day work. For any given activity undertaken, a police officer may record on COPS details including the date, time, location, offence involved, offender details, victim details and witness details. A police officer may also record a 'narrative' of events, which is an account of what happened in the officer's own words.

Prior to the commencement of the review period the Ombudsman held discussions with the NSW Police Force Chief Statistician and Business and Technology Services Unit of the NSW Police Force on the proposed enhancements of COPS to capture the use of the powers under review. We outlined the information we required from COPS in relation to personal searches, crime scenes and notices to produce and asked to be advised of any limitations on the data provided. COPS information provided included details of:

- actions where a personal search was recorded in the field or in custody[94]
- events where the establishment of a crime scene was recorded, with or without a warrant[95]
- cases where notice to produce applications was recorded.[96]

This data was used to broadly establish patterns of use and also to investigate particular incidents as case studies. We relied on COPS to detail particular incidents, by looking up record numbers which had been provided to us by NSW Police Force.

5.3.2. Local Court data provided by the Attorney General's Department

Crime scene warrant and notice to produce applications are considered primarily at Local Courts. NSW Local Courts forward statistical information on crime scene warrant and notice to produce applications to the statistics section of the Attorney General's Department on a monthly basis. The Attorney General's Department provided us with relevant crime scene and notice to produce data for the review period.

5.3.3. BOCSAR data

Information on charges for offences relating to the searches, notice to produce and crime scene provisions was obtained from the NSW Bureau of Crime Statistics and Research (BOCSAR).

5.4. Consultations

We canvassed the views of a wide cross-section of police officers using a range of methods.

5.4.1. NSW Police Force Local Area Command visits

We conducted two rounds of consultations with seven NSW Police Force Local Area Commands (LACs) — identified for the purpose of this report as LACs 'A' to 'F'. Four of these LACs were located in the Sydney metropolitan area and three were located in regional NSW. The purpose of these consultations was to discuss the implementation of the provisions under review with members of the NSW Police Force across ranks (from probationary constables to superintendents) and roles. This included consultations with commanders, crime managers, duty officers, detectives, general duties and specialist sergeants and constables, custody managers, Aboriginal Community Liaison Officers, Education Development Officers, Scene of the Crime Officers and police prosecutors.

The first round of consultations commenced three months after the introduction of the commencement of LEPRA (March — August 2006). The second round of consultations were conducted one year later (June — November 2007). The same LACs were visited in both rounds of consultations.[97] During the first round of consultations LACs were not aware that we would be returning to conduct a second round of consultations. Two rounds of consultations were held so that a balanced and staged assessment of the implementation of LEPRA could be made.

94 Included demographic details, search type location, reasons for search, time and date of search, searching officer details and whether a support person was present.
95 'Events' are records of incidents that police attended.
96 Case records allow police officers to record law enforcement and administrative processes encountered in their day to day policing role.
97 With the exception of LAC A which was used as a trial consultation.

Our interviews and focus groups were semi-structured and posed a range of questions about the implementation of LEPRA. In some cases the interviews focused on the particular knowledge, operational experience or expertise of the officer(s). We undertook to protect the anonymity of the officers so that we could obtain frank views and opinions. We sought permission to refer to the officer's we consulted with by title in this report.

5.4.2. Interviews with specialist units within NSW Police Force

We consulted specialist police units where the introduction of the LEPRA provisions under review had a major impact on their policing practice. We met with senior members of the Homicide Squad, Crime Scene Services Branch and Crash Investigation Unit regarding crime scenes and members of the Fraud Squad and Assets Confiscation Unit regarding notices to produce.

5.4.3. Consultations with community organisations, legal officers, relevant departmental officers and other interested parties

To ensure we obtained a broad range of perspectives on the LEPRA provisions under review, we consulted with stakeholder groups and individuals as follows:

- We conducted a mail out to over 200 identified community and government stakeholders to inform them of the review in December 2005.
- We held a stakeholder forum in May 2006, invited a range of key stakeholders and briefed them on the scope and issues arising from the review.
- We held interviews and meetings with a number of key stakeholder groups and individuals with regard to personal searches and the associated safeguards including the Intellectual Disability Rights Service, the Criminal Justice Support Network, the Gender Centre, the Youth Justice Coalition, Jane Sanders — Principal Solicitor of the Shopfront Youth Legal Centre, David Dixon — Dean of UNSW Law School, Andrew Haesler — Deputy Senior Public Defender, Alan Brown, Head of Police Powers and Procedures from the Policing Powers and Protection Unit of the Home Office in the United Kingdom, Legal Aid and Aboriginal Legal Services.
- We held interviews and meetings with a number of key stakeholder groups and individuals with regard to crime scenes including the Homicide Victims Support, the NSW Fire Brigade Fire Investigation and Research Unit, Enough is Enough, Justice Action, NSW Health Sexual Assault Services, the NSW Coroner and Deputy Coroner and departmental officers from NSW Local Courts. We also distributed leaflets through agencies to victims of crime asking them to contact us.
- We consulted with the Banking and Financial Services Ombudsman and major banks with regard to notices to produce.

5.4.4. Publicising the review

We published an article in the *Law Society Journal* outlining the provisions in LEPRA under review.[98] We asked legal practitioners to identify any issues or problems they may have encountered with these provisions and requested comments or submissions.

An article was also published in the *Police Weekly* outlining the scope of the Ombudsman's review and inviting feedback on the implementation of the new provisions from police.[99]

5.5. Issues paper

In June 2007 we released an issues paper on the sections in LEPRA under review. It was placed on the Ombudsman website and distributed widely to various interested parties including:

- NSW Police Force
- NSW Attorney General's Department
- NSW Legal Aid
- NSW Director of Public Prosecutions

98 A. Tan, 'Law Enforcement: Consolidation and codification of police powers to be scrutinised by Ombudsman', *NSW Law Society Journal*, Vol. 44, February 2006, pp.36–37.

99 NSW Police Force, *Police Weekly*, 'Focus on Operational Policing', Vol. 17, No. 30, 22 August 2005, pp.8–10. This article was written in cooperation with NSW Police Communications and Change Management Unit.

- Law Society of NSW and NSW Bar Association
- community legal centres
- NSW Council of Civil Liberties
- victim's and prisoner support groups
- authorised deposit-taking institutions
- academics
- other relevant government departments and community stakeholders.

Our issues paper detailed the new provisions and their use to date. It canvassed issues arising from the implementation of the provisions. The paper includes 33 questions for consideration. We received 14 submissions. See Appendix 4 for a list of submissions.

5.6. Observations

5.6.1. Direct observations

We conducted direct observations of police activity relevant to the functions under review. Direct observation of police operations allows us to obtain an independent and first hand understanding of the use of police powers in the field. We conducted all of our observations in cooperation with police, who allowed us to observe police briefings and debriefings, observe interactions with members of the public, and obtain operational documentation. We provided police and our observers with information about the conduct of the research prior to observing any police operation.

Relevant police activity observed over the review period included:

- attending 17 field operations throughout New South Wales (including Vikings operations, Commuter Crime Unit beat patrols and drug detection trial operations)
- attending charge rooms on 16 occasions at LACs throughout New South Wales to observe searches in custody
- attending activities undertaken by the Crime Scene Services Branch (CSSB) at crime scenes on six occasions in the Sydney and Wollongong metropolitan areas.

5.6.2. Closed circuit television observation of charge rooms

In November and December 2007 we attended five police stations in the Sydney metropolitan area and conducted a review of charge room CCTV footage for records of strip searches. The purpose of this review was to observe and comment on the application of the strip search safeguards while preserving the privacy and dignity of the person being searched.

5.7. Surveys

During the review period we devised and conducted a number of surveys to obtain information from different stakeholder groups. Some surveys asked stakeholders to comment on all aspects of LEPRA under review, while other surveys asked for comment on only one or two of the functions under review.

5.7.1. Survey on all aspects of LEPRA under review

5.7.1.1. Survey of police prosecutors

An email survey was distributed via NSW Police Legal Services to all NSW police prosecutors. Police prosecutors handle evidence briefs for the NSW Police Force and are responsible for prosecutions under LEPRA. The survey asked police prosecutors to comment on issues relating to all aspects of the LEPRA review.

5.7.2. Surveys on personal searches

5.7.2.1. Survey of people facing charges in the Local Court and Children's Court

We interviewed over 500 people facing charges at 12 Local and Children's Courts throughout New South Wales on any personal searches they had been subject to at the time of their arrest and while in police custody. The purpose of the survey was to gauge the impact of the LEPRA search provisions on the public. The survey was conducted using a prepared questionnaire to guide responses from interviewees. Participation in the survey was voluntary and respondents were assured of confidentiality. Our findings from the survey are discussed throughout Part 2 and a full report of the survey can be found in Appendix 1.

5.7.2.2. Youth street survey

We attended street patrols with youth workers in three metropolitan areas of Sydney to survey young people on their experiences of being searched by police. The purpose of this survey was to hear from young people who had been searched by police during the review period, but may not have come before the courts.

5.7.2.3. Survey of defence solicitors

An email survey was distributed to defence solicitors working for Legal Aid, Community Legal Centres (NSW) and Aboriginal Legal Services NSW/ACT. The survey asked solicitors to comment on any issues concerning the personal search powers and safeguards.

5.7.3. Surveys on crime scenes and notices to produce

5.7.3.1. Authorised officer's survey and magistrate's surveys

An email survey was distributed via the Attorney General's Department to all Local Court registrars and other Attorney General Department employees identified as authorised officers for the purpose of LEPRA. Authorised officers are responsible for issuing crime scene warrants and notices to produce. The survey asked authorised officers to comment on these aspects of the review.

5.7.3.2. Telephone survey of people affected by the establishment of a crime scene

A telephone survey was undertaken of a sample of people identified as having had a crime scene established at their home or workplace during the review period. The survey asked them to comment on their experience.

5.7.3.3. Survey of authorised deposit-taking institutions

We distributed a survey to five of the major banks, asking their compliance divisions to comment on the operation of notice to produce provisions.

5.8. Review of complaints received by the NSW Ombudsman

Throughout the review period, the NSW Ombudsman received complaints relating to LEPRA. We identified a number of relevant complaints relating to personal searches and crime scenes and analysed these for the purposes of the review.

5.9. Literature review

We conducted an initial review of literature relevant to the issues being considered. Throughout the review period we continued to examine relevant literature as we became aware of it. Material considered throughout the review period is listed in the selected bibliography at Appendix 5.

5.10. External legal advice

In December 2007 we sought advice from external legal counsel on issues relating to aspects of interpretation of the personal search, crime scene and safeguard provisions in LEPRA.

5.11. Other information sources

A range of other information was examined, including Parliamentary debates, media reports and comparable legislation in other jurisdictions.

5.12. Consultation on final report

On 30 September 2008, a confidential consultation draft of this report was provided to the Attorney General's Department and the Office of the Commissioner of Police for comment. The purpose of this consultation was to give agencies an opportunity to comment on the accuracy of the material presented, and on the proposed findings and recommendations in the report.

The Attorney General's Department did not raise any issues or objections with respect to the draft report or recommendations in their response.[100] While our letter was addressed to the Commissioner of Police, a response was provided by the Ministry for Police.[101] The Ministry commented on nine recommendations in the report expressing support for four and objections to five recommendations. Those comments have been noted in the relevant discussions in Parts 2, 3 and 4 where appropriate.

5.13. Research limitations

In conducting this review we have attempted to obtain information and data from a wide and diverse range of sources. We are cognisant that there may be inherent limitations to some of the information sources. Where possible we have endeavoured to use more than one source to verify the observations, data and information relied upon in this report. We are aware of the following limitations in the data and information available to us during the review.

5.13.1. COPS data

There were concerns raised as to the overall accuracy of records kept on COPS for the provisions under review. Low recording rates were identified for the COPS data relating to both notices to produce and the establishment of crime scenes under LEPRA. The Attorney General's Department provided us with approximately 10 times the number of cases relating to notices to produce and the establishment of crime scenes than what was found on COPS. The COPS data and data provided by the Attorney General's Department should have correlated as both record how many crime scene warrant and notice to produce applications were made by police officers to the NSW Local Court during the review period.[102]

In relation to searches, issues arose with the variability of searching practices across the NSW Police Force which brought into question the accuracy of information regarding the manner in which searches were conducted.[103]

5.13.2. Data provided by the NSW Local Court

There were a number of discrepancies in the data provided to us by the Attorney General's Department relating to notices to produce and crime scene warrants. These discrepancies were due to errors in collation of monthly court statistics by Local Courts.[104]

5.13.3. Consultations with the NSW Police Force

Consultations with police provided us with direct insight into the experiences and concerns of officers who use the search powers in a variety of contexts. While we undertook to ensure the anonymity of all officers who took part in these consultations, it is possible that the frankness of officers may have been affected by the formal complaint oversight role which the NSW Ombudsman performs in relation to police.

5.13.4. Telephone survey of persons affected by crime scenes

All of the people contacted in our telephone survey of people affected by crime scenes were victims of crime. We did not contact people who had been charged following a crime scene being established on their premises and may have had a less positive experience of crime scene establishment by police.[105]

5.13.5. Survey of people facing charges in the Local Court and Children's Court

There are a number of elements of the survey of people facing charges in the Local Court and Children's Court design that may limit the conclusions that can be drawn from the data obtained, as discussed in Appendix 1, Chapter 2.

100 Letter from Mr Lauire Glanfield, Director General, Attorney General's Department, 14 November 2008.
101 Letter from Mr Les Tree, Director General, Ministry for Police, 9 January 2009.
102 The limitations associated with the COPS data provided are further discussed in section 22.9 (crime scenes) and 35.6 (notices to produce).
103 The limitations associated with the COPS data relating to personal searches is further discussed in section 11.7.
104 Discrepancies relating to data provided by the NSW Local Courts are further discussed in section 22.9 and 35.6.
105 The limitations associated with the telephone survey of persons affected by crime scenes are discussed in detail in section 22.9.

Chapter 6. Implementation

This chapter details the steps taken by the relevant authorities to implement the provisions of LEPRA under review. More detailed information specific to the implementation of the provisions relating to personal searches, crime scenes and notices to produce is provided in Parts 2, 3 and 4 of this report.

6.1. NSW Attorney General's Department

The Attorney General is responsible for administering the *Law Enforcement (Powers and Responsibilities) Act 2002* and in particular the Attorney General's Department has certain responsibilities for implementing the provisions introduced by LEPRA.

Changes introduced by LEPRA particularly relevant to the Attorney General's Department include: Part 7 of LEPRA which outlines the powers of police to establish and preserve a crime scene including the introduction of crime scene warrants and Part 5 which outlines the power to apply to an authorised officer for a notice to produce and a crime scene warrant. LEPRA defines an 'authorised officer' as a Magistrate or Children's Magistrate; a registrar of a Local Court, or an employee of the Attorney General's Department authorised by the Attorney General as an authorised officer for the purposes of LEPRA.[106] Authorised officers are personnel of the Attorney General's Department.[107]

In order to implement these provisions, the Attorney General's Department was required to make a number of policy and procedural changes and provide information and training to authorised officers regarding their new responsibilities under LEPRA. Details of these activities are provided below.

6.1.1. Publications

The NSW Local Court produces regular publications for communicating news and relevant administrative information to court officers, including authorised officers, and other employees. These include the *Local Courts Bulletin* which provides officers with information and developments on new technology and legislation, policies and procedures.

Six articles referring to LEPRA generally and the crime scene and notice to produce provisions of LEPRA in particular were published in the *Local Courts Bulletin* when LEPRA commenced in 2005.[108]

6.1.2. Procedural changes

New forms were made available and circulated with the *Local Courts Bulletin* and uploaded to the Lotus Notes Forms Library and the Local Court website.[109] These included forms directly related to applications for crime scene warrants and notices to produce.[110]

The NSW Local Court also produces and regularly updates the *Policy and Procedure Manual* which provides general information about the services provided and sets out the policies, procedures and standards for all NSW Local Courts. The *NSW Local Courts Policy and Procedure Manual* was updated to include summaries of the crime scene warrants[111] and notice to produce[112] provisions of LEPRA. The manual provides definitions of key terms in LEPRA and details of the prescribed forms.

A number of NSW Local Court officers were appointed as LEPRA Contact Officers to assist with questions regarding the legislation. Their contact details were circulated in the *Local Courts Bulletin*.[113]

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106 *Law Enforcement (Powers and Responsibility) Act 2002*, s.3.

107 Registrars and other Local Court staff who formerly had powers as 'authorised justices' have powers as 'authorised officers'. This change was notified through the *Local Courts Bulletin 2005/013*.

108 '*Law Enforcement (Powers and Responsibilities) Act 2002*' — *Local Courts Bulletin 2005/0130*; 'Search Warrants — *Law Enforcement (Powers and Responsibilities) Act 2002*' — *Local Courts Bulletin 2005/0131*; 'Crime Scene Warrants' — Local Courts Bulletin 2005/0132; 'Notice to Produce Financial Documents — Criminal Investigations' — *Local Courts Bulletin 2005/0133*; '*Law Enforcement (Powers and Responsibilities) Act 2002* — Contact Officers' — *Local Courts Bulletin 2005/0141*; '*Law Enforcement (Powers and Responsibilities) Act 2002* and Law Enforcement (Powers and Responsibilities) Regulation 2005' — *Local Courts Bulletin 2005/0145*.

109 '*Law Enforcement (Powers and Responsibilities) Act 2002* and Law Enforcement (Powers and Responsibilities) Regulation 2005' — *Local Courts Bulletin 2005/0145*.

110 Form 4 — Application for a Crime Scene Warrant; Form 12 — Crime Scene Warrant; Form 19 — Occupier's Notice Crime Scene Warrant; Form 20 — Report to Authorised Officer about execution of Warrant; Form 6 — Application for Notice to Produce Documents/Record of Application; and Form 15 — Notice to Produce Documents.

111 29.21 'Crime Scene Warrants' *NSW Local Courts Policy and Procedures Manual*, Court Services, Attorney General's Department of NSW, p.43.

112 29.22 'Notice to Produce Financial Documents — Criminal Investigation' *NSW Local Courts Policy and Procedures Manual*, Court Services, Attorney General's Department of NSW, p.44.

113 '*Law Enforcement (Powers and Responsibilities) Act 2002* — Contact Officers' — *Local Courts Bulletin 2005/0141*.

6.1.3. Training

Training was provided to Attorney General's staff on the introduction of LEPRA by representatives from the Legal Services Section of the NSW Police Force. Two training/information sessions were conducted on LEPRA, and in particular on the major changes introduced through the legislation, for Extended Registry staff, registrars and Chamber registrars between September and October 2005.

At the Local Court Annual Conference in August 2006, the Judicial Commission and Local Courts conducted a session for magistrates entitled *'A User's Guide to LEPRA'*. A paper which accompanied the session, entitled '*The Consolidation of Police Powers; the Law Enforcement (Powers and Responsibilities) Act 2002'*, was also distributed to all magistrates.

6.2. NSW Police Force

Although the Attorney General formally administers the *Law Enforcement (Powers and Responsibilities) Act 2002,* given that most of the powers and functions are conferred on police officers, the NSW Police Force had core responsibilities for implementing the provisions in LEPRA.

6.2.1. The LEPRA Steering Committee

A LEPRA Implementation Project Steering Committee was established within the NSW Police Force in 2003 to facilitate the implementation of LEPRA. The project plan for the Committee commented on its brief as follows:

> *It is incumbent upon NSW Police to ensure that all police officers in the State are sufficiently educated about the Act to enable its commencement without jeopardizing current and future investigations and public safety.*

The Committee stated its core project aims as follows:

- implementation of the *Law Enforcement (Powers and Responsibilities) Act 2002* without adverse impact on core business across NSW Police
- to ensure a smooth transition and implementation of the *Law Enforcement (Powers and Responsibilities) Act 2002*
- to ensure all documentation and corporate systems reflect the relevant changes made by the *Law Enforcement (Powers and Responsibilities) Act 2002*
- to ensure the relevant agencies are made aware of the relevant changes made by the *Law Enforcement (Powers and Responsibilities) Act 2002*
- to ensure NSW Police employees are made aware of and receive the necessary training in relation to the relevant changes made by the *Law Enforcement (Powers and Responsibilities) Act 2002.*[114]

The committee included representatives of the following sections of the NSW Police Force:

- Legal Services
- Project Management Unit
- Business and Technology Services
- Education Services
- Communication and Change Management.

Representatives of various operational police areas, the Ministry for Police, and the Police Association were also involved in the committee.

The committee formed five working party groups, headed by members of the committee, which considered the following areas:

- operational policing
- education and training
- communications and change management
- information technology
- search warrants.

114 NSW Police Force, *Law Enforcement (Powers and Responsibilities) Act 2002* Project Plan, March 2003.

A project plan was developed which depicted the progression of the implementation works for the various committees. A steering committee review of implementation occurred on 1 April 2006. Also guiding the process was the 'Project Execution Plan and Functional Requirements Document' developed by the Business and Technology Services section of the NSW Police Force.

6.2.2. Training

Training on LEPRA was mandatory for all police officers. From July 2005, Education Services 'rolled out' a training package to all units and Local Area Commands (LACs). This involved three face-to-face training sessions and two online units, covering various topics including the search powers and related safeguards, crime scenes, notices to produce and the general safeguards.

The training required for the introduction of LEPRA formed the entire Mandatory Continuing Police Education (MCPE) training units for the 2005–2006 year with the aim of ensuring that LEPRA was 'fully implemented without adversely impacting on operational policing and public safety' prior to the commencement of the legislation in December 2005.[115]

Other training conducted included:

- training of all Education Officers early in 2005 to enable them to deliver the LEPRA MCPE training to staff in their LAC
- the development of specific LEPRA training materials for police prosecutors and the roll out of training for prosecutors across the state between August and September 2006
- LEPRA training of student police conducted by the Foundational Studies Unit of Education Services which commenced in February 2005.

Other strategies used to educate and train police include the following training aids and publications:

- The publication of a special edition of the *Policing Issues & Practice Journal* devoted to LEPRA in July 2005, which was distributed during training and made available to all current police.[116] This special edition was designed to serve as 'a key support document in delivery of the LEPRA MCPES' and therefore mirrors the content and structure of the training program.[117]
- The development of a frequently asked questions guide which was placed on the police intranet in October 2005 and periodically updated.
- Revision of a 'Police Powers' section on the Police Intranet (partially updated).
- The publication of a *COPS Law Enforcement (Powers and Responsibilities) Act 2002 User Guide* (COPS LEPRA User Guide) in November 2005 which outlined changes to the Computerised Operational Policing System (COPS) and intranet forms required to implement LEPRA.
- The creation and dissemination of LEPRA marketing posters by the Communications and Change Management Working Group to raise awareness about LEPRA in stations and LACs.
- Production of the 'Understanding LEPRA Articles' section of the police intranet containing the law notes relevant to the implementation of LEPRA.
- The publication of articles about LEPRA in the *Police Weekly* in the period leading up to the commencement of LEPRA in December 2005 and a regular column in the *Police Weekly* about LEPRA provisions and developments from July 2006 to July 2007.
- Inclusion of LEPRA provisions in the *Police Weekly* — Professional Conduct edition, 30 October 2006.

6.2.3. Articles

General articles on LEPRA distributed to officers by the NSW Police Force during the review period include:

- 'Meeting your commitments for mandatory police education', *Police Weekly*, Vol 17 No 30, 22 August 2005, p.3
- 'Focus on operational policing', *Police Weekly*, Vol 17 No 30, 22 August 2005, pp.8–11
- 'Understanding LEPRA', *Police Weekly*, Vol 18 No 23, 3 July 2006, p.12
- 'Comparing the old and new provisions', *Police Weekly*, Vol 18 No 30, 21 August 2006, pp.18–22

115 NSW Police College, *LEPRA Facilitator Introductory Guide*, p.8. The MCPE program generally includes a variety of core and elective elements which officers can choose from to fulfil the MCPE requirements.
116 *Policing Issues & Practice Journal*, 'LEPRA: Consolidating Police Powers', Special Edition, July 2005, Vol. 13, No. 3.
117 NSW Police College, *LEPRA Facilitator Introductory Guide*, p.10.

- 'Understanding LEPRA 06/08 — Powers of Entry', *Police Weekly*, Vol 18 No 34, 18 September 2006, pp.16–17
- 'Understanding LEPRA 06/03: *Law Enforcement (Powers and Responsibilities) Act 2002*', *Police Weekly*, Vol 18 No 25, 17 July 2006, p.12
- 'Power, discretion and responsibility', *Police Weekly*, Vol 18 No 27, 31 July 2006, p.14
- 'Understanding LEPRA 06/08: LEPRA and the Young Offenders Act', *Police Weekly*, Vol 18 No 43, 20 November 2006, p.12
- 'Understanding LEPRA 06/09: Improving police powers', *Police Weekly*, Vol 18 No 46, 11 December 2006, pp.12–13
- 'LEPRA Update — Improving police powers' *Policing Issues & Practice Journal*, Vol 15 No, 1, February 2007, pp.12–13.

There were also a number of articles published specific to crime scenes, notices to produce, personal searches and related safeguards details of which are provided in Parts 2, 3 and 4 of this report.

6.2.4. Development of policies and procedures

The NSW Police Force has advised that any policy documents affected by LEPRA, such as the *NSW Police Handbook* and *Procedures for Evidence*, are reviewed and amended on a regular basis, as are all forms used in the exercise of police powers and criminal investigations.

The *Police Handbook* has been updated to reflect all relevant changes as a result of LEPRA.

The Code of Practice for CRIME is also updated periodically. Updates made in December 2005, August 2006 and May 2008 incorporate many of the changes made by LEPRA.[118]

6.2.5. Systems changes to COPS

The implementation of LEPRA required the NSW Police Force to update its technology systems. Changes to COPS were completed in November 2005, with new screens, properties and action types introduced. The changes are in various modules of COPS including: event management, case management, custody management and statistical reports and downloads. The primary changes were in relation to how police record information about searches, crime scenes, and notices to produce.

These changes were introduced and outlined in an article in the *Police Weekly* titled 'Changes to LEPRA and COPS' in July 2007.[119]

6.2.6. Advice regarding amendments to legislation

As discussed above in section 3.5, a number of amendments were made to the LEPRA provisions under review during the review period. Officers were made aware of legislative changes through the Research and Legislative Review Section of NSW Police Force by means of:

- statewide emails issued to all police advising of the changes
- memorandums to all Education Officers explaining the changes and requesting that staff be made aware of the changes
- articles published in the *Police Weekly* which included an explanation of the nature of the amendments.[120]

118 At the time of writing the Code of Practice for CRIME has not been updated with a number of amendments to LEPRA which occurred during the review period.

119 NSW Police Force, *Police Weekly*, 'Changes to LEPRA and COPS', Vol. 19, No. 27, 30 July 2007, p.7.

120 These articles include: NSW Police Force, *Police Weekly*, 'Understanding LEPRA 06/09: Improving police powers', Vol. 18, No. 46, 11 December 2006, pp.12–13; *Policing Issues & Practice Journal,* 'LEPRA Update — Improving police powers', Vol. 15, No. 1, February 2007, pp.12–13; *Policing Issues & Practice Journal*, 'LEPRA Update — Search Warrants & Crime Scene Warrants' Vol. 14, No. 4, October 2006, pp.53–55.

Part 2 — Personal searches

Chapter 7. Introduction

Part 4, Division 2 of LEPRA provides police with the power to conduct searches of persons on arrest or while in custody. These powers are accompanied by specific safeguards for searches in Part 4, Division 4 and general safeguards in Part 15.

The following discussion of personal searches is structured as follows:

- the objectives of the personal search provisions
- the legislative provisions under review
- comparable legislation in other jurisdictions
- the research methodology used to scrutinise the personal search provisions
- implementation of the personal search provisions
- operation of the personal search provisions
- issues concerning the personal search provisions identified during the review period
- conclusion.

Chapter 8. Background

8.1. Objectives of the personal search provisions

In the second reading speech for LEPRA the then Attorney General, the Hon. Bob Debus, introduced the personal search provisions saying:

> *Police powers to conduct personal searches have been significantly simplified without reducing or increasing existing powers, so that police are able to readily understand the types of search[es] that they may undertake, and the community can understand more readily the powers that police have in this respect. A regime of three tiers of searches has been adopted, and safeguards have been introduced to ensure that civil liberties are upheld and that the integrity of the police process is not compromised.*[121]

8.2. Parliamentary debate on the provisions

While there was little discussion in the Legislative Assembly, there was some debate in the Legislative Council where the possibility of requiring officers to obtain approval for strip searches from a senior officer was proposed but not supported.[122]

Most debate in the Legislative Council focused on section 33(3) which provides that children and people with impaired intellectual functioning must only be strip searched in the presence of a support person. The Hon. Richard Jones argued that section 33(3) should be amended so that compliance is required 'unless there is no other alternative' rather than 'as far as reasonably practicable', saying that such an amendment, 'strengthens the existing provision without making it unworkable'.[123]

Ms Lee Rhiannon argued that police should be required to charge the child with an offence or obtain an order from a magistrate before conducting a strip search, saying:

> *Children should only be searched in the most exceptional circumstances … Additional safeguards are required, such as the requirement that the person has been arrested and charged with an offence or that the search has been ordered by a magistrate … The law must make a point of protecting the rights of children and those suffering incapacity, because they are not in a position to protect themselves.*[124]

These stricter safeguards in relation to strip searches were originally provided in very similar terms in the draft exposure Law Enforcement (Powers and Responsibilities) Bill 2001, but were removed for reasons that are not clear from the parliamentary debates.[125]

The Hon. Helen Sham-Ho also commented that the strip search safeguards for children and intellectually impaired persons should also apply to frisk and ordinary searches of those persons to ensure that they are not vulnerable when a frisk or ordinary search takes place, however, this proposal was not adopted.[126]

121 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
122 The Hon. Richard Jones MLC, NSWPD, Legislative Council, 21 November 2002, p.7260.
123 The Hon. Richard Jones MLC, NSWPD, Legislative Council, 21 November 2002, p.7260.
124 Ms Lee Rhiannon MLC, NSWPD, Legislative Council, 21 November 2002, p.7260.
125 The Law Enforcement (Powers and Responsibilities) Bill 2001, cl.123.
126 The Hon. Helen Sham-Ho MLC, NSWPD, Legislative Council, 21 November 2002, p.7260.

Chapter 9.
Overview of the personal search provisions

Part 4 of LEPRA sets out certain personal search powers and safeguards:

- Division 1 provides police with the power to stop, search and detain persons in relation to particular offences
- Division 2 provides police with the power to search persons on arrest or while in custody
- Division 3 provides police with additional personal search and seizure powers in public places and schools
- Division 4, which applies to all searches under Part 4, outlines when frisk, ordinary and strip searches can be used and the safeguards that apply to the exercise of those searches.

General safeguards that apply to personal searches amongst other powers are provided in Part 15.

Part 4, Divisions 2 and 4 (insofar as Division 4 applies to searches under Division 2) and Part 15 (insofar as it relates to functions exercised under Part 4, Division 2 and Part 7) are the subject of this review. Part 4, Divisions 1 and 3 are not.[127]

The personal search provisions in Part 4 and the general safeguards in Part 15 of LEPRA commenced on 1 December 2005. Since that time a number of amendments have been made including the introduction of ancillary powers to search a person's mouth and/or hair when detained or on arrest (but not in custody), changes to section 201 that make the warning requirements subject to the person's compliance and provides other exceptions to the general requirement outlined in section 201(1) and (2). These amendments are detailed in Appendix 2.

9.1. The personal search powers

9.1.1. The power to search people on arrest or while in custody

Section 23 provides police with the power to search a person who has been arrested for an offence or under a warrant, or for the purpose of taking the person into lawful custody. Section 23 provides:

(1) A police officer who arrests a person for an offence or under a warrant, 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:

(a) that would present a danger to a person, or

(b) that could be used to assist a person to escape from lawful custody, or

(c) that is a thing with respect to which an offence has been committed, or

(d) that is a thing that will provide evidence of the commission of an offence, or

(e) that was used, or is intended to be used, in or in connection with the commission of an offence.

(2) 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:

(a) that would present a danger to a person, or

(b) that could be used to assist a person to escape from lawful custody.

(3) A police officer may seize and detain a thing found in a search if it is a thing of a kind referred to in subsection (1) or (2).

(4) Nothing in this section limits section 24.

Section 24 provides:

A police officer may search a person who is in lawful custody (whether at a police station or at any other place) and seize and detain anything found on that search.

The term 'lawful custody' is defined in section 3 as the lawful custody of the police.

127 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.242.

9.1.2. The power to request that a person open their mouth or move their hair as part of a search on arrest

In December 2007 the *Law Enforcement (Powers and Responsibilities) Amendment Act 2007* amended Part 4, Division 2 by inserting a new section 23A. Section 23A provides:

(1) In conducting a search of a person under section 23, a police officer may, if the police officer suspects on reasonable grounds that a thing of a kind referred to in section 23 (1) or (2) is concealed in the person's mouth or hair, request the person:

(a) to open his or her mouth, or

(b) to shake, or otherwise move, his or her hair.

(2) Subsection (1) does not authorise a police officer to forcibly open a person's mouth.

(3) A person must not, without reasonable excuse, fail or refuse to comply with a request made by a police officer in accordance with this section and section 201.

Maximum penalty: 5 penalty units.

In the second reading speech introducing section 23A, the Attorney General stated:

> *The bill makes a number of amendments to police powers legislation designed to improve the efficiency of policing and to eliminate red tape experienced by police officers. [Section 23A] replicates an existing search power for searches in public places in relation to searches conducted upon arrest. The power enables police to direct a person to open their mouth or shake their hair to search for concealed items such as prohibited drugs.*[128]

The reference to an 'existing search power for searches in public places' refers to the section 21A powers which were introduced one year earlier to supplement the powers available in section 21 for searches on detention. Throughout this section of the report, the term 'on detention' refers to situations where police are exercising a power to stop, search and detain a person, such as searches pursuant to sections 21 or 26 of LEPRA. In such circumstances the person is not under arrest while being detained.

9.1.3. The power to conduct frisk, ordinary and strip searches

Section 30 of LEPRA provides police with the power to carry out a 'frisk search' or an 'ordinary search'. Section 30 states:

(1) A police officer or other person who is authorised to search a person may carry out a frisk search or an ordinary search of the person for any purpose for which the search may be conducted.

(2) In conducting a frisk search, a police officer or other person may, if the police officer or other person has asked the person to remove a coat or jacket, treat the person's outer clothing as being the person's outer clothes after the coat or jacket has been removed.[129]

A 'frisk search' is defined in section 3 as:

(a) a search of a person conducted by quickly running the hands over the person's outer clothing or by passing an electronic metal detection device over or in close proximity to the person's outer clothing, and

(b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person, including an examination conducted by passing an electronic metal detection device over or in close proximity to that thing.

An 'ordinary search' is defined in section 3 as:

A search of a person or articles in the possession of a person that may include:

(a) requiring the person to remove only his or her overcoat, coat or jacket or similar article of clothing and any gloves, shoes, [socks] and hat, and

(b) an examination of those items.[130]

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128 The Hon. John Hatzistergos MLC, NSWPD, Legislative Council, 6 November 2007, p.3515.

129 Section 29 of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides that section 30 applies to 'any search of a person carried out, or authorised to be carried out, by a police officer or other person under this Act (other than an internal search under Division 3 of Part 11) except as otherwise provided by this Act or the regulations'. Note that Part 11, Division 3 was repealed by the *Law Enforcement (Powers and Responsibilities) Amendment Act* 2007 on 17 December 2007.

130 Socks were added to the definition of an ordinary search in section 3 by the *Police Powers Legislation Amendment Act 2006* on 15 December 2006.

Section 31 of LEPRA provides police with the power to conduct a 'strip search':

> *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.*[131]

A 'strip search' is defined in section 3 as:

> *A search of a person or of articles in the possession of a person that may include:*
>
> *(a) requiring the person to remove all of his or her clothes, and*
>
> *(b) an examination of the person's body (but not of the person's body cavities) and of those clothes.*

9.2. The safeguards that apply to personal searches

9.2.1. The general safeguards

Part 15 of LEPRA provides general safeguards that apply to the exercise of certain powers including the power to search or arrest a person.[132] Since LEPRA commenced, section 201 has been amended twice.[133] The current section 201, which includes amendments made by the *Police Powers Legislation Amendment Act 2006* and the *Law Enforcement and Other Legislation Amendment Act 2007* provides:

> *(1) A police officer must provide the person subject to the exercise of a power referred to in subsection (3) with the following:*
>
> *(a) evidence that the police officer is a police officer (unless the police officer is in uniform),*
>
> *(b) the name of the police officer and his or her place of duty,*
>
> *(c) the reason for the exercise of the power.*
>
> *(2) A police officer must comply with subsection (1) in relation to a power referred to in subsection (3) (other than subsection (3) (g), (i) or (j)):*
>
> *(a) if it is practicable to do so, before or at the time of exercising the power, or*
>
> *(b) if it is not practicable to do so before or at that time, as soon as is reasonably practicable after exercising the power.*
>
> *(2A) A police officer must comply with subsection (1) in relation to a power referred to in subsection (3) (g), (i) or (j) before exercising the power, except as otherwise provided by subsection (2B).*
>
> *(2B) If a police officer is exercising a power to give a direction to a person (as referred to in subsection (3) (i)) by giving the direction to a group of 2 or more persons, the police officer must comply with subsection (1) in relation to the power:*
>
> *(a) if it is practicable to do so, before or at the time of exercising the power, or*
>
> *(b) if it is not practicable to do so, as soon as is reasonably practicable after exercising the power.*
>
> *(2C) If a police officer exercises a power that involves the making of a request or direction that a person is required to comply with by law, the police officer must, as soon as is reasonably practicable after making the request or direction, provide the person the subject of the request or direction with:*
>
> *(a) a warning that the person is required by law to comply with the request or direction (unless the person has already complied or is in the process of complying), and*
>
> *(b) if the person does not comply with the request or direction after being given that warning, and the police officer believes that the failure to comply by the person is an offence, a warning that the failure to comply with the request or direction is an offence.*
>
> *(3) This section applies to the exercise of the following powers (whether or not conferred by or under this Act):*
>
> *(a) a power to search or arrest a person,*

131 Section 29 of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides that section 31 applies to 'any search of a person carried out, or authorised to be carried out, by a police officer or other person under this Act (other than an internal search under Division 3 of Part 11) except as otherwise provided by this Act or the regulations'.

132 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(3)(a).

133 The detail of those amendments can be found in Appendix 2.

(b) a power to search a vehicle, vessel or aircraft,

(c) a power to enter premises (not being a public place),

(d) a power to search premises (not being a public place),

(e) a power to seize any property,

(f) a power to stop or detain a person (other than a power to detain a person under Part 16) or a vehicle, vessel or aircraft,

(g) a power to request a person to disclose his or her identity or the identity of another person,

(h) a power to establish a crime scene at premises (not being a public place),

(i) a power to give a direction to a person,

(j) a power under section 21A to request a person to open his or her mouth or shake or move his or her hair,

(k) a power under section 26 to request a person to submit to a frisk search or to produce a dangerous implement or metallic object.

(3A) If a police officer is exercising more than one power to which this section applies on a single occasion, and in relation to the same person, the police officer is required to comply with subsection (1) (a) and (b) in relation to that person only once on that occasion.

(4) If 2 or more police officers are exercising a power to which this section applies, only one officer present is required to comply with this section.

(5) However, if a person asks another police officer present for information as to the name of the police officer and his or her place of duty, the police officer must give to the person the information requested.

(6) This section does not apply to the exercise of a power that is conferred by an Act or regulation specified in Schedule 1.

Note. See section 5(1), which provides that this Act does not limit the functions of a police officer under an Act or regulation specified in Schedule 1.

In the second reading speech introducing amendments to section 201, the Parliamentary Secretary commented that:

> *The bill simplifies this regime, makes it more consistent, and clarifies which police powers it applies to [by making amendments to provide:] no warning is required if a person has already complied with the direction; police are not required to warn the person that failure to comply with the direction is an offence unless the person has been given a chance to comply and has failed or refused; an officer has only to identify themselves once; one warning can cover a situation where an officer is exercising a number of powers or where there is more than one officer exercising powers; and police powers exercised under other Acts are not subject to section 201. These Acts have their own accountability provisions, if needed. These are sensible amendments. They balance the public's right to be confident that police will exercise their powers accountably and openly, with a commonsense, practical approach to policing.*[134]

9.2.2. The safeguards for all personal searches

Section 32 provides a number of safeguards in relation to personal searches.[135] Section 32 provides:

(1) A police officer or other person who searches a person must, as far as is reasonably practicable in the circumstances, comply with this section.

(2) The police officer or other person who searches a person must inform the person to be searched of the following matters:

(a) whether the person will be required to remove clothing during the search

(b) why it is necessary to remove the clothing.

(3) The police officer or other person must ask for the person's co-operation.

134 Ms Linda Burney MP, NSWPD, Legislative Assembly, 14 November 2006, p.102.

135 Section 29 of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides that section 32 applies to 'any search of a person carried out, or authorised to be carried out, by a police officer or other person under this Act (other than an internal search under Division 3 of Part 11) except as otherwise provided by this Act or the regulations'.

(4) The police officer or other person must conduct the search:

(a) in a way that provides reasonable privacy for the person searched, and

(b) as quickly as is reasonably practicable.

(5) The police officer or other person must conduct the least invasive kind of search practicable in the circumstances.

(6) The police officer or other person must not search the genital area of the person searched, or in the case of female or transgender person who identifies as a female, the person's breasts unless the police officer or other person suspects on reasonable grounds that it is necessary to do so for the purposes of the search.

'Transgender person' is defined in section 32(11) as:

a person, whether or not the person is a recognised transgender person:

(a) who identifies as a member of the opposite sex, by living or seeking to live as a member of the opposite sex, or

(b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or

(c) who being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex,

and includes a reference to the person being thought of as a transgender person, whether or not the person is, or was, in fact a transgender person.

(7) A search must be conducted by a police officer or other person of the same sex as the person searched or by a person of the same sex under the direction of the police officer or other person concerned.

(8) A search of a person must not be carried out while the person is being questioned. If questioning has not been completed before a search is carried out, it must be suspended while the search is carried out.

'Questioning' is defined in section 32(11) as 'questioning the person, or carrying out an investigation (in which the person participates)'.

(9) A person must be allowed to dress as soon as a search is finished.

(10) If clothing is seized because of the search, the police officer or other person must ensure the person searched is left with or given reasonably appropriate clothing.

9.2.3. The additional safeguards for strip searches

Section 33 provides further safeguards for strip searches as follows:[136]

(1) A police officer or other person who strip searches a person must, as far as is reasonably practicable in the circumstances, comply with the following:

(a) the strip search must be conducted in a private area,

(b) the 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,

(c) except as provided by this section, the strip search must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the search.

(2) A parent, guardian or personal representative of the person being searched may, if it is reasonably practicable in the circumstances, be present during a search if the person being searched has no objection to that person being present.

(3) 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.

136 Section 29 of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides that section 33 applies to 'any search of a person carried out, or authorised to be carried out, by a police officer or other person under this Act (other than an internal search under Division 3 of Part 11) except as otherwise provided by this Act or the regulations'.

'Impaired intellectual functioning' is defined in section 33(9) as:

> *(a) total or partial loss of a person's mental functions, or*
>
> *(b) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or*
>
> *(c) a disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgment, or that results in disturbed behaviour.*

(4) A strip search must not involve a search of a person's body cavities or an examination of the body by touch.

(5) A strip search must not involve the removal of more clothes than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purposes of the search.

(6) A strip search must not involve more visual inspection than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purposes of the search.

(7) A strip search may be conducted in the presence of a medical practitioner of the opposite sex to the person searched if the person being searched has no objection to that person being present.

(8) This section is in addition to the other requirements of this Act relating to searches.

Note. Procedures for searches of a more invasive nature are dealt with under the Crimes (Forensic Procedures) Act 2000.

Section 34 states that 'a strip search must not be conducted on a person who is under the age of 10 years'.

Chapter 10.
Comparable legislation

A number of states and territories in Australia have legislative provisions that specify when and how police officers may conduct personal searches on arrest and while in custody — in particular, the Commonwealth, the Australian Capital Territory, Queensland and Western Australia. tables detailing comparable provisions in those states and territories are provided in Appendix 6.

The following discussion provides a general outline of provisions in other jurisdictions that present significant points for comparison to the LEPRA search provisions.[137]

10.1. Commonwealth

As indicated by the then Attorney General in the second reading speech, the three tiered search model in LEPRA is largely based on the personal search provisions in the Commonwealth *Crimes Act 1914*.[138] The terms 'frisk search', 'ordinary search', and 'strip search' are defined in section 3 of the *Crimes Act 1914* and have substantially the same meaning as they do in LEPRA. However, unlike LEPRA, in order to conduct a strip search under the *Crimes Act 1914,* police must not only suspect on reasonable grounds that the search is necessary in order to recover a seizable item or evidentiary material, they must also obtain approval from an officer of the rank of superintendent or higher, and can only conduct a search once the person is in custody at a police station.[139]

The rules for the conduct of a strip search in the *Crimes Act 1914* are similar to the rules for strip searches in section 33 of LEPRA. However, under the *Crimes Act 1914*, a person who is incapable of managing their own affairs or a child between the ages of 10 and 17 must not be strip searched unless they have been charged or an order has been obtained from a magistrate.[140]

Only one rule is provided in the *Crimes Act 1914* for the general conduct of a frisk or an ordinary search, namely, that the search must be conducted by a person of the same sex as the person being searched, if reasonably practicable to do so.[141] This differs from LEPRA which provides a range of safeguards covering issues of privacy and dignity for all searches in section 32.

10.2. Queensland

The personal search safeguards for privacy and dignity in LEPRA most closely reflect the Queensland *Police Powers and Responsibilities Act 2000* (PPRA). The PPRA contains general safeguard provisions for all personal searches,[142] and additional provisions to protect the dignity of persons during searches that involve the removal of clothing.[143] In particular, the PPRA provides that searches in public should be restricted to outer clothing only, unless an immediate and more thorough search is necessary.[144]

The general rules for the conduct of searches are expressed in terms of 'causing minimal embarrassment to the person being searched' and include rules that are similar to the search safeguards in section 32 of LEPRA.[145] However, instead of defining searches (as frisk, ordinary and strip) and providing safeguards based on those definitions, the PPRA distinguishes between searches that involve the removal of clothing and those that do not.

What is more, the additional safeguards for searches involving removal of clothing appear to apply to a greater number of searches than the strip search safeguards in LEPRA, because a search involving removal of clothing under the PPRA can involve as little as removal of 'all items of outer clothing'.[146]

The PPRA provisions in relation to searches involving the removal of clothing differ from LEPRA in two notable respects, namely:

137 The provisions of the Australian Capital Territory *Crimes Act 1900* that relate to personal searches on arrest or while in custody are very similar to those of the Commonwealth, consequently those provisions are not discussed separately in this chapter. However, the Australian Capital Territory provisions are detailed in Appendix 6.
138 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
139 *Crimes Act 1914* (Cth), s.3ZH.
140 *Crimes Act 1914* (Cth), s.3ZI(1)(f).
141 *Crimes Act 1914* (Cth), s.3ZR.
142 *Police Powers and Responsibilities Act 2000* (Qld), ss.624 and 625.
143 *Police Powers and Responsibilities Act 2000* (Qld), s.630.
144 *Police Powers and Responsibilities Act 2000* (Qld), s.624.
145 *Police Powers and Responsibilities Act 2000* (Qld), s.624.
146 *Police Powers and Responsibilities Act 2000* (Qld), s.629.

- officers are required to provide the person with the opportunity to remain partly clothed during the search if reasonably practicable to do so[147]
- officers have the power to require a person to 'hold his or her arms in the air or to stand with legs apart and bend forward to enable a visual examination to be made'.[148]

Whether conducting a search on arrest or while in custody, the same search power applies under the PPRA without any threshold distinction or variation in the extent of the search that may be conducted, unlike LEPRA which provides separate powers and limitations for personal searches on arrest and while in custody.[149]

10.3. The United Kingdom

In the United Kingdom, police operating under the *Police and Criminal Evidence Act 1984* (PACE) may search a person who has been arrested at a place other than a police station if the officer has reasonable grounds for believing that the arrested person may present a danger to himself or others. If this threshold requirement is met, the officer is authorised to search for anything that may be used to escape from lawful custody or which may constitute evidence relating to an offence.[150]

The power to search on arrest in PACE does not include a power to require removal of clothing in public other than an outer coat, jacket or gloves, but it does allow officers to search a person's mouth.[151] Like PACE, LEPRA also provides police with the power to search a person's mouth on arrest,[152] but also provides police with powers to search the person's hair and conduct a strip search in public in circumstances where the seriousness, urgency and necessity requirements in section 31 are met.[153]

Under PACE, police can also search a person who is in custody if the custody officer considers it necessary to carry out the duty 'to ascertain everything which the detainee has with him'.[154] This power to search applies to people who have been:

- taken into custody after being arrested elsewhere
- committed to custody by an order or sentence of a court
- arrested at the station
- detained there in relation to bail requirements.

In contrast, LEPRA provides police with the power to search a person who is in lawful custody without specifying the purpose of the search or defining 'lawful custody' for the purpose of this provision.

The power to conduct a strip search is provided in Code C, 'The Code of practice for the detention, treatment and questioning of persons by police officers', which limits the power to strip search to custody at a police station, unlike LEPRA which authorises strip searches anywhere, provided the criteria in section 31 are met.[155]

Code C, Annex A also contains rules for the conduct of strip searches that are similar to those in LEPRA.[156] However, the strip search safeguards in PACE resemble the Queensland PPRA more closely, by providing:

- 'detainees who are searched shall not normally be required to remove all their clothes at the same time, e.g. a person should be allowed to remove clothing above the waist an redress before removing further clothing'[157]
- 'if necessary to assist the search, the detainee may be required to hold their arms in the air or to stand with their legs apart and bend forward so a visual examination may be made of the genital and anal areas provided no physical contact is made with any body orifice'.[158]

Code C, Annex A also expresses the power to strip search in terms of necessity and specifies that a record of the strip search must be made including the reason why it was considered necessary, those present and any result.[159]

147 *Police Powers and Responsibilities Act 2000* (Qld), s.630(4).
148 *Police Powers and Responsibilities Act 2000* (Qld), s.630(4).
149 *Police Powers and Responsibilities Act 2000* (Qld), ss.442 and 443.
150 *Police and Criminal Evidence Act 1984* (UK), s.32.
151 *Police and Criminal Evidence Act 1984* (UK), s.32(4).
152 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.23A.
153 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.31.
154 *Police and Criminal Evidence Act 1984* (UK), s.54. The role of the custody officer in the United Kingdom is comparable to that of a custody manager in part 9 of LEPRA.
155 *Police and Criminal Evidence Act 1984* (UK), Code C, Annex A, par. 10.
156 *Police and Criminal Evidence Act 1984* (UK), Code C, Annex A, par. 11. This includes requirements that: the search be conducted by an officer of the same sex; in a place where it cannot be observed by people who do not need to be present, or by people of the opposite sex except for an appropriate adult requested by the person being searched; that the strip search be conducted as quickly as possible and that the person is allowed to dress as soon as the procedure is completed.
157 *Police and Criminal Evidence Act 1984* (UK), Code C, Annex A, par. 11(d).
158 *Police and Criminal Evidence Act 1984* (UK), Code C, Annex A, par. 11(e).
159 *Police and Criminal Evidence Act 1984* (UK), Code C, Annex A, par. 10 and 12.

Chapter 11. Methodology

In reviewing the operation of the personal search provisions we undertook a number of research activities to obtain information from a range of sources and gain different perspectives about the way personal searches are conducted.

The overall research methodology for this review is discussed in Part 1 of this report. Only those research methods and activities that relate specifically to the personal search provisions are discussed here.

11.1. Data

11.1.1. COPS data

Arrangements were made with the NSW Police Force to provide the Ombudsman with relevant information from the NSW Police Computerised Operational Policing System (COPS) throughout the review period. This data included information about:

- the person who was searched
- the officer who conducted the search
- the type, location and reasons for the search itself.

Details of the information provided in the COPS data are discussed in section 13.1.

11.1.2. BOCSAR data

Information on charges for offences relating to failure to follow a police direction to open one's mouth or move one's hair under section 21A was obtained from the NSW Bureau of Crime Statistics and Research (BOCSAR).

11.2. Consultations

11.2.1. NSW Police Force Local Area Command visits

As discussed in Part 1, we conducted two rounds of consultations with seven NSW Police Force Local Area Commands (LACs).[160] During those consultations we discussed the implementation and operation of the search provisions with officers ranging from probationary constables to superintendents performing a variety of functions. Police performing functions of particular relevance to personal searches included: general duties officers, proactive officers, detectives, brief handlers, police prosecutors, education development officers, gay and lesbian liaison officers, duty officers, custody managers and commanders.

11.2.2. Other consultations

With regard to specific personal search provisions we consulted a number of groups and individuals such as:

- the Intellectual Disability Rights Service (IDRS)
- the Criminal Justice Support Network (CJSN)
- the Gender Centre
- the Youth Justice Coalition
- the Shopfront Youth Legal Centre
- Professor David Dixon — Dean of UNSW Law School
- Andrew Haesler SC — Deputy Senior Public Defender
- Alan Brown — Head of Police Powers and Procedures from the Policing Powers and Protection Unit of the Home Office in the United Kingdom.

160 The LACs that we visited covered metropolitan and regional areas and are identified as LACs 'A' to 'G' for the purpose of this report.

11.3. Issues paper

As discussed in Part 1 of this report, we released an issues paper on the sections in LEPRA under review in June 2007. The paper included 13 questions specifically on the personal search provisions. In response, we received seven submissions that addressed the issues relating to the personal search provisions. A full list of the submissions can be found in Appendix 4.

11.4. Observations

11.4.1. Direct observation of personal searches conducted by police

Over the course of the review period we attended 17 field operations targeting different policing priorities to ensure that we observed personal searches on arrest being performed in a variety of contexts. This included observations of uniformed police in the field at special events, high visibility operations, commuter crime unit patrols and regular foot patrols. We also conducted direct observations of searches in 16 charge rooms across the state.

11.4.2. Closed circuit television observation of charge rooms

In order to observe and comment on the application of the strip search safeguards while preserving the privacy and dignity of the person being searched, we conducted an audit of charge room CCTV tapes.

Five police stations were selected based on the availability of CCTV recording facilities in the charge room and the number of strip searches recorded as occurring in the 'charge room' or the 'dock' in the COPS data. We focused on strip searches recorded as occurring in these areas due to the greater likelihood that they would be recorded on CCTV in accordance with the *Standard Operating Procedures for CCTV Surveillance in Police Charge Rooms and Other Locations in Police Stations* which states:

> *Generally there will be two cameras: one for the charge room covering the fingerprint bench, docks and entry door and the other for the charge counter including the search area.*[161]

A male and a female researcher from our office attended each station in order to ensure that an officer of the same sex as the person who was searched was available to review any strip searches recorded on tape. Police were provided with a list of dates for which we might wish to access tapes. In viewing the tapes we identified the relevant searches by referring to the date and time stamp as well as the age and sex of the person in custody as recorded on COPS.

In total we viewed 55 interactions recorded as strip searches on the COPS custody management system. Four involved a direct view of the strip search and six involved a partial view of the search because the camera was positioned so that only the police officers could be seen during the strip search. The majority (41) involved observations of people being taken in the direction of the cells at the time when the COPS records indicate that a strip search occurred in the charge room or dock.

11.5. Surveys

11.5.1. Court survey

In 2007, a survey of people facing charges at Local Court was developed by the Ombudsman's Office and conducted at Local Courts and Children's Courts in New South Wales between September and December 2007. Ombudsman staff visited 14 Local and Children's Courts and spoke to 700 eligible people. A person was eligible to participate in the survey if he or she was facing charges on the day and was arrested by police some time since December 2005. Overall, 70% of the people we approached in the Local Court and 85% of the young people we approached in the Children's Court completed surveys.[162] Participation in the survey was voluntary and respondents were assured of anonymity and confidentiality. A full report of the survey can be found in Appendix 1.

161 NSW Police, *Standard Operating Procedures for Video Surveillance in Police Charge Rooms and Other Locations in Police Stations*, January 2005, p.5.

162 In the Local Court, 70% of adults (401 of 572) we approached participated in the survey — the sample size of 358 adults excludes 43 partially completed surveys. In the Children's Court, 85% of young people (109 of 128) we approached participated in the survey — the sample size of 103 excludes six partially completed surveys.

11.5.2. Youth street survey

We attended street patrols with youth workers in three metropolitan areas of Sydney over two afternoons and evenings to obtain the views and experiences of young people who had been searched by police in the past year but may not have come before the courts.

The survey focused mainly on general issues such as whether the police officer was in uniform, provided his or her name and station and gave a reason for the search, how private the search was and whether a support person was present if they were asked to remove clothing that would amount to a strip search under LEPRA. We surveyed 17 young people who had been searched in the past year, most of whom had been searched on detention rather than on arrest.

For this research task we did not make a distinction between searches on detention or on arrest in order to simplify the survey for young people. We are of the view that this was appropriate given that our youth street survey questions only related to the search safeguards in Part 4, Division 4 and Part 15 which apply to all personal searches.

11.5.3. Survey of police prosecutors

In December 2007, we arranged for NSW Police Force Legal Services to distribute an email survey to all NSW Police Force prosecutors. The survey included questions designed to establish prosecutors' handling of matters where any aspect of a search on arrest or in custody had been contested. Questions also related to education and training received by police prosecutors on the legislation and what they saw as concerns, issues or problems with the legislation.

11.5.4. Survey of defence solicitors

In February and March 2008 we conducted a survey of defence solicitors working for Legal Aid, Community Legal Centres (NSW) and Aboriginal Legal Services (NSW/ACT). The survey asked solicitors to comment on any issues or matters that they were aware of concerning the personal search powers and safeguards in Part 4 and Part 15.

11.6. Review of complaints received by the NSW Ombudsman

During the review period the NSW Ombudsman received 35 complaints that raised potential Part 4 search issues and 19 matters that raised potential Part 15 safeguard issues in relation to personal searches. These complaints have been considered for the purpose of this review.

11.7. Research limitations

There were several limitations in the information that was available to us as outlined below.

11.7.1. COPS data

In our analysis of the COPS data we identified recording issues which brought into question the accuracy of information regarding the identification of the officer who conducted the search and where the search was conducted. These data issues are discussed at relevant parts of Chapter 16.[163]

11.7.2. Direct observations of personal searches conducted by police

One consequence of observing police while they work is that police may alter their behaviour as a result of the observer's presence. Consequently, it is possible that aspects of the personal searches observed by our researchers and detailed in this report may not necessarily conform in every respect to the general policing activity that occurs in the absence of observers.

In accordance with the safeguards provided in LEPRA, our researchers did not directly observe any strip searches of people in the interest of maintaining the person's privacy and dignity during the search. To compensate for this limitation, other research methods were employed following careful consideration to ensure that our researchers did not compromise the safeguards.

163 See discussion of data issues with regard to reasonable privacy in section 16.2.1.3 and the same sex requirement in section 16.3.4.3.

11.7.3. Court survey

As discussed in Appendix 1 there are a number of limitations to this information resource. In particular, we note that the survey was largely conducted in metropolitan courts and only involved people who had been arrested and charged. In addition, the survey data reflects peoples' recollections of events. Factors affecting a person's recall may include any trauma the person experienced in relation to being arrested and searched, the length of time between being searched and surveyed, and whether or not the person had used drugs or alcohol immediately prior to their interaction with police.[164] We also note that many of the safeguards apply to the extent that it is 'reasonably practicable in the circumstances' and that the subjective nature of those safeguards limited the extent to which we could provide a measure of compliance.

164 42% of adults (151 of 358) in the Local Court sample and 33% of young people (34 of 103) in the Children's Court sample said 'yes' to the question 'Had you used drugs or alcohol immediately prior to your contact with police?'.

Chapter 12. Implementation

In Part 1, we outlined the broad activities undertaken by the NSW Police Force and the Attorney General's Department to implement LEPRA. Below we identify the activities undertaken by the NSW Police Force specifically to implement the personal search powers and safeguard provisions.

12.1. NSW Police Force

The implementation of LEPRA involved mandatory training for all police officers. The personal search provisions were addressed in the training sessions 'Operation High Visibility Policing' and 'Operation Reactivity'. The personal search provisions were also discussed in Chapter 2 of the *Policing Issues & Practice Journal* special edition dedicated to LEPRA.[165]

In addition, the NSW Police Force undertook the following activities specific to the implementation of the personal search provisions:

- In December 2005 the *Code of Practice for Custody, Rights, Investigation, Management and Evidence* (Code of Practice for CRIME) was updated to reflect changes to search powers and safeguards under LEPRA. The Code of Practice for CRIME has been updated a number of times since then to include amendments such as the introduction of the section 23A power to search a person's mouth on arrest,[166] but does not currently reflect the changes to the warning provision that make it unnecessary to warn unless the person is not complying.[167]
- In October 2006, NSW Police Continuing Education published a revised version of the *Searching Manual* which incorporated changes to the personal search powers introduced by LEPRA.[168] At present the *Searching Manual* does not include amendments to LEPRA since its commencement on 1 December 2005.
- A number of articles in the *Police Weekly* were dedicated to issues concerning the operation of the personal search provisions, primarily in relation to the application of the section 201 requirements to searches.[169]
- A number of articles in the *Policing Issues and Practice Journal* also addressed particular issues relating to the personal search provisions in LEPRA.[170]
- Business and Technology Section made changes to COPS which included the introduction of new 'person search' types to reflect the three tiers of frisk, ordinary or strip searches, new screens were created in the event management system which are mandatory for personal search incidents and optional for all other incidents, and new screens were created in the custody management system to allow for the recording of a personal search which is unrelated to a search for property.[171]

165 *Policing Issues & Practice Journal*, 'LEPRA: Consolidating Police Powers', Special Edition, July 2005, Vol. 13, No. 3.
166 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated May 2008, pp.11–12.
167 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated May 2008, p.8.
168 NSW Police Continuing Education, *Searching Manual*, October 2006.
169 NSW Police Force, *Police Weekly*, 'Understanding LEPRA 06/02: Do I need to 'WIPE' a person when I'm dealing with them in the charge room?', 10 July 2006; Vol. 18, No. 24, p.11; 'Understanding LEPRA 06/06: How can I ensure that a person understands the official caution after I have complied with the safeguards in section 201 (WIPE)?', 7 August 2006, Vol. 18, No. 28, pp.6–7; and 'Offences for failing to comply with person searches', 24 September 2007, Vol. 19, No. 35, pp.12–13.
170 NSW Police Force, *Policing Issues & Practice Journal*, 'Recording the WIPE in statements', October 2006, Vol. 14, No. 4, p.56; and 'LEPRA Update — Improving Police Powers', February 2007, Vol. 15, No. 1, pp.12–13.
171 NSW Police Force, *Police Weekly*, 'COPS changes', 21 November 2005, Vol 17. No. 43, p.6, and NSW Police Force. Business and Client Services, *COPS Law Enforcement (Powers and Responsibilities) Act 2002 User Guide*, 2005, pp.21–26.

Chapter 13.
Use of the personal search provisions

As discussed in section 11.1.1, the NSW Police Force was required to provide our office with data from COPS on the use of personal searches from 1 December 2005 to 30 November 2007. This chapter provides an overview of the types of searches conducted by police.

The distinction between searches 'on arrest' and searches 'while in custody' provided in LEPRA is not used on COPS records, which classify searches according to their occurrence 'in the field' or 'in custody'. Consequently, it has not been possible to determine how many searches involved a section 23 search 'on arrest', or a section 24 search 'in lawful custody'. However, this data does provide useful information on the application of the personal search *safeguards*, because the safeguards apply to 'any search of a person'.[172]

13.1. Recording of personal searches on COPS

Police are required to record the details of personal searches on COPS. The nature of each category of information and the requirements are outlined in table 1 below.

Table 1. COPS Data categories provided for LEPRA personal searches review

	Field event records	Custody management records
Record number	Automatically generated.	
Person of Interest — Central Names Index (CNI) number	A person's details are recorded in the CNI. When creating a COPS record, police can search for the person by name or CNI. If the person has provided different aliases in the past, the officer will be asked to choose from one of the existing CNI records. Alternatively, a new record can be created.	
Person of Interest — Date of Birth	If an existing record is chosen, any information previously recorded will be incorporated into the record automatically. At this point, the date of birth can be manually altered by the officer, which will result in the creation of a new alias record.	
Person of Interest — Sex		
Aboriginal or Torres Strait Islander status	Compulsory drop down options (yes, no, unknown, or refused) for both Aboriginal and Torres Strait Islander.	
Date and time of search	Defaults to date and time when the record is created, however, the officer can change it manually.	
Type of search	Compulsory drop down options (frisk, ordinary or strip).	
Location of search	Compulsory drop down options (list only contains field locations).	Compulsory drop down options (list only contains custody locations).
Primary reason for search	Compulsory drop down options (list only contains field specific reasons).	Compulsory drop down options (list only contains custody specific reasons and defaults to 'Property custody search').
Additional reason for search	Optional free text.	
Police — Registration number	Defaults to person logged on to system but can be changed.	
Police — Sex	Extracted from NSW Police Force personnel systems for the LEPRA review — based on the officer's registration number.	
Support person present	Not applicable.	Compulsory if strip search is selected.

Source: Computerised Operational Policing System (COPS) and consultations with the NSW Police Force, Business Technology Systems Unit.

172 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.29.

A search in the field is recorded as a 'person search' incident within the event management system, while a search in custody can be entered under 'property' or 'update custody details' in the custody management system. Police cannot enter property in the custody management system until a search record is created.[173]

When a person is taken into custody at a police station the arresting officer generally completes a 'field arrest form' by hand.[174] That information is entered on the COPS custody management system by another officer — usually the custody manager or other officers working in the charge room. However, the field arrest form does not ask the officer to nominate the type of search conducted, or the actual location of the search. Consequently, it is unclear how the officer entering the record decides which search type or location to nominate when entering these details on COPS.

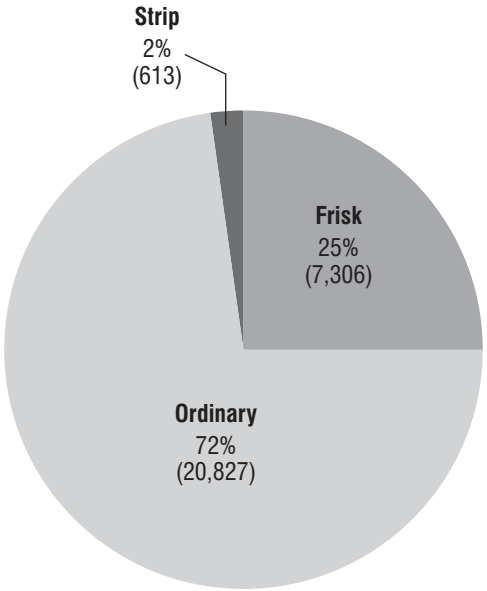
In addition, our consultations with officers and data analysis suggest that some arresting officers only enter this information in the event management system and some only provide it in the field arrest form, while others complete both.[175] The accuracy of personal search records is considered further in section 16.2.1.3 and 16.3.4.3.

13.2. The types of searches being conducted

The COPS data indicates that over the review period, 278,731 searches were recorded on COPS including 28,746 searches in the field, and 249,985 searches while in custody. The vast majority of these searches were ordinary searches as shown in figures 1 and 2.

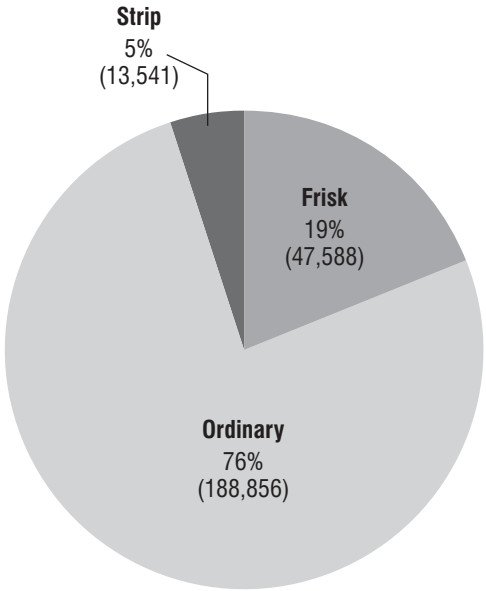
- Frisk searches accounted for 25% (7,306) of searches in the field and 19% (47,588) of searches while in custody.
- Ordinary searches accounted for 73% (20,827) of searches in the field and 76% (188,856) of searches while in custody.
- Strip searches accounted for 2% (613) of searches in the field and 5% (13,541) of searches while in custody.

Figure 1. Searches in the field



Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2007. Note: percentage points total 99% due to rounding. n=28,746.

Figure 2. Searches in custody



Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2007. n=249,985.

173 NSW Police, Business and Client Services, *COPS Law Enforcement (Powers and Responsibilities) Act 2002 User Guide*, 2005, pp.21–26.
174 See Appendix 9 for a copy of the standard field arrest form.
175 Data from the COPS event management system and custody management system both contain records relating to searches on arrest based on information in the narrative and additional reasons for search.

13.3. Personal search terminology used in this report

For the purpose of this report the following terms are defined as follows.

The terms 'frisk' and 'ordinary' refer to searches:

(a) recorded on the COPS system as a 'frisk' or 'ordinary' search, or

(b) described in the Court survey as a search that did not involve the removal of shirt, trousers, shorts, skirt, dress, and/or underwear.

The term 'strip' refers to searches:

(a) recorded on the COPS system as a 'strip' search, or

(b) described in the Court survey as a search that did involve the removal of shirt, trousers, shorts, skirt, dress, and/or underwear. [176]

The term 'in the field' refers to searches:

(a) recorded on the COPS event management system (which generally includes locations outside a police station), or

(b) described in the Court survey as occurring away from a police station, including parks, streets, residences, shopping centres and other locations.

The term 'in custody' refers to searches recorded on the COPS custody management system (which generally includes locations within a police station).[177]

The term 'at a police station' refers to searches described in the Court survey as occurring while in custody at a police station.

The terms 'children' and 'child' refers to children between the age of 10 and 17 for the purpose of section 33(3) of LEPRA.

The terms 'young people' and 'young person' refers generally to people surveyed in the Children's Court (including young people above the age of 17).

176 See Appendix 1 (4.4 and 4.3) for further detail on the categorisation of searches for the purpose of the Court survey.
177 Issues relating to the accuracy of the distinction between 'field' and 'custody' searches in the COPS data are discussed below in section 16.2.1.3.

Chapter 14.
Issues relating to the personal search powers

Part 4, Division 2 of LEPRA codifies the powers to search on arrest or while in custody, setting out the threshold requirements that must be met to exercise each power. Four specific personal search powers are identified in Part 4, Division 2, namely the power to search on arrest for an offence or under a warrant, the power to search on arrest for the purpose of taking a person into lawful custody, an ancillary power to search a person's hair and mouth on arrest and the power to search a person who is in lawful custody.[178]

Our review of the personal search powers in LEPRA identified a number of significant issues in relation to the operation of the legislation which are discussed in detail below. In brief, it is not clear that Part 4, Divisions 2 and 4 and Part 15 have effectively clarified the personal search powers and related safeguards. Nor is it clear that these provisions either reduce the possibility of abuse of powers through ignorance or assist in the training of police.[179] In particular:

- the scope of the section 24 power to conduct a personal search in custody, and the impact this has on the operation of the section 23 power to conduct a personal search on arrest is not clear
- the utility of the distinction between a frisk and an ordinary search in the three tiered regime of personal searches is questionable
- whether the personal search safeguards imply that police are authorised to delegate their search powers or use assistants to conduct personal searches is unclear
- how the personal search powers and safeguards provided in LEPRA are affected if consent is obtained from the person to conduct a search that would otherwise contravene the personal search provisions set out by Parliament in LEPRA is uncertain.

14.1. The aim of Part 4, Division 2: Simplifying search powers on arrest and while in custody

In the second reading speech the then Attorney General, the Hon. Bob Debus, introduced the personal search provisions saying:

> *Police powers to conduct personal searches have been significantly simplified without reducing or increasing existing powers, so that police are able to readily understand the types of search[es] that they may undertake, and the community can understand more readily the powers that police have in this respect.*[180]

In addition, the explanatory note states 'the objects of this Bill are to consolidate, restate and clarify the law relating to police and other law enforcement officers' powers and responsibilities'.[181]

14.2. The power to search a person while in lawful custody

14.2.1. The definition of 'custody' and its implications

Section 24 provides police with the power to search a person who is in lawful custody and seize and detain anything found on that search. The term 'lawful custody' is defined in section 3 as the lawful custody of the police, which may include 'a police station or at any other place' for the purpose of section 24.

In the second reading speech the then Attorney General differentiated between searches on arrest and searches in custody saying:

> *The search powers set out in clause 23 are powers that may be exercised at or after the time of arrest. These powers should be distinguished from those set out in clause 24, which sets out the search powers that may be exercised by a police officer after a person has been arrested and taken into custody, for example, at a police station.*[182]

178 *Law Enforcement (Powers and Responsibilities) Act 2002,* ss.23, 23A and 24.
179 Royal Commission into the NSW Police Service, *Final Report*, May 1997, Vol. II, at par. 7.20.
180 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
181 Law Enforcement (Powers and Responsibilities) Bill 2002, explanatory notes.
182 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.

These comments suggest that Parliament intended to limit the section 24 power to circumstances where the person is in custody subsequent to an arrest. If so, the definition of lawful custody for the purpose of section 24 should reflect this limitation. However, nothing in section 24 or section 3 limits the application of the section 24 search power in this way. The only element in Part 4 that would suggest a limitation on the application of section 24 power to search while in custody is the existence of a separate power to search on arrest in section 23.

14.2.1.1. The need for a broad search power that is limited to 'lawful custody'

The power to conduct a search in section 24 is an extensive power, the exercise of which is not subject to any threshold requirement beyond the person being in lawful custody. While the second reading speech does not elaborate on the purpose of the power to search a person while in custody under section 24, the scope of this search power would appear to be commensurate with police responsibilities to ensure the proper care of people in lawful custody. The Code of Practice for CRIME, advises officers:

> *Of prime importance is ensuring the legal rights of people being held in custody are protected and an appropriate level of care is maintained.*[183]

The Code goes on to say:

> *Detained people should be searched where the custody manager will have continuing duties with them or where their behaviour or the offence makes it appropriate.*[184]

However, these responsibilities are not stated in LEPRA. Unrestricted by any of the 'reasonable suspicion' requirements that apply to other search powers such as those in sections 21, 23 and 26, section 24 appears to provide police with a far-reaching discretionary power to search a person in custody that is only limited by the safeguards in Part 4, Division 4.

14.2.1.2. The 'normal meaning' of 'lawful custody' — to ensure the broad scope of police responsibility for people while in custody

In defining the scope of police responsibility, the term 'lawful custody' has been interpreted quite broadly. For example, in *R v McKellar* the NSW Court of Criminal Appeal defined lawful custody as 'under physical restraint'.[185] In the 1990 report *Criminal Procedure*, the NSW Law Reform Commission (NSWLRC) noted that for the purpose of specifying the amount of time available to police to conduct investigative procedures or deprive a person of their liberty, custody must 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.*[186]

A similarly broad definition was adopted in determining the jurisdiction of the *Royal Commission into Aboriginal Deaths in Custody*. In that context, Justices Morling and Gummow noted:

> *Persons restrained for a brief period in their dwelling house to enable the police to satisfy themselves that the wanted man was not there and that no one was threatening the police, could not be regarded as being 'in custody' within the meaning of the Letters Patent.*[187]

Their Honours went on to say:

> *To confine the meaning of 'custody' to 'that state which follows arrest or similar official act' … is, in our opinion, to pay too close a regard to legal forms rather than the substantive character or quality of police activity.*

14.2.1.3. The limited meaning of 'lawful custody' in section 24 — to provide a broad search power in limited circumstances

In defining the extent of police powers, the normal meaning of the term 'lawful custody' cannot be the meaning intended by Parliament. The presence of a specific limited power to search on arrest in section 23 and the Attorney General's comments in the second reading speech, suggest that Parliament did not intend that section 24 provide police with the power to search a person in any situation where police are 'in control' or have 'physical restraint' of a person.

183 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated May 2008, p.16.
184 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated May 2008, p.32.
185 Justice Howie, *R v McKellar,* [2000] NSWCCA 523 at par. 43. In that matter the court was asked to reconsider the admissibility of photographic evidence in the context of section 115(5) which limits the admissibility of identification evidence where the identification was made using photographs while the person was 'in the custody of a police officer'.
186 NSW Law Reform Commission, *Criminal Procedure: Police Powers of Detention and Investigation After Arrest*, Report 66, (1990), par. 3.33.
187 Nettheim G., *Aboriginal Law Bulletin* [1990] 25; 2 (44), p.17. Case note on *Eatts v Dawson*, unreported Federal Court of Australia No. G208 of 1990 FED No. 216.

In the context of Part 4, Division 2, section 24 must be seen as providing police with a broad search power that may only be exercised in the limited circumstances of 'lawful custody' where a person has been arrested and taken into custody. However, 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 section 24. As Justice Howie observed in *R v McKellar*:

> *Words and terms used in the provisions of the Act are [only] defined where any but the normal meaning of a word or term was intended by the drafter or there may be a doubt arising about the meaning of a word or term used in the Act.*[188]

The fact that 'lawful custody' is one of the terms defined in section 3 suggests that something other than the normal meaning may have been intended or that there may be uncertainty about its meaning in certain contexts within LEPRA. In order to avoid any confusion, any definition must give real and comprehensible meaning to the term.

14.2.1.4. Distinguishing a search while in lawful custody from a search after arrest

One way of defining 'lawful custody' for the purpose of section 24 is to limit its application to custody following arrest. However, given that section 23 provides police with the power to search a person at or after the time of arrest, it is necessary to consider what factors distinguish a search 'after the time of arrest' under section 23 from a search 'after a person has been arrested and taken into custody, for example, at a police station' under section 24.

In response to a question posed on the definition of 'custody' in our issues paper, the NSW Police Force indicated that for operational purposes, police interpret section 24 as empowering police to conduct a search when a person is in 'custody at a police station or other similar custody point', which suggests that the place where the search takes place is significant to the police interpretation of lawful custody.[189] On this interpretation, location is a relevant factor that effectively differentiates a search 'after the time of arrest' from a search while 'in lawful custody'.

If the term 'lawful custody' is used in other parts of LEPRA for different effect, the term should be defined within Part 4, Division 2 so that the extent of police powers to search in 'lawful custody' is not misunderstood and misapplied.

In summary, the term 'lawful custody' should, in our view, be defined in a way that limits the application of section 24 to searches while in custody only where a person has been arrested *and* taken to a specified custody location such as a police station or other relevant location deemed relevant by the legislature.

Having said this, section 24 should not operate to *exclude* the use of other relevant search powers. While section 24 may be limited to custody following arrest, the exercise of that power should not preclude the use of relevant search powers available on arrest or detention provided that police are able to meet the threshold requirements to exercise a relevant power. In this way, the use of the arrest or detention search powers in sections 21, 21A, 23 and 23A continue to be available, but only in circumstances limited by the threshold requirements that apply there.[190]

Recommendation

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).

14.3. The power to search a person on arrest

Section 23(1) provides police with the power to search a person at or after the time of arrest for an offence or under a warrant 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, could assist in escape from lawful custody or relates to an offence.

188 *R v McKellar* [2000] NSWCCA 523 at par. 37.
189 NSW Police Force submission to LEPRA issues paper, 24 August 2007, p.1. Police also commented that 'the current definition [of lawful custody] is capable of causing confusion'.
190 The section 26 frisk search power is necessarily excluded by location as a person cannot be in custody (properly defined) and in a public place or school at the same time.

14.3.1. Suspecting on reasonable grounds that it is prudent to conduct a search on arrest

In order to lawfully search a person on arrest, police must suspect on reasonable grounds that it is *prudent* to do so. This test differs from the test in sections 21 and 26 where police may search a person who has been detained if they suspect on reasonable grounds that specified circumstances exist,[191] or that the person has a dangerous implement in their custody as shown in table 2.[192]

Table 2. The Part 4 personal search power thresholds

Person's status		Threshold test to conduct a personal search	Power to search
Detained without a warrant		Officer must suspect on reasonable grounds that certain circumstances exist.	Part 4 Division 1 Section 21
		Officer suspects on reasonable grounds that a thing referred to in section 21 is concealed in the person's mouth or hair.	Part 4 Division 1 Section 21A
Arrested	For an offence or under a warrant	Officer must suspect 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; could assist in escape from lawful custody; or relates to an offence.	Part 4 Division 2 Section 23(1)
	In order to be taken into lawful custody	Officer must suspect 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 or could assist in escape from lawful custody.	Part 4 Division 2 Section 23(2)
		Officer suspects on reasonable grounds that a thing of a kind referred to in section 23 is concealed in the person's mouth or hair.	Part 4 Division 2 Section 23A
In lawful custody		Person is in the lawful custody of police — no belief or suspicion is required to justify a search.	Part 4 Division 2 Section 24
Detained in a public place or school		Officer must suspect on reasonable grounds that the person has a dangerous implement in his or her custody.	Part 4 Division 3 Section 26

These threshold tests are important because they 'define and control the legality of the use of police powers … If the test of reasonable suspicion … is not satisfied then the police can be found to have operated beyond their legal powers'.[193]

The threshold requirement for a personal search on arrest states that the officer must 'suspect on reasonable grounds that it is *prudent* to do so'. The *Macquarie Dictionary* defines 'prudent' as:

> *Wise, judicious, or wisely cautious in practical affairs, as a person; sagacious or judicious, discreet or circumspect.*[194]

In assessing whether it is prudent to conduct a search on arrest, an officer must therefore consider whether it would be a wise or cautious thing to do. While an officer might suspect that it is prudent to search in any arrest situation, prudence is not the only requirement set out in section 23. The test also requires suspicion based on reasonable grounds. The Code of Practice for CRIME includes a dictionary of terms which defines 'reasonable grounds to suspect' based on the test propounded by his Honour Justice Smart in *R v Rondo*:

> *A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be some grounds which would create in the mind of a reasonable person an apprehension or fear that the person has committed an offence. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials that may be inadmissible in evidence. What is important is the information in the mind of the police officer making the arrest at the time the officer did so. Having ascertained that information,*

191 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.21.
192 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.26.
193 Griffith G., *Police Powers in NSW: Background to the Law Enforcement (Powers and Responsibilities) Bill 2001*, *Briefing Paper 11/2001,* August 2001, par. 5.6.
194 *The Macquarie Dictionary*, Third edition, 1997.

the question for a court is whether that information afforded reasonable grounds for the suspicion which the police officer formed.[195]

In order to exercise the personal search power in section 23, an officer must, therefore, have an objective, 'factual basis' for suspecting that it would be wise or cautious to conduct a search — which would not, presumably, be satisfied by the occasion of an arrest alone. The *Searching Manual* provides further guidance, advising officers:

> *You should be prepared to explain why and how you developed your suspicion that a person should be subject to a search and what you were searching for. Points here could include your observations, details of conversation you had with the suspect, aspects of his behaviour which gave rise to suspicion, your knowledge of the person, including CNI checks, COPS checks, warnings etc, and the knowledge of other police.*[196]

The identification of certain things listed in sub-section 23(1)(a) to (e) suggest that Parliament intended to limit the power to search on arrest to circumstances where police suspect that it would be prudent to conduct a personal search for safety, security or evidentiary related items. In our view this threshold test for a search on arrest is lower than the threshold test of suspicion on reasonable grounds that certain circumstances exist for a search on detention — reflecting the higher duty of care placed on police in relation to people who are under arrest.

In summary, our consultations, observations and other research suggest that the threshold test placed on the power to search in order to ascertain whether the arrested person has anything listed in section 23 is practical and appropriate.

14.3.2. Searching a person who has been arrested in order to be taken into lawful custody

Section 23(2) provides police with a limited power to search a person who has been arrested in order to be taken into lawful custody, 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 or could assist in escape from lawful custody.

In the second reading speech, the then Attorney General indicated that section 23(2) 'addresses a gap in the law identified in the course of consolidation' as to 'whether police have the power to search a person arrested otherwise than for an offence'.[197] The Attorney General went on to say that this provision provides police with the power to search a person arrested other than for an offence 'in limited circumstances' and stressed that the provision 'addresses concerns about safety of police and others while in custody and is a justifiable law enforcement power'.[198]

The Code of Practice for CRIME advises officers:

> *When you arrest a person other than for an offence (for example, to undergo a breath analysis) you may search the person at or after the time of arrest if you suspect 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 the person to escape.*[199]

This appears to provide police with reasonable search powers to ensure that a person who is being taken into lawful custody cannot escape or hurt themselves or anyone else.

As noted in the extract taken from the Code of Practice for CRIME, a person might be arrested in order to undergo breath analysis. Another example might be arrest for breach of bail, neither of which constitutes an arrest for an offence or under a warrant.[200] However, these are only examples of arrest in order to be taken into lawful custody. The other circumstances to which this limited search power may apply are not clear.

It has not been possible to analyse how many searches were performed under section 23(2) as the COPS data does not specify whether the person was arrested for an offence, under a warrant or in order to be taken into lawful custody. Nor are we aware of any matters where this has been contested at court or complaints relating to the exercise of this power.

While the section 23(2) search power — limited to safety or security related items — appears to be appropriate, we are of the view that officers should be provided with clear direction regarding the circumstances to which this search

195 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated May 2008, p.108, paraphrasing Smart AJ in *R v Rondo*, [2001] NSWCCA 540 (24 December 2001).
196 NSW Police Continuing Education, *Searching Manual*, October 2006, p.16.
197 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
198 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
199 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated May 2008, pp.11–12.
200 The *Bail Act 1978*, section 30 and the *Road Transport (Safety and Traffic Management) Act 1999*, section 13, both provide police with the power to arrest a person other than for an offence and without requiring a warrant.

power applies. In order to give effect to the limited scope of section 23(2) and ensure the admissibility of evidence obtained using this search power, police must ensure that officers clearly understand when this search power applies and that it does not authorise police to search for evidence of an offence.

Recommendation

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.

14.3.3. Section 23A: Power to request that a person open their mouth or move hair

Section 23A commenced on 17 December 2007. This provision provides police with a specific power to request that a person open their mouth or move their hair if the officer suspects on reasonable grounds that a thing of a kind referred to in section 23 is concealed in those places.

In the second reading speech the Attorney General, the Hon. John Hatzistergos indicated that section 23A:

> *Replicates an existing search power for searches in public places [in section 21A] in relation to searches conducted upon arrest. The power enables police to direct a person to open their mouth or shake their hair to search for concealed items such as prohibited drugs.*[201]

In the second reading speech introducing section 21A, Ms Linda Burney noted that:

> *Operational police have reported that some offenders, particularly drug dealers, are secreting small objects in their mouth and hair. The new law makes it clear, however, that this power does not give police the right to forcibly open a person's mouth.*[202]

Concern relating to the concealment of small objects in a person's mouth in particular was reflected in our consultations with police, as officers told us in consultations:

> *They carry balloons [containing drugs] in their mouths all the time and they swallow them when police approach them so you might ask them to open their mouth.*[203]

> *Prisoners especially carry lots of things in their mouths and it's just part of a general thing to say to someone "put your head forward, run your fingers through your hair, open your mouth, lift up your tongue" and then go through the rest [of the search].*[204]

Following the introduction of section 23A the Code of Practice for CRIME advises officers in relation to a search conducted on arrest:

> *When you arrest a person for an offence or under a warrant you may search the person at or after the time of arrest if you suspect 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*
>
> *— could be used to assist the person to escape, or*
>
> *— may provide evidence of an offence.*
>
> *If you suspect on reasonable grounds one of these things may be concealed in the person's mouth or hair, your search may include requesting the person to open their mouth or shake their hair. However, you may not forcibly open a person's mouth.*[205]

It has not been possible to scrutinise the exercise of functions conferred on police under section 23A because the provision did not commence until after the expiry of the review period specified in section 242. However, the impact of the power to request that a person open their mouth on the operation of the three tiered search regime and personal search safeguards in Part 4, Division 4 make it necessary to comment on the issues that these provisions present.

201 The Hon. John Hatzistergos MLC, NSWPD, Legislative Council, 6 November 2007, p.3515.
202 Ms Linda Burney MP, NSWPD, Legislative Assembly, 14 November 2006, p.102.
203 Interview with duty officer, LAC E, 3 July 2006.
204 Focus group with plain clothes detectives, LAC B, 23 July 2007.
205 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated May 2008, p.11.

14.3.3.1. Is the mouth a body cavity?

In order to address the complexity surrounding the exercise of the section 21A and 23A powers, it is necessary to consider whether or not the mouth is a body cavity. According to the definition of a strip search in section 3, and the strip search safeguard in section 33(4) police are authorised to examine the person's body but not the person's body cavities, however, the term 'body cavity' itself is not defined in LEPRA. Based on the tiered structure of the personal search regime, this prohibition on the examination of body cavities at the highest level of personal searches must apply equally to ordinary and frisk searches in the absence of any clear statement to the contrary.

If it is determined that the mouth *is* a body cavity for the purpose of LEPRA, sections 3 and 33(4) state unequivocally that police are prohibited from examining this part of the body. Consequently, it would be necessary to query what purpose the section 23A(1)(a) ancillary power serves. While this provision provides police with the power to request that a person open their mouth, it does not authorise police to search the person's mouth. Alternatively, it is arguable that the provision of a power to request that the person open their mouth or move their hair implies a power to search these parts of a person's body, however, if this is what Parliament intended, we are of the view that it would be preferable for a power of this kind to be stated explicitly so that the nature and extent of the personal search powers can be readily understood by police and the public.

If it is determined that the mouth is *not* a body cavity for the purpose of LEPRA and is therefore, a permissible part of the body to search it is necessary to consider what it is about opening one's mouth or moving one's hair that requires specific authorisation and punishment for non-compliance that is only relevant to searches on detention and arrest, but not in custody. In our view, the issue should not be resolved by attaching an ancillary provision to the section 24 power to search in custody. To do so could only complicate Part 4, Division 2 even further. The introduction of any new search powers or safeguards must always consider the personal search provisions — if not all of LEPRA — holistically to ensure that all provisions continue to operate coherently.

The *Searching Manual* instructs officers to start their search at the top 'with the hair, mouth, and ears', but reminds officers two paragraphs later that 'there is no power for police to conduct a search of the body cavities (*Remember the mouth is considered a body cavity*)'.[206] This suggests that the mouth is considered by police to be a body cavity. Similarly, the *Crimes (Forensic Procedures) Act 2000* provides that the term forensic procedure does *not* include a reference to 'any intrusion into a person's body cavities *except* the mouth' — which tends to suggest that the mouth would otherwise be considered a body cavity for the purpose of that Act.[207]

In consultations, many officers indicated that they do not search a person's body cavities. However, officers do sometimes look inside people's mouths, suggesting that those officers may not consider the mouth to be a body cavity, for instance some officers told us:

> *At a safe distance [I'd ask them to] open their mouth and just move the tongue around, that's about it. We'd do that as part of the strip.*[208]

> *You just ask them to open their mouth and move their tongue around and have a bit of a look and I'd say that would be an ordinary search.*[209]

In our view, the term 'body cavity' should be clearly defined in LEPRA to clarify what parts of the body the term applies to for the purpose of complying with the prohibition against searching body cavities in sections 3 and 33(4) as well as assisting in the application of any power relating to searches, requests or directions that pertain to body cavities.

14.3.3.2. Where does a search of a person's mouth fit in the three tiered search regime?

The application of the personal search safeguards in Part 4, Division 4 revolves around classification of a search as a frisk, ordinary or a strip search. If an exception is to be made for the mouth (as Parliament's insertion of sections 21A and 23A might suggest), the amended provision should clearly prescribe whether a mouth search should be treated as an ordinary search or a strip search to ensure the proper application of the personal search safeguards in Part 4, Division 4.

In consultations we asked police how they would categorise a mouth search. Officers variously replied that it could be categorised as anything from a frisk search to a forensic procedure:

> *Strip would be like stripping your clothing, but saying 'open your mouth', is just the same as 'put your hands up', 'what have you got to conceal', 'what's up your nostril' or whatever.*[210]

206 NSW Police Continuing Education, *Searching Manual*, October 2006, p.33. Emphasis added.
207 *Crimes (Forensic Procedures) Act 2000*, s.3.
208 Interview with sergeant, LAC F, 26 July 2006.
209 Interview with general duties senior constable, LAC D, 6 August 2007.
210 Interview with custody manager, LAC G, 20 November 2007.

I don't consider that a strip search. If you're forcing me to fit it into one of the three categories, well it's either a frisk or ordinary search, it's not a strip search even though it's invasive to a degree.[211]

Ordinary [search] because I think ordinary under the legislation covers things like no cavities. They can open their mouth but no cavities, stuff like that and just outer clothing.[212]

I suppose just asking them [to open their mouth] would be just an ordinary [search] but if they refuse and you think that there's something in there and you're having to go beyond that I'd say it would become a forensic procedure.[213]

If I need to search their mouth [in custody] it's because I think they've got drugs secreted or something, I would then have them strip searched. So that would come under strip search.[214]

It would be an intrusive search … it is an internal cavity.[215]

At the time when police made these comments, the power to search a person's mouth on detention under section 21A had only recently commenced, which may account for the variability in responses. However, this inconsistency in classification suggests that while one officer might apply the rules that apply to a forensic procedure, another may conduct the same search according to the strip search safeguards in section 33, while another might only apply the general search safeguards in section 32. In Western Australia the power to search a person's mouth is provided within the context of a strip search under section 64(1)(d) of the *Criminal Investigation Act 2006* — which goes on to expressly prohibit searches of other orifices. In the context of LEPRA, classification must take into account the relevance of the safeguards provided in sections 32 and 33 to a search of a person's mouth.

Section 23A(2) does clarify that police cannot forcibly open a person's mouth, however, this is really a safeguard measure which could be more appropriately provided within the safeguard provisions in a way that addresses any exceptions to the prohibition on body cavity searches.

14.3.3.3. Failing or refusing to comply with a request under section 23A

Section 23A(3) specifies that failure or refusal to comply with a request under section 23A is an offence carrying a maximum of 5 penalty units. It is not clear from the second reading speech what Parliament intended when it prescribed this offence.[216]

Given that section 23A commenced after our review period expired it has not been possible to obtain data on the application of this provision. However, data provided by the Bureau of Crime Statistics and Research (BOCSAR) on the use of the similar section 21A(3) offence for the period 12 December 2006 to 30 September 2007 indicates that eight people were charged under section 21A during that period, seven of whom were successfully prosecuted for failing or refusing to open their mouth or move their hair.[217]

We reviewed the Facts Sheet for those matters that were successfully prosecuted under section 21A(3).[218] Only one Facts Sheet specified that the person was asked to open their mouth. None specified that the person was asked to move their hair, nor did any note that the person refused to follow a direction of this kind.

While acknowledging that section 21A has been in operation for a relatively short time, the data from BOCSAR referred to above suggest that the section 21A (and section 23A) offences are not essential tools to assist police in the conduct of mouth searches. In order to properly review the operation of these powers, the exercise of functions conferred on police by sections 21A and 23A or an alternative should be subject to review.

In summary, it is our view that the introduction of sections 21A and 23A may have complicated the personal search provisions unnecessarily. Moreover, it is not clear that the existing provision is clearly understood or applied.

211 Interview with duty officer, LAC B, 23 July 2007.
212 Interview with custody manager, LAC E, 16 October 2007.
213 Focus group with general duties constables, LAC B, 24 July 2007.
214 Interview with custody manager, LAC G, 20 November 2007.
215 Focus group with general duties sergeants, LAC F, 29 October 2007.
216 The Hon. John Hatzistergos MLC, NSWPD, Legislative Council, 6 November 2007, p.3515. Nor was the reason for prescribing a specific offence discussed in the second reading speech introducing section 21A.
217 NSW Bureau of Crime Statistics and Research, NSW Local Criminal Courts Statistics 12 December 2006 to 30 September 2007, 'Persons with at least one charge under the *Law Enforcement (Powers and Responsibilities) Act 2002,* s.21A(3)'.
218 A Facts Sheet is a document prepared by police which is provided to the court and the defendant in relation to a criminal offence. NSW Police Force, *Law Note 18 of 2003,* states that the Facts Sheet 'should set out how the accused person committed the offence'.

Recommendation

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)
      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.

14.4. The three tiers of searches

In the second reading speech the then Attorney General stated:

> *A regime of three tiers of searches has been adopted and safeguards have been introduced to ensure that civil liberties are upheld and that the integrity of the police process is not compromised.*[219]

14.4.1. Distinguishing between frisk and ordinary searches

In practice, there is little difference between a frisk and an ordinary search as both invoke the same safeguards in section 32. The question that arises is whether removing the frisk search category and subsuming it into the definition of ordinary search will impact on police practice. The use of a metal detector is specifically identified as part of a frisk search, however, the only other practical points of difference are small increases in the amount of outer clothing that may be removed,[220] and the extent to which a person may be compelled to remove outer clothing for an ordinary search.[221]

Our consultations with police suggest that many officers are not able to state what the difference is between a frisk and an ordinary search. Moreover, in practice, the distinction between frisk and ordinary searches is not critical for officers as the following comment suggests:

> *When I'm searching someone out on the street I don't think in terms of frisk or ordinary because normally I just do a search one way. If you think they've got a knife on them or whatever, you're going to do it as thoroughly as you can without being intrusive and then the next category of search would be a more intrusive [strip search]. But when I'm out there I don't think whether I'm doing a frisk or an ordinary search.*[222]

A number of officers indicated that in practice, an ordinary search is usually required for reasons of safety and effective policing. As one officer said:

> *It's very rare to do a frisk search. I don't even know whether I've done one, 99% of our searches would be ordinaries. I don't think I've every recorded a frisk.*[223]

Our direct observation of searches conducted by police similarly indicates that the practical differences between frisk and ordinary searches are minimal. As the quote from the officer above suggests, each officer has his or her own way of performing a search and communicating the search requirements to the person. In particular, our observations suggest that an officer's choice of terminology is rarely predicated on the type of personal search he

219 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
220 *Law Enforcement (Powers and Responsibilities) Act 2002*, section 30 provides that a 'coat or jacket' may be removed for a frisk search, while section 3 provides that an 'overcoat, coat, jacket or similar article of clothing, gloves, shoes, socks and hat' may be removed for an ordinary search.
221 *Law Enforcement (Powers and Responsibilities) Act 2002*, section 30 provides that an officer can 'ask' a person to remove their outer clothing for a frisk search, while section 3 indicates that an officer can 'require' removal of outer clothing for an ordinary search.
222 Focus group with general duties constables, LAC C, 8 May 2006.
223 Focus group with constables, LAC G, 29 August 2006.

or she is conducting. For instance one officer's style might be to always 'tell' — or direct — a person to remove their jacket, while another officer's style might be to always 'ask' — or request — that a person to do the same, however, this does not mean that the former only conducts ordinary searches while the latter only performs frisk searches. Many of the officers we observed utilised 'requests' as a way of facilitating frisk and ordinary searches.

We did not observe the use of a metal detector at any of the operations we attended, nor did we observe the removal of many hats or gloves. In our observations, the removal of shoes and socks were the primary factor that distinguished an ordinary search from a frisk search. Consequently, it is not evident that the removal of the 'frisk search' category would result in an increase in intrusiveness of searches conducted by police in any practical sense.

As noted in the Royal Commission into the NSW Police Service, the clearer and simpler the rules governing personal searches, the easier they will be to understand and enforce.[224] Given the marginal difference between frisk and ordinary searches, two tiers of ordinary and strip searches may provide a simpler system and categorisation of personal search types. Any simplifications that do not impact on the actual operation of the search powers can potentially assist both the public and police to understand what type of search is being conducted and what limits and safeguards apply. As one officer said:

> *Why have three if it can be done in two? Why complicate anything in this job?* [225]

One area where the frisk search has particular application is the conduct of searches pursuant to the section 26 knife search power, which only authorises the use of frisk searches with the clear intention of restricting the type of search an officer can conduct in this context. While we would not argue for the expansion of police powers in this context, the minimal differences suggest that a marginal increase in the amount of clothing that may be removed as part of this search would not result in a practical increase to this search power. In their formal response to the consultation draft report, Police expressed support for simplifying the three tiered search regime without removing the existing (section 26) power to conduct relatively non-intrusive street level searches.[226]

14.4.2. The power to conduct a strip search

In order to lawfully conduct a strip search under LEPRA, section 31 provides that police must suspect 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.

For the purpose of strip searches, the *Searching Manual* advises officers:

> *In addition to the removal of all clothing, any search requiring a female (or transgender person) to remove outer clothing (not jumpers, coats or similar) from the top or bottom down to underwear, should be regarded as a strip search even though the underwear itself is not removed. With males, any search requiring removal of clothing from the bottom down to underwear, should be regarded as a strip search even though the underwear itself is not removed.*[227]

The COPS data provided by police indicates that strip searches are the least common type of search conducted by police, comprising 2% (613) of searches in the field and 5% (13,541) of searches while in custody over the review period.[228] While the incidence of strip searches in the field may be lower than in custody, all strip searches should be considered carefully — given the intrusiveness of the search — particularly when that search is conducted outside a police station or in any public location.

The following discussion considers the threshold requirements in two parts, in terms of:

1. the necessity to conduct a strip search for the purpose of the search
2. the seriousness and urgency of the circumstances.

14.4.2.1. Necessary for the purpose of the search

Section 31 provides that in order to conduct a strip search a police officer must suspect on reasonable grounds that a strip search is 'necessary for the purposes of the search'.

On arrest, an officer must therefore suspect on reasonable grounds that a strip search is necessary for the purpose of ascertaining whether the person has anything listed in section 23. However, when it comes to searches while in custody, section 24 does not state what the purpose of this search might include.

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224 Royal Commission into the NSW Police Service, *Final Report*, May 1997, Vol. II, at par. 7.20, which in part stated that codified police powers should reduce the possibility of abuse of powers through ignorance and assist in the training of police.
225 Focus group with general duties constables, LAC E, 17 October 2007.
226 Letter from Mr Les Tree, Director General, Ministry for Police, 9 January 2009.
227 NSW Police Continuing Education, *Searching Manual*, October 2006. p.12.
228 As shown in figures 1 and 2 in section 13.2.

While it is difficult to assess the level of compliance with the requirement of necessity, the reasons identified or provided by police for a search provide some insight into the types of considerations that police identify as necessitating the conduct of a strip search. The following discussion considers searches in the field and searches while in custody separately.

14.4.2.2. In the field

As discussed in section 13.1, COPS includes a 'primary reason' category which officers must complete by selecting a reason from a set list. Data taken from this category over the review period indicates that 'suspected possession of illegal drug' was the reason most often identified by officers for a search in the field, accounting for 70% of strip searches and 47% of frisk and ordinary searches.[229] Other primary reasons that recorded higher proportions for strip searches than other search types included 'ensure does not harm self or others', 'ensure cannot escape custody' and 'possession of drug implement', suggesting that these may all be factors that could necessitate a strip search in the field in the minds of police.[230]

Local Court respondents who described a strip search in the field reported that safety and police policy were the two main reasons provided by police for the removal of clothing as part of the search, followed by drugs.[231]

In summary, while the COPS data indicates that suspected drug possession was the primary reason identified by police for recorded strip searches in the field, information from our Local Court survey suggests that people were most often told that removal of clothing was required as part of a strip search for safety related reasons or because it was police policy.

14.4.2.3. While in custody

Local Court respondents who described a strip search at a police station reported that the most common reason provided by police as necessitating the removal of clothing was police policy, followed by evidence and safety.[232]

In custody, the 'primary reason' recorded for over 99% of all searches was 'custody property search' — which is the default position in the COPS custody management system.[233] As with strip searches in the field, the reasons identified by police on COPS records do not necessarily correlate directly with a need to strip search, however, information recorded in the free text 'additional reasons' category provides some insight into the range of reasons that necessitate a strip search in the minds of police. Our analysis of this information suggests that the reasons identified by officers as necessitating a strip search while in custody broadly fall into four categories namely: [234]

- Safety or behaviour,[235] for example:

  Asked to produce any further property; pulled large safety pin out from under shirt bottom; stated he was going to stab himself with same when police were not watching. Strip searched as a result.[236]

  Appears to be mentally ill. Searched for own safety.[237]

- Drugs or evidence,[238] for example:

  Strip searched due to suspicion he may have had further prohibited drugs secreted on his person and in clothing.[239]

  Prisoner was suspected of having secreted cash inside her clothing, which is subject of the offence for which she had been arrested.[240]

229 Over the review period, 70% (428 of 613) of strip searches and 47% (13,293 of 28,133) of frisk and ordinary searches in the field categorised the primary reason as 'suspected possession of illegal drug' in the COPS event management system.
230 'Ensure does not harm self or others' accounted for 7% of all strip searches compared to 5% of all frisk and ordinary searches. 'Ensure cannot escape custody' accounted for 5% of all strip searches compared to 4% of all frisk and ordinary searches. 'Possession of drug implement' accounted for 3% of all strip searches compared to 2% of all frisk and ordinary searches.
231 See section 16.3.10 and Appendix 1 (5.5).
232 See section 16.3.10 and Appendix 1 (5.5).
233 99.9% of records nominated 'custody property search' as the primary reason. Other possible reasons are 'ensure does not harm self or others', 'ensure cannot escape custody' and 'suspected possession of illegal drug or drug implement', which together constitute 0.1% of all strip searches in custody.
234 23% (3,100 of 13,541) of the strip searches recorded in the COPS custody management system over the review period included information in the 'additional reasons' field. Of those, 65% (2,012 of 3,100) contained information that could explain why the strip search was necessary.
235 41% of records (824 of 2,012) noted safety or behaviour related issues.
236 COPS record U228899591, strip search 22 year old male.
237 COPS record U26636259, strip search of 47 year old male.
238 29% of records (575 of 2,012) noted drugs or evidence related issues.
239 COPS record U31538341, strip search of 40 year old male.
240 COPS record U27643984, strip search of 26 year old female.

- Routine procedures or police policy,[241] including records such as:

  Strip search due to overnight custody.[242]

  Bail likely to be refused. Proper and full search to be conducted.[243]

  As per SOPs.[244]

- Transfer to another agency such as Department of Corrective Services custody,[245] for example:

  Search required to ensure nothing secreted that may be located during Corrective Services search which would generate further charges.[246]

  Illegal immigrant, strip search conducted as will be transferred to DIMIA.[247]

While the largest proportion of COPS records for strip searches in custody that included additional reasons, noted safety issues or the behaviour of the person, this data also suggests that a considerable proportion of strip searches in custody occur routinely. This was also reflected in a complaint our office received, outlined in the case study below.

Case study 1

Complaint alleging a routine strip search in custody

In January 2006 our office received a complaint that a routine strip search had been conducted on a suspected unlawful non-citizen while in police custody pending transfer to the then Department of Immigration and Multicultural and Indigenous Affairs (DIMIA).[248]

The officer in question acknowledged that he conducted a strip search of the person, but defended his actions saying that he was following the Local Area Command's standard procedures regarding the transfer of prisoners to external agencies.

The Local Area Command denied the existence of any such policy and no written evidence was produced by the subject officer. However, to dispel any misunderstanding, all officers were sent a memorandum clarifying that strip searches cannot be conducted as a matter of routine, and reminding them of the LEPRA requirements.

In relation to the issue of interacting with other agencies, some officers suggested that officers from Corrective Services or other authorities sometimes require police to conduct a strip search before accepting a prisoner. For instance, officers told us:

> *We don't strip very often at all. It's really only if they're going into Corrective Services custody or something like that which we would determine if it's necessary to do that and that's really a requirement from them.*[249]

> *Corrective Services get really cranky, as they should, if they find something that we should have found so [we strip search prisoners], it's for our safety as well. You don't want someone in there with a big bloody knife.*[250]

This was also reflected in the COPS data provided by police. For example, notes made by officers in the additional reasons field for strip searches included:

> *Bail refused — requirement of Corrective Services.*[251]

> *Reasons for bra removal explained and understood no complaints. Corrective Services will not receive a prisoner wearing a bra.*[252]

> *Has outstanding warrant and will be required to be strip searched prior to arrival at Corrective Services.*[253]

241 21% of records (428 of 2,012) noted routine or procedural issues.
242 COPS record U29899105, strip search of 20 year old male.
243 COPS record U25931850, strip search of 17 year old male.
244 COPS record U31368056, strip search of 24 year old female.
245 9% of records (185 of 2,012) noted that the person is to be handed over to another agency.
246 COPS record U26666261, strip search of 24 year old male.
247 COPS record U49285402, strip search of 31 year old male. DIMIA stands for the Department of Immigration and Multicultural and Indigenous Affairs, now known as the Department of Immigration and Citizenship.
248 Now known as the Department of Immigration and Citizenship.
249 Interview with duty officer, LAC F, 30 October 2007.
250 Focus group with general duties constables, LAC B, 24 July 2007.
251 COPS record U28288066, strip search of 26 year old male.
252 COPS record U29817243, strip search of 20 year old female.
253 COPS record U27949169, strip search of 55 year old female.

These notes were made by police and reflect the additional reasons they identified for conducting the strip search which may not reflect the actual requirements of the Department of Corrective Services.

While Corrective Service officers are authorised to conduct searches routinely (including strip searches), police may only lawfully strip search a person while in custody if they have reason to suspect that it is necessary to do so.[254] If an individual officer from an external agency stipulates that they will not take a person unless police conduct a strip search and the police officer cannot meet the threshold requirements for a strip search under section 31 of LEPRA, the matter should be referred to a senior officer. If this issue is more widespread, it may be necessary to clarify the powers and responsibilities of each respective agency at a corporate level and acknowledge that one agency's requirements cannot be imposed on another.

The Code of Practice for CRIME advises officers that it may be necessary to search people while in custody for reasons of safety and duty of care, stating:

> *Of prime importance is ensuring the legal rights of people being held in custody are protected and an appropriate level of care is maintained.*[255]
>
> *Detained people should be searched where the custody manager will have continuing duties with them or where their behaviour or the offence makes it appropriate'.*[256]

While the Code of Practice for CRIME alludes to factors that might make it necessary to search a person while in custody, there is no clear statement or direction to which officers and the public can refer.

In the United Kingdom, the *Police and Criminal Evidence Act 1984* provides a useful example of how this can be achieved while still providing police with broad discretionary powers to search while in custody. Section 54 of that Act states:

> *(1) The custody officer at a police station shall ascertain everything which a person has with him when he is brought to the station after being arrested elsewhere or after being committed to custody by an order or sentence of a court.*
>
> *(6) … a person may be searched if the custody officer considers it necessary to enable him to carry out his duty under subsection (1) above and to the extent that the custody officer considers necessary for that purpose.*

In our view, the section 31 requirement in LEPRA that police reasonably suspect that it is necessary to conduct a strip search for the purpose of the search is practical and appropriate. However, in order to ensure that both police and the public clearly understand the limits of a strip search while in custody the purpose of that search must be clear. Consequently, the purpose of a search in custody under section 24 should be clearly stated.

14.4.2.4. Seriousness and urgency of the circumstances

In the second reading speech, the then Attorney General indicated that the personal search powers in Part 4 are based on the Commonwealth *Crimes Act 1914*. However, the threshold test for a strip search in that Act does not contain the criteria of seriousness and urgency in the circumstances.[257] The addition of 'seriousness and urgency' to the threshold requirements for a strip search under section 31 of LEPRA appears to be a trade off in order to allow police in New South Wales to conduct strip searches on detention or on arrest in the field.[258]

Considerations of urgency in particular are undoubtedly essential for searches in the field, however, police have a higher duty of care for people being held in custody and would no doubt be criticised for a death or injury that could have been avoided by conducting a more 'thorough' strip search — even in circumstances where it may not be possible to demonstrate the seriousness or urgency of the circumstances.

In consultations, many officers indicated that the main reason a person would be searched while in custody is for safety reasons, as the following comments suggest:

> *If I was in doubt I'd prefer to search someone to be sure that they're safe and we're safe than the other way but most people just hand you everything. We generally don't have to search everyone. I'd say it's a minority that get strip searched.*[259]

254 The then, Crimes (Administration of Sentences) Regulation 2001, clause 46(1) provided, 'A correctional officer may search an inmate at such times as the general manager directs and at such other times as the correctional officer considers appropriate'. Equivalent to the current Crimes (Administration of Sentences) Regulation 2008, cl.43(1). The directions provided in the Department of Corrective Services, *Operations Procedures Manual* do not state that the officer must consider the necessity of such a search in any circumstances where a strip search may be conducted by Corrective Services officers.

255 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated May 2008, p.16.

256 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated May 2008, p.32.

257 *Crimes Act 1914* (Cth), s.3ZH.

258 For further detail see discussion of the Commonwealth *Crimes Act 1914* in Chapter 10 and Appendix 6.

259 Interview with custody manager, LAC G, 20 November 2007.

If the person has previous self-harm issues and they conceal and there's intel on our system and it's in their best interest as well as ours to maintain their safety, we'll consider a strip search of that person.[260]

The primacy of safety concerns was also reflected in a complaint our office received as described in the case study below.

Case study 2

Complaint demonstrating safety reasons necessitating a strip search in custody

In December 2006 our office received a complaint from a man alleging that he had been strip searched unnecessarily while in custody at a police station.

Our office reviewed the matter and found that the decision to conduct a strip search was appropriate. In particular, the custody record and CCTV tape indicated that the complainant had been committing acts of self-harm, told police he was in possession of a razor blade and was observed tapping on the door of the dock with a hard object which he then put in the back of his pants in the period immediately prior to the search.[261]

The custody record states: 'The [person of interest] had stated that he had a razor blade between his buttocks. The prisoner was searched on the ground and his shorts and underpants removed. Item [razor blade] was located between his buttocks and removed'.

While this scenario is characterised by all three factors, there are times when it may be necessary to conduct a strip search in custody before the situation becomes serious and urgent — particularly where there is concern for the safety of the person or other people in custody including police, as illustrated in the following case study.

Case study 3

Complaint alleging failure to conduct a thorough search in custody

In April 2006 our office received a complaint from police alleging that police officers from another station had not conducted a thorough search before transferring a person from one custody location to another.

This matter involved a man who had been arrested for possession of a prohibited substance. He was taken to one station to be charged, but then had to be moved to a second police station.

On arrival at the second police station a syringe was found to be secreted in the man's pants. Officers at the second police station noted that this raised potential safety risks for: the receiving officers because they assumed that the man had been thoroughly searched after being taken into custody at the first police station; and the man being transferred who could not be observed while being transported.

When questioned, the arresting officer indicated that, he only frisk searched the prisoner because he believed he did not have enough information to conduct a more thorough search and had not been directed to do so by the custody manager at the first charge room.

The police investigation concluded that there were sufficient grounds for the officers at the first police station to reasonably suspect that it was necessary to conduct a strip search once the person had been taken into custody due to the warnings present on COPS and the man's admission to possession of a prohibited substance.

In summary, while necessity is a key factor that must be carefully considered before every strip search, the seriousness and urgency of the circumstances are more pertinent to strip searches in the field than in custody.

14.4.2.5. Benefits of recording reasons for searches

To ensure that the key factor of necessity is properly considered for every strip search, we are of the view that reasons should be recorded for all strip searches, as provided in the Commonwealth, Australian Capital Territory and the United Kingdom.[262]

260 Focus group with general duties sergeants, LAC D, 18 June 2007.
261 Note that the CCTV tape did not record the actual search but showed the man's behaviour in the dock.
262 *Crimes Act 1914* (Cth), s.3ZH(6); *Crimes Act 1900* (ACT) s.227(6); and *Police and Criminal Evidence Act* 1984 (UK), Code C, Annex A, par. 12.

Requiring police to note their reasons for conducting a strip search in their own words will encourage officers to turn their minds to the issue and thereby assist in sound decision-making. Improved accountability for strip search practices and decision-making benefit police by helping to safeguard against complaints and ensuring the admissibility of evidence obtained by confirming the lawfulness of searches.

Given the limited nature of the information required and the relatively small number of searches to which this requirement would apply, this should not be a time or resource intensive exercise. These reasons should also be regularly reviewed by senior police. If the reasons recorded by an officer are questionable, the officer should be provided with further guidance and education to improve police practices and outcomes for people being held in police custody. In addition, police should consider whether it would be appropriate to provide officers with additional guidance with regard to record-keeping for strip searches generally in SOPs.

Recommendations

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.
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.
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.
7. The NSW Police Force ensure that all strip searches are properly recorded on 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
        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.
    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
        ii. all persons present during the strip search, 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.

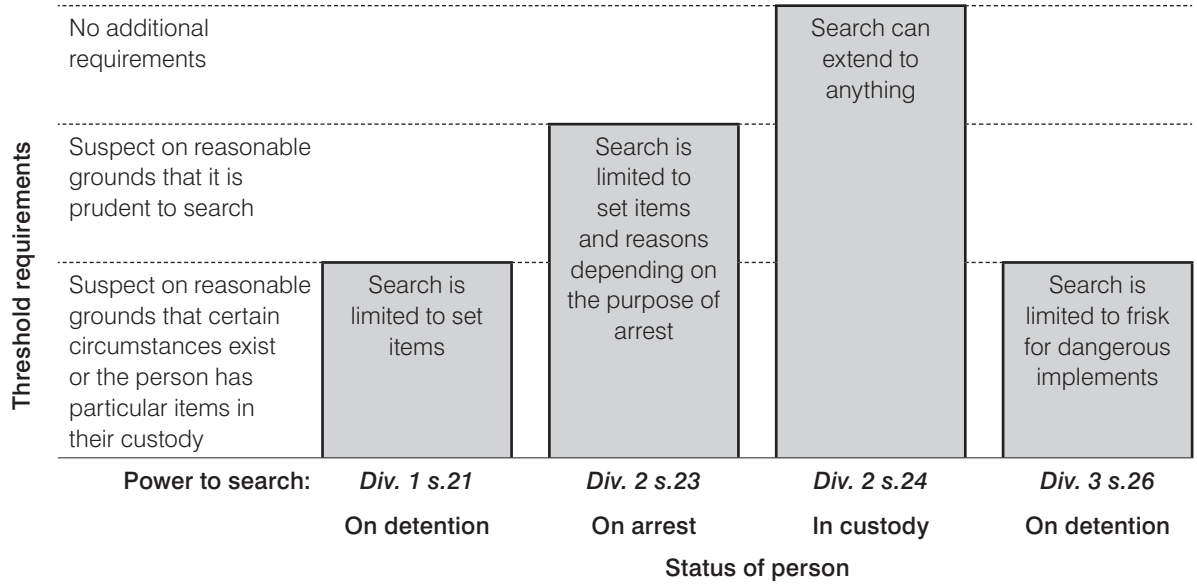
14.5. The interaction between the personal search powers in Part 4

While our review does not cover the operation of the powers to search on detention provided in Part 4, Divisions 1 and 3, it is necessary to consider those provisions in order to comment effectively on the extent to which personal search powers provided in Part 4 have been simplified and the ease with which they may be understood.[263]

Unlike Division 3 which specifies the type of search that police can conduct, the powers provided in Divisions 1 and 2 simply specify that police have the power to conduct a search in those circumstances. The type of search that may be performed in those circumstances is outlined in Division 4 which relates generally to personal searches.

At the surface level, understanding of these provisions is complicated by the presentation of the personal search powers which graduate from a lower level 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, as shown in figure 3.

Figure 3. Threshold levels in order that provisions are presented in Part 4



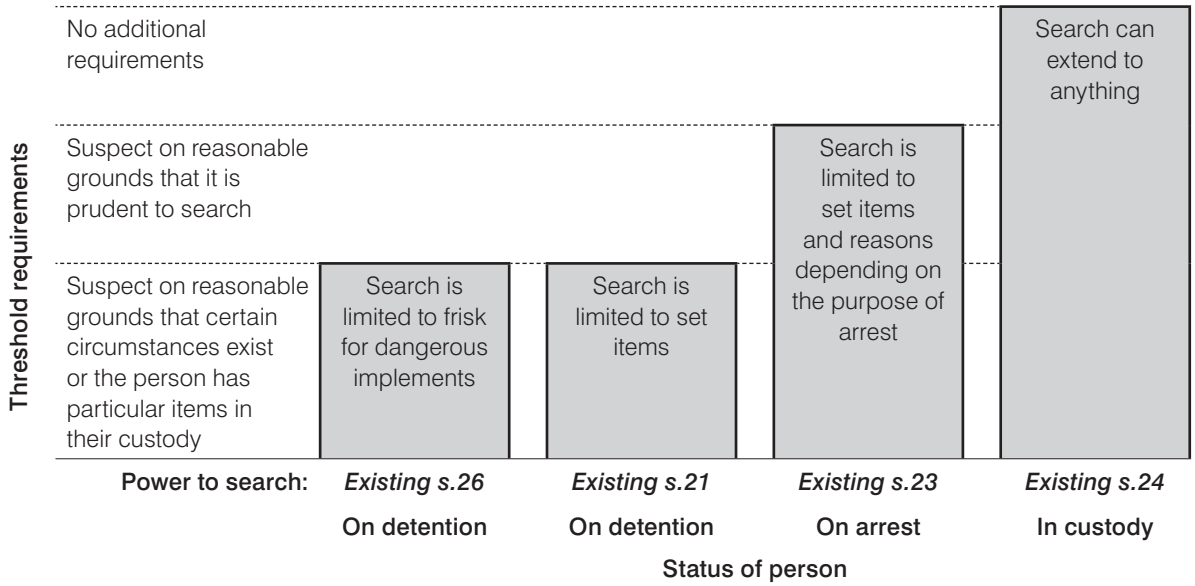
A possible interpretation of the various search powers is that the three threshold levels for personal searches in Part 4, Divisions 1 to 3 could be considered in terms of a three level regime of search powers, namely:

1. The power to search on detention without a warrant or frisk search for knives in a public place if the officer 'suspects on reasonable grounds' that the relevant circumstances exist in section 21 or the person has a dangerous implement in their custody as specified in section 26.
2. The power to search on arrest if the officer 'suspects on reasonable grounds that it is prudent' to search the person for the safety, security or investigative reasons listed in section 23.
3. The power to search in lawful custody.

A three level system of search powers such as this could be used to clearly demonstrate when and in what way the personal search powers increase, lessening the potential for misunderstanding, as shown in figure 4.

263 Part 4, Division 1 provides police with the power to stop search and detain a person in relation to particular offences. Part 4, Division 3 provides police with additional powers to search a person for knives or dangerous implements in public places or schools.

Figure 4. Possible rearrangement of search powers in Part 4



A simplified structure may also facilitate a clearer understanding of the way detention and arrest search powers continue to be available as the officer's duty of care increases — provided that they can meet the requirements for that type of search.

Recommendation

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.

14.6. Implying a power to delegate or assist with a search in order to meet the safeguards

The search powers in Divisions 1 to 3 only provide *police* with the authority to search on arrest or while in custody, not other people. A 'police officer' is defined in section 3 as a member of the NSW Police Force and 'other person' is not defined. However, the personal search safeguards in Part 4, Division 4 state that the safeguards apply to all personal searches carried out by a police officer *or other person*.

As a result it is unclear whether police have the power to delegate their search power or request assistance in order to comply with the safeguards.

14.6.1. Using assistants to conduct strip searches of females in custody

In our consultations with police we asked officers if they ever request assistance from non-police officers, when no female police officers are available to conduct a strip search of a female while in custody in order to comply with section 32(7) of LEPRA. The responses from police were varied. Some officers, particularly those in metropolitan areas, stated that they never seek the assistance of non-police officers while other police officers, particularly those in rural areas, stated that they sometimes ask Corrective Services officers to conduct a search if there are no female police officers available. For instance, in one rural area an officer said:

It could occur [that no female police officer is available to search a female], especially on late shifts, but that wouldn't be very often and we have Corrective Services here as well, they help us out, as we do them.[264]

Another officer commented:

Corrective Services, we call upon them [if a female police officer is not available to search a female] and if they've got no-one on [we] call an ambulance down, female or a nurse, whichever [is] most practical.[265]

This issue could similarly arise in circumstances where police are working alongside staff from other emergency services and regulatory agencies such as customs, ambulance and police officers from other jurisdictions.

Our analysis of the COPS data found at least 21 strip search records which specify that Corrective Services conducted the search. The following are examples of additional reasons recorded by officers in the COPS custody management system which indicate that an officer from Corrective Services conducted a strip search:

Searched by female Corrective Service officer, police not present during search — nil female officer available.[266]

Person was taken to Corrective Service and searched by female officer due to no female police officer available.[267]

Juvenile searched by corrective officers upon return from court. Females used only — nil males present during search. Officers [two female names] carried out search.[268]

By female police officer and female Corrective Service officer. Prisoner is to be bail refused.[269]

The police practice of requesting assistance to search to a person in some circumstances, whilst assisting police to comply with Division 4 safeguards, may be problematic in view of the apparent limited authorisations provided by search powers in Divisions 1 to 3.

In *Hartnett v State of NSW [1999] NSWSC* 265, Justice Dunford noted that 'an assistant is someone who assists and a distinction is to be drawn between an assistant who acts with and helps a principal and a delegate or representative or agent who acts in place of the principal'. If in the circumstances outlined above, police are not participating in the exercise of the search and Division 4 does not provide a power to delegate the authority to search, searches conducted by an 'assistant' alone could be unlawful.

In Queensland, the PPRA specifies that a doctor may conduct a search under the direction of a police officer.[270] In their review of the strip search provisions in Queensland, the Criminal Justice Commission (CJC) noted that it is not appropriate for police to delegate their strip search powers to civilians because of the health and safety risks involved.[271] The CJC did, however, make an exception for medical practitioners and unsworn police liaison officers if that person has appropriate training and has been asked to do so by the Watchhouse Manager who has assessed the situation and considers it safe for the person to do so, in circumstances where a police officer of the same sex is not available. The CJC also noted that another reason for not allowing this power to be delegated is that the actions of such a person would not be subject to scrutiny by the CJC as any complaint about that person's search practices would be outside the jurisdiction of the CJC. In our view, delegation of search powers in New South Wales would raise similar issues which should be carefully considered before any changes are made to the legislation.

While LEPRA does not provide police with any specific power to delegate their search powers in Part 4, the safeguard requirements in Division 4 imply that personal searches may be conducted by police or other persons. This anomaly is likely to create confusion for police officers and may result in some searches being conducted unlawfully as well as raising safety and accountability issues.

It is not clear whether the NSW Parliament intended to imply a power for police to delegate their search powers or use assistants to conduct a personal search under Part 4, Divisions 1 to 3. If Parliament did intend to allow police to use assistants or delegate their personal search powers in order to meet the safeguard requirements in Part 4, Division 4, the ramifications of this should be carefully considered including the benefits and risks involved in having an officer of the opposite sex conduct a search, delaying or not conducting a search due to a lack of appropriate personnel, or having a civilian conduct a search.

264 Focus group with sergeants, LAC F, 26 July 2006.
265 Interview with custody manager, LAC F, 29 October 2007.
266 COPS record U27661379, strip search of 21 year old, Aboriginal female in a regional area, recorded by a male officer.
267 COPS record U27208587, strip search of 28 year old female in a regional area.
268 COPS record U26461658, strip search of 21 year old female in a regional area.
269 COPS record U28664133, strip search of 21 year old female in a regional area.
270 *Police Powers and Responsibilities Act 2000* (Qld).
271 Criminal Justice Commission, *Police Strip Searches in Queensland: An inquiry into the law and practice*, June 2000, p.63. Note that the CJC is now known as the Crime and Misconduct Commission.

Recommendation

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.

14.7. Consent

As discussed in this office's *Review of the Police Powers (Drug Detection Trial) Act 2003*, the police practice of requesting or seeking permission to do something in the absence of any explicit power raises the vexed and complex issue of consent policing.[272] This issue is particularly complicated where the practice that police are seeking to undertake is regulated by legislation. The issue of consent is particularly relevant to the LEPRA personal search provisions in two respects, namely, the interaction with the legislated power to search and interaction with the personal search safeguards.

14.7.1. The power to search on arrest or while in custody and the issue of consent

Consent policing involves a police officer making a request or seeking permission to do something in circumstances where he or she may not otherwise have a specific power to act. For instance, in the context of an arrest, an officer might seek the person's consent to conduct a search in the absence of the reasonable suspicion requirements set out in section 23.[273] Similarly, the issue of consent might arise in circumstances where police are seeking to conduct a strip search in the absence of reasonable suspicion that it is necessary and that the seriousness and urgency of the circumstances require a strip search.[274]

The inherent difficulty with consent policing is the fact that the person consenting to a police request may not fully understand or appreciate that they need not comply with the request. A person whose liberty has been restricted by police may not be able to easily differentiate between a mere request to be searched on the one hand, and a lawful direction to submit to a search on the other. This was borne out in our Court survey in response to the question 'did police tell you why they were searching you?' as the following comments indicate:[275]

> *'Under arrest; that's what happens'.*[276]
>
> *'Under arrest therefore standard procedure'.*[277]
>
> *'Because I had a texta in my hand I was under arrest and that meant they could search me'.*[278]

In addition, in the context of personal searches on arrest, Parliament's identification of specific rules governing the circumstances and manner in which a search may be conducted on arrest or while in custody seems to suggest that a search should only be conducted when those conditions set out in Part 4 of LEPRA have been met.

14.7.2. The personal search safeguards and the issue of consent

A further issue of concern is whether consent policing practices could displace the effectiveness of the personal search safeguards. For example, as discussed below in section 16.4.1.3, some officers appear to be of the view that the safeguard requiring a support person for a child can be circumvented by obtaining the child's consent to be strip searched in the absence of their parent or other appropriate adult.

272 For further discussions of consent policing, see the NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, January 2005, section 14.8 'Consent'; and NSW Ombudsman, *Review of the Police Powers (Drug Detection Trial) Act 2003*, June 2008, section 4.2.3.3 'Consent policing'.
273 There is no room for consent for searches conducted in lawful custody under section 24 as the fact of lawful custody is the basis of the power.
274 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.31.
275 Note that in each of these instances police may have had the requisite suspicion. These quotes have been provided to present the arrested person's perspective during their interaction with police.
276 Local Court survey 136, strip search in custody.
277 Local Court survey 312, frisk or ordinary search before being placed in a police vehicle.
278 Children's Court survey 102, frisk or ordinary search on arrest in the field.

Section 29 states that Part 4, Division 4 applies to:

> *any search of a person carried out or authorised to be carried out, by a police officer or other person under this Act … except as otherwise provide by this Act or the regulations.*[279]

Accordingly, it is in the public interest to ensure that these safeguards apply to all personal searches conducted by police. As the reference to *responsibilities* in the title of the Act suggests, the safeguards in Part 4, Division 4 are not 'rights' vested in the person being searched, they are 'responsibilities' that lie with the officer conducting the search and are, therefore, not amenable to any waiver.

Consequently, we are of the view that the general search safeguards in section 32 apply to all personal searches and the additional safeguards in section 33 apply to any strip search, as far as is reasonably practicable in the circumstances, regardless of whether the person has consented to a search that an officer is otherwise authorised to conduct.

279 The text '(other than an internal search under Division 3 of Part 11)' was excluded from this quote because that Division has been repealed.

Chapter 15.
Issues relating to the general safeguards

Section 201(1) contains three core safeguard requirements, namely:

- evidence that he or she is a police officer if not in uniform
- the police officer's details — that is, the officer's name and place of duty
- the reason for exercising the power.[280]

In general, this information must be provided before exercising a relevant power, or as soon as practicable after exercising the power if it is not possible to do so beforehand.[281]

In addition to the core safeguard requirements, section 201(2C) sets out the warnings that must be provided by police if a person is not complying with a request or direction that the person is required to comply with by law.

The original requirements of section 201(1) were identified by police as the 'WIPE' provisions for training purposes. In consultations, this terminology was sometimes used by police. While the acronym is no longer accurate, as warnings are not generally required under section 201(1), we note that 'WIPE' stood for:

Warn that failure to comply may be an offence

Inform of the reason for the exercise of the power

Provide your name and place of duty

Evidence that you are a police officer.

Our review of the general safeguards in LEPRA identified a number of significant issues in relation to compliance with the legislation which are discussed in detail below. In brief:

- elements of section 201 appear to make the application of the general safeguards overly complex
- it appears police officers may not clearly understand what the requirement that they provide a person with the reason for the exercise of a power involves
- there is considerable scope to promote the use of plain English for the benefit of both police and the public.

15.1. The aim of the Part 15 safeguards: Police accountability and codification of common law requirements

Requiring officers to provide their details and the reason for exercising a power ensures that procedural requirements are met. As the then Attorney General indicated in the second reading speech, Part 15:

> *Represents a codification of the common law requirement that a person must be told of the real reason for their arrest, and a clarification of the additional requirements that an officer must provide their name, place of duty and a warning.*[282]

This comment suggests that a person must similarly be told the real reason for the exercise of any power to which the safeguards apply, including personal searches.[283]

The importance of these safeguards is stressed in the *LEPRA Facilitator Introductory Guide* which notes that safeguards of this kind have always existed in policy because they help to guard against people misrepresenting themselves as police officers and people have the right to know why they are being arrested and should be warned that failure to comply may result in further offences, as well as noting that these requirements help to guard against people misrepresenting themselves as police officers.[284]

280 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(1).
281 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(2).
282 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
283 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(3).
284 NSW Police College, *LEPRA Facilitator Introductory Guide*, p.31.

15.2. Compliance with section 201 for searches on arrest and while in custody

The section 201 safeguards apply to the exercise of all the powers listed in section 201(3), however, this review is limited to the application of these safeguards in relation to personal searches. The following analysis of the extent and nature of compliance with section 201 for the purpose of searches on arrest and while in custody draws extensively on our Court survey as the COPS data does not lend itself to statistical analysis of these issues.

15.2.1. Evidence that the person is a police officer

When exercising any of the powers identified in section 201(3), including a search on arrest or while in custody, an officer must provide the person who is subject to the exercise of the power with 'evidence that the police officer is a police officer (unless the police officer is in uniform)'.[285]

Compliance with this safeguard in section 201(1)(a) can help to reduce the likelihood of resistance and risk of injury or further offences by demonstrating that the person exercising a police power is in fact a police officer. As one officer commented in consultations:

> *It's for our protection as well so that people know that we're police and they're not about to smack us or something 'cause they think we're idiots. We show our ID and say 'we're the police'.*[286]

The need for police to announce their office and provide evidence when not in uniform was highlighted in our Local Court survey as the following case study shows.

Case study 4

Local Court survey report of a plain clothed police officer not showing identification

We spoke to a man in his thirties who was facing charges of drug possession and resisting police in the execution of their duty.

The man told us that he had been arrested and searched by police in a public place. The search itself involved looking through his wallet and requiring him to remove his shoes and socks so that they could be searched. As a result, drugs were found.

The man told us that he did not cooperate with this search because he 'didn't know who they were [as they were] undercover'. The man noted that police did not warn or ask for his cooperation at that stage. When asked what police could have done better the man answered 'shown ID badge before searching me'.

The utility of this requirement was also demonstrated in an example provided in our report *Policing Public Safety*, where a person ran from plain clothes officers saying he didn't realise they were police and thought he was going to be bashed.[287]

In consultations with police we asked officers for their views on the section 201 safeguards. Most of the police we spoke to were uniformed officers and did not comment on the requirement. Of those officers who were working in plain clothes units, all indicated that they provide their identification. As one officer said:

> *As plain clothes we have to provide our identification and it just follows the natural path of progression to then say 'Hi, I'm Constable X, LAC G Police'.*[288]

As part of our Court survey, we asked people how they knew the person searching them was a police officer. Responses suggested that the vast majority of people searched on arrest in the field — 83% of Local Court respondents (144 of 174) and 82% of Children's Court respondents (49 of 60) realised that the person searching them was a police officer because they were in uniform.[289]

A further 10% of Local Court respondents (18 of 174) and 8% of Children's Court respondents (5 of 60) said that they knew the person was a police officer because they showed police identification in accordance with LEPRA.

285 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(1)(a).
286 Focus group with plain clothes detectives, 23 July 2007.
287 NSW Ombudsman, *Policing Public Safety — Report under s.6 of the Crimes Legislation Amendment (Police and Public Safety) Act 1998,* November 1999, at par. 5.85. This incident was identified through observational research.
288 Focus group with general duties proactive constables, LAC G, 20 November 2007.
289 People could nominate more than one factor in response to this question. These figures include all people who reported that the officer was in uniform regardless of other factors reported and exclude them from subsequent counts because section 201(1)(a) specifies that a police officer is only required to provide identification if not in uniform.

The remainder of those who reported that they were able to tell that the person was a police officer indicated that the person searching them either told them they were a police officer; that they noticed a police car, flashing lights, a gun or a siren; or that they recognised the officer from previous dealings.[290]

Only one young person reported that she did not know the person searching her was a police officer noting that this was because the officer was 'plain clothed' and 'didn't show badges'.[291]

Alternative means of police identification that do not comply with section 201(1)(a) can be problematic if the person being searched does not believe that the person is a police officer, as demonstrated in case study 4 above.[292] It is understandable that a person might resist being subjected to a search if unaware that the person they are interacting with is a police officer — raising the risk of escalation and injury for all involved.

In summary, information from our Court survey suggest that compliance with this important safeguard by police was high in relation to personal searches, primarily because most officers are in uniform. In circumstances where police are not in uniform, there are cogent reasons for police to ensure that they provide identification, particularly as a means of reducing the possibility of escalation and injury to both suspects and police.

15.2.2. Name and place of duty

When conducting personal searches police must also provide the person who is subject to the power with the name of the police officer and his or her place of duty.[293]

Compliance with this safeguard can help to ensure transparency and facilitate the interaction between the officer and the person being searched by showing that the officer is willing to identify him or herself and is therefore, accountable for actions undertaken and decisions made. As one sergeant put it:

> *If you're doing something you should be able to state your name and all that without anything to hide. I think people have the right to know who they're dealing with and if [police officers are acting] appropriately it shouldn't be a concern anyway.*[294]

In our consultations with police we received mixed responses in relation to the requirement that officers provide their name and station. Some officers indicated that it is very much part of their everyday practice:

> *If you didn't tell them your name that would be the first thing that they would say "what's your name, what's your name, what's your name" so I don't care. It doesn't worry me at all to tell them my name, I'll tell them three or four times over.*[295]

> *It's not that hard to say who you are and where you work and the reason you're there.*[296]

> *I think it's just become a stock standard thing that cops do when they approach people now, "my name is Sergeant [x] from [y] Police Station". It's basically the first thing that comes out of your mouth.*[297]

> *No hesitations with our name. They want to know who we are, they'll find out anyhow so we might as well tell them.*[298]

Other officers indicated that they did not consider it necessary to provide their name and place of duty, as one officer told us:

> *It's not about me, it's about our job and what we do as individuals. It shouldn't have anything to do with our name. If people want to make a complaint and get our names, not a problem in the world, but we shouldn't be telling people.*[299]

Some officers also suggested that they should not be required to provide their name and details if the person already knows the officer, especially if it is a person that police deal with frequently, as officers said:

> *Some of them already know us and they actually call us by our name.*[300]

> *I think it's silly, you walk up and say 'G'day, I'm [name]' and they go 'of course, you locked me up ten times'.*[301]

290 See Appendix 1 (5.1).
291 Children's Court survey 4.
292 Local Court survey 239.
293 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(1)(b) and 201(3).
294 Interview with general duties sergeant, LAC D, 6 August 2007.
295 Focus group with general duties constables, LAC B, 24 July 2007.
296 Interview with brief handler, LAC D, 6 August 2007.
297 Focus group with proactive sergeants, LAC E, 16 October 2007.
298 Focus group with general duties sergeants, LAC F, 29 October 2007.
299 Focus group with highway patrol officers, LAC F, 26 July 2006.
300 Focus group with general duties sergeants, LAC F, 29 October 2007.
301 Focus group with detective constables, LAC E, 17 October 2007.

A small proportion of officers expressed the view that the requirements in section 201(1)(b) can create safety issues for police and conflict with the NSW Police Force badge policy. The NSW Police Force nameplate policy includes an option for officers to wear a badge that identifies the officer according to a three digit number with their unit or command underneath.[302] The issue of name badges is discussed in detail below in section 15.2.2.1. As two officers put it:

> *Being in full uniform I choose to have a number plate as opposed to a name badge because I like to remain [anonymous] for my personal security, we've all had threats — we all deal with unsavoury type characters.*[303]

> *I don't necessarily agree with having to give someone your name, particularly as I've been the subject of death threats and also had my house spray painted with death threats which I believe were directly related to my work. I think a number is sufficient.*[304]

The view of the Shopfront Youth Legal Centre was that police should be required to provide their name and place of duty given that they are in a position of power:

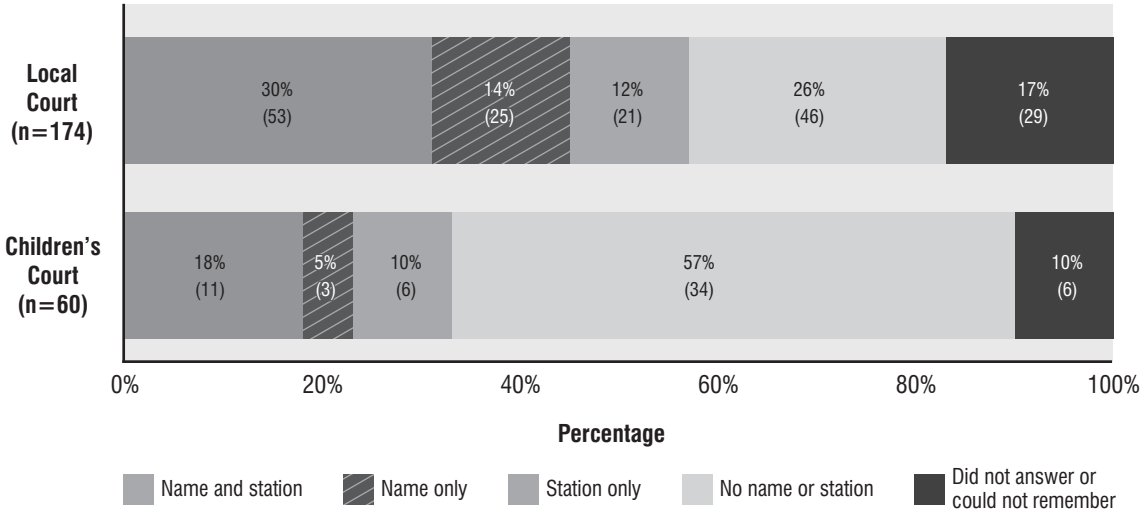
> *Well they're the ones with the uniforms. They're the ones with the gun … unless you're working under-cover, if you're going to be conducting a public role like that and you're going to be interfering with people's liberty, I think people have a right to know who you are or some way of identifying you.*[305]

In our Court survey people were asked whether the officer provided his or her name and station when they were searched on arrest. Responses indicated that compliance with this safeguard was moderate for Local Court and low for Children's Court respondents

As indicated in figure 5 below, 30% of Local Court respondents (53 of 174) who described a search in the field reported that the searching officer provided both their name and station at some time during the interaction. In comparison, only 18% of Children's Court respondents (11 of 60) reported that officers provided both of these details — as required by section 201(1)(b). A further 26% of Local Court respondents (46 of 174) and 15% of Children's Court respondents (9 of 60) reported that the officer provided either their name or station, thereby partially complying with section 201(1)(b).

Conversely, while 26% of Local Court respondents (46 of 174) reported that the searching officer *did not* provide their name *or* station during the interaction, this statistic rose to 57% for Children's Court respondents (34 of 60).[306]

Figure 5. Provision of name and station for searches on arrest in Court survey sample



Source: NSW Ombudsman, Court survey 2007. Note: percentage points total 99% for the Local Court responses due to rounding.

While compliance appears to be lower for young people, it is interesting to note that this may nevertheless represent an improvement on pre-LEPRA practices, as the Shopfront Youth Legal Centre noted one year after LEPRA commenced:

302 NSW Police Force, *Police Weekly*, 'New nameplate policy', 27 February 2006, Vol. 18, No. 5, p.10. This policy was approved by the Commissioner's Executive Team on 21 October 2005.
303 Focus group with senior constables, LAC G, 29 August 2006.
304 Interview with senior constable, LAC F, 30 October 2007.
305 Interview with Jane Sanders, Shopfront Youth Legal Centre, 7 November 2006.
306 See Appendix 1 (5.2).

We used to get a lot of complaints before LEPRA about police refusing to give their name and things. We haven't had so many complaints since.[307]

15.2.2.1. Identification badges

As mentioned above, in consultations a number of officers raised concerns about providing their name and place of duty noting that this conflicts with the identification badge policy (which allows officers to wear an identification number rather than their name) and citing safety concerns about personal details being included on identification badges.[308]

The first safety concern relates to using the personal details included on a police officer's badge, to identify, harass and intimidate police officers and their families. As officers from a variety of locations told us:

Last night three or four officers were threatened by the offender saying 'I'll find out where you live, I'll kill you, I'll kill your family, I'll shoot you, blah, blah'. [Those police were] wearing name badges, they've told him who they are, what station they work at. You're dealing with unknown crooks. You're not dealing with decent average people.[309]

I suppose it depends where you come from. Now that I've got kids I wouldn't wear my last name.[310]

As you can see, I'm wearing a number. The reason I wear it around here is because I also live close to the patrol. We have a lot of intimidation offences here. As recent as yesterday we locked up a group of persons who [intimidated officers by saying] 'I'm going to kill you', 'I'm going to wait til the end of your shift', 'you're dead'. We've had previous stuff [such as] 'I know where you live', 'I know you've got a baby', 'I'm going to kill your kid', that sort of stuff. So for that reason I wear a number but when I'm actually dealing with people on the street because of the LEPRA I have to say 'my name is blah, I'm from blah' and I obviously give my name. I just don't publicise it because as proactive police officers we're out there quite a lot and I just don't want my name to be rammed down their throat because it's a very real threat to police.[311]

In response to our issues paper, the NSW Police Force asserted that those officers who wish to maintain a degree of anonymity when performing their duties (due to operational reasons, or concerns for their own safety and that of their family members) should be allowed to do so by wearing a numbered badge and providing that number and the name of their command to persons on whom they exercise powers.[312]

Wearing a badge that identifies the officer by name and place of duty complements the section 201(1)(b) safeguards. However, when exercising a relevant power police must state their name and place of duty regardless of the type of identification they are wearing. In our view the nameplate policy need not conflict with the section 201(1)(b) requirements. While it is open to an officer to wear a number rather than their name on their badge, this decision does not alter the officer's duty to state his or her name and place of duty when exercising a relevant power.

A number of other jurisdictions require that police officers wear identification including the Metropolitan Police in the United Kingdom where officers are required to wear name tags in an ongoing effort to build relationships with the public and to show the organisation is open and transparent,[313] and Northern Ireland where officers are engaged in Neighbourhood Policing Team duties. These officers are required to wear badges that show their name, rank and department.[314]

In October 2005 the Police Service of Northern Ireland undertook a review of its name badge policy which found no apparent link between wearing a name badge and threats to police. The Chief Constables Forum noted that even in circumstances where an officer has an unusual name, not wearing a name badge did not prevent 'getting picked up', and that in public order situations, protesters have chanted officers names at police who were not wearing name badges.[315]

The second safety issue relates to the possibility that the badge itself could be used to cause injury. This concern was raised by custody officers at one particular LAC who were not wearing identification tags when we consulted with them. One officer noted:

I don't like the actual badges because they do have the needle behind. Don't get me wrong, it's one in a million [that a badge could be used against an officer as a weapon] but knowing my luck I'd be the one in a million.[316]

307 Interview with Jane Sanders, Shopfront Youth Legal Centre, 7 November 2006.
308 NSW Police Force, *Police Weekly*, 'New nameplate policy', 27 February 2006, Vol. 18, No. 5, p.10.
309 Interview with duty officer, LAC E, 17 October 2007.
310 Focus group with general duties sergeants, LAC F, 29 October 2007.
311 Focus group with duty officers, LAC G, 19 November 2007.
312 NSW Police Force submission to LEPRA issues paper, 24 August 2007, p.2.
313 Metropolitan Police Service and Metropolitan Police Authority, *Joint Annual Report 2003/04*, London, 2004, p.17.
314 Police Service of Northern Ireland, Uniform wearing of name badges policy. http://www.psni.police.uk/index/pg_freedom_of_information/pg_classes_of_information/pg_name_badges.htm, accessed 3 July 2008.
315 Police Service of Northern Ireland, Chief Constables Forum, minutes of meeting, 17 October 2005, p.8.
316 Interview with custody manager, LAC F, 20 October 2007.

Following the 2007 Asia-Pacific Economic Cooperation Forum in Sydney the issue of the NSW Police Force removing identification tags while on duty was discussed in the Budget Estimates 2007–2008 inquiry.[317] The Government was asked how many officers had been injured in 'badge attacks' since 2001. The NSW Police Force advised that 'a search of available data has not identified any records of incidents where a pin badge has been used as a weapon', noting that they were unable to collate local data in the timeframe provided. The NSW Police Force also indicated that it has intelligence that violent protest groups aim to injure officers with badges.[318]

Despite these concerns, the vast majority of officers we spoke to in consultations wore the standard pin identification badge with either their name or number.

While the issue of wearing a badge is independent of the LEPRA requirements, in our view it is preferable that all police officers wear identification of a kind prescribed in the nameplate policy at all times when dealing with members of the public to complement the safeguards in section 201(1)(b).

15.2.3. Reason for the search

Arguably the most important element of the safeguard provisions is the requirement that police provide the reason for the exercise of a power to search a person.[319]

Requiring police to state the reason for conducting a search can help to ensure that officers reflect on the reason for exercising a search power *before or at the time* of exercising the power, rather than ascribing reasons after the fact and risking the admissibility of evidence obtained as a result of the search.

Articulating the reason for the search can also reassure the person being searched of the officer's authority to conduct the search which in turn, can increase the likelihood of cooperation and reduce the risk of escalation, injury and complaints against police. As one officer noted:

> *Obviously the legislation is designed to make sure the accused or the person being spoken to is aware of what they're being spoken to about and that's very important because it reduces conflict [that could result from] people saying 'well I'm not sure what the police are even talking to me about'.*[320]

In circumstances where no reasons or questionable reasons are provided, the person being searched may well assume that the police decision to conduct a search is due to some arbitrary factor such as their age, sex or physical appearance. In order to reassure the person that police have the authority to conduct a search, and thereby facilitate the interaction, police must carefully consider what authority they have to exercise the power in question and provide the person with 'the real reason', as illustrated in the case study below.[321]

Case study 5

Complaint alleging police failure to provide real reasons for search

In June 2007 our office received a complaint from an Aboriginal woman alleging that police had searched her unlawfully and failed to tell her the real reason for the search.

The complainant stated that police first told her she would be searched because she had abused an officer, but later stated that that she had been searched because she threw a cigarette butt on the ground.

During the police investigation of the matter the officers involved stated that the complainant was searched because she told police she had drugs in her pockets. The complainant confirmed that she said this, but was never told that this was the reason for the search.

Police concluded that while the search itself was lawful, the officers involved failed to advise the complainant of the real reason why she was being searched. As a result, the officers involved in this matter were counselled and provided with training on the proper provision of reasons for searches.

In consultations, some officers implied that they do not always give reasons out of concern that doing so will disclose police intelligence, as one officer said:

317 NSW Parliament Legislative Council General Purpose Standing Committee No. 3, *Budget Estimates 2007–2008*, Report 19, 5 December 2007.
318 NSWPD, Legislative Council, 27 November 2007, Questions and Answers no. 31, question number 0717, pp.1134–1135.
319 *Law Enforcement (Powers and Responsibilities) Act 2002,* ss.201(1)(c) and 201(3).
320 Interview with brief handler, LAC D, 6 August 2007.
321 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.

You might say, "okay well now we're going to search because this is a well known area for drug activity" or "because this vehicle has been implicated for drug activity," but generally we don't tell them that because we don't want them to know, so that's one that generally slips away.[322]

These comments suggest that the type of information required to fulfil the section 201(1)(c) requirement may not be clear to all officers. In our view, section 201(1)(c) involves a two step process. Police must first identify what power they are exercising, and then consider what grounds they have for exercising that power. Taking a search on arrest as an example, in order to fulfil the section 201(1)(c) requirement, the officer must identify that the power to conduct that search is provided in section 23, and then consider whether he or she is able to meet the threshold requirements outlined in that section. As noted by the Attorney General, this safeguard simply represents a codification of common law requirements.[323]

15.2.3.1. On arrest

With respect to personal search powers, section 201(1)(c) requires that the person be told 'the real reason' why they are being arrested *and* searched.[324] However, information from our Court survey and observations suggest that while people may be advised of the reason for their arrest, specific reasons for the search are not often provided or expected, as one person told us, 'I suppose that's part of being arrested, you get searched'.[325] The following example was typical of reasons provided for searches that we observed on arrest.

Case study 6

Observation of man arrested for urinating in public and searched without reason being provided

We observed a search of a man during regular beat patrols in an inner city area. At approximately 1am two males attracted the attention of police. Our observer noted, 'I arrived at the scene shortly after and heard the officer state his name, place of duty and that the male has been stopped because he was seen urinating in public'.

The officer tells the man that it is an offence to urinate in a public place, advises him that he is under arrest and informs him that he will be searched but does not give a reason for doing so.

Two male officers conduct the search. One officer asks the man for his cooperation, then requests that he empty his pockets. The man hands one officer his wallet, camera, phone and small change. The man is then searched by the other officer who visually inspects the man's pockets, asks the man to lift his shirt — which he does, exposing his stomach and lower back, then asks the man to lift his pants so that the officer can visually inspect the man's shoes and socks.

The search was completed in approximately three minutes.

In our Court survey people were asked to describe their own words, 'what reason did police give for the search?'

In the Local Court, 34% of respondents (60 of 174) who described a search in the field reported that police did not provide any reasons for the search and 5% (8 people) could not remember or did not answer. The remaining 61% (106 people) reported that they were given a reason. Responses broadly fell into one of three categories, namely:

- Evidence, including suspected possession of stolen property, house breaking implements and drugs.[326] For example: 'Looking for stolen stuff' or 'Search for drugs'.[327]
- Safety including searches for weapons, dangerous items or items that could assist with escape.[328] For example: 'Because I was to get into a police car — wanted to make sure I had no weapons'.[329]

322 Focus group with general duties constables, LAC B, 24 July 2007.
323 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
324 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
325 Local Court survey 258.
326 21% of adults (22 of 106 who said they were given a reason for a search on arrest in the field) reported that police provided them with a reason that we have categorised as 'evidence related'.
327 Local Court surveys 139 and 153.
328 23% of adults (24 of 106 who said they were given a reason for a search on arrest in the field) reported that police provided them with a reason that we have categorised as 'safety related'.
329 Local Court survey 305.

- The fact of being under arrest or police procedures without any further reasons.[330] For example: 'Just advised "you're under arrest, you're going to be searched"'.[331]

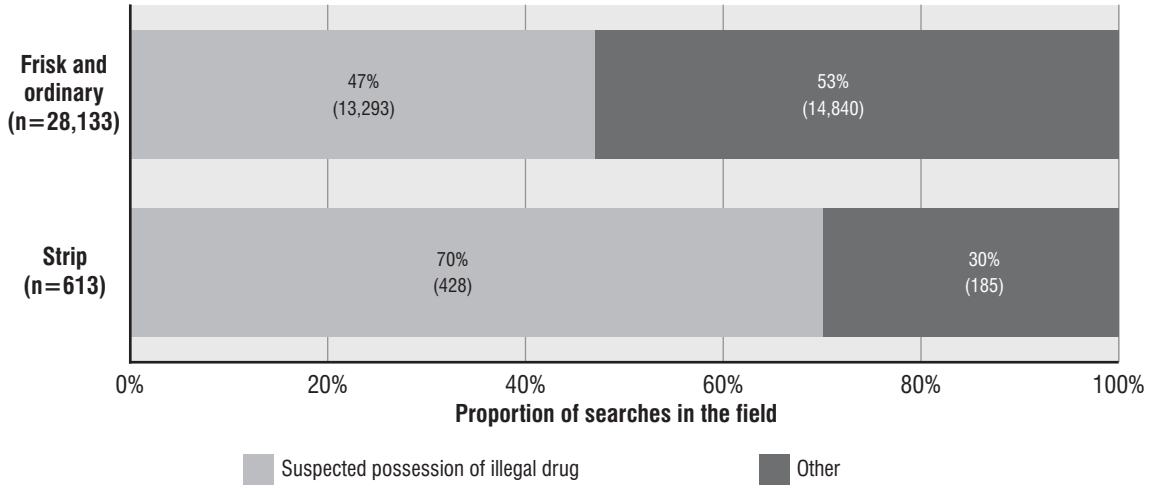
In the Children's Court, 62% of respondents (37 of 60) who described a search in the field reported that police did not provide any reasons for the search. Of the 23 Children's Court respondents who reported that they were given a reason, the types of reasons reflected the Local Court responses, namely:

- Evidence,[332] for example: 'they said something about looking for stuff connected to the assault/robbery',[333] or 'looking for break and enter stuff'.[334]
- Safety,[335] for example: 'for safety since I was going in a police car',[336] or 'looking for syringes on me'.[337]
- The fact of being under arrest or police procedures without any further reasons.[338] For example: 'because I had a texta in my hand and I was under arrest and that meant they could search me'.[339]

While we endeavoured to frame a question that would cause people to think about the reason that police gave them for the search, the information provided indicates that this did not always occur. As noted in section 11.7 information obtained through the Court survey reflects people's recollection of the event which could be affected by a number of factors. In relation to the reason for being searched, responses suggest that there may be some blurring between reasons provided by police and reasons that were perceived by the person being searched which makes it difficult to provide a *measure* of compliance with this safeguard requirement.

The searches recorded in the COPS event management system are not limited to searches on arrest, consequently the list of available search reasons do not reflect reasons that would be required to fulfil this safeguard requirement for a search on arrest. Nor can it be assumed that the reason selected by the officer in making the record was the reason that was provided to the person at the time of the search. Nevertheless, this data is capable of illustrating some of the reasons that officers identified for the search they conducted. As shown in figure 6, the primary reason identified by police for any kind of search in the field was suspected possession of illegal drugs.

Figure 6. Primary reasons identified by police for searches in the field



Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2007. The category 'other' includes: possession of item in connection with an offence; ensure does not harm self or others; other; knife/weapon used/intended to be used; possession of property stolen/unlawfully obtained; ensure cannot escape custody; suspected possession of drug implement; tool/implements used/intended to be used; intoxicated person; possession of dangerous implement in place/school; possession of firearm/explosives — each of which accounted for less than 10% of reasons for both frisk and ordinary or strip searches in the field.

330 57% of adults (60 of 106 who said they were given a reason for a search on arrest in the field) reported that police provided them with a reason that we have categorised as 'arrest or procedure' related.
331 Local Court survey 336.
332 26% of young people (6 of 23 who said they were given a reason for a search on arrest in the field) reported that police provided them with a reason that we have categorised as 'evidence related'.
333 Children's Court survey 58.
334 Children's Court survey 9.
335 26% of young people (6 of 23 who said they were given a reason for a search on arrest in the field) reported that police provided them with a reason that we have categorised as 'safety related'.
336 Children's Court survey 80.
337 Children's Court survey 83.
338 48% of young people (11 of 23) who said they were given a reason for a search on arrest in the field) reported that police provided them with a reason that we have categorised as 'arrest or procedure' related.
339 Children's Court survey 102.

The fact of arrest does not in and of itself justify a search under section 23. Under section 23 an officer must also 'suspect on reasonable grounds that it is prudent to do so' for reasons of safety, security or evidence and the person who has been arrested should be advised of this suspicion as the reason for the search. As the following examples from officers show, the reasons for the arrest and the search may not always be articulated separately by the officer:

> *You'd say "Hello, I'm Senior Constable [name], I'm a police officer" and you normally would say "I believe you're carrying something in your pocket, [or] I just saw something happen, [or] I believe you're carrying some drugs in your pocket — I need to search you". You used to say that anyway.*[340]

> *If it's an assault or a stealing or whatever, you say "My name is so and so from so and so patrol, at this stage you're under arrest for assault" and once you give the caution then you get a vehicle down there, a cage truck and "I've got to give you a search before you go in there". So they know.*[341]

In some circumstances the reasons for both the arrest and the search may be very similar. While it may be possible for police to provide one reason for both powers in some circumstances, all officers must be aware that they are two separate requirements and ensure that both are fulfilled whenever a power to arrest is exercised at the same time as a power to conduct a personal search.

15.2.3.2. While in custody

LEPRA provides that being in lawful custody in itself constitutes grounds for a search of a person under section 24. While a person may assume that they are being searched because they are in custody, police are still required to advise the person of the reason for a search while in custody under section 201(1)(c). Our consultations with officers indicate that some officers who perform custody roles do provide further reasons, particularly if a strip search is required, as one female custody manager told us:

> *If I'm called upon to do a strip search of a female for instance, I would explain to them why I'm doing it. It's common courtesy and common sense to explain to them what you're going to do, how you're going to do it and the reason why.*[342]

The COPS custody management system defaults to 'custody property search', consequently over 99% of searches record this as the primary reason.[343]

In our Local Court survey, 53% of respondents (93 of 177) who described a search at a police station reported that police did not provide a reason for the search and 9% (16 people) could not remember or did not answer. Of the 68 of Local Court respondents who reported that police did provide a reason for the search, responses were fairly evenly split between the categories of safety, evidence, and arrest or police procedure.[344]

In our Children's Court survey, 65% of respondents (34 of 52) who described a search at a police station reported that police did not provide a reason for the search and 4% (2 young people) could not remember or did not answer. As with the Local Court survey, of the 16 Children's Court respondents who reported that police did provide a reason for the search, responses were fairly evenly split between the categories of safety, evidence, and arrest or police procedure.[345]

It may not be possible to report an actual rate of compliance based solely on these figures, largely due to two factors. First, it is difficult to say unequivocally whether the reasons provided by people in response to the Court survey were actually stated by police or assumed by the person. Comments such as 'I crossed the road dangerously', 'because under influence of alcohol or drugs, so looking for drugs', 'weapons I think' suggest that the reason provided by the person reflects the reason they perceived for the search rather than what they were actually told by police.[346] Second the reasons that related to 'policy or procedure' or because a person was 'under arrest' would not necessarily meet the information requirements of section 201(1)(c).

The impression that a considerable proportion of young people are searched routinely was supported by the Shopfront Youth Legal Centre who commented:

> *The experience of our clients suggests that a search is a procedure routinely conducted by police upon arrest. We have read numerous police Facts Sheets that state "the accused was arrested and searched" … The language used in these Facts Sheets, together with the absence of any explanation as to why it was thought*

340 Interview with general duties senior constable, LAC D, 6 August 2007.
341 Focus group with duty officers, LAC G, 19 November 2007.
342 Interview with custody manager, LAC F, 29 October 2007.
343 Other possible reasons are 'ensure does not harm self or others', 'ensure cannot escape custody' and 'suspected possession of illegal drug or drug implement', which together constitute 0.1% of all searches in custody.
344 Each category accounted for approximately a third of 68 people who reported that police provided a reason for the search in custody. See Appendix 1 (5.3).
345 Four or five responses fell within each of the three categories. The remaining two young people advised that a reason was given but did not provide details of the reason. See Appendix 1 (5.3).
346 Local Court surveys 216, 177, and 47 respectively.

'prudent' to conduct a search under section 23, suggests that searches are carried out as a matter of course upon arrest.[347]

In summary, information from our Court survey suggest that while many Local Court respondents were provided with reasons for searches in the field, the number dropped substantially in custody (from 59% in the field to 39% while in custody). In comparison Children's Court respondents were not generally provided with reasons for searches either in the field or while in custody (38% in the field and 31% while in custody).

15.2.4. Timing

In general the section 201(1) requirements should be fulfilled before exercising a power. However, section 201(2) acknowledges that this is not always possible by making allowance for the safeguards to be met as soon as practicable after the exercise of certain powers including personal searches.[348]

While it is not possible to comment on the level of compliance with this element of the safeguard because timing is dependent on the reasonable practicability of the circumstances, information from our Court survey suggests that 22% of Local Court respondents (39 of 174) and 17% of Children's Court respondents (10 of 60) were provided with both the officer's name and station prior to the search in compliance with sections 201(1)(b) and 201(2) of LEPRA.

15.2.5. Warning

Since December 2006, police have only been required to warn people that they may be committing an offence if the person is not complying with a request or direction that the person is required to comply with by law.[349] The section 201(2C) warning requirement is presented as a two stage process. In the first instance, police must warn the person they are required by law to comply with the request or direction unless the person is already complying. If the person does not comply after receiving this warning and the officer believes that the person's failure to comply is an offence, the officer must provide the person with a further warning to this effect.[350]

This safeguard can help to diffuse situations where a person is not complying by putting the person on notice that they may face further charges if they do not comply, as one officer said:

Sometimes people will go 'What do you mean committing further offences?' I say 'Well, simply put, if you don't do what we ask you to do, you may be committing different offences, not the one we're talking to you about, you might be committing additional offences on top of that 'cause there are certain offences for not complying with police officers' then they go 'yeah, that's fine'.[351]

Prior to December 2006, it was necessary for police to warn people that failure to comply with a request or direction is an offence in every instance where a relevant power was being exercised, regardless of whether the person was already complying.[352]

In consultations with police, the majority were not aware of this amendment. However, once advised, most officers supported the change, as officers said:

Only having to warn them if they're failing to comply makes a lot more sense. It's a lot more user friendly the way it is now.[353]

It's a little bit better now than it was with that warning. Just one more thing you don't have to worry about.[354]

A number of officers also indicated that they still warn people that they may be committing an offence in circumstances where the person is complying. As one constable put it:

I think in most cases you'd still warn. It makes good common sense too, to warn the person that if you're failing to obey this direction, it could be an offence. [355]

Some officers suggested that it could be difficult to warn a person when they are resisting, noting also that warning after the fact might be considered redundant once the incident has passed and the person has already committed the further offence saying:

347 Shopfront Youth Legal Centre submission to LEPRA issues paper, 10 August 2007, p.2.
348 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(2).
349 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(2C).
350 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(2C).
351 Interview with brief handler, LAC G, 20 November 2007.
352 Section 201(1)(d) was repealed and replaced with s.201(2C) by the *Police Powers Legislation Amendment Act 2006* on 15 December 2006.
353 Focus group with general duties constables, LAC E, 17 October 2007.
354 Focus group with detective constables, LAC F, 29 October 2007.
355 Focus group with general duties proactive constables, LAC G, 20 November 2007.

If they're resisting you might bundle them into the back of the truck and get them back to the station and into the charge room, it might be half an hour, are you going to warn them then? [356]

Simple if they're compliant. If they're not compliant, it's very hard. If you're wrestling someone — no way. For instance, the guy that injured me, I don't think I told him 'cause it's very hard when you're in the middle of something but if they're compliant there's no problem.[357]

Other officers were of the view that the warning requirement only provides an opportunity for failed prosecutions, as one officer commented:

If I was to walk up to you on the street and assault you that would be an offence but if I'm a police officer and I walk up and ask somebody to do something and they don't do it I then have to warn them and then they assault me and the Magistrate says "well you didn't warn them so it's no longer an offence" and the matter is dismissed. It just provides more reasons for people to get off.[358]

We are not aware of any failed prosecutions as a result of police failing to comply with the warning requirement or any other safeguards.

While these figures cannot be taken as an indication of police compliance with this safeguard (because they do not convey whether the person's actions warranted a warning from police) we note that over a third of respondents who described a search in the field reported that police told them that they 'may be committing an offence' if they did not comply with the search, namely, 34% of Local Court respondents (60 of 174) and 38% of Children's Court respondents (23 of 60).[359]

15.3. Possible reasons for low compliance

A number of factors may be contributing to the low rate of compliance with the requirement that officers provide reasons for a search and their details in certain circumstances. While not all aspects of section 201 apply to searches on arrest or while in custody, it is necessary to consider the operation of the whole provision as its complexity can affect the application of the safeguards to any specific power including the personal search powers.

15.3.1. The internal complexity of the provision

The information that an officer is required to provide under section 201 is not particularly clear or straight forward. Having considered whether one or more of the eleven powers (currently) listed in section 201(3) is being exercised, an officer must consider:

- Which time limits apply to the safeguards, depending on whether police are:
  - — exercising a power that that does not involve requesting identification, giving a direction to one person only or requesting that a person open their mouth or move their hair under section 21A — in which case police must comply with section 201(1) before, at the time or as soon as is reasonably practicable after exercising the power[360]
  - — requesting identification, giving a direction to one person only or requesting that a person open their mouth or move their hair under section 21A (not section 23A) — in which case police must comply with section 201(1) *before* exercising the power,[361] or
  - — giving a direction to a group of two or more people — in which case the general requirement applies.[362]
- What warnings are required, if any, depending on whether:
  - — the person fails to comply with a power that involves a request or a direction — in which case an officer must warn the person that they are required to comply,[363] furthermore
  - — the person continues to fail to comply after this warning — in which case an officer must issue a second warning that it is an offence if the person does not comply and the officer believes failure to comply is an offence.[364]

356 Interview with custody manager, LAC F, 29 October 2007.
357 Interview with brief handler, LAC G, 20 November 2007.
358 Focus group with general duties sergeants, LAC B, 25 July 2007.
359 A similar proportion of Local Court respondents reported that they were warned in custody (35% or 62 of 177), however, the proportion of Children's Court respondents who reported that they were warned in custody was somewhat lower (13% or 7 of 52). See Appendix 1 (5.4).
360 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(2).
361 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(2A).
362 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(2B).
363 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(2C)(a).
364 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(2C)(b).

- If any given officer is required to provide his or her name and place of duty, depending on:
  - — whether the officer has already provided his or her name and place of duty to the same person on a single occasion in relation to another relevant power — in which case the officer is not required to provide the information again[365]
  - — whether another officer who is present and exercising a relevant power has already done so — in which case the section 201 requirements are considered to have been met,[366] or
  - — whether the officer has been asked for his or her name and station — in which case the officer must provide the requested information.[367]

Generally, these factors must be considered in the heat of the moment without recourse to immediate legal advice. In consultations, comments from officers on the application of section 201 suggest that it can be difficult to apply in practice. As one officer told us:

> *Usually you explain it and if someone's going off their head you don't get time to explain it but if someone is able to listen and understand and give you an answer, usually they'll tell you to get nicked or something like that anyway so it's a bit hard but you tell them anyway and then you explain, if they tell you to get nicked, you just say the same thing again and then they listen.*[368]

To complicate matters further, section 201 is not the only place in LEPRA where these types of safeguards appear. Section 138C contains a specially tailored version of section 201 that applies to the exercise of powers to obtain fingerprints and palmprints.[369]

In summary section 201 contains a number of variables that alter the core requirements. If all of these exceptions are required in order to ensure that the one safeguard provision can be applied to any relevant power in LEPRA it is difficult to explain why a similar safeguard is provided separately in section 138C. The complexity of the variables is a factor that can frustrate those who wish to understand section 201, impeding accurate and effective compliance with these safeguard requirements.

15.3.2. Amendments

Section 201 is designed to provide general safeguards that apply to a variety of specific powers. However, for the safeguards to be effective, it is important to consider how amendments could affect the operation of LEPRA as a whole to ensure that gaps are not created inadvertently. Two examples of arguably inadvertent outcomes already exist as the result of amendments made subsequent to the commencement of LEPRA in December 2005.

Section 201(2A) states that officers must comply with section 201(1) '*before* exercising the power' in 201(3)(g), (i) or (j). When LEPRA commenced, 201(3)(j) referred to the power to conduct a search for knives or dangerous implements under section 26. A year later, amendments to LEPRA under the *Police Powers Legislation Amendment Act 2006* moved the reference to knife search powers from subsection 3(j) to subsection (3)(k), however, section 201(2A) was not amended so that it would continue to apply to knife search powers under 201(3)(k). As a result, the requirement that an officer comply with section 201(1) 'before exercising the power' shifted from the exercise of knife search powers to the exercise of a power to request that a person open their mouth or move their hair as part of a search on detention without explanation. While it is possible that this result may have been intended, the absence of any reasons in the second reading speech to explain why this occurred might suggest otherwise.

Similarly, while police are required to provide their name, station and the reason for the search before asking a person to open their mouth or move their hair as part of a search on detention under section 21A, they are not required to do so until after exercising the new power to search a person's mouth or hair on arrest under section 23A, if not reasonably practicable to do so before exercising the power. Again, it is not clear why it is important for

365 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(3A).
366 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(4).
367 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.201(5).
368 Interview with brief handler, LAC G, 20 November 2007.
369 *Law Enforcement (Powers and Responsibilities) Act 2002,* section 138C states:
(1) A police officer must, at the time of exercising a power to require finger-prints or palm-prints, or both, to be taken under section 138A or 138B, provide the person subject to the exercise of the power with the following:
(a) evidence that the police officer is a police officer (unless the police officer is in uniform),
(b) the name of the police officer and his or her place of duty,
(c) the reason for the exercise of the power,
(d) a warning that, if the person fails to comply with the requirement, the person may be arrested for the offence concerned and that, while in custody, the person's finger-prints and palm-prints may be taken without the person's consent.
(2) If 2 or more police officers are exercising a power, only one officer present is required to comply with this section.
(3) However, if a person asks another police officer present for information as to the name of the police officer and his or her place of duty, the police officer must give to the person the information requested.

the safeguard to be applied before exercising the power in section 21A but not before the power in section 23A which replicates section 21A.[370]

In our view, ambiguous amendments are just one possible source of impediments affecting the effective application of the section 201 safeguards, particularly if the changes are not effectively communicated to police officers consistently across the NSW Police Force. In addition, our consultations with police suggest that information about amendments can sometimes take some time to reach officers at the street level who have to contend with a multitude of amendments to laws that affect their work.

15.3.3. Officer education and comprehension of the section 201 requirements

In consultations, some officers suggested that the content of the section 201 safeguards are reasonable but expressed concern about the 'formulaic' way in which the information has to be provided, which is in itself premised on a belief that the section 201 safeguards are not met unless delivered in the particular way learnt by the officer. As a number of officers told us:

> *I don't know if it's a training issue or the way it was written but it is very formalised. I don't always go out and "hi, I'm such and such of [x] police". You've got to be able to adapt your communication and talk to all sorts of people. If you walked up to half our friends down here and did the formalised approach, they wouldn't understand what you were saying anyway. If you can adapt your communication, they've got more chance of actually understanding their rights than if we just said it verbatim, which is the whole of LEPRA spiel.*[371]

> *Policing is about talking to people. It's about communicating. It's about being able to relate to people from all walks of life. [Student officers] are very formal in their delivery and I think that's probably part of the training, they're instructed very formally.*[372]

> *What looks good on paper in a pristine world isn't how our world operates out there. People are expecting cops to go into a situation they're expecting no other person in society to got into. The way we interact, the way we stand, the tone we use, the words we use, every single thing affects that person that we're talking to.*[373]

> *It just creates angst and it creates arguments [when people say] 'I don't understand what you're talking about'. You turn out people from the Academy like robots and they've got to say 'my name is Constable [x] from the [y] station'.*[374]

> *I'm a good communicator and good at dealing with offenders, victims, witnesses but even I feel like a robot sometimes thinking have I covered my WIPE.*[375]

A number of police officers also expressed concern that section 201 increases the potential for failed prosecutions, and creates opportunities for accused persons to argue that evidence should be excluded on technicalities as officers commented:

> *Police just have a view at the moment that they're not going to be backed up by the Court if there's a confrontation and they don't have the opportunity to do it and they're concerned that Magistrates are going to say 'well you didn't tell them the reason why you're doing it' even though they were trying to spit at you and punch you and stuff like that, therefore, the matter is dismissed. That's a concern of most police out on the street have.*[376]

> *If I was the defence solicitor or the barrister [I'd] be walking into Court every matter and saying 'they've failed to comply with this [section 201 requirement], so everything else should be thrown out as improperly obtained'.*[377]

This concern was also noted by the Deputy Senior Public Defender, Andrew Haesler SC who commented:

> *It's the fear of getting into trouble which actually leads to a lack of understanding, which leads to lack of compliance. That was the thing that has struck me from day one that they [the police] still haven't done and we still get them applying laws that they don't themselves understand.*[378]

There is clearly apprehension on the part of at least some police officers as to the effects of a failure to administer the warnings required under section 201 on the court's discretion to exclude evidence. In particular, there seems to be an absence of understanding of the operation of section 201(2) in respect of the circumstances described by some

370 The Hon. John Hatzistergos MLC, NSWPD, Legislative Council, 6 November 2007, p.3515.
371 Focus group with proactive sergeants, LAC E, 16 October 2007.
372 Interview with senior constable, LAC F, 30 October 2007.
373 Interview with duty officer, LAC B, 23 July 2007.
374 Focus group with general duties sergeants, LAC F, 29 October 2007.
375 Interview with duty officer, LAC B, 23 July 2007.
376 Focus group with general duties sergeants, LAC B, 25 July 2007.
377 Interview with brief handler, LAC D, 6 August 2007.
378 Interview with Andrew Haesler SC, Public Defenders Office NSW, 17 December 2007.

officers as noted above. In our view it is possible that this issue could be addressed through guidance and training as discussed below in section 15.4.3.

15.3.4. Adjusting to change

Requiring police to provide their details, evidence that they are a police officer and reason for exercising a power are not new. As the then Attorney General indicated, officers were required to provide this information when requesting disclosure of a person's identity or exercising knife search and move on powers for some time before LEPRA.[379] Nevertheless, when LEPRA commenced section 201 received a mixed reception from officers. Some officers were apprehensive, while others were of the view that little if anything had changed, as the following comments from officers in our first round of consultations suggest:

> *We had to train people very quickly because the magic wand was about to be waved. One set of laws applied one day, codifying of our powers occurred the next.*[380]

However, 18 months into the review, most officers appeared to accept that the section 201 requirements are reasonable, as one officer noted:

> *When it first came in, I thought how is this going to work? I could say it's convoluted but it's second nature now. You just tell people 'I'm going to search you, here's my ID, this is where I'm from, if you don't submit you could be committing an offence'. It just sort of rattles off like the old caution used to.*[381]

> *I think it's just become a stock standard thing that cops do when they approach people now, "my name is Sergeant [x] from [y] Police Station". It's basically the first thing that comes out of your mouth.*[382]

Similar safeguards specific to stop, search, detain powers have been in place in the United Kingdom for over two decades. Section 2 of the *Police and Criminal Evidence Act 1984* (PACE), requires that an officer provide his or her 'name and the name of the police station to which he is attached, the object of the proposed search, the constable's grounds for proposing to make it'.[383]

In consultations Alan Brown, the head of the Police Powers Unit in the Home Office (UK) indicated that officers were initially concerned that the section 2 safeguards in PACE would be restrictive and it took between four and five years for the safeguards to be fully accepted by police in the United Kingdom. According to Mr Brown, now it is second nature for officers to provide this information.[384]

In summary, while it would appear that the adjustment to new safeguards is in part simply a matter of time, the effectiveness of the 'general' safeguards in section 201 has been limited by the impact of subsequent amendments which have qualified and varied the safeguards depending on an assortment of factors including the power being exercised, the number of officers and people present and the continuity of the interaction between police and the person — all of which complicates the understanding and application of the rules for police and the public. In addition, it is not evident that amendments have been clearly conveyed to and understood by all officers.

15.4. Simplifying the section 201 safeguards

No matter how comprehensive a safeguard may be on paper its strength must be measured by its actual application. The need for clarity in section 201 was noted by a defence solicitor who commented that one problem with section 201 is:

> *A failure of police officers, who appear to be genuinely trying to do the right thing, to understand exactly what information section 201 requires them to convey. (The breaches are generally minor and technical such as are unlikely to found a defence based on discretionary exclusion of evidence of the search).*[385]

The clearer the rules, the greater the likelihood and possibility of ensuring compliance, as Lord Devlin noted in 1967:

379 For example, the *Crimes Act 1900* (NSW), section 563 provided police with the power to demand a person's name and address in certain circumstances, provided that the police officer: (a) provides evidence to the person that he or she is a police officer (unless the police officer is in uniform), and (b) provides his or her name and place of duty, and (c) informs the person of the reason for the request, and (d) warns the person that failure to comply with the request may be an offence. Similar requirements could also be found in the *Police Powers (Vehicles) Act* 1998, section 6 in relation to the power to request disclosure of a driver or passenger's identity and the *Summary Offences Act 1988*, section 28A in relation to the powers to search for knives and dangerous implements, and section 28F the power to give reasonable directions in public places respectively.
380 Interview with duty officer, LAC B, 23 July 2007.
381 Interview with detective senior constable, LAC D, 6 August 2007.
382 Focus group with proactive sergeants, LAC E, 16 October 2007.
383 *Police and Criminal Evidence Act 1984* (UK), s.2(3)(a)–(c).
384 Interview with Alan Brown, head of the Police Powers Unit, Home Office, United Kingdom, 27 March 2007.
385 Survey of defence solicitors response 1.

It is useless to complain of police overstepping the mark if it takes a day's research to find out where the mark is.[386]

When Lord Devlin made this comment he was advocating the codification of police powers at a time when police relied more heavily on the common law, however, his comments are a pertinent reminder of the need for clarity where police powers and responsibilities are concerned.

While it may not take a day of research to verify what section 201 requires in any given circumstance, an officer's obligations under that provision are less than clear, which appears to be a factor influencing the levels of compliance as discussed in section 15.3.

15.4.1. Standardise the variable timing requirements

At present compliance with section 201(1) is only required *before* the exercise of the three powers listed in section 201(2A).[387] If it is critical that officers fulfil the section 201(1) requirements *before* exercising these three powers, it is arguable that specific safeguards should be attached to those powers in the way that section 138C attaches to the power to take fingerprints and palmprints from certain people under sections 138A and 138B. In this way, the specific safeguard and consequences for failing to comply in those particular circumstances could not only be provided and learnt alongside the relevant power, it would also simplify section 201 by standardising the requirements.

The possible drawback of such an amendment is that the safeguards would not be centrally located. However, given that an exception has already been made for section 138C and the added benefits of clarity in exceptional circumstances, it would be preferable to attach those few specific safeguards that must be met before exercising the power to the particular power to which they relate.

Alternatively, section 201 could be simplified by requiring compliance with the section 201(1) requirements 'before or at the time of exercising the power' for *all* the powers listed in subsection (3) and accommodating extraordinary circumstances by providing a higher exception threshold across the board such as unless exceptional circumstances prevent the officer from doing so, in which case the officer must do so as soon as reasonably practicable after exercising the power. The drawback of this option is that it would be possible for officers to exercise the three powers currently singled out in section 201(2A) before complying with the safeguards.

Either of these options would alleviate the need for subsections (2A) and (2B) so that the same rule applies to all powers in all circumstances making the requirements easier to understand and apply.

The equivalent safeguard provision in Queensland provides that this information must be provided as soon as reasonably practicable without exception for any powers.[388]

15.4.2. Streamline the exceptions

Section 637 of the PPRA in Queensland provides similar safeguards to those in section 201 of LEPRA, however, that provision takes the reader through the process of applying the safeguard by stating what is required in a logical order, namely: what powers the safeguards apply to, what the general requirement is, followed by four additional or exceptional requirements. In comparison LEPRA starts with the general requirement, outlines the three possible timing provisions, moves to the additional warning provisions, then outlines which powers the section applies to before providing four more additional or exceptional requirements.

While this might appear to be a cosmetic change, the possible advantages of presenting the safeguard steps in a logical manner are that the structure itself could recommend a process to readers — particularly officers who are required to apply the safeguards, while also making it easier to amend the safeguards in future with less likelihood of loopholes being inadvertently created.

15.4.3. Provide clear guidance and thorough training

In order to explain the reasons for searches to people in a way that fulfils the requirements of section 201(1)(c), police must have a thorough understanding of the personal search powers available to them and the grounds on which those powers may be exercised.

386 Lord Devlin, 'Police in a changing society', *The Australian Police Journal*, April 1967, pp.112–125 at p.122.
387 In accordance with section 201(2A) which singles out the three powers to request identification, give a direction or move hair/open mouth as part of a search on detention, identified in section 201(3)(g), (i) and (j).
388 *Police Powers and Responsibilities Act 2000* (Qld), s.637.

The apprehension expressed by officers about providing reasons for searches and questionable validity of reasons provided by officers suggests that further guidance could help to clarify what this safeguard requires. In order to avoid unhelpful formulaic explanations, continuing efforts must be made to familiarise and reinforce police understanding of frequently used law enforcement powers such as those listed in section 201(3).

A similar issue relates to the application of the warning safeguard. Section 201(2C)(b) states that an officer must warn the person that they may be committing an offence if the officer 'believes that the failure to comply by the person is an offence'. No guidance is provided on what the possible offences might be. In our view, if police officers at the front line are to apply this particular safeguard properly, the NSW Police Force should provide officers with clear, concise guidelines outlining where each of their section 201(3) powers can be found and what offence the person would be committing if they do not comply.

15.4.3.1. Use plain English

As the then Attorney General noted at the end of the second reading speech, LEPRA 'represents ideals of transparency, accountability and legitimacy'.[389]

The use of plain English in legislation, guidelines and education material is important to achieving these aims.[390] In consultations the Deputy Senior Public Defender commented:

> *I know that the New South Wales Law Reform Commission are actually getting the plain English institute to look at Judge's directions to juries, and it's surprised me that the police have not done that given that they themselves are not legally trained and yet their standard response seems to be that they just repeat what's in the legislation even though half the time they don't understand it themselves, let alone some of the people they have to deal with.*[391]

Since that time, the then Police Minister has announced that changes will be made to the way that police are required to read someone their rights when they are arrested adding that the currently legalistic and detailed process would be altered by 'changing it to plain English'.[392] However, it is not clear whether this will also involve changes to the way that the safeguard provisions are taught and provided to people by police officers. Encouraging police to use plain English when providing the information required in section 201 would help to ensure that the person being searched understands the information being conveyed to them and would thereby fulfil all the aims of the section 201 safeguards.

In summary, the safeguards in section 201 are important to ensure that people who are subject to the exercise of police powers know who they are dealing with and the reason why the power in question is being exercised. In order to ensure that this is achieved, legislative requirements must be clear and supported by practical guidance. Such measures will help to ensure that police understand the safeguards and meet the requirements with confidence in a way that is comprehensible to members of the public.

Recommendations

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.
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.
12. The NSW Police Force provide guidance to officers on how to plainly state the reason(s) for the exercise of a power.
13. The NSW Police Force provide further guidance to officers to clarify when warnings are required and the offences that apply to relevant powers.
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.

389 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
390 NSW Law Reform Commission, *Criminal Procedure: Police Powers of Detention and Investigation After Arrest*, Report 66, (1990), par. 1.72.
391 Interview with Andrew Haesler SC, Public Defenders Office NSW, 17 December 2007.
392 The Hon. David Campbell MP, *New arrest process gets police back on the front line*, media release, 19 June 2008.

Chapter 16.
Issues relating to the personal search safeguards

The following four chapters consider the safeguards provided in sections 32, 33 and 34 in four categories namely safeguards designed to:

- protect the privacy of the person being searched
- maintain the dignity of the person being searched
- ensure appropriate support during a search
- prevent strip searches of children under 10 years of age.

In consultations we asked police officers for their general views on the section 32 and 33 safeguards. The vast majority of officers at every level indicated that they believe the safeguards are reasonable and for the most part reflect the requirements and practices that existed before LEPRA. Community stakeholders we consulted were of the view that while the personal search safeguards are appropriate, police compliance with these safeguards could be improved. Our review of the personal search safeguards in LEPRA identified a number of significant issues in relation to the operation of and compliance with the legislation which are discussed in detail below. In brief, there are a few key safeguards that do not appear to be achieving their stated aims. In particular:

- there are different views and expectations about the privacy requirements
- while there is broad support for the use of CCTV in custody, the current SOPs relating to the regulation of digital CCTV equipment in custody need to be updated
- there is apprehension about the safeguard precluding officers from conducting a search while questioning a person and limited compliance.

16.1. The aim of the Part 4, Division 4 safeguards: Maintenance of privacy and dignity

In the second reading speech, the then Attorney General indicated:

> *The safeguards in Division 4 are in addition to the safeguards in Part 15 that apply generally across the bill. The safeguards better define what a police officer can do when conducting a search, and ensure the integrity of the criminal justice process.*[393]

In particular, the Attorney General noted:

- Section 32 provides personal search safeguards that are 'intended to ensure that a police officer conducting any search has regard to the searched person's right to privacy and maintenance of dignity throughout the search'. These safeguards apply to all personal searches to the extent that it is reasonably practicable in the circumstances.
- Section 33 provides additional safeguards 'which relate to privacy, the absence of people not necessary for the purpose of the search and the presence of support persons' and 'clarify that a strip search is, in fact a visual search and not an examination of the body by touch'.
- Section 34 provides that 'a child under 10 may not be strip searched'.[394]

16.2. Privacy issues relating to the search safeguards

Privacy safeguards are provided in both sections 32 and 33. In particular section 32(4) provides that all searches must be conducted 'in a way that provides reasonable privacy' while section 33(1) emphasises that a strip search must be conducted 'in a private place'. Both rules apply to the extent that it is reasonably practicable.

In consultations, the majority of police officers supported the privacy safeguards, as the following officers noted:

393 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
394 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.

I definitely agree [with the safeguards]. Obviously, the person that's being searched doesn't want to be searched in the middle of the street, nor do people want to see people being strip searched in the middle of the street.[395]

I put myself in the position of somebody on the street, I wouldn't want to be searched necessarily in a public place in full view of everybody.[396]

Some officers went on to comment on factors that might affect an officer's ability to comply with the safeguards. For example, one officer commented:

So you take them out of public view. I think that's the first port of call for most police, however, that may not always be possible. You've got busy places where the cops might be on foot themselves, [and the] geography may not enable them to make it private.[397]

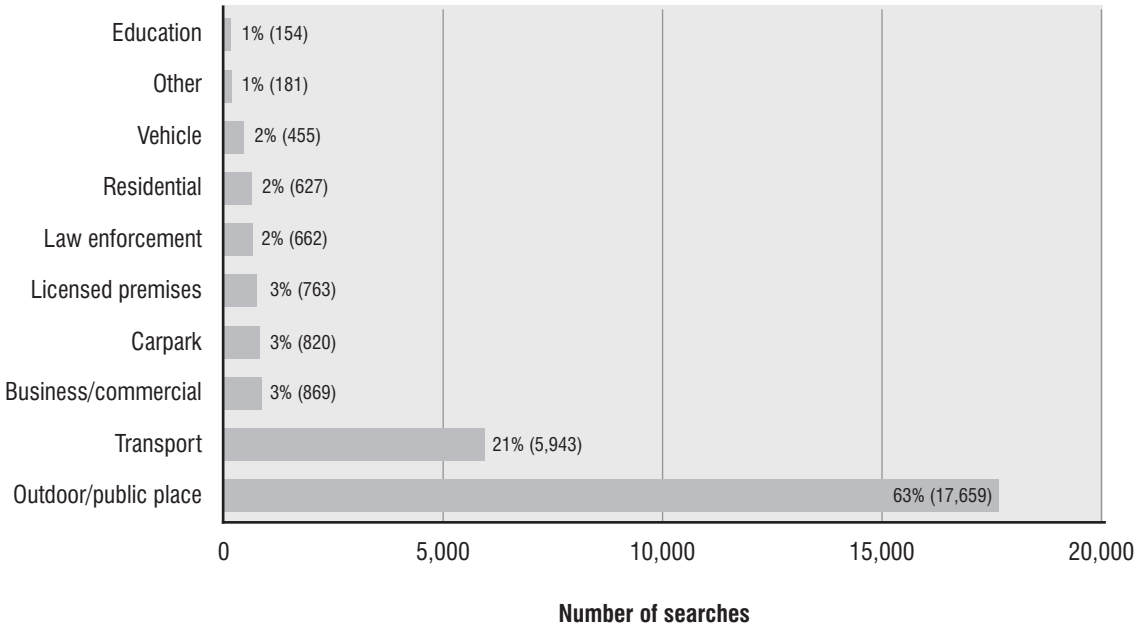
Similar strip search privacy safeguards are provided in other Australian jurisdictions. In particular, the comparable provisions in the Commonwealth, Australian Capital Territory and Queensland legislation provide that a strip search must be conducted in a private area without exceptions regarding the reasonable practicability of the circumstances.[398]

16.2.1. Reasonable privacy for all searches

16.2.1.1. In the field

The COPS data indicates that over the review period, the majority of frisk and ordinary searches in the field were conducted in an outdoor or public place (63%) or on transport (21%) as shown in figure 7.

Figure 7. Location of frisk and ordinary searches in the field



Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2007. The category 'other' includes: recreation; health; utilities; industrial; marine transport; religious; unknown; adult entertainment; and rural industry — each of which accounted for less than 1% of all frisk and ordinary searches in the field. n=28,133.

In our Court survey, 75% of Local Court respondents (111 of 148) and 65% of Children's Court respondents (32 of 49) who described a frisk or ordinary search in the field reported that they were searched in a public place such as a footpath, park or on a road, suggesting that a slightly larger majority of searches in the field may occur in outdoor or public places.[399]

395 Focus group with proactive sergeants, LAC E, 16 October 2007.
396 Interview with senior constable, LAC F, 30 October 2007.
397 Interview with duty officer, LAC B, 23 July 2007.
398 *Crimes Act 1914* (Cth), s.3ZI(1)(a); *Crimes Act 1900* (ACT), s.228(1); *Police Powers and Responsibilities Act 2000* (Qld), s.630(2).
399 See Appendix 1 (5.7).

In consultations, officers expressed the view that 'reasonable privacy' may vary depending on the locality, urgency and the type of search being conducted. Some officers suggested that for a search which does not involve removal of clothing, reasonable privacy might involve moving the person to another location on the street that is less public.[400]

Our direct observation of searches in the field also suggests that the application of the requirement for reasonable privacy in the field may vary depending on the circumstances and the officers involved, as indicated in the two case studies below.

Case study 7

Observation of an ordinary search on a train station platform following arrest for indecent exposure

We observed an ordinary search of a man who had been caught exposing himself to female passengers on a train. As he alighted from the train, a police officer stopped him, told him he was under arrest for exposing himself and cautioned him.

A different officer introduced himself to the man, provided his name and station and told the man he was about to be searched. The search was conducted on the platform where the man had been stopped.

As passengers walked past, the officer instructed the man to put his hands on the wall and spread his legs apart. The officer patted down the man's clothes from top to bottom. Various items were removed and placed in plastic bags. The man was not required to remove any clothing.

Police determined that it was necessary to conduct a more thorough search and photograph the man. The man was then taken to a nearby police station and strip searched in private in the interview room. While we did not observe the strip search, police advised that they found women's underwear in the man's underpants, photos of women and an adult book amongst other items.

While privacy was only considered by police when it became necessary to conduct a strip search in this instance, on other occasions we have observed personal searches conducted by police where privacy requirements were anticipated and equipment was provided to ensure this safeguard was met in every instance, as indicated in the following case study.

Case study 8

Observation of searches following drug dog indications at a youth event

We observed frisk and ordinary searches performed on people attending a youth event who were indicated by a drug detection dog as they moved from the train station to the venue. On this occasion, police set up a number of tents, which provided six separate spaces in which searches could be conducted and advised us that this had been done to provide people with a level of privacy.

Once an indication had been made, two police officers were introduced and the person was taken to a tent where the search was conducted. While we only observed frisk and ordinary searches, strip searches were also performed in the tents. We did not observe any searches outside the tents.

These quotes and examples demonstrate that many factors impact on the provision of privacy for regular searches in the field including the officer's perceptions, the location and circumstances in which the search takes place.

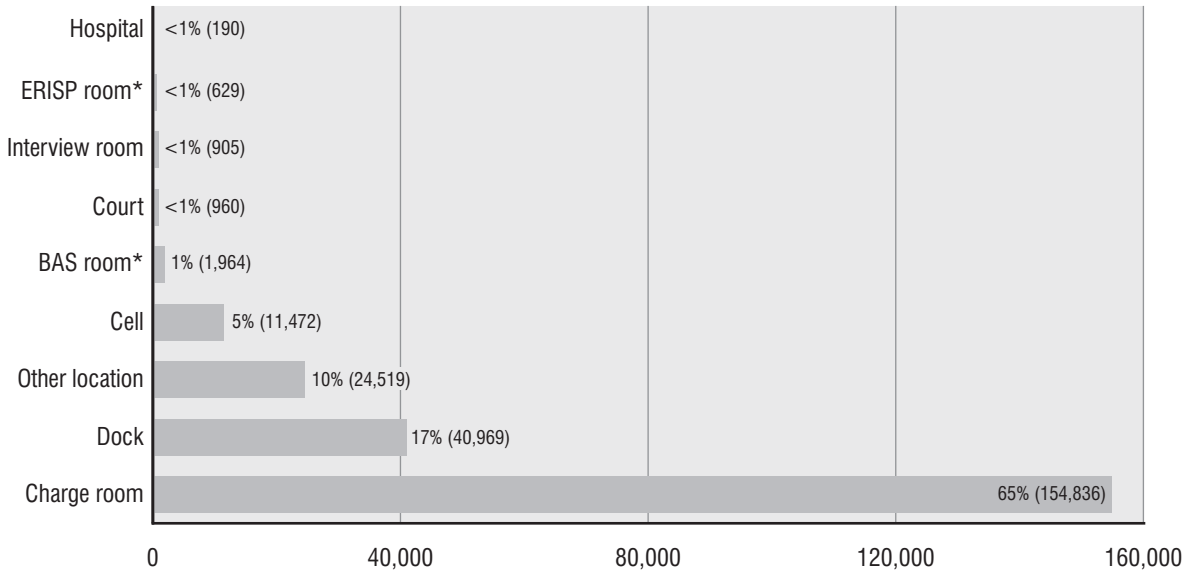
16.2.1.2. While in custody

The COPS data shows that over the review period, 65% of frisk and ordinary searches while in custody occurred in the charge room, while the next largest proportion (17%) occurred in the dock, as shown in figure 8.[401]

400 Focus group with beat officers, LAC A, 2 March 2006, 'We don't do anything out in public. Frisk search is fine because that's just doing their pockets or whatever like that, but anything else you should really take them somewhere else more private even if it's around the street'.

401 The 'dock' refers to small cubicles in the charge room that are within view of the custody manager.

Figure 8. Location of frisk and ordinary searches while in custody



Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2007. * BAS stands for Breath Analysis Section and ERISP stands for Electronically Recorded Interview of Suspected Person. n=236,444.

Information from our Court survey broadly reflected the COPS data. Of those who described a frisk or ordinary search at a police station, 75% of Local Court respondents (72 of 96) and 79% of Children's Court respondents (27 of 34) reported that the search was conducted in relatively public areas such as the charge room (56 Local Court and 23 Children's Court respondents) or the dock (16 Local Court and 4 Children's Court respondents).[402]

In this discussion we have considered location as the primary factor in providing reasonable privacy. Other important factors such as the presence of other people and CCTV surveillance are considered in section 16.2.2 in the context of strip searches. Furthermore, with regard to those searches that appear to have occurred in relatively public areas it is not possible to infer how reasonably practicable it would be to conduct the search elsewhere in the circumstances.

16.2.1.3. Recording issues concerning the location of searches

As noted in section 13.1, personal searches are recorded in two systems on COPS: the event management system which allows officers to choose from field locations; and the custody management system which allows officers to choose from custody locations. These two systems operate independently and are not linked on COPS. While the majority of records in each system appear to relate to field and custody events respectively, it is apparent that there is some cross over and/or duplication.

As indicated above in figure 8, 'other location' comprises 10% of all frisk and ordinary search records in custody. Our analysis of the additional reasons for those records suggests that the category 'other location' includes a number of field locations as shown in table 3.[403]

402 See Appendix 1 (5.7).

403 The COPS custody management system data indicates that over the review period, of the 26,572 searches recorded as 'other location', 21,325 did not record any further information in the additional reasons field. Of the 5,247 records that include further information, 1,386 contain information that could not be considered 'location related' (such as who performed the search, property details, etc) and 189 records indicate that a search was not performed — contrary to the existence of the COPS record. These records are not included in table 3.

Table 3. Additional information for 'other location' in custody records

Field locations identified in additional reasons for custody records	Total
At scene	2,616
Street address	144
Shopping centre	48
Road	35
Police vehicle	34
Train station	25
Hospital	13
Park	13
Airport	9
Education facility	5
Court	4
Total	2,946

Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2007.

Of these custody records that identified the search location as 'other location', we found a number of records that had a matching event management system record for the same incident. For example, one incident the custody management system notes that the person was 'searched at arrest scene by arresting officers' who conducted a frisk search. The same incident was recorded in the event management system as an ordinary search conducted in an outdoor or public place.[404] In another example, the custody management system notes that an ordinary search was conducted on a person who was 'searched at [x] road, [suburb] prior to conveying to police station.' The same incident was recorded in the event management system as a frisk search in an outdoor or public place.[405]

This information is not only recorded for the purpose of our review, we are aware that it is also used by the NSW Police Force to monitor and measure policing activities undertaken by officers and Local Area Commands. All agencies have a responsibility to maintain accurate records to ensure appropriate transparency and accountability. In fact, the number of personal searches and arrests performed by officers are two of the measures used to report on Vikings operations in the NSW Police Force *Annual Report*.[406]

While the accurate recording of this information may not be a high priority, in our view the inaccuracy and potential for duplication suggests that streamlining of the record-keeping systems could reduce data entry and paperwork for police while improving the accuracy of records.

Recommendation

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 not created.

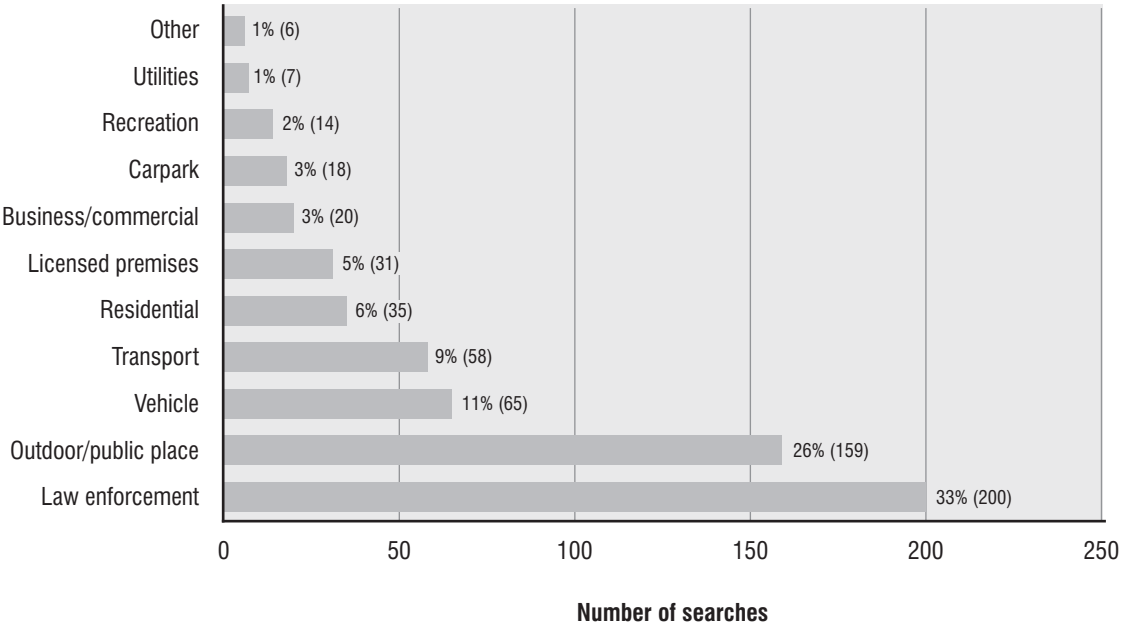
16.2.2. Private area for strip searches

16.2.2.1. In the field

The COPS data indicates that the majority of strip searches in the field were conducted at a law enforcement place (33%). However, this was followed by outdoor/public place (26%), as shown in figure 9.

404 COPS records E28662203 and U29135739.
405 COPS records E30713018 and U30663334.
406 NSW Police Force, *Annual Report 2006–2007*, p.31.

Figure 9. Location of strip searches in the field



Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2007. The category 'other' includes: education, health and unknown — each of which accounted for less than 1% of all strip searches in the field. n=613.

An audit of COPS events revealed that 'law enforcement place' primarily refers to police stations, correctional facilities and security rooms within shopping centres, suggesting that these searches are usually performed in relatively private areas.[407] The second largest category 'outdoor/public place' mainly refers to street locations which would be difficult to classify as private areas.[408] When this is compared with the COPS data for frisk and ordinary searches the largest proportion shifts from 'outdoor/public place' for all searches to the less public 'law enforcement' location for strip searches.[409]

Information from our Court survey indicates that the majority of people who described a strip search in the field reported that the search occurred in an outdoor or public location. Of those who described a strip search in the field, 69% of Local Court respondents (18 of 26) and 73% of Children's Court respondents (8 of 11) reported that they were searched in a public place such as a road, footpath or park.[410] Three of these Local Court respondents reported that police offered them an alternative location for the strip search which was more private, for example, the laundry room at the back of a block of units.[411] One man reported that he protested to police about being searched on the street 'in front of my home to embarrass me in front of neighbours' but no attempt was made to conduct the search in a more private area.[412] A further eight Local Court and three Children's Court respondents who described a strip search in the field reported that they were searched either in a residential setting, including one man who reported that police took him to another room in his house that was more private to conduct the strip search.[413] Other places reported by respondents which may have afforded more privacy included a private office in a shopping centre and a police vehicle.

In consultations, officers suggested that private areas in the field can include a shop doorway,[414] public toilets,[415] the back of a police paddy wagon,[416] or a police station, depending on the location (particularly whether it is rural or metropolitan) of the arresting officers. One officer commented:

407 An audit of the event narratives for 30 COPS events that nominated 'law enforcement' as the location of the strip search indicated that 15 were conducted in custody and four were conducted at a correctional centre. A further two were conducted in a security/manager's room at a shopping centre, three were conducted at a hotel or licensed premises and six did not contain further information about the actual location of the search in the event narrative.

408 An audit of the event narratives for 17 COPS events that nominated 'outdoor/public place' as the location of the strip search indicated that six were conducted on a road or footpath, with the majority of the remainder occurring in more private areas such as private search rooms at events (3), the back of a police vehicle (2), police station (1) or utilities (2). The remaining three did not contain further information about the actual location of the search in the event narrative.

409 See figure 7 in section 16.2.1.1.

410 See Appendix 1 (5.14).

411 Local Court survey 199.

412 Local Court survey 85.

413 Local Court survey 298.

414 Interview with duty officer, LAC D, 3 July 2006, 'take them to an alcove'.

415 Focus group with general duties sergeants, LAC F, 29 October 2007. 'Back of the truck or a toilet block'.

416 Interview with duty officer, LAC C, 19 June 2007. 'We're not going to strip search them on the footpath on a Thursday evening… put them in the truck, strip search them in there if you have to'.

If we can find a particular area to take the person which is away from the public, sometimes you might use the public toilets at a railway station or a shopping centre. Worst case scenario, we'll get a caged truck down and search them in the back of the truck. That way then there's no embarrassment to them.[417]

The requirement that a strip search be conducted in a 'private area' in section 33(1) which operates in addition to the requirement that officers provide reasonable privacy for all searches in section 32(4) suggests that 'private area' involves something more than reasonable privacy. However, what this actually involves is not made clear in LEPRA.

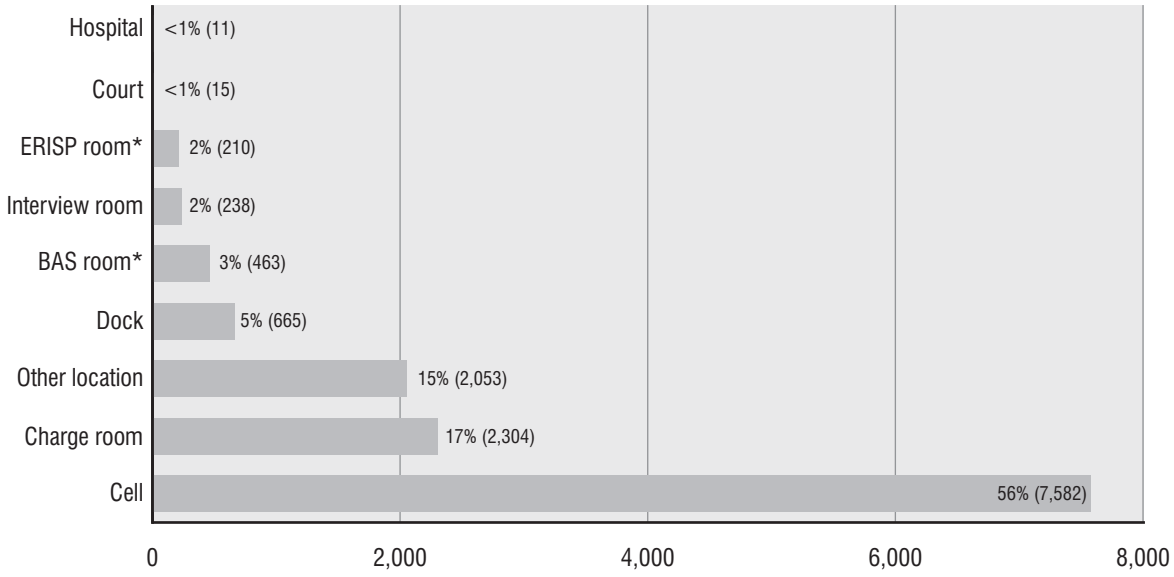
In summary, a number of information sources suggest that the majority of strip searches in the field occur in relatively public areas. While there are some indications that police endeavour to conduct strip searches in more private areas in the field, a considerable proportion of strip searches do occur in locations that are unlikely to be considered private. However, these figures do not provide a direct measure of compliance with the section 32(4) and 33(1) safeguards because it is not possible to measure the extent to which it was reasonably practicable in each circumstance. To some extent this may be addressed through the recommendations we have made in relation to strictly enforcing the threshold requirements in relation to the power to conduct a strip search in the field, as discussed in section 14.4.2. However, it could also be beneficial for the NSW Police Force to ensure that all officers are aware of and understand the privacy requirements for strip searches.

16.2.2.2. While in custody

When strip searches in custody are considered separately, the COPS data also indicates that 56% of those searches were conducted in the cells, followed by 17% in the charge room as shown in figure 10. When this is compared with the data for frisk and ordinary searches in custody the largest proportion shifts from the charge room for frisk and ordinary searches to the cells for strip searches — which would be considered a more private area.[418]

The larger proportion of strip searches conducted in the cells may also be a reflection of the requirements of the *Standard Operating Procedures for CCTV Surveillance in Police Charge Rooms and Other Locations in Police Stations* (the CCTV SOPs). These CCTV SOPs and the issue of strip searches conducted in view of CCTV are considered below in section 16.2.3.

Figure 10. Location of strip searches while in custody



Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2007. *BAS stands for Breath Analysis Section and ERISP stands for Electronically Recorded Interview of Suspected Person. n=13,541.

Information from our Court survey broadly reflected the COPS data. Of those who described a strip search at a police station, 58% of Local Court respondents (47 of 81) and 61% of Children's Court respondents (11 of 18) reported that the search was conducted in an area of the police station that may have afforded a degree of privacy such as the cells (33 Local Court and 5 Children's Court respondents), an interview room (6 Local Court and 2

417 Focus group with proactive sergeants, LAC E, 16 October 2007.
418 See figure 8 in section 16.2.1.2.

Children's Court respondents), or the dedicated search area of the police station (8 Local Court and 4 Children's Court respondents).[419]

Our observations of a small number of charge room CCTV tapes suggested a high rate of compliance with the 'private area' requirement for strip searches while in custody. We viewed 55 interactions on tape where the COPS record noted that a strip search was conducted either in the charge room or the dock.[420] Of those, 75% (41 of 55) were observed to be taken in the direction of the cells (or other more private designated search area within the charge room), where the person could not be observed on tape.[421] A further 18% (10 of 55) were searched in the charge room or docks in ways that would not constitute a strip search under LEPRA.[422]

Only three of the interactions we viewed involved a strip search in an open area of the charge room:

- Two strip searches performed in the dock, where the movements of officers suggested the cells may have been occupied and the dock appeared to be the most private area at the time.[423]
- One strip search performed in the charge room, where the movements of officers suggest that the cells may have been occupied. It was not clear why this open location was chosen for the search as there were other docks available.[424]

The remaining search was conducted in the privacy of the cell but recorded on CCTV because all areas of that particular police station are continuously recorded on CCTV.[425]

Our consultations with police also suggest that officers are more acutely aware of the issue of privacy when it comes to strip searches while in custody. For instance, one officer commented that 'even in a dock you don't strip search them in front of other prisoners'.[426]

In summary, the data and comments from officers and stakeholders suggest that while officers seek to conduct general searches in reasonable privacy, greater efforts are made to ensure privacy for strip searches both in the field and while in custody. We note that providing reasonable privacy in the field can vary depending on the location and circumstances.

16.2.3. CCTV in custody

The CCTV SOPs provide that a camera will generally cover the search area of the charge room.[427] The CCTV SOPs also state that 'searching officers are to ensure that they and any prisoner they are searching stand within the marked area on the floor, in front of the charge counter, throughout the search process'. An exception is made for strip searches which should be 'carried out in an area not covered by the CCTV and in accordance with the Code of Practice for CRIME',[428] which restates the LEPRA requirements.[429]

In comparison, section 632 of the PPRA in Queensland specifies that police are only required to turn the camera off or conduct the search out of view of the camera for a search involving the removal of clothing if the person viewing the search is of the opposite sex to the person being searched. If a camera cannot be turned off for safety or operational reasons, the monitor for that search area must be turned off or used to monitor another area while the person is being searched if reasonably practicable.[430] If a search is recorded, the recording must not be shown to anyone (other than those listed in the Act).[431]

These provisions and the associated police practices in Queensland were considered in detail by the CJC in their report, *Police Strip Searches in Queensland*.[432] In that report, the CJC concluded that strip searches should only be electronically monitored (either in real time in another part of the station or on tape):

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419 See Appendix 1 (5.14). Some charge rooms have a dedicated area for conducting searches that is out of view.
420 Involved five charge rooms with CCTV facilities. Methodology discussed above in section 11.4.2.
421 This includes the six searches partially observed where the person was taken to a more private place (search area) where the officer, but not the person can be observed on CCTV.
422 The 'search' practices that have been included in this category include, frisk and ordinary searches that did not involve the removal of outer clothing, photographing a tattoo that required the person to lift their shirt over their head, rolling up trouser legs, and instances where people removed their own clothing without being asked to do so as part of a search by police.
423 CCTV records 24 and 41.
424 CCTV record 71.
425 CCTV record 50.
426 Focus group with general duties officers, LAC B, 27 March 2006.
427 NSW Police, *Standard Operating Procedures for Video Surveillance in Police Charge Rooms and Other Locations in Police Stations*, January 2005, p.5.
428 NSW Police, *Standard Operating Procedures for Video Surveillance in Police Charge Rooms and Other Locations in Police Stations*, January 2005, p.4.
429 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated May 2008, pp.30–31, and 111–113.
430 *Police Powers and Responsibilities Act 2000* (Qld), s.632(2).
431 *Police Powers and Responsibilities Act 2000* (Qld), s.632(2) includes: the person searched or his or her lawyer; a doctor treating the person searched; a person deciding if a proceeding is to be started against the person for an offence, a police officer investigating an offence involving the person; a police officer, lawyer, public prosecutor or witness involved in a proceeding against the person; or a court.
432 Criminal Justice Commission, *Police Strip Searches in Queensland: An inquiry into the law and practice*, June 2000.

If, in the opinion of the watchhouse manager, there is reason to believe that the QPS [Queensland Police Service] officer conducting the search may be in danger and that it is not otherwise possible to protect the officer, or that the watchhouse manager believes that the detainee may make a false complaint about how the strip search was conducted.[433]

In terms of recording and storage, the CJC recommended:

- The search tape should be recorded in a register that includes details of any copies that are authorised and their movement.
- The detainee should be fully informed about the recording of the search including the possibility that the tape could be used in any future investigation.
- Unauthorised use and possession of videotapes of strip searches, or copies, by Queensland Police Service officers or anybody else should be an offence.[434]

Unlike the PPRA in Queensland, LEPRA is silent on the issue of taping strip searches. As mentioned above, the NSW Police Force CCTV SOPs prohibit it. On the other hand, as an increasing number of stations are updated with more sophisticated digital monitoring and recording systems, the operating procedures must keep pace with the new technology.

For example, our observations of CCTV tapes indicate that continuous taping is already occurring in a small number of police stations. At two stations we attended over the course of the review period, all areas of the custody suite were taped without exception and it was not possible for officers to turn the tape off. However, police at one station reported that because resources were limited, footage of the essential charge room areas were kept for six months on VHS, while footage of other areas of the station including the cells, hallways and lifts were only kept for two weeks on a digital system.[435]

In order to preserve the privacy and dignity of a person during the conduct of a strip search at police stations that have continuous digital CCTV equipment, relevant guidance must be provided. In particular, any such guidance should stipulate where a strip search should be conducted if all areas of the charge room or police station are monitored or recorded on CCTV, and regulate access to that footage in real time and storage and copying of any recordings.

As part of our observations at this station we observed one strip search which was conducted in the privacy of the cells and captured on the digital recording system, as described in the following case study.

Case study 9

Observation of CCTV footage involving a strip search of a man while in police custody

CCTV recording of the cell shows three male officers present for the strip search of a man. One officer conducts the actual search while two others can be seen in the background, just outside the door.

The man takes off his shirt and hands it to the officer, then takes of his pants and hands them to the officer who searches both items and places them on the bed. The man then removes his underwear and shows the officer both sides by turning them inside out but is not required to hand his underwear to the officer. The man then squats to demonstrate that he is not secreting anything between his buttocks, turns around and puts his underwear back on. During the search the officers stand at a distance of approximately one metre. The officers then leave and the man is left to dress himself. The entire search took less than three minutes.

In this instance, the footage was accessed on site by the duty officer in accordance with the information requirements of our office for the purpose of this review. However, it is possible that footage can be used or viewed inappropriately. For instance, in our Children's Court survey, one young person reported that he was moved to a different cell to be searched saying:

I was in a little small cell then they moved me in the big cell with the camera. I was strip searched by two males and when [I] went outside the female police were laughing and my cousin said they had been watching it.[436]

433 Criminal Justice Commission, *Police Strip Searches in Queensland: An inquiry into the law and practice*, June 2000. Recommendation 9.1, p.75.
434 Criminal Justice Commission, *Police Strip Searches in Queensland: An inquiry into the law and practice*, June 2000. Recommendations 9.3, 9.5 and 9.7 pp.80–81.
435 CCTV LAC 3, attended 30 November 2007.
436 Children's Court survey 2.

The main argument against conducting strip searches in areas covered by CCTV relates to the risks of inappropriate access to tapes and monitors that would compromise the person's privacy and dignity during the search.

As the safeguards in Part 4, Division 4 demonstrate, privacy and dignity are at the core of the search safeguards. The recording of strip searches in itself need not contravene these important protections. The taping of a person's whole interaction with police from the moment they enter police custody at a police station — including any strip searches — can help to promote greater accountability by providing a continuous, independent account of events, thereby promoting greater compliance with the search safeguards.

In consultations, community stakeholders such as Professor David Dixon, Dean of UNSW Law School, and Andrew Haesler SC, Deputy Senior Public Defender, expressed support for this view provided that the tapes are stored securely and accessed properly. In particular, Professor Dixon noted:

> *If you're able to completely avoid a system [by taking a person out of view of the camera] then it doesn't make any difference but if you have the technology which requires a detention to be tracked from beginning to end, that is really significant.*[437]

This view was supported by Andrew Haesler SC who noted:

> *With more security, I think the more that's videotaped, the better. I think everyone's becoming a bit more aware [of information security requirements] and I think that that level of protection is probably worth it.*[438]

Our consultations with police indicate that many officers would support more extensive taping, primarily in order to verify the truth of complaints regarding incidents while in custody. As one officer commented, reasons for having taping include:

> *So there's no allegations of anything, I'm a great believer in the ICV [in-car video] in the highway cars, videos and everything. Then if an article is found [during a search] and it pops out of their underwear there it is on the video as well.*[439]

In our Court survey we asked people who described a strip search at a police station whether they would have liked the strip search recorded on CCTV if the information was stored securely. While just under half the Local Court respondents said they would have liked the search recorded, the Children's Court respondents were equally divided between those who were undecided, supported and opposed the idea.[440]

Those who said they would agreed to the search being recorded in those circumstances included a woman who commented that she would have 'preferred to be on video [because] it's on record',[441] and a boy who commented 'I think I'd be better off' if the search was recorded.[442] One woman who said she would be opposed to the idea of recording strip searches reported that there was a camera in the cell where she was searched, which police told her was turned off, however, she still felt very uncomfortable.[443]

In summary, there is some support for the wider use of CCTV in police stations generally and charge rooms more specifically. In our view the varying availability and quality of CCTV in charge rooms across New South Wales must first be addressed at a corporate level.

16.2.4. Strip searches must not be conducted in the presence or view of people who are not necessary to the search

Section 33(1)(c) provides that a strip search of a person must not be conducted in the presence or view of people whose presence is not necessary for the purposes of the search, as far as is reasonably practicable in the circumstances.

16.2.4.1. Police presence for strip searches

In consultations, officers suggested that the presence of more police officers is sometimes an operational or tactical decision, as one officer said:

> *It might be that someone starts to resist and you may have to restrain them but then it's about trying to change the situation. Extra police might cause them to comply just by the physical presence alone but then some people might say "there's too many cops there, you shouldn't be searching the person with so many people*

437 Interview with Professor David Dixon, Dean of UNSW Law School, 13 August 2007.
438 Interview with Andrew Haesler SC, Public Defenders Office NSW, 17 December 2007.
439 Interview with custody manager, LAC E, 16 October 2007.
440 46% (37 of 81) Local Court respondents and 33% (6 of 18) Children's Court respondents said that they would like the search recorded if the footage was kept secure. See Appendix 1 (6.6).
441 Local Court survey 100.
442 Children's Court survey 61.
443 Local Court survey 110.

around". The environment we're making decisions in — it's not a pristine environment, there are so many variables with so many things going on.[444]

Given that this safeguard applies to the extent that it is reasonably practicable in the circumstances, it is not possible to infer a level of compliance based purely on reported number of officers present, however, we note that in our Court survey a large proportion of people reported that three or more police officers were present for a strip search in the field.[445]

As noted above, in some circumstances the level of police presence may be a tactical decision. However, in other circumstances, it appears that police may not have given adequate consideration to the section 33(1)(c) safeguard, or used a high level of police presence to exert control over the person being searched. For instance, one man surveyed in the Local Court who described a strip search in the field told us there were 'nine officers around me in my home. It was pretty intimidating'.[446]

The Code of Practice for CRIME currently advises that when strip searches are conducted while in custody officers should:

Have the search carried out … where possible in the presence of a senior officer (custody manager, duty officer, supervisor) not connected with the investigation.[447]

This suggests that while in custody, the general practice is to conduct strip searches in the presence of two officers wherever possible, which was confirmed through information from our Court survey and our observations of strip searches while in custody captured on CCTV. In charge room CCTV observations, observers took note of the number of officers present for the search. In the majority of searches observed, two officers were present. However, it was not evident that one of those officers was necessarily a senior police officer. Similarly, in our Court survey the majority of people who described a strip search at a police station reported that two officers were present for the search.[448]

Other jurisdictions that place similar restrictions on the number of people present include the Commonwealth, the Australian Capital Territory, Western Australia and Queensland.[449] In their report *Police Strip Searches in Queensland*, the CJC noted that the number of officers present during a strip search may cause concern to the person being searched particularly if the increased presence is 'a tactic of intimidation' or causes embarrassment.[450] However, the CJC went on to note that strip searches are potentially dangerous procedures and there are safety concerns for officers. As a result, it was recommended that the Watchhouse Manager should be responsible for deciding how many officers are present for a strip search while in custody, but that no more than two officers should be present unless a forced strip search is required.[451]

In summary, while acknowledging that a sizable police presence may be required on occasion, all officers should be reminded of their obligation to avoid conducting strip searches in the presence or view of people who are not necessary to the search — including additional police officers.

16.2.4.2. The presence of people other than the searching officer and support people

In our Court survey we also asked people whether anyone other than the searching officer or their support person (where relevant) could see them, and if so, who those people were. In relation to strip searches on arrest, more than half of all respondents reported that someone other than the searching officer or their support person could see them during the search (58% of Local Court and 55% of Children's Court respondents), including members of the general public, friends and family.[452] For instance, one woman commented that her neighbours could see her during the search which she described as including removal of her top and pants.[453]

The proportion of people who reported that the search was visible to others was lower for searches in custody (22% of Local Court and 33% of Children's Court respondents), possibly due to the more controlled conditions of the charge room.[454] This mainly included other police officers for example, one man commented that 'staff at the front

444 Interview with duty officer, LAC B, 23 July 2007.
445 14 of the 26 Local Court respondents and all of the 11 Children's Court respondents who described a strip search in the field reported that three or more officers were present for the search. See Appendix 1 (5.15).
446 Local Court survey 85.
447 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated May 2008, p.31.
448 41 of the 81 adults and 11 of the 18 young people who described a strip search at a police station reported that two officers were present for the search. See Appendix 1 (5.15).
449 *Crimes Act 1914* (Cth), s.3ZI(1)(d); *Crimes Act 1900* (ACT), s.228(1)(d); *Criminal Investigation Act 2006* (WA), s.72(3)(f); and *Police Powers and Responsibilities Act 2000* (Qld), s.630(2).
450 Criminal Justice Commission, *Police Strip Searches in Queensland: An inquiry into the law and practice*, June 2000, p.64.
451 Criminal Justice Commission, *Police Strip Searches in Queensland: An inquiry into the law and practice*, June 2000, p.64.
452 15 of the 26 Local Court respondents and six of the 11 Children's Court respondents who described a strip search in the field reported that the search was visible to other people. See Appendix 1 (5.15). Again, these relatively high figures may be influenced by police practices in the field and the person's recollection of the situation.
453 Local Court survey 19.
454 18 of the 81 Local Court respondents and six of the 18 Children's Court respondents who described a strip search at a police station reported that the search was visible to other people. See Appendix 1 (5.15).

counter' could see him during the search which he described as including removal of his top, shorts and underwear.[455]

In summary, information from our Court survey suggests that a considerable proportion of strip searches were conducted in the presence or view of people who may not have been necessary to the search. However, as with the level of police presence, it is not possible to infer a level of compliance based purely on these figures since an exception may be made if it is not reasonably practicable in the circumstances. Nevertheless, police should be mindful of the person's privacy and dignity especially when conducting strip searches, and efforts should be made to remind officers of their responsibilities in relation to the section 33(1)(c) safeguard when conducting strip searches.

16.2.4.3. Exceptions to the restriction on the presence of people who are not necessary to the search

Section 33 contains exceptions which allow for the presence of other people during a strip search, namely the presence of:

- a support person who may be present for a strip search of any person under section 33(2)
- a support person who must be present for a strip search of a child or person with impaired intellectual functioning under section 33(3), or
- a medical practitioner of the opposite sex who may be present for a strip search of any person under section 33(7).

The support person provisions are considered below in section 16.4.

If section 33(7), is designed to ensure that a strip search can be conducted in the presence of a medical practitioner, it is not clear why it has been limited to medical practitioners *of the opposite sex*. On the other hand, if the sex specific exception in section 33(7) is intended to imply that a medical practitioner of the same sex can *ordinarily* be present (as a person who is 'necessary for the purpose of the search'), it is not clear why medical practitioners of the opposite sex have been legislated for specifically when an exception can be made for the presence of anyone of the opposite sex under section 33(1)(b) in circumstances where it is not reasonably practicable to comply with that safeguard.

Moreover, if a special exception is required to allow for the presence of a medical practitioner *of the opposite sex*, it is not clear why no equivalent exception has been made for parents, guardians or personal representatives *of the opposite sex*, or more importantly, whether the presence of support people of the opposite sex is adequately provided for under existing provisions.

In our view the exceptions to section 33(1)(c) should be limited to the person's role or relation to the person being strip searched — that is the necessary presence of a: parent, guardian, other support or medical practitioner — regardless of that person's sex. If the person performing that role is of the opposite sex, this should be adequately addressed in the context of section 33(1)(b), which safeguards people from being searched in the presence of people of the opposite sex but makes an exception if it is not reasonably practicable to do so in the circumstances.

16.2.5. Strip searches must not be conducted in the presence or view of the opposite sex

Section 33(1)(b) provides that a strip search of a person must not be conducted in the presence or view of people of the opposite sex to the person being searched, as far as is reasonably practicable in the circumstances.

All six of the Children's Court respondents and 14 of the 15 Local Court respondents who reported that people other than the searching officer could see them during a strip search on arrest, said that the search was visible to people of both sexes. The remaining person reported that he was searched by a male officer in his own home and his male friends could see the search.[456]

With regard to strip searches while in custody, five of the 18 Local Court respondents and one of the six Children's Court respondents who reported that people other than the searching officer could see them during the strip search said that the search was visible to people of both sexes.

While the proportion of those who said they could be seen by people of the opposite sex in the field is high, it must be remembered that this figure is a proportion of those who said other people could see them — not of all people who described a strip search in the field. This discussion is only concerned with the proportion of people who said they could be seen by people of the opposite sex because the presence of other people who are not necessary to the search constitutes a breach in itself, as discussed above in section 16.2.4.

455 Local Court survey 51.
456 Local Court survey 231.

In addition, while it appears that a much greater proportion of people could be seen by the opposite sex when strip searched in the field in comparison to strip searches that occurred while in custody, the less controlled conditions in the field may restrict the extent to which it is reasonably practicable for police to comply with this safeguard when conducting strip searches on arrest.

Furthermore, while a search may have been performed in the presence or view of a person of the opposite sex, the situation may have been such that it was not reasonably practicable to do otherwise, as illustrated in the case study below.

Case study 10

Complaint alleging a strip search of a man in custody in the presence of a female police officer

In December 2006 our office received a complaint from a man alleging that he had been strip searched unnecessarily in the presence of a female officer when he was taken into custody at a police station.

Police investigated the matter and reported that a female police officer was present behind the charge room counter and was able to view the search for a short time when she approached to provide gloves at the request of the male officers who were conducting the search.

Our office reviewed the CCTV footage of the charge room and found that it appeared that the search was conducted out of view of the female officer as far as reasonably practicable in the circumstances.

Western Australian legislation provides that any person present during a strip search that involves examination of the person's 'private parts' must, if it is practicable, be of the same sex as the person being searched.[457] The Commonwealth and Australian Capital Territory legislation provide that a search must not be conducted in view of persons of the opposite sex with the exception of medical practitioners or the person's family or personal representative.[458] Queensland does not have any specific provisions relating to the sex of those who can see a search that involves the removal of clothing but includes this as a privacy consideration in an example of what reasonable privacy might mean within the Act.[459]

In summary, it appears that there may be considerable room for improvement in terms of ensuring that strip searches are conducted out of view of people of the opposite sex — particularly in the field. However, we note that in circumstances where it is necessary to conduct a search in the presence or view of other people, it may be equally difficult to prevent the search from occurring in the presence of people who are of the opposite sex.

Recommendations

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 strip searches may be conducted in order to fulfil the 'private area' requirement in section (1)(a) 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
    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.
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.

457 *Criminal Investigation Act 2006* (WA), s.72(3)(b).
458 *Crimes Act 1914* (Cth), s.3ZI(1)(c), (3) and (4); *Crimes Act 1900* (ACT), s.228(1)(c), (3) and (4).
459 *Police Powers and Responsibilities Act 2000* (Qld), s.630(2). Example states, 'Reasonable privacy may be provided by conducting the search in a way that ensures, as far as reasonably practicable, the person searched cannot be seen by anyone of the opposite sex.'

Recommendation

19. Parliament consider amending the section 33(7) strip search safeguards to permit the presence of a medical 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).

16.3. Dignity issues relating to the search safeguards

Sections 32 and 33 are set out in full in section 9.2. In brief, the dignity safeguards include requirements that:

- the person must be asked for their cooperation[460]
- police must conduct the least invasive kind of search practicable in the circumstances[461]
- the search must be conducted as quickly as is reasonably practicable[462]
- the person must be searched by an officer of the same sex[463]
- the person's genital area including the breasts of a female or transgender person who identifies as a female must not be searched[464]
- the person must not be searched while being questioned[465]
- the person must be told whether they will be required to remove clothing during the search and if so, why[466]
- the person must be allowed to dress as soon as the search is finished[467]
- the person must be left with or given reasonably appropriate clothing if their clothes are seized because of the search.[468]

If a strip search is conducted, additional safeguards that protect the person's dignity specify that the strip search:

- must not involve a search of the person's body cavities or an examination of the body by touch[469]
- must not involve removal of more clothes than reasonably necessary for the purpose of the search[470]
- must not involve more visual inspection than reasonably necessary for the purpose of the search.[471]

16.3.1. Cooperation must be requested

Section 32(3) states that in conducting a search the police officer or other person must 'ask for the person's co-operation' provided that it is reasonably practicable to do so in the circumstances.

In consultations, most officers indicated that this is common practice because it assists their work, as the following comments from officers suggest:

> *I think that's the way it normally is. It's all about communication with them. It makes it pretty difficult if you don't.*[472]

> *You seek [their cooperation] wherever you can, the more cooperation you can get with them the better.*[473]

Others indicated that they only ask for a person's cooperation if the person starts to get violent or begins to be uncooperative. As one officer said, 'Unless they begin to not cooperate, I don't think you need to ask'.[474]

460 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.32(3).
461 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.32(5).
462 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.32(4)(b).
463 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.32(7).
464 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.32(6) and (11).
465 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.32(8) and (11).
466 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.32(1) and (2).
467 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.32(9).
468 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.32(10).
469 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.33(4).
470 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.33(5).
471 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.33(6).
472 Focus group with sergeants, LAC D, 24 May 2006.
473 Focus group with sergeants, LAC G, 29 August 2006.
474 Focus group with detective constables, LAC F, 26 July 2006.

Our Court survey indicates that almost half of all people searched were asked for their cooperation. Of those who described a search in the field, 44% of Local Court respondents (77 of 174) and 55% of Children's Court respondents (33 of 60) reported that police requested their cooperation. Similarly, in relation to searches in custody 42% of Local Court respondents (74 of 177) and 46% of Children's Court respondents (24 of 52) reported that police requested their cooperation.[475]

As with LEPRA, requesting the cooperation of the person being searched is a feature of both the Queensland and Western Australian regimes. In Queensland the officer must request the person's cooperation before the search if it is reasonably practicable,[476] while in Western Australia officers are directed to request the person to consent to the search, rather than just to cooperate.[477]

In summary, the requirement that officers seek the person's cooperation appears to be a sensible safeguard and no practical difficulties have been identified during the review.

16.3.2. A search must be of the least invasive kind practicable in the circumstances

Section 32(5) states that police officers or other persons must conduct 'the least invasive kind of search practicable in the circumstances'.

In the three tiered regime, searches increase in invasiveness from frisk, through ordinary, to strip.Analysis of the COPS data indicates that the second tier of ordinary searches are the most common type of search performed by police — comprising 73% of all searches in the field and 76% of all searches in custody, while frisk searches accounted for 25% of all searches in the field and 19% of all searches in custody.[478] However, the data does not disclose whether the type of search conducted was the least invasive search that was practicable in the circumstances.

When we asked police about the circumstances in which they conduct searches, a number of officers indicated that an ordinary search is usually required at a minimum for reasons of safety and effective policing. As one officer said:

> *It's very rare to do a frisk search. I don't even know whether I've done one, 99% of our searches would be ordinaries. I don't think I've every recorded a frisk.*[479]

Nor is it possible to infer whether searches reported in our Court survey were the least invasive type possible in the circumstances.

In comparison the Western Australian *Criminal Investigation Act 2006* sets a slightly higher threshold specifying that the search must not be more intrusive than is reasonably *necessary.*[480] Like Western Australia, the PPRA in Queensland also restricts the level of searches according to necessity rather than practicability by limiting searches in public to outer clothing unless an immediate and more thorough search is *necessary* — in which case police should take the person to be searched to a location out of public view.[481]

While 'necessity' may provide a stronger safeguard, it is not evident that amending LEPRA in this respect would result in substantial changes to police searching practices, nor is it evident that police are currently conducting searches that exceed the level necessary to carry out their work. Consequently, based on the available information the requirement that police conduct the least invasive search practicable in the circumstances appears to be a reasonable safeguard and no practical difficulties have been identified during the review.

16.3.3. A search must be conducted as quickly as reasonably practicable

Section 32(4)(b) states that a police officer or other person must conduct the search 'as quickly as is reasonably practicable'. A similar requirement is provided in Western Australia.[482] As with the requirement that officers conduct the least invasive search, it is difficult to measure the level of compliance with this safeguard as the level of practicability will vary with every situation.

As part of our Court survey, people were asked to give an indication of how long the search took to provide some indication of the duration of searches generally.

475 See Appendix 1 (5.6).
476 *Police Powers and Responsibilities Act 2000* (Qld), s.630(1)(a).
477 *Criminal Investigation Act 2006* (WA), s.70(2)(c).
478 As shown in figures 1 and 2 in section 13.2.
479 Focus group with constables, LAC G, 29 August 2006.
480 *Criminal Investigation Act 2006* (WA), s.70(3)(b).
481 *Police Powers and Responsibilities Act 2000* (Qld), s.624(1)(c) and (d).
482 *Criminal Investigation Act 2006* (WA), s.70(3)(a).

16.3.3.1. In the field

Approximately half of the respondents in our Local Court survey reported that searches on arrest in the field took less than five minutes. In the Local Court 51% of respondents (76 of 148) who described a frisk or ordinary search and 50% of respondents (13 of 26) who described a strip search in the field reported that the search took five minutes or less.[483]

16.3.3.2. While in custody

Responses were more varied for searches while in custody. In our Local Court survey, 68% of respondents (65 of 96) who described a frisk and ordinary search and 49% of respondents (40 of 81) who described a strip search at a police station reported that the search took five minutes or less.[484]

As part of our observation of strip searches in custody captured on CCTV tape, we noted how long the strip search took *or* how long the person was taken out of view of the CCTV camera if the search itself was not recorded on the tape. Of those strip searches that we observed, the length of time taken to conduct a search ranged from one minute to 11 minutes with the average strip search taking four minutes.[485] Our observations did not disclose any instances of unnecessarily long searches.

In summary, while the time taken to conduct a search cannot be used to gauge whether a search was performed as quickly as possible in the circumstances, the data does suggest that searches both in the field and while in custody are generally conducted swiftly. This requirement appears to be a reasonable requirement and no practical difficulties have been identified during the review.

16.3.4. A search must be conducted by an officer of the same sex as the person being searched

Section 32(7) states that frisk, ordinary and strip searches must be conducted by an officer or other person of the same sex as the person searched, to the extent that it is reasonably practicable in the circumstances.

In consultations, police officers agreed that this safeguard is reasonable and appropriate, and reflects long-standing police practice saying:

> *You always had to have a same sex officer searching them so that hasn't really changed. That stuff was all in [The Code of Practice for] CRIME before anyway.*[486]

> *I wouldn't necessarily want to be searched by a female, the same as I wouldn't necessarily want my wife to be searched by a male. I think they're reasonable.*[487]

The requirement that searches be conducted by an officer of the same sex is common to the majority of Australian jurisdictions.[488] The Queensland PPRA contains one of the most onerous of the same sex search requirements. Section 624 of the PPRA not only provides that the person conducting the search must be of the same sex 'unless an immediate search is *necessary'*, it also gives an example of when an immediate search may be necessary, namely, 'because the person searched may have a bomb strapped to his or her body or has a concealed firearm'.

16.3.4.1. In the field

The COPS data indicates that over the review period, 81% of frisk and ordinary searches in the field were conducted by an officer of the same sex as the person being searched and 18% were conducted by an officer of the opposite sex to the person being searched, as shown in figure 11.[489]

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483 Slightly larger proportions of Children's Court respondents reported quick searches: 30 of the 49 respondents who described a frisk or ordinary search in the field and six of the 11 respondents who described a strip search in the field reported that the search took less than five minutes. See Appendix 1 (5.8).

484 In the Children's Court, 20 of the 34 respondents who described a frisk or ordinary search at a police station and 12 of the 18 respondents who described a strip search at a police station reported that the search took less than five minutes. See Appendix 1 (5.8).

485 Based on the 31 strip searches we observed where we were able to make a note of the time. This included four strip searches observed directly and 27 inferred from time spent out of view of the CCTV camera.

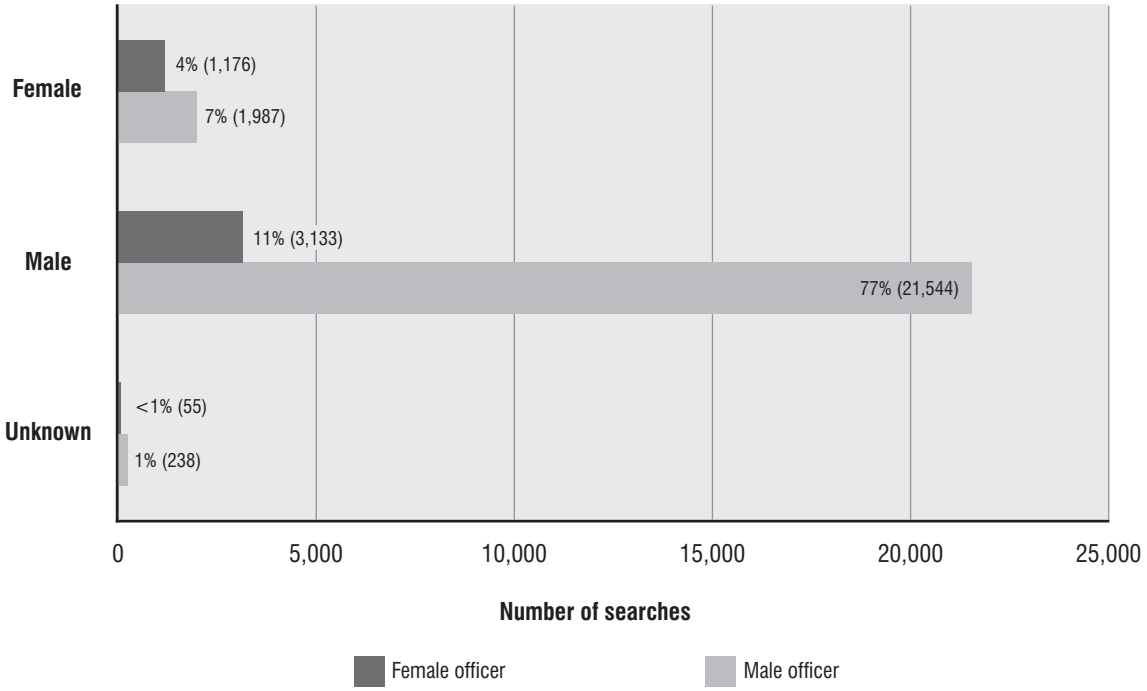
486 Focus group with general duties constables, LAC C, 8 May 2006.

487 Interview with senior constable, LAC F, 30 October 2007.

488 *Crimes Act 1914* (Cth), s.3ZR; *Police Powers and Responsibilities Act 2000* (Qld), s.624(2); *Criminal Investigation Act 2006* (WA), s.72(3); *Police Administration Act 1978* (NT), s.120E; *Police Manual* (Vic), s.5.1; and additionally for strip searches: *Crimes Act 1914* (Cth), s.3ZI(1); and *Crimes Act* 1900 (ACT), s.228(1).

489 The COPS data indicates that over the review period 81% of frisk and ordinary searches (22,720 of 28,133) were conducted by an officer of the same sex as the person being searched and 18% of searches (5,120 of 28,133) were conducted by an officer of the opposite sex to the person being searched in the field.

Figure 11. Frisk and ordinary searches in the field according to sex



Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2007. n=28,133.

Information from our Court survey suggests that an even lower proportion of searches were conducted by an officer of the opposite sex.

In the Local Court, one woman reported that police did not search her because a female officer was not available to conduct the search.[490] In the Children's Court, five of the 49 respondents who described a frisk or ordinary search in the field reported that the officer who searched them was of the opposite sex. In two of the five instances the young person noted that no officers of the same sex were present at the scene.[491]

While awareness and compliance with this safeguard appears to be high in relation to searches of females, it appears that this may not be clearly understood that a male officer must also conduct a search of a male unless it is not reasonably practicable to do so in the circumstances, as the following case study demonstrates.

Case study 11

Complaint alleging an ordinary search of a male conducted by a female officer when a male officer is present and able to conduct the search

In February 2006, our office received a complaint regarding the execution of a search warrant on licensed premises. The warrant was executed at night in a partly lit outdoor area and the searches were video taped as required by the standard operating procedures for search warrants.

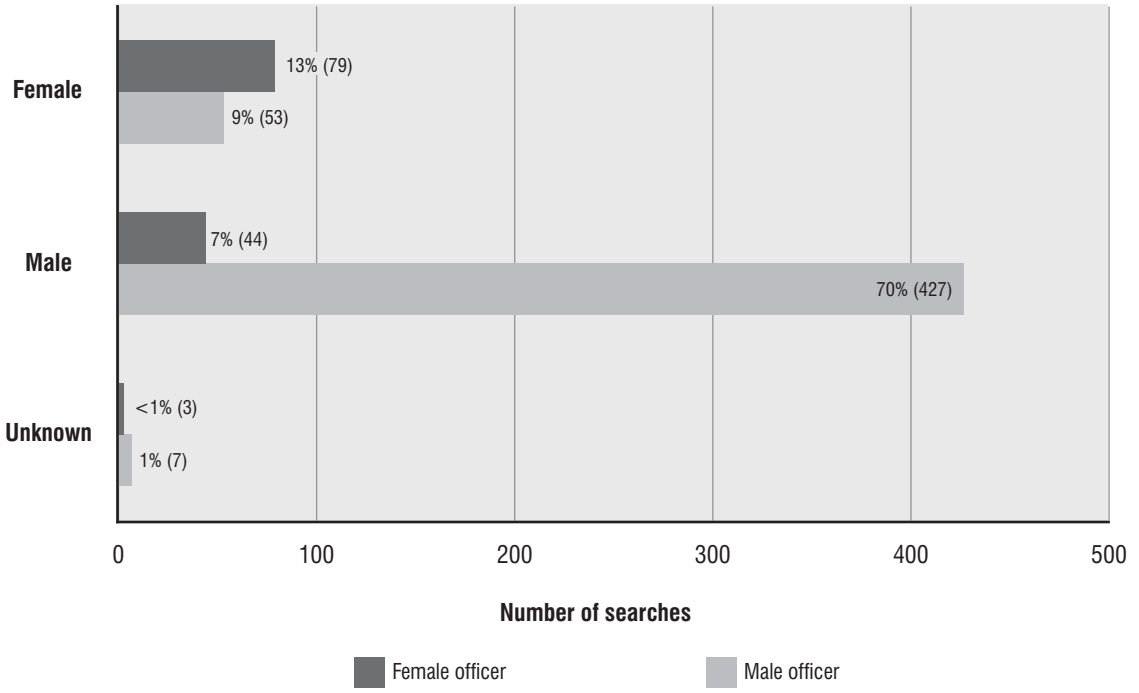
Our office reviewed the tape which showed a male being searched by a female police officer while a more senior male officer stood to one side, lighting the scene with a torch.

Our office advised police that in accordance with sections 32(1) and (7) of LEPRA, searching officers should be the same sex as the person being searched unless it is not reasonably practicable in the circumstances and that it did not appear to be impracticable for an officer of the same sex to perform the search in this instance given that the tape recording of the search showed a male officer was available to conduct the search at the time.

490 Local Court survey 172. A quantitative analysis is not included because this question was not asked consistently in our Local Court survey.
491 Children's Court surveys 51 (14 year old girl reported being searched by male officer) and 57 (17 year old boy reported being searched by female officer).

When strip searches are considered separately, the proportion of searches reported on COPS as conducted by an officer of the opposite sex fell from 18% for frisk and ordinary searches to 16% for strip searches, as shown in figures 11 and 12.

Figure 12. Strip searches in the field according to sex



Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2007. n=613.

In our Court survey, the majority of people who described a strip search in the field reported that the officer who searched them was of the same sex.[492] Only two Local Court and one Children's Court respondent reported that the officer who searched them was of the opposite sex:[493]

- A 22 year old woman who described a search that involved removal of her trousers, shirt, underwear and bra reported that she was searched by a male officer who was the only officer present at the scene.[494]
- A 21 year old man who described a search that involved removal of his shirt reported that he was searched by a male and a female officer.[495]
- A 16 year old boy who described a search that involved removal of his shirt reported that he was searched by a female officer even though there were male officers present at the scene.[496]

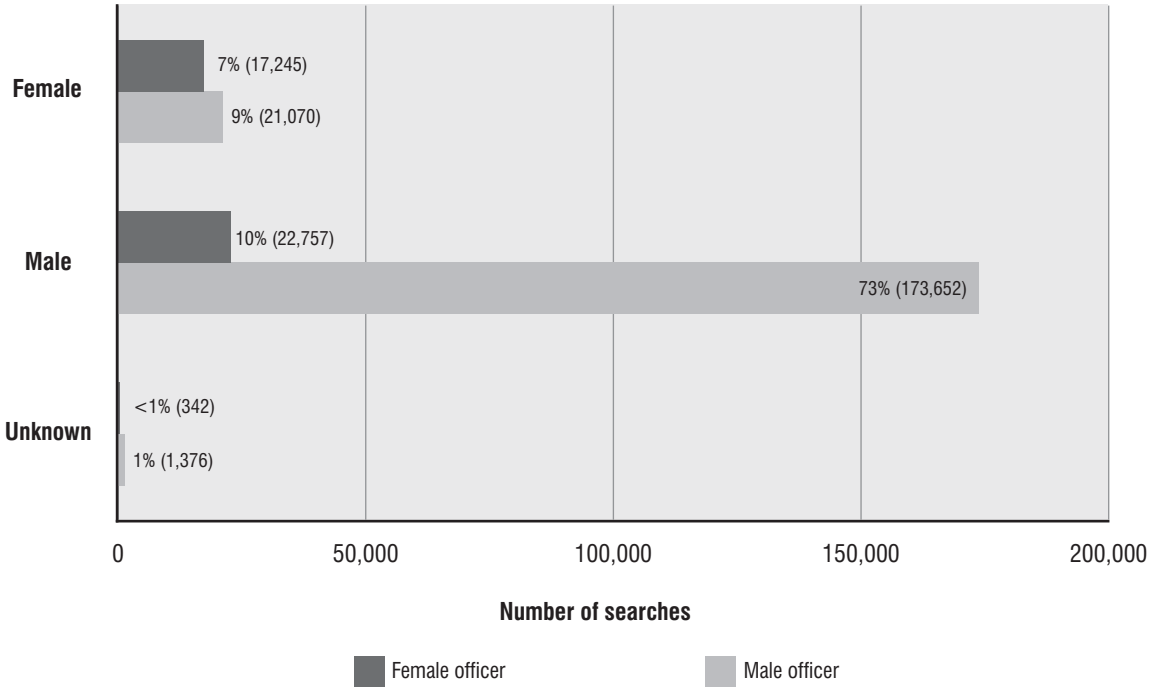
16.3.4.2. While in custody

The COPS data indicates that over the review period 81% of all searches performed while in custody were conducted by an officer of the same sex as the person being searched and 18% were conducted by an officer of the opposite sex to the person being searched.

When strip searches are considered separately, the proportion of searches conducted by an officer of the opposite sex fell from 19% for frisk and ordinary searches to 8% for strip searches as shown in figures 13 and 14.

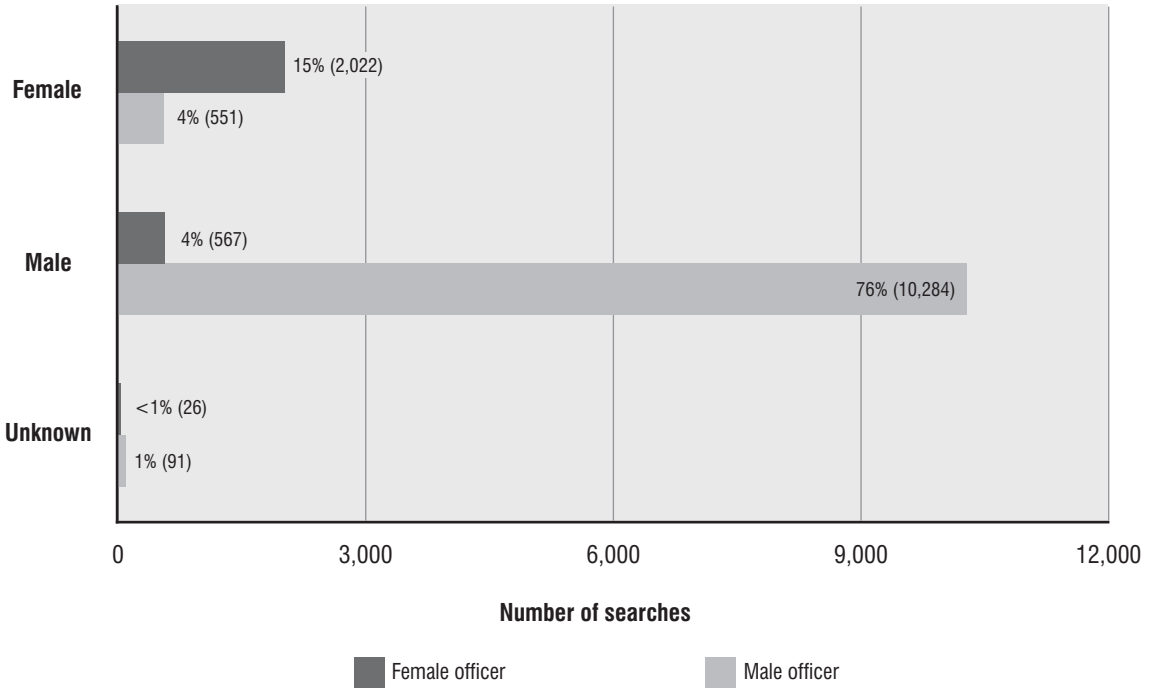
492 81% of Local Court respondents (21 of 26) and 91% of Children's Court respondents (10 of 11) who described a strip search in the field reported that the officer who searched them was of the same sex. See Appendix 1 (5.10).
493 The remaining three adults could not remember or did not provide an answer.
494 Local Court survey 295. The woman advised that she was facing a fraud charge.
495 Local Court survey 253. The man advised that he was facing charges for theft, motor vehicle theft and receiving stolen goods.
496 Children's Court survey 46. Young person advised that he was a motor vehicle theft charge.

Figure 13. Frisk and ordinary searches while in custody according to sex



Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2007. Note: it was not possible to identify the sex of the officer in two recorded searches while in custody. A check of the record indicated the officers in question had been 'terminated'. Those two records have not been included in this count. n=236,442.

Figure 14. Strip searches while in custody according to sex



Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2007. n=13,541.

Again, information from our Court survey supports the view that the majority of strip searches in custody are conducted by an officer of the same sex as the person being searched. None of the Local Court or Children's Court

respondents who described a strip search at a police station reported that the officer who searched them was of the opposite sex.[497]

Comments made by police officers in consultations also indicate that searches (particularly strip searches of women) are generally conducted by an officer of the same sex, as the following comments suggest:

> *I'd be very surprised if anybody did an opposite sex strip search. In fact it just wouldn't happen in this LAC. The opposite sex searching for your ordinary or frisk, that probably does happen which is no major issue given the nature of the search. Of course if you had a female available to search the female well that's more preferable but if you haven't there's no issue with a male doing a pat search. I'm talking pockets, coat pockets, that sort of thing that's all.*[498]

> *A male wouldn't do [a strip search of] a female; even in an urgent situation a female would be found.*[499]

> *Oh generally done by the same sex but I mean boys never search girls. We always try and find a girl but I've searched lots of blokes. Girls search blokes, not strip searching or anything but ordinary searching … if there's no male nearby and you need to have a look.*[500]

The practice of obtaining a female officer to conduct strip searches in custody was observed by our researchers during charge room observations as illustrated in the case study below.

Case study 12

Observation of a strip search in custody involving a female where police arranged for a female officer to conduct the search

During observations at a police station a woman was brought into the charge room by two male officers in relation to a domestic violence offence.

The woman was introduced to the custody manager who explained that he would arrange for a female officer to attend to search the woman. Approximately 10 minutes later a female officer attended and took the woman to an interview room to be strip searched. Our observer stood outside the door — out of view of the woman and listened to the exchange.

The officer asked the woman to take her jacket off and checked the jacket. The officer then asked the woman if she had a bra on. The woman reported that she did. The officer asked the woman to lift her shirt and explained to the woman that she would need to check under her bra. The officer then asked the woman if she had underwear on. The woman said no. The officer asked her to take off her trousers and turn them inside out. Woman said 'oh my god', while apparently doing as the officer requested. The officer replied 'people always hide drugs and things down there'. Officer asked if the woman would prefer to remove her shoe laces or take her shoes off instead. The woman agreed to hand over her shoes and was returned to the charge room. The search took approximately four minutes.

The custody manager had a brief exchange with the searching officer and recorded the search as an ordinary search in the cells.

This safeguard applies to the extent that it is reasonably practicable, which means that there may be circumstances where it would be acceptable for an officer of the opposite sex to conduct a search where an officer of the same sex is not available. As one senior officer told us:

> *If there are two [male] officers on and there's a female that's had a knife or she's armed, if she stabs herself or she stabs somebody else then you'd be criticised. I tell people "you're allowed to do it under these circumstances" and they don't believe you because they think a bloke can't search a female.*[501]

Another female officer commented, 'If I think that I've got a male with a weapon on him I'm not going to sit there and wait for an hour putting my life in jeopardy'.[502]

497 86% of Local Court respondents (70 of 81) and 100% of Children's Court respondents (18 of 18) who described a strip search at a police station reported that the officer who searched them was of the same sex. The remaining 11 Local Court respondents could not remember or did not provide an answer. See Appendix 1 (5.10).
498 Interview with duty officer, LAC F, 30 October 2007.
499 Interview with brief handler, LAC D, 6 August 2007.
500 Interview with general duties senior constable, LAC D, 6 August 2007.
501 Interview with duty officer, LAC E, 17 October 2007.
502 Focus group with general duties constables, LAC E, 17 October 2007.

16.3.4.3. Recording issues concerning the sex of officer and person being searched

The proportion of people searched by an officer of the opposite sex has been calculated based on the sex of the person — as recorded in the 'person details' screen on COPS, and the sex of the officer who conducted the search — as recorded in the NSW Police Force personnel system.

While the COPS data does provide some indication of police compliance with this safeguard, we note that there are issues relating to the accuracy of the information recorded in the system.

Recording the sex of the person searched

As the break down of searches according to sex in figures 11 to 14 show, the sex of a small proportion of people was recorded as unknown. Further analysis of this category suggests that this is not because the sex of the person was not discernable, as the person's details and/or narrative often provides some indication of the person's sex. While we would not suggest taking further action to remedy this data entry issue because there are good reasons for not altering the Central Names Index records where these details are recorded, we note this as a factor affecting the reliability of the data presented here.

Recording the sex of the officer who conducted the search

A different issue arises regarding the sex of the officer who conducted the search. COPS automatically identifies the officer who is logged on to the system as the searching officer. Consequently, the officer who creates the record will be identified as the searching officer unless he or she changes the details in the searching officer field manually.

For example, of the 551 female strip search records in custody that are recorded under the name of a male officer, 211 contain information in the additional reasons field, 45% of which (95 of 211) included notes in the additional information field that suggest the search was conducted by someone other than the officer who created the record. While we can only comment on those records that contained information in the additional reasons field, we note that 40% of those records (38 of 95) specified that a female conducted the search.

Consequently, our analysis of the COPS data and other sources of information indicate that it is possible the number of searches conducted by an officer of the opposite sex may be lower than the raw COPS data suggests. However, the extent cannot be accurately measured.

In summary, our consultations with police, Court survey data and detailed analysis of the COPS data suggest that compliance with the safeguard in section 32(7) is high, particularly in relation to searches of females. This reflects policing practices and policies that were in place prior to the commencement of LEPRA. However, due to recording issues on COPS, the data appears to under represent the level of compliance with this safeguard. In practice, requiring that a search be conducted by a person of the same sex as the person being searched is appropriate and no practical difficulties have been identified during the review.

16.3.5. Genital areas must not be searched

Section 32(6) provides that police officers or other persons must not search the genital area of the person searched, unless the officer suspects on reasonable grounds that it is necessary to do so for the purpose of the search. This safeguard applies equally to frisk, ordinary and strip searches.

The practice of searching genital areas as part of a frisk or ordinary search is covered in the section on 'search methods' within the *Searching Manual* which states:

> *It is important to note that when searching the groin and buttocks area, that police do so carefully, and not use the fingers in a manner that may intimidate, molest or be considered to be outside your duties as a police officer when searching. However, do not be reluctant to place your hands in these areas. It may be considered an unpleasant task, however, offenders know this as well, thus prompting them to hide weapons or evidence in these areas.*[503]

While this section of the *Searching Manual* is ostensibly concerned with different methods, regardless of when these techniques can be employed, it is important that any advice about the importance of searching these areas for evidence is accompanied with advice regarding the need to comply with the section 32(6) safeguard and can therefore only be conducted if the officer suspects on reasonable grounds that it is necessary.

In the absence of advice that such a search cannot be conducted 'unless the officer suspects on reasonable grounds that it is necessary', the guidance in the *Searching Manual* could be taken to mean that officers should routinely search these areas because 'offenders know' that police may be reluctant to search these areas.

503 NSW Police Continuing Education, *Searching Manual*, October 2006, p.20.

In our consultations, some of the circumstances that officers identified as warranting a search which might involve a search of the person's genital area included the secretion of drugs and dangerous objects, as one officer told us:

> *There's quite a number of people in the Command who we know will carry drugs hidden underneath their genitals or very close to their anus. Police have to have a fairly reasonable suspicion that they've got drugs and they might have seen the person shove something into their clothing at the time of arrest [which would warrant a] strip search.*[504]

Information from our Court survey suggests a number of practices that may constitute searches of genital areas through clothing in the context of frisk or ordinary searches. For instance, one woman told us that she felt uncomfortable when police felt her breasts,[505] while one man reported that he disliked police searching his groin area.[506]

While section 32(6) applies to all searches, given the intimidation and embarrassment that a strip search involving a person's genitals could involve, it is arguable that adherence to this safeguard is of even greater importance with regard to strip searches.

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,[507] or conducted a visual search of their anus or vagina.[508] In addition, a number of people reported that they were required to squat,[509] bend over,[510] or spread their buttocks,[511] 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.

The practice of requiring people to squat is discussed in the context of the safeguard prohibiting searches of body cavities or an examination of the body by touch is discussed in section 16.3.8.

In relation to strip searches the Queensland PPRA prohibits officers from physical *contact* with the genital or anal area of a person as part of a strip search, but provides police with the power to require the person to hold their arms in the air or stand with their legs apart and bend forward to enable a *visual* inspection to be made.[512] While the Western Australian *Criminal Investigation Act 2006* does not prohibit searches of the genital area it does specify that all strip search safeguards apply to searches involving searches of people's 'private parts'.[513] We are not aware of any equivalent safeguards that apply to all searches in other jurisdictions.

16.3.6. Transgender persons

Section 32(6) makes particular provision to ensure that transgender people who identify as female are treated as females for the purpose of restricting searches of a person's breasts.

In order to assess compliance with these safeguards in relation to transgender people, we sought feedback from a variety of community stakeholders including the AIDS Council of NSW (ACON) and the Gender Centre as well as the NSW Police Force — all of whom indicated that they were not aware of any complaints from transgender people concerning the way that they had been searched, or issues relating to the application of this particular safeguard.

Nevertheless, ACON suggested that police could be assisted by better working definitions that encourage officers not to rely solely on the person's physical appearance and resources on communicating effectively with people who may be transgender.[514]

'Transgender' is defined in section 32(11) as:

> *a person, whether or not the person is a recognised transgender person:*
>
> *(a) who identifies as a member of the opposite sex, by living or seeking to live as a member of the opposite sex, or*

504 Focus group with sergeants, LAC G, 29 August 2006.
505 Local Court survey 270.
506 Local Court survey 147.
507 One of the 26 respondents who described a strip search in the field, and 23 of 81 respondents in the Local Court who described a strip search at a police station reported that police asked them to lift their breasts or testicles.
508 One of the 26 respondents who described a strip search in the field, and eight of the 81 respondents in the Local Court who described a strip search at a police station reported that police visually searched their anus or vagina.
509 Five of the 26 respondents who described a strip search in the field, and 42 of the 81 respondents in the Local Court who described a strip search at a police station reported that police asked them to squat.
510 Four of the 26 respondents who described a strip search in the field, and 29 of the 81 respondents in the Local Court who described a strip search at a police station reported that police asked them to bend over.
511 Two of the 26 respondents who described a strip search in the field, and 14 of the 81 respondents in the Local Court who described a strip search at a police station reported that police asked them to spread their buttocks. See Appendix 1 (5.9).
512 *Police Powers and Responsibilities Act 2000* (Qld), s.630(4).
513 *Criminal Investigation Act 2006* (WA), s.72(3)(b).
514 AIDS Council of NSW submission to LEPRA issues paper, 20 August 2007.

(b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or

(c) who being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex,

and includes a reference to the person being thought of as a transgender person, whether or not the person is, or was, in fact a transgender person.

The NSW Police Force *Draft Policy Statement on Gender Diversity* provides a definition of 'transgender' that includes people who 'identify on a temporary or permanent basis as a gender different to their birth sex'.[515] The NSW Police Force, Gay, Lesbian and Transgender Senior Policy Officer advised us that this definition aims to be inclusive of the gender diverse community. While the current definition of 'transgender' in LEPRA does not *exclude* people who identify as a member of the opposite sex on a temporary basis, we are of the view that officers should be advised that if they are in any doubt whatsoever, to treat the person as transgender to ensure that this safeguard is considered and applied inclusively.

16.3.6.1. Possible broader applications of the 'transgender' definition in section 32(11)

The definition of 'transgender' in section 33(11) is provided to assist in the application of the section 32(6) safeguard prohibiting searches of a person's genital area. However, police should also be sensitive as to which sex a person identifies as when determining whether a male or female officer should conduct a search of a transgender person and endeavour to ensure that the search is carried out by an officer of the same sex as the person, unless it is not reasonably practicable in the circumstances, in accordance with section 32(6).

It appears that this may already be the practice of some officers, as the following notes in the additional reasons field, taken from a COPS record of a strip search suggests:

Prisoner is transgender. Stated she doesn't care if she is searched by female or male police. As there were two female police in the charge room decision made that search be done by female police.[516]

The practice of ensuring that the officer conducting the search is of the same sex as the person being searched was also demonstrated in the following complaint received by our office.

Case study 13

Complaint alleging a strip search of a transgender person who was referred to by a male name but searched by a female officer

In May 2006, our office received a complaint from a transgender person who identifies as a female concerning an alleged strip search in custody. In particular, she alleged that police used her male name to harass her and strip searched her unnecessarily.

Police investigated the complaint and reported that an ordinary search had been conducted by a female officer and involved asking the person to show that there was nothing concealed in her waistband without the officer touching her.

Our office reviewed the matter and found that while the person's male name had been used wrongly by some officers and included in some documentation, the ordinary search had been conducted appropriately by a female officer in accordance with the LEPRA safeguards.

The Code of Practice for CRIME contains a brief discussion on transgender and transvestite people. The Code advises custody managers to consider transgender people while in custody as people at risk and notes:

Where circumstances suggest someone in custody might be transgender, discreetly inquire whether that is the case. If so, deal with them accordingly, if possible.[517]

In our consultations with police in inner city areas, officers have suggested that people often tell them that they identify as a member of the opposite sex. For example, one officer told us, 'I have never really had a major issue because they will identify straight away who they're comfortable being searched by'.[518]

515 NSW Police Force, *Draft NSW Police Force Policy Statement on Gender Diversity*, p.1.
516 COPS record U54268402, strip search of 29 year old female in the Sydney metropolitan area, recorded by female officer.
517 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated May 2008, p.35.
518 Interview with custody manager, LAC G, 20 November 2007.

In the Australian Capital Territory, the *Crimes Act 1900* specifically provides that a transgender or intersex person 'may require that the search be conducted by either a male or a female' for any search conducted under Part 10 — which covers all types of searches conducted on detention, arrest or at a police station.[519]

As with all other search safeguards that include the 'reasonably practicable' qualification the application of this safeguard would be subject to safety, availability and effectiveness considerations and the reasonable practicability of complying with a request would necessarily remain with police.

In conclusion, while it appears that some of the search techniques employed by police (particularly while in custody) involve possible searches of genital areas, it seems that the decision to do so may be appropriate in the context. No obvious breaches or operational concerns have been brought to our attention with regard to the safeguard concerning searches of genital areas.

However, continuing efforts should be made to encourage officer awareness of social diversity and any policies and initiatives that could assist officers to identify and respond appropriately to the gender diverse community should be supported.

Recommendations

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.
21. Parliament consider defining the term 'genital area' for the purpose of LEPRA in order to clarify what search practices this safeguard applies to.
22. The NSW Police Force consider providing additional guidance on the definition of 'transgender person' in the Code of Practice for CRIME and other policy and educational material.

16.3.7. A person must not be searched while being questioned

Section 32(8) states that a search of a person 'must not be carried out while the person is being questioned' and goes on to say that 'if questioning has not been completed before a search is carried out, it must be suspended while the search is carried out'. This safeguard applies to the extent that it is reasonably practicable in the circumstances.

Questioning is defined in section 32(11) as 'questioning the person, or carrying out an investigation in which the person participates'.

On a strict reading, section 32(8) operates on the premise that the questioning occurs first and, therefore, only prohibits police from conducting a search if 'questioning' has not been completed or is in progress, not the other way around. However, on a broader reading this safeguard is applicable to any questions asked in the context of a search.

In response to our issues paper, where we asked for views on the requirement that officers not question while searching, the NSW Police Force asserted:

> *It is important to be able to question somebody as items are located. Consideration should be given to repealing section 32(8) as practically it can be difficult to avoid questioning during some situations, and it has a potential to impact on officer safety.*[520]

However, in the second reading speech the then Attorney General noted that this safeguard requires that the officer not 'question the person searched at the time *in relation to a suspected offence*',[521] suggesting that this safeguard does not preclude officers from asking questions to ensure safety, develop rapport or facilitate the search. As one officer noted:

> *You've got to talk to them while you're searching them because you've got to tell them why you're doing it and you've got to ask if they understand — but I know what they [the legislators] mean, they're saying you don't start interviewing people while you're searching because they've obviously got a disadvantage, but you've got to ask them if there's anything that can injure police.*[522]

519 *Crimes Act 1900* (ACT), s.185A.
520 NSW Police Force submission to LEPRA issues paper, 24 August 2007, p.3.
521 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
522 Interview with crime manager, LAC D, 6 August 2007.

Within the section on communication the *Searching Manual* advises officers to:

> *Ask the suspect if he has anything that may cause danger or injury. The person may volunteer that he is carrying a weapon, syringe or other such implement.*[523]

This practice was reflected in responses to our Court survey where people reported that they were asked whether they had any dangerous items or items they shouldn't have on them in the context of a strip search at a police station, as well as comments from police in consultations, as the following comments suggest:

> *Sometimes I ask them 'Do you have anything on you that's going to hurt me if I'm searching you?' That's the first things we generally all ask, but am I interrogating them as I'm searching them? No.*[524]

> *I might ask 'Is there anything on you that's going to hurt me or hurt you?'*[525]

In our view, section 32(8) does not preclude an officer from asking questions to facilitate the search or manage safety concerns. However, if investigative questioning is taking place, police must stop the investigation to perform the search. The difficulty is that the distinction between questions about items to establish safety and questions about items that constitute part of an investigation may not always be clear as the following comment from an officer suggests:

> *You might say 'is there anything in your possession that shouldn't be there and what's in this pocket here?' If you feel something outside, you might ask 'what's that?' and you're questioning them as you conduct it … If you find something, you pull it out and you say 'What can you tell me about that and whose is that and where did it come from?', and then you go through the rest of it and as you find things you question them about it.*[526]

A number of officers also noted that talking to the person can help to put the person at ease and facilitate the search, as the following officers noted:

> *If I'm searching someone, generally I'll ask them "where are you from, where do you come from, where do you live, what do you do for a living, have you been around here long, what are you doing out here tonight?" It may not necessarily be specifically about what I may be about to arrest them for or what I may have already arrested them for. You just try and get that rapport going with them.*[527]

> *Once you're talking to them you can then focus on what you're looking for. So you talk about the football, or the kids, or the upcoming Court appearance. They're probably a little bit distracted and not able to hide something or distract you because if you're controlling the situation through communication, they're on a back foot. So they're trying to respond to the things that you're saying, plus sometimes it makes them a little bit more comfortable.*[528]

An example taken from our Local Court survey provides an illustration of when 'questions' would not be considered 'questioning' for the purpose of section 32(8) as the case study below demonstrates.

Case study 14

Local Court survey report of questions asked by officer to build rapport while strip search was being conducted in custody

We spoke to a man in his early twenties who was facing charges for property damage and resisting or hindering police in the execution of their duty.

The man reported that he had been required to remove his shirt as part of a strip search at a police station. He also reported that he was asked questions while being searched. When we enquired what questions police asked, he reported that police 'tried to chat with me, made small talk'.

16.3.7.1. In the field

Of those who described a frisk or ordinary search in the field, 32% of Local Court respondents (47 of 148) and 47% of young people (23 of 49) reported that they were asked questions during the search. However, taking into account the type of questions asked, only 20 Local Court and 11 Children's Court respondents reported that they were asked 'questions about the offence they thought I had committed'. Having said this, other questions that do not discuss an

523 NSW Police Continuing Education, *Searching Manual*, October 2006, p.18.
524 Focus group with duty officers, LAC G, 19 November 2007.
525 Focus group with proactive sergeants, LAC E, 16 October 2007.
526 Interview with general duties senior constable, LAC D, 6 August 2007.
527 Focus group with duty officers, LAC G, 19 November 2007.
528 Focus group with proactive sergeants, LAC E, 16 October 2007.

offence directly may still *relate* to a suspected offence. For instance, questions relating to the reason for the person's presence in an area or items found during the search, could ultimately relate to a suspected offence. Conversely, such questions could arguably relate to other factors such as safety or small talk depending on the context.

Of those who described a strip search in the field, 27% of Local Court respondents (7 of 26) and 18% of Children's Court respondents (2 of 11) reported that they were asked questions during the search. Taking into account the types of questions asked, four Local Court respondents and none of the Children's Court respondents reported that they were asked questions about the suspected offence. Other questions covered topics such as items found during the search, the location they were in, their name and address or whether police would find anything on the person.

16.3.7.2. While in custody

In comparison to searches in the field, the proportion of people who reported that they were asked questions during a search at a police station in our Court survey was slightly lower. Of those who described a frisk or ordinary search at a police station, 13% of Local Court respondents (12 of 96) and 9% of Children's Court respondents (3 of 34) reported that they were asked questions during the search. As with searches in the field, less than half of these concerned questions about the suspected offence.[529] Other questions covered topics such as items found during the search, the location they were in, their name and address, whether the person had anything on them, the company they were keeping, and one man reported that police 'asked if I was known to harm myself'.[530]

Of those who described a strip search at a police station, 30% of Local Court respondents (24 of 81) and 22% of Children's Court respondents (4 of 18) reported that they were asked questions during the search. While Local Court respondents most frequently reported being asked about the offence they were suspect of committing, Children's Court respondents more often reported being asked their name and address.[531]

The following case study provides an example of when it appears it would have been appropriate to complete the search before commencing questioning.

Case study 15

Local Court survey report of inappropriate questioning during strip search

We spoke to a man in his late twenties who was facing charges for assault.

The man described a strip search at a police station that involved removing his trousers and shirt and reported that police questioned him during the search. When asked what questions police asked, he reported that police asked for his name, address, about the offence police believed he had committed, how much he had drunk and 'who else was at the house' where he was arrested, amongst other questions.

A clear distinction needs to be made between rapport building or facilitating the search and carrying out an investigation or questioning in relation to a suspected offence.

This provision not only safeguards a person's privacy and dignity during a personal search. It also ensures that a person is not intimidated during investigative questioning because of a concurrent search and reinforces the person's rights in relation to investigations and questioning under Part 9 of LEPRA.

It is important for police to be able to balance the need to build rapport and communicate effectively with a person being searched (particularly where the search is for dangerous weapons/items) and the need to refrain from conducting a search while 'questioning the person or carrying out an investigation'. However, it is apparent that this distinction is not clearly understood by all officers.

In comparison, the Western Australian *Criminal Investigation Act 2006* qualifies the types of questions that cannot be asked during a search saying:

> *If a basic search or a strip search is done of a person — the person must not be questioned while it is being done about any offence that he or she is suspected of having committed.*[532]

529 Six Local Court respondents and none of the Children's Court respondents who described a frisk or ordinary search at a police station reported that they were asked 'questions about the offence they thought I had committed'.
530 Local Court survey 216.
531 13 Local Court respondents who described a strip search at a police station reported that they were asked 'questions about the offence they thought I had committed'. In the Children's Court, three respondents said police asked for their name and two said police asked for their address. See Appendix 1 (5.11).
532 *Criminal Investigation Act 2006* (WA), s.70(3)(f).

In our view the Western Australian terminology is preferable because it makes clear what types of discussions are not permitted during a search.

In summary, our consultations suggest that the requirement that officers not question people in the course of a search does not appear to be universally understood and accepted by police. While we are not aware of any matters where the safeguard has been deliberately disregarded, ambiguity around the concept amongst police and the public suggests that further clarification is required if this safeguard is to be effective.

Recommendations

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.
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
    b. when it is appropriate to suspend questioning in order to conduct a search and how this should be carried out.

16.3.8. Strip searches must not involve the person's body cavities or an examination by touch

Section 33(4) states that a strip search must not involve a search of the person's body cavities or an examination of the body by touch. This safeguard is 'without exception, mandatory' for all strip searches, consequently, body cavities should never be searched in the context of a strip search.[533]

If police consider it necessary to conduct a more thorough examination of the person's body cavities, more invasive search procedures must be conducted in accordance with the *Crimes (Forensic Procedures) Act 2000.*

The Commonwealth *Crimes Act 1914* and Australian Capital Territory *Crimes Act 1900* both forbid searches of body cavities as part of a strip search, but do not expressly prohibit touching as part of a strip search.[534] In comparison the Queensland PPRA specifies that officers must not make physical contact with the person's genital and anal area as part of a strip search, but does not prohibit searches of body cavities, and provides police with the power to require that the person stand with legs apart and bend forward to enable a visual examination to be made.[535]

The difficulty that arises in applying this safeguard involves determining what is and is not a body cavity. As discussed in section 14.3.3, there is a need to define the term 'body cavity' in LEPRA to clarify the scope of this safeguard and ensure that other provisions that relate to searches of possible body cavities such as the mouth are clearly understood and applied appropriately.

16.3.8.1. Searching practices employed by police to circumvent the prohibition on searching body cavities

In our Court survey we came across instances where police search practices appear to have avoided the prohibition on body cavity searches, while still achieving a search of those areas. For instance:

- One man reported that as part of the search he was required to remove his trousers and shirt, squat down, bend over, spread his buttocks and open his mouth as part of the search.[536]
- One man reported that while he was handcuffed, police removed his trousers, shirt and underpants and then required him to squat down, bend over, spread his buttocks. He went on to say that police required him to lift his testicles and directed him to open his mouth.[537]

In consultations police have advised that asking a person to squat allows them to see if the person is secreting anything in the groin area without touching or even visually inspecting that area directly, as the action of squatting will

533 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
534 *Crimes Act 1914* (Cth), s.3ZI(1)(g); *Crimes Act 1900* (ACT), s.228(1)(g).
535 *Police Powers and Responsibilities Act 2000* (Qld), s.630(1).
536 Local Court survey 58.
537 Local Court survey 201.

cause items to fall to the ground.[538] However, in the section on 'strip search technique', the *Searching Manual* advises officers to 'be careful; police have no power to make the person "squat"'.[539]

If Parliament is of the view that such search practices assist in reducing embarrassment by minimising direct visual observation, while ensuring that the person is not secreting evidence or items that could be used to harm themselves, clear guidance must be provided to ensure the proper conduct of this search practice. If left unregulated, practices such as these have the potential to compromise the dignity of a person. Consequently, it may be necessary to review this practice and if necessary regulate its use in New South Wales.

We are not aware of any jurisdiction in which police have the power to require a person to squat as part of a strip search. However, we note that in Queensland, police have the power to require a person to stand with legs apart and bend forward to enable a visual inspection to be made.[540]

16.3.8.2. Examination of the body by touch

While a strip search is defined in part as 'an examination of the person's body', section 33(4) makes it clear that the examination cannot include a search of the body by touch.[541] No exceptions for reasonable practicability apply to this safeguard requirement.

While a number of respondents in both the Local Court and Children's Court reported that police touched them during the search all went on to describe the search in ways that do not suggest that they were subject to an examination of the body by touch.[542] For example, one man who described a strip search in custody and reported being touched by police during the search commented that he was patted down at the start,[543] and one boy described a strip search in the field as follows, 'police unzipped [my] jacket, checked it [and] took my hat off. I was in handcuffs on the ground so they took my shoes and socks off'.[544] We are not aware of any instances where people have been subject to an examination of the body by touch as part of a strip search. This safeguard appears to be reasonable and appropriate.

Recommendation

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.

16.3.9. Strip searches must not involve more visual inspection than necessary

Section 33(6) states that a strip search must not involve more visual inspection than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purpose of the search.

As with LEPRA, the Commonwealth, Australian Capital Territory and Western Australian legislation provide that a search must not involve more visual inspection than the officer believes to be necessary, with no notable differences.[545]

Our review has not uncovered any issues concerning this specific safeguard, but we note that it provides a sensible and practical limitation on the level of visual inspection that can be conducted as part of a strip search. While a search of a person's genital areas or body cavities may inherently involve excessive visual inspection those issues are discussed separately in sections 16.3.5 and 16.3.8 respectively.

16.3.10. Requirements concerning removal of clothing

The safeguards in section 32 concerning removal of clothing relate to any item of clothing and apply to all searches, however, these rules are of even greater importance if an officer is conducting a search that involves the removal of more than outer clothing — in other words, a strip search.

538 CCTV LAC 3, attended 30 November 2007.
539 NSW Police Continuing Education, *Searching Manual*, October 2006, p.32.
540 *Police Powers and Responsibilities Act 2000* (Qld), s.630(4).
541 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.3.
542 See Appendix 1 (5.18).
543 Local Court survey 246.
544 Children's Court survey 1.
545 *Crimes Act 1914* (Cth), s.3ZI(1)(i); *Crimes Act 1900* (ACT), s.228(1)(i); *Criminal Investigation Act 2006* (WA), s.73(3)(e).

16.3.10.1. The person must be advised if they will be required to remove clothing and why it is necessary

Section 32(2) provides that the person being searched must be informed as to whether they will be required to remove clothing during the search and if so, why it is necessary.

This safeguard applies equally to frisk, ordinary and strip searches as far as is reasonably practicable in the circumstances. Similar safeguards are provided in both Queensland and Western Australia.[546]

In consultations, police indicated that this safeguard is reasonable and practical. As mentioned earlier, one female custody manager told us:

> *If I'm called upon to do a strip search of a female for instance, I would explain to them why I'm doing it. It's common courtesy and common sense to explain to them what you're going to do, how you're going to do it and the reason why.*[547]

In our Court survey, we asked if the person was required to remove clothing and what, if any, reason was given for this requirement.

<u>In the field</u>

Of the 49 Local Court and 24 Children's Court respondents who described a frisk or ordinary search in the field that involved removal of outer clothing, 10 Local Court and four Children's Court respondents said they were told why they were required to remove those items.[548] Those reasons broadly related to safety, evidence (namely drugs), or police procedures. A further 15 Local Court and 20 Children's Court respondents reported that they *were not* told why it was necessary to do so.[549]

Of the 26 Local Court and 11 Children's Court respondents who described a strip search in the field, 10 Local Court and three Children's Court respondents said they were told why they were required to remove those items. Those reasons broadly related to evidence (including 'searching for drugs'), **safety,** or police procedures. A further 11 Local Court and eight Children's Court respondents reported that they *were not* told why it was necessary to do so.[550]

These responses suggest that informing the person to be searched why it is necessary to remove clothing in accordance with section 32(2) appears to be the exception rather than the rule.

<u>While in custody</u>

Of the 36 Local Court and 24 Children's Court respondents who described a frisk or ordinary search in custody that involved removal of outer clothing, 12 Local Court and four Children's Court respondents said they were told why they were required to remove those items.[551] Those reasons broadly related to safety (for example, 'so I don't hurt myself'),[552] evidence (drugs), and police procedure ('because being arrested').[553] A further 14 Local Court respondents and 18 Children's Court respondents reported that they *were not* told why it was necessary to do so.[554]

Of the 81 Local Court and 18 Children's Court respondents who described a strip search at a police station, 24 Local Court and seven Children's Court respondents said they were told why they were required to remove those items. Those reasons broadly related to evidence (including 'searching for drugs'),[555] safety**,** or routine ('regulation strip search').[556] A further 45 Local Court respondents and 10 Children's Court respondents reported they *were not* told why it was necessary to do so.[557]

In summary, it appears that it is not common for people to be provided with reasons for removal of clothing for any kind of search, however, higher proportions of people were provided with reasons if the search involved removal of clothing that would amount to a strip search.

In our view the low level of compliance with this safeguard is of concern and should be redressed urgently. As with the provision of reasons for searches generally, a lack of information and communication can lead to anxiety and fear for the person being searched and escalation and injury for both police and the person.

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546 *Police Powers and Responsibilities Act 2000* (Qld), s.630(1)(a); *Criminal Investigation Act 2006* (WA), s.70(3)(c).
547 Interview with custody manager, LAC F, 29 October 2007.
548 33% of Local Court respondents (49 of 148) and 49% of Children's Court respondents (24 of 49) described a frisk or ordinary search in the field in which they were required to remove outer clothing such as a jacket, hat, or shoes and socks. See Appendix 1 (5.5).
549 The remaining 24 Local Court respondents could not remember or did not provide an answer to this question.
550 The remaining five Local Court respondents could not remember or did not provide an answer to this question.
551 38% of Local Court respondents (36 of 96) and 71% of Children's Court respondents (24 of 34) described a frisk or ordinary search at a police station in which they were required to remove outer clothing such as a jacket, hat, or shoes and socks. See Appendix 1 (5.5).
552 Local Court survey 175.
553 Local Court survey 347.
554 The remaining 10 Local Court and two Children's Court respondents could not remember or did not provide an answer to this question.
555 Local Court survey 55.
556 Local Court survey 125.
557 The remaining 12 Local Court and one Children's Court respondent could not remember or did not provide an answer to this question.

Recommendation

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.

16.3.10.2. The person must be allowed to dress as soon as the search is finished

Section 32(9) states that in conducting a search the police officer or other person 'must be allowed to dress as soon as a search is finished'. This safeguard applies equally to frisk, ordinary and strip searches to the extent that it is reasonably practicable in the circumstances.[558]

In consultations, officers indicated that this safeguard is reasonable and practical. In our Local Court survey, respondents who described a strip search were asked how long it was before they were allowed to dress. Of those who described a strip search on arrest in the field, 69% of respondents (18 of 26) reported that they were able to dress immediately after the strip search was completed.[559] In relation to strip searches at a police station, 73% of respondents (59 of 81) reported that they were able to dress immediately after the strip search was completed.[560]

While Children's Court respondents were not asked an equivalent question, some of those who described a strip search commented that they were allowed to dress soon, if not immediately after the strip search was completed, for example, two young people said:

> *Police said, 'take shirt off and put it on table, turn around, put shirt back on', then 'take trousers off and undies and put on table, turn around'. Then [I was] able to dress straight away.*[561]

> *Undressed myself, handed one item at a time to police, allowed to put shirt back on while they searched pants.*[562]

However, others noted some delay when asked if there was anything about the search that made them feel uncomfortable, for example, two young people commented:

> *They made me take it all off. Probably about 15 minutes they made me stand there naked. Hands on my head and freezing.*[563]

> *[I] had no clothes on and officers made me stand there naked for ages.*[564]

These responses from survey respondents suggest that people are generally allowed to dress soon after the search is completed in accordance with section 32(9), however, there are instances where it appears police could have done more to ensure the person's dignity in this regard, as demonstrated in case study 16.

Case study 16

Complaint alleging failure to return or provide appropriate clothing in a timely manner following a strip search while in custody

In February 2006, our office received a complaint from two young people who alleged that they had been strip searched in police custody and left without clothing for 10 to 15 minutes.

Police investigated the complaint and reported that the two young people had been strip searched in order to find an implement they were using to write on the cell walls. Police reported that the incident had been captured on tape as it had been conducted in the observation cell and that the tape showed the boys being left naked for six minutes.

Our office reviewed the tape and wrote back to police noting that the search of the clothing and its return to the young people could have occurred in a more expeditious manner and that if this was not possible, the young people should have been offered a blanket or alternative clothing after their own clothing had been removed for the search.

558 Similar provisions are provided for all searches in Western Australia and for strip searches in Queensland: *Police Powers and Responsibilities Act 2000* (Qld), s.630(3) and *Criminal Investigation Act 2006* (WA), s.70(3)(d).
559 A further two respondents reported that they were allowed to dress after five minutes, one reported being allowed to dress after 15 minutes and the remaining five could not remember or did not provide an answer. See Appendix 1 (5.12).
560 A further nine respondents reported that they were allowed to dress after five minutes; three reported being allowed to dress after 10 minutes; and the remaining 10 could not remember or did not provide an answer.
561 Children's Court survey 9. 16 year old boy who described a strip search at a police station.
562 Children's Court survey 66. 15 year old girl who described a strip search at a police station.
563 Children's Court survey 57. 17 year old boy who described a strip search at a police station.
564 Children's Court survey 27. 17 year old boy who described a strip search at a police station.

16.3.10.3. A strip search must not involve removal of more clothing than necessary

Section 33(5) states that a strip search must not involve the removal of more clothes than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purpose of the search.

As in New South Wales, the Commonwealth, Australian Capital Territory and Western Australia all limit the amount of clothing that may be removed as part of a strip search according to what is reasonably necessary or what is believed on reasonable grounds to be necessary by the person conducting the search.[565] While the Queensland PPRA does not specify that removal of clothing must be limited according to what is reasonably necessary it does provide that the person must be given the opportunity to remain partially clothed during the search if reasonably practicable.[566]

In our view, very few occasions would necessitate the removal of all clothing. Our review has not uncovered any issues concerning this safeguard, but note that it provides a sensible and practical limitation on the amount of clothing police can require a person to remove as part of a strip search.

16.3.10.4. The person must be left with or given reasonably appropriate clothing if clothes are seized

Section 32(10) states if clothing is seized because of the search, the police officer or other person must ensure the person searched is left with or given reasonably appropriate clothing.

This safeguard applies equally to frisk, ordinary and strip searches. Both Queensland and Western Australia have similar requirements for the provision of adequate clothing if the person's clothes are seized.[567]

Replacements for shoes, socks and other outer garments seized

Information from our Court survey suggests that in most instances where outer garments (such as shoelaces, shoes, belts, and hats) were seized, replacement clothing was not provided.[568] For example, two boys reported that their shoes were seized following a strip search on arrest in the field and indicated that alternative footwear was not provided,[569] and one woman who described a strip search in the field reported that her shoes were seized and she was not offered alternative footwear, but she was otherwise allowed to dress immediately after the search.[570]

While it may not be possible for police to provide alternative clothing of all kinds in custody, particularly if the items were removed for safety or security reasons, each instance must be considered separately and blanket policies should not be applied. As the Code of Practice for CRIME states:

> *Detained people may retain clothing and personal effects at their own risk unless you consider the items might be used to cause harm, interfere with evidence, damage property, effect an escape or they are needed for evidence. If these items are removed tell the person why. If it is necessary to remove someone's clothes, arrange replacement clothing of a reasonable standard (usually arranged through family or friends). Do not allow an interview unless adequate replacement clothing has been offered.*[571]

Unlike LEPRA which refers generally to replacement clothing, the Western Australian *Criminal Investigation Act 2006* specifies that if a person is left without adequate clothing *or footwear* in the circumstances due to seizure of those items, reasonably adequate replacement clothing or footwear must be provided.[572]

Replacements for tops, pants and underwear seized

In consultations, police indicated that in circumstances where it is necessary to seize clothing for evidence or safety issues while in custody and other clothing is not available, a paper jump suit may be provided.

Information from our Court survey suggests that in most instances where basic clothing such as shirts and pants were seized, replacement clothing was provided.[573] For example, one man said that he was provided with a jumpsuit when his underwear, trousers, belt, coat, shoes and socks were seized following a strip search in custody, 'but replacement clothing took a while';[574] another man commented that he was 'very cold in [the] overalls provided' when his shirt, trousers, shoes and socks were seized following a strip search in custody;[575] and one 15 year old

565 *Crimes Act 1914* (Cth), s.3ZI(1)(h); *Crimes Act 1900* (ACT), s.228(1)(h); *Criminal Investigation Act 2006* (WA), s.72(3)(e).
566 *Police Powers and Responsibilities Act 2000* (Qld), s.630(1)(b).
567 *Police Powers and Responsibilities Act 2000* (Qld), s.630(5); *Criminal Investigation Act 2006* (WA), s.70(3)(e).
568 11 adults and five young people described a strip search that involved seizure of outer clothing either in the field or at a police station. See Appendix 1 (5.13).
569 Children's Court surveys 24 and 46.
570 Local Court survey 19.
571 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated May 2008, p.31.
572 *Criminal Investigation Act 2006* (WA), s.70(3)(e).
573 Seven adults and six young people described a strip search that involved seizure of trousers, tops or underwear either in the field or in at a police station. See Appendix 1 (5.13).
574 Local Court survey 360.
575 Local Court survey 303.

boy reported that his cousin brought his replacement clothing to the station when his trousers and shirt were seized following a strip search in custody, but his friends had to wear overalls supplied by police.[576]

Two Local Court and two Children's Court respondents who described a strip search that involved seizure of basic items of clothing reported that they were not left with or given replacement clothing. This included a man who described a strip search at his home that involved seizure of his shirt and pants;[577] a woman who described a strip search at a police station that involved seizure of her underwear;[578] a 14 year old boy who described a strip search in a public place that involved seizure of his pants;[579] and a 13 year old boy who described a strip search at a police station that involved seizure of his trousers and jumper.[580]

In our view the priority must be to ensure that people are provided with appropriate clothing to cover their bodies if tops, pants or underwear are seized. Examples of 'reasonably appropriate clothing' are not provided in LEPRA, the Law Enforcement (Powers and Responsibilities) Regulation 2005, or the Code of Practice for CRIME. However, proper consideration must also be given to ensure that other items of clothing are provided, particularly in circumstances where the lack of clothing such as shoes and socks can impact on the person's dignity in circumstances where there are no safety issues.

Recommendation

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
    b. ensure that all charge rooms are properly equipped to provide appropriate clothing when clothes are seized.

16.4. Support issues relating to the strip search safeguards

Section 33 of LEPRA specifies when a support person can and when a support person must be provided for strip searches of certain people. The following discussion considers:

- section 33(3) which provides that a support person must be present during a strip search of a child or person with impaired intellectual functioning
- section 33(2) which provides that a support person may be present during a strip search of any person.

The term 'support person' is used here to refer to the relevant people listed in sections 33(2) and 33(3), namely a parent, guardian, another person (other than a police officer) who is capable of representing the interest of the person or a personal representative.

16.4.1. Protecting the interests of people who may not be able to do so themselves

Section 33(3) provides that a strip search of a child, 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 support person.

Two main aims were identified by the then Attorney General in introducing this safeguard, namely:

- to protect the interests of those who may not be able to protect their own interests
- to assist police in the conduct of the strip search.[581]

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 — which suggests that other measures may be required in order to effectively protect the interests of those who may not be able to do so themselves, as discussed in detail below.

576 Children's Court survey 38.
577 Local Court survey 231.
578 Local Court survey 94.
579 Children's Court survey 91.
580 Children's Court survey 102.
581 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.

16.4.1.1. People with impaired intellectual functioning

In order for this provision to safeguard people with impaired intellectual functioning, the person must first be properly identified by police as someone who requires a support person for the purpose of section 33(3). Identification of impaired intellectual functioning is therefore pivotal to the operation of this safeguard. However, our consultations with both community groups and police all suggest that people with impaired intellectual functioning are not being accurately identified by police and support is rarely provided.

The low level of identification was highlighted in *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local Courts*. In that report, the NSW Law Reform Commission (NSWLRC) noted:

> *Recognition of the individual with intellectual disability at some point in their career through the criminal justice system is likely to be serendipitous … many persons with an intellectual disability are not recognised at any point in the criminal justice system, perhaps to their detriment.*[582]

The view that people with impaired intellectual functioning are not often identified by police was also supported by comments from officers themselves. In consultations with police, we asked officers how often they interact with people who have an intellectual impairment and how they identify people with impaired intellectual functioning. Responses were varied, however, the majority indicated that their contact with people who have impaired intellectual functioning of any kind is infrequent, as one officer told us:

> *It's not very often that a person with an intellectual disability comes into custody, it's very rare and if they do it might be a very minor stealing or a lot of them are sexually related but it's very, very rare.*[583]

Other officers commented that in the rare circumstances where police have contact with people who have impaired intellectual functioning, it is unlikely the interaction would involve a strip search.[584]

In comparison, research and inquiries repeatedly show that people with an intellectual disability are over-represented in all aspects of the criminal justice system. In its recent report *Enabling Justice*, the Intellectual Disability Right Service (IDRS) noted:

> *Persons with intellectual disability are disproportionately represented in the criminal justice system. For example, one study found that, whilst persons with intellectual disability constitute approximately 2–3% of the Australian population, nearly one quarter (23.6%) of persons appearing as defendants before six Local Courts in NSW could be diagnosed with having intellectual disability, with a further 14.1% of persons in the borderline range of ability. These figures were found to rise in regional areas.*[585]

<u>Identification of impaired intellectual functioning</u>

Section 33(9) of LEPRA defines impaired intellectual functioning as: total or partial loss of a person's mental functions; a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction; or a disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgment, or that results in disturbed behaviour.

Part of the difficulty in applying and monitoring the exercise of this safeguard involves defining the scope of people to whom the safeguard applies in a meaningful and practical way.

In *People with an Intellectual Disability and the Criminal Justice System* the NSWLRC considered the term 'impaired intellectual functioning' in the context of that review and discussed whether this broader term should be used in circumstances where a wider group of people should attract the operation of a particular section. While noting that there was some support for a broader definition, the NSWLRC did not advocate the universal application of the term citing 'several disadvantages', in particular:

- *Impaired intellectual functioning is not a clinical term with a recognised meaning.*
- *It is difficult to define impaired intellectual functioning other than in circular terms (for example 'impaired intellectual functioning means impaired intellectual functioning') or inclusive terms (for example 'impaired intellectual functioning includes intellectual disability, brain injury or dementia').*
- *It is impossible to list all of the impairments which could fall within this term, leading to uncertainty in its application.*

582 NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Appearances Before Local Courts*, Research Report 4 (1993), par. 1.44.
583 Interview with custody manager, LAC E, 16 October 2007.
584 Interview with general duties sergeant, LAC D, 6 August 2007.
585 Intellectual Disability Rights Service, *Enabling Justice: A Report on Problems and Solutions in Relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System*, May 2008, p.13. With reference to NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System: Two Rural Courts,* Research Report 5 (1996), par. 4.35.

— *There was concern in some submissions that such a term was too general and could include such a wide range of impairments that it would become unworkable.*

— *Whether or not such a term could or should include people with a mental illness remains a matter of debate.*[586]

These concerns appear to be borne out in our research which suggests low levels of understanding amongst officers regarding the definition of impaired intellectual functioning. In consultations we asked police how they identify people who may have an intellectual impairment. Many noted that they are not medically trained to diagnose people, but were confident of their ability to properly identify people for the purpose of the safeguards, as one officer told us:

> *Obviously we're not medical people but we see enough people to know when someone needs assistance or support people. Personally I'm on the side of caution all the time in regards to support people, because at the end of the day, when it gets to Court, you're going to lose anyway unless you've gone [and got a support person].*[587]

In general, officers advised that their cumulative experience as a police officer,[588] common sense,[589] their conversations with the person,[590] and their knowledge of the individual,[591] all assist them to determine if the person has an intellectual impairment. Some officers acknowledged that it can be difficult to establish if a person has an intellectual impairment, as the following officers said:

> *Sometimes it's very obvious, other times it might be quite borderline and it might not even be in the minds of [police] that a person's got a mental impairment. With the young people in particular behaviour disorder could be the issue. You might think they're mentally impaired just by the way they're behaving and they're not.*[592]

> *I find that the tricky ones are the people that sort of, they'll speak to you and everything will sound normal but then they'll just ask you repeatedly certain things that are fairly simple and at first sometimes you think — well are they being a smart arse or do they actually have a problem?*[593]

As these comments suggest, education is important to help officers properly identify people who may require a support person in order for a strip search to be conducted. In consultations we also asked senior and education officers how police are trained to identify people with impaired intellectual functioning. In consultations police advised:

> *We have training days when we get guest speakers in from different disability services and local bodies and things that might come in place on our training days, they come in, mental health workers and different people, teach us about the lectures on the symptoms and the signs and everything else.*[594]

However, in consultations both the CJSN and IDRS noted that while they used to be involved in disabilities training at the Police Academy, at present the IDRS are only involved in training for custody managers, officers in Adult Sexual Assault Teams and officers in the Joint Investigative Review Teams, not general duties officers.[595]

In addition to dedicated training, there are a number of resources available to police to guide them in this area. For instance, Schedule 2 of the Law Enforcement (Powers and Responsibilities) Regulation 2005 provide custody managers with additional guidance in identifying people with impaired intellectual functioning, stating:

> *In considering whether a detained person has a total or partial loss of his or her mental functions, or a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction, the custody manager for the detained person should have regard to whether the person appears:*
>
> *(a) to have difficulty understanding questions and instructions, or*
>
> *(b) to respond inappropriately or inconsistently to questions, or*
>
> *(c) to have a short attention span, or*
>
> *(d) to receive a disability support pension, or*

586 NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996), par. 3.23.
587 Interview with general duties sergeant, LAC D, 6 August 2007.
588 Interview with general duties senior constable, LAC D, 6 August 2007, 'Well we've got the regulars. As soon as the name comes over the air you go "oh". You know the name and the address. People that aren't known to you, if you turn up it doesn't take you long to realise that they're not quite there'.
589 Interview with general duties senior constable, LAC D, 6 August 2007, 'It depends on how impaired I suppose. Obviously common sense comes into it. You can tell but yeah, I see it's going to be a fine line still. Mentally, especially if they're on their meds, you wonder if they're just backwards. So no, I think it can be hard sometimes'.
590 Interview with custody manager, LAC G, 20 November 2007. 'Usually by the way they speak. Once they've settled down you have a talk to them, you might know, sometimes they even tell you'.
591 Focus group with general duties constables, LAC G, 20 November 2007. 'Behaviour, speech, previous intel or previous events, you can check them. It's usually easy to tell'.
592 Interview with duty officer, LAC B, 23 July 2007.
593 Interview with brief handler, LAC G, 19 November 2007.
594 Interview with general duties sergeant, LAC D, 6 August 2007.
595 Interview with Intellectual Disability Rights Service and Criminal Justice Support Network, 18 October 2006.

(e) to reside at a group home or institution, or be employed at a sheltered workshop, or

(f) to be undertaking education, or to have been educated at a special school or in special education classes at a mainstream school, or

(g) to have an inability to understand a caution given to the person under section 122 of the Act.

These identifiers are based on recommendations made by the NSWLRC in relation to the identification of people with an intellectual disability and also appear in the Code of Practice for CRIME. [596] In addition, the Code of Practice for CRIME also advises officers that other indicators are when:

— *the person identifies themselves as someone with impaired intellectual functioning*

— *someone else (carer, family member or friend) tells you the person is or may be someone with impaired intellectual functioning*

— *the person exhibits inappropriate social distance, such as being overly friendly and anxious to please*

— *the person acts much younger than their age group*

— *the person is dressed inappropriately for the season or occasion*

— *the person has difficulty reading and writing*

— *the person has difficulty identifying money values or calculating change*

— *the person has difficulty finding their telephone number in a directory*

— *the person displays problems with memory or concentration.*[597]

As rigorous and useful as these checklists may be, this guidance does not encourage officers to be proactive in identifying people who may require support in circumstances where a strip search is required. Nor is it clear that they are known and applied consistently by all officers.

In order to ensure that people with impaired intellectual functioning are appropriately identified for the purpose of applying the section 33(3) safeguard, measures must be taken to improve officer awareness and encourage officers to actively consider relevant, practical criteria.

A further issue that may be affecting police awareness and identification of people with impaired intellectual functioning is the variety of terms used to identify people to whom additional safeguards apply as they move through the criminal justice system such as 'vulnerable person',[598] 'incapable person', [599] or a 'mentally incapacitated person',[600] to name a few.

In our view it would be beneficial to rationalise terminology used for safeguards so that people who may not be able to protect their own interests are identified and afforded relevant protections consistently throughout any interaction they may have with the criminal justice system.

Once properly identified, the strip search must be conducted in the presence of a support person for this safeguard to effectively protect the interests of the person who may not be able to do so themself.

Provision of support for people who are identified as having impaired intellectual functioning

It has not been possible to statistically analyse how often police arrange for a support person to be present if a strip search is required of a person with impaired intellectual functioning because this information is not recorded on COPS in a systematic way.

Our Court survey found one example of a man who disclosed that he had a mental illness who reported that he was strip searched in the presence of a doctor whom he identified 'as his support person'.[601]

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596 NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996), Recommendation 6(a), par. 4.49–4.52.

597 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated May 2008, pp.106–107.

598 Law Enforcement (Powers and Responsibilities) Regulation 2005, clause 24(1) provides: 'A reference in this Division to a vulnerable person is a reference to a person who falls within one or more of the following categories:
(a) children
(b) persons who have impaired intellectual functioning
(c) persons who have impaired physical functioning
(d) persons who are Aboriginal persons or Torres Strait Islanders
(e) persons who are of non-English speaking background but does not include a person whom the custody manager reasonably believes is not a person falling within any of those categories'.

599 *Crimes (Forensic Procedures) Act 2000*, section 3 defines an 'incapable person' as 'an adult who:
(a) is incapable of understanding the general nature and effect of a forensic procedure, or
(b) is incapable of indicating whether he or she consents or does not consent to a forensic procedure being carried out'.

600 *Summary Offences Act 1988*, section 27A defines a 'mentally incapacitated person' as 'a person who is incapable of managing his or her affairs'.

601 Local Court survey 54. See Appendix 1 (5.17).

In order to canvas some of the issues concerning people with impaired intellectual functioning, we consulted with the IDRS and the CJSN who indicated that two-thirds or more of their calls for assistance are from case managers, workers, family members, guardians and the like who have become aware that a person with an intellectual disability is being held by police.[602] The IDRS said:

> *We know of a number of cases where people have said 'I have a disability, I want a support person', [and] police have either refused to call someone or said they couldn't find anyone to call, even when they had our details and we have had contact with the police and then gone ahead anyway, or said 'Oh, no, you don't have a disability'.*[603]

The IDRS indicated that even where police have identified that a person has impaired intellectual functioning, police do not always contact them for the search, saying:

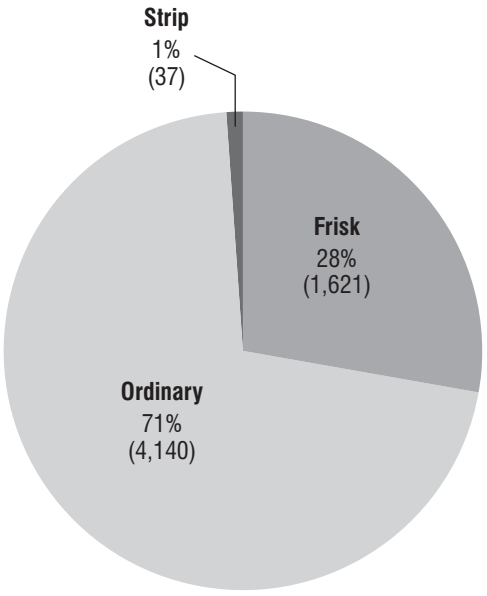
> *So often, we've had police say 'Oh, we're not interviewing them so you don't need to send a support person' or they ring us afterwards and say 'We're just letting you know, we've had someone in, we didn't interview them, so we didn't need to get a support person'.*[604]

These comments from a key stakeholder suggest that compliance with this safeguard in relation to people with impaired intellectual functioning appears to be very low. Legislating that a support person be present for a strip search of a person with impaired intellectual functioning can do little to protect the interests of the person unless the person is properly identified as someone who must have a support person present and support is in fact provided during the strip search. Consequently, in our view, the aims of Parliament do not appear to have been met with regard to people with impaired intellectual functioning.

16.4.1.2. Children

Despite the absence of identification issues compliance with the section 33(3) safeguard in relation to children is low. The COPS data indicates that 884 strip searches of children were recorded on COPS during the review period including 37 in the field and 847 while in custody as shown in figures 15 and 16.

Figure 15. Searches in the field of 10 to 17 year olds



Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2007. n=5,798.

<u>In the field</u>

Of the 5,798 searches in the field involving people between the ages of 10 and 17 during the review period, less than 1% (37) were characterised as a strip search. We have not been able to analyse how many of these strip searches were attended by a support person because this information is not recorded on COPS for searches in the field.

Both our Children's Court and street surveys provide some indication of how often a support person is present for a strip search in the field. As part of both surveys, we asked young people what clothing they were required to remove as part of the search. In analysing this information 'strip searches' were identified by our office as those searches where the young person reported that they were required to remove their shirt, trousers, shorts, skirt, dress, and/or underwear.

In the Children's Court survey, nine of the 10 respondents under 18 years of age who described a strip search in the field reported they were not offered a support person. This included one incident involving two brothers aged 13 and 15 who reported that they were arrested at their home early in the morning and taken outside, onto the street where they were strip searched in the absence of an available adult who was present in the home.[605]

Only one 14 year old boy reported that he had a support person present when he was arrested and strip searched at his home. This young person reported that his carers who acted as his support people were able to see and hear the whole search and that he was 'really comfortable' having them present for support.[606]

602 Interview with Intellectual Disability Rights Service and Criminal Justice Support Network, 18 October 2006.
603 Interview with Intellectual Disability Rights Service and Criminal Justice Support Network, 18 October 2006.
604 Interview with Intellectual Disability Rights Service and Criminal Justice Support Network, 18 October 2006.
605 Children's Court surveys 62 and 63.
606 Children's Court survey 24. See Appendix 1 (5.17).

As part of our youth street survey we spoke to a further six young people who described a strip search in the field. Two of those young people reported that a support person was present, as outlined in case studies 17 and 18.

Case study 17

Youth street survey report of a strip search on the street in the presence of a support person

We spoke to a 16 year old boy who told us he was searched by police in a way that involved taking his shirt off and pulling his shorts down 'for about one minute' on a busy road in an inner city area. When asked whether anyone else could see him the young person said 'other boys were watching me'.

His version of events was confirmed by a youth worker who acted as a support person during this particular search. The youth worker told us it was lucky she just happened to be coming out of a nearby shop when she saw the young person with police, and reported that it appeared to her the search would have been even more invasive if she had not turned up and insisted on staying. The boy reported that he was glad the youth worker was there and told police he wanted her to stay during the search.

Case study 18

Youth street survey report of a strip search in a shop in the presence of a support person

We spoke to a 16 year old girl who told us she was arrested for shop lifting babies' clothes by a male officer who called for a female officer to attend to conduct the search.

The girl asked police to contact a friend (over 18) who was available and allowed to attend as her support person. The girl was taken to a back room in the shopping centre where the female officer conducted the search in the presence of the friend. The search itself required that she remove her shoes, and lift up her skirt. She was then taken to the police station for fingerprinting. The girl reported that she was glad to have a support person with her during the search.

While a support person was present in both scenarios, it was not instigated by police in either instance. In case study 17, the support person was only allowed to remain after some discussion with police. Had this youth worker not been aware of the support person requirement for a search of this kind and insisted on staying, it is possible that the outcome may have been different.

Of the four young people who described a strip search in the field without support in our youth street survey, three said they would not have wanted a support person to be present, including one 17 year old boy who reported that when police asked if he would like a support person he said no.[607] However, as discussed below in section 16.4.1.3, not wanting a support person does not provide an exception to the section 33(3) safeguard.

Consultations with the Shopfront Youth Legal Centre indicate that it is not uncommon for an available support person to be turned away in the field, as the principal solicitor, Jane Sanders commented:

> *If police encounter someone on the street and they want to search them, normally [police] tell all the person's friends to nick off. [Police] generally don't like to be watched while they're doing things.*[608]

In consultations, only a small number of police officers advised that they had conducted a strip search of a child in the field since LEPRA commenced. However, many indicated that situations can and do arise where it is necessary. For searches in the field, one officer told us:

> *I'd say there's definitely been times when a strip search may have been warranted. However, a lot of the time you weigh up whether it's worth really invading a young person at that age to find a small amount of something … I don't think it's a very common practice because of the difficulties around that, even our regular juveniles. [If you are] searching on the street, it's not practical unless someone's there with them at the time.*[609]

In summary, the COPS data and information from the young people we surveyed suggests that police rarely take measures to ensure that a strip search of a child on arrest in the field is conducted in the presence of a support person. In our view, a support person should be present for all but exceptional circumstances in which it is not

607 Youth street survey 12.
608 Interview with Jane Sanders, Shopfront Youth Legal Centre, 7 November 2006.
609 Focus group with general duties proactive constables, LAC G, 20 November 2007.

possible to do so. The low level of compliance with this safeguard is of concern and should be redressed urgently. Some of the factors that may be contributing to this low level of compliance are considered below in section 16.4.1.3.

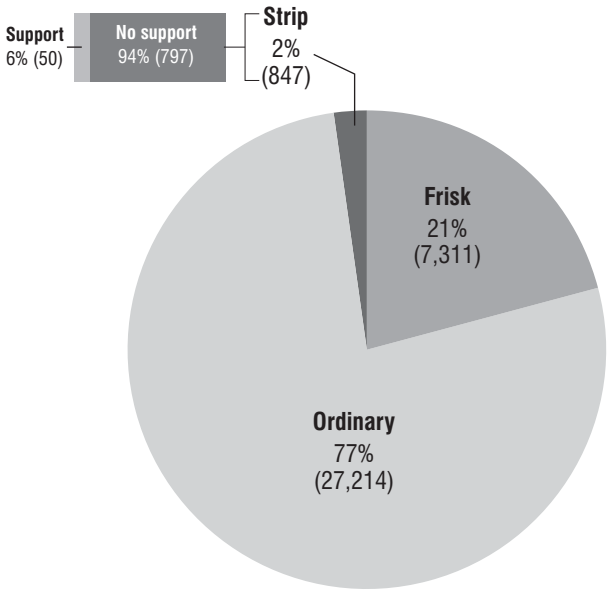
While in custody

Of the 35,372 searches in custody involving people between the ages of 10 and 17 during the review period, 2% (847) were categorised as a strip searches. As shown in figure 16, for 6% (50) of those strip searches, the child had a support person present. It is mandatory for police to record whether a support person was present for all strip searches while in custody by checking a 'yes' box if so. In addition, police can also make notes in the free text 'additional reasons' field of COPS.

We have considered any additional reasons provided by officers in relation to the 847 children strip searched while in custody. Of the 50 records that indicated a child was strip searched with a support person, three recorded who that support person was in the additional reasons: one record noted that the 13 year old girl's case worker was present,[610] another noted that the 11 year old boy's grandmother was present,[611] and the third noted that the 15 year old boy's older sister and a Department of Community Services representative were present.[612]

Of the 797 records that indicated a child was strip searched without a support person, only six commented on the absence of a support person in the additional reasons. table 4, below shows the additional reasons recorded by officers in those six records.[613]

Figure 16. Searches in custody of 10 to 17 year olds



Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2007. n=35,372.

Table 4. Additional reasons noted where support person was not present for a strip search of a child while in custody

Example	Additional reason
1: 17 year old male	Strip searched for drugs as arrested for supplying drugs. *Declined* a support person to attend the strip search.[614]
2: 16 year old male	*Declined* support person to be present, searched due to the serious nature of the offences.[615]
3: 15 year old male	Violent prisoner who was seen on CCTV footage to secrete objects down the front and rear of his pants. Support person offered due to being juvenile but *refused*; violent and extremely aggressive during search and time in custody.[616]
4: 17 year old male	Bail refused breach bail; *consented* to search without support person.[617]
5: 17 year old male	Clothes required as exhibits — *support person unable to be contacted* at this stage as not answering phone.[618]

610 COPS record U371295490, strip search of 13 year old female in a regional area.
611 COPS record U32044511, strip search of 11 year old male in the Sydney metropolitan area. Record notes that the support person was present because the young person was non-compliant, suggesting that the support person's presence may have assisted police to conduct the search.
612 COPS record U31535533, strip search of 15 year old male in the Sydney metropolitan area.
613 The 'primary reason' recorded for all six searches was 'custody property search' which is the default option.
614 COPS record U28916169, strip search of 17 year old male in the Sydney metropolitan area.
615 COPS record U31671971, strip search of 16 year old male in the Sydney metropolitan area.
616 COPS record U29826728, strip search of 15 year old male in the Sydney metropolitan area.
617 COPS record U29522157, strip search of 17 year old male in the Sydney metropolitan area.
618 COPS record U27525882, strip search of 17 year old male in the Sydney metropolitan area.

Table 4. Additional reasons noted where support person was not present for a strip search of a child while in custody cont'd

Example	Additional reason
6: 17 year old male	Strip search conducted due to information a weapon was used in the commission of the offence. No weapon had been recovered at the scene. *Unable to await a support person* to be present for strip search due to the possibility of the prisoner still being in possession of a weapon.[619]

Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2007. Emphasis added.

Examples 1 to 4 suggest that some officers may be of the view that it is possible to 'opt out' of this safeguard if the child 'consents' or 'declines' to have a support person present. However, unlike section 33(2) which provides that a strip search of any person 'may' be conducted in the presence of a support person, section 33(3) provides that a strip search of a child 'must' be performed in the presence of a support person.

The only situation in which section 33(3) authorises police to conduct a strip search of a child (or person with impaired intellectual functioning) in the absence of a support person is if 'it is not reasonably practicable in the circumstances'. While this may include the unavailability of a support person (as suggested in example 5) or the urgency to search (as suggested in example 6), a child's acquiescence to a strip search in the absence of a support person cannot and should not constitute circumstances that make it impracticable to comply with the safeguard. The issue of children declining to have a support person is discussed further in section 16.4.1.3.

In our Court survey, 15 of the 19 young people under 18 years of age who described a strip search at a police station reported that they did not have a support person present.[620] This included one 17 year old boy who commented that when he asked police for a support person, 'police said no, so I didn't get one'.[621]

The four young people who said they had a support person present during a strip search at a police station, included one 17 year boy in the Local Court who reported that his father was at the police station but 'waited outside' while the strip search was conducted,[622] and one 16 year old boy in the Children's Court who described a situation in which police deferred the conduct of a strip search to meet this safeguard, as illustrated in the case study below.[623]

Case study 19

Children's Court survey report of a strip search of a young person where police contacted and waited for the support person to attend

We spoke to a 16 year old boy who told us he was asked by police if he would like a support person before a strip search was conducted. He said that he would and police waited approximately one hour until his foster mother was able to attend the station to be present for the search.

The boy told us that the search involved him being asked to take his shirt off and put it on the table, turn around, put shirt back on, then take his trousers and undies off and put them on the table and turn around. He was then allowed to dress straight away.

He also reported that his support person could both see and hear the search. When asked how he felt about having his support person there he said, 'I would rather have her there than not'.

In summary, the COPS data and information from young people suggest that strip searches of children while in custody are seldom conducted in the presence of a support person as required in section 33(3). As with strip searches of children in the field, in our view, a support person should be present for all but exceptional circumstances in which it is not possible to do so. The low level of compliance with this safeguard is of concern and should be redressed urgently. Some of the factors that may be contributing to this low level of compliance are considered below in section 16.4.1.3.

619 COPS record U31028967, strip search of 17 year old male in the Sydney metropolitan area.
620 The total of 19 young people includes 17 young people who described a strip search in our Children's Court survey and two young people who described a strip search in our Local Court survey. See Appendix 1 (5.17).
621 Children's Court survey 27.
622 Local Court survey 337.
623 Children's Court survey 9.

16.4.1.3. Possible factors influencing compliance with section 33(3)

There are four main factors that appear to be contributing to the low incidence of support for strip searches of children namely:

- unavailability of support persons
- focus on the support requirements for interviews under Part 9
- people declining support if asked
- urgency in the circumstances requiring a strip search before support can be obtained.

Each of these factors are considered in turn below, focusing mainly on children. While many of these issues also relate to people with impaired intellectual functioning, the primary issue affecting compliance for people with impaired intellectual functioning is identification, which is a prerequisite for the provision of support, as noted above in section 16.4.1.1.

Availability of support persons

In consultations, a number of officers commented on the difficulty they experience getting parents or guardians to attend the police station as support for a child. In most LACs, at least one officer noted that there are times and locations where police have difficulty obtaining a support person, for instance, police officers told us:

> *In some cases we have mum along if they're under the age of 16 you would, you'd get the parent, but between 16 and 18 years, not really. You can make your own mind up as to who you have. Half the time the parents or the guardians they'll basically say they're not coming in, you know, 'It's 2 in the morning, 3 in the morning, I've had enough of them'.*[624]

> *In an area like this it's very hard. I've spent a couple of weeks over at [another station] as a sergeant and it's totally different like if we ring up people's parents over there they come straight in type thing but over here 'no, I don't want to speak to them, I've had enough, don't care what you do with him'.*[625]

> *In custody we wait plenty of times for support people, [up to] two or three hours but the fact is, around this area that most times you can't get a support person. You ring up the kid's parents and they refuse to come in so you have great difficulties.*[626]

Police also indicated that this means the responsibility often falls on volunteer agencies to provide support at all hours, for instance, officers commented:

> *You've obviously got to start at the parents and that's usually an issue around here because a lot of them don't have phones or mobile phones, or the parents just couldn't give a rat's. There are other agencies who do have people that will come and act as a support person depending on what time of the day it is. That's something that is a real problem in the country. When you get them on the list, they start out fairly keen but when you start calling at 2 and 3 o'clock in the morning, after a while they start not to answer the phone so then you go through a new list of people.*[627]

> *At midnight when it's required there's no-one around. I could go on for hours about this. No, there isn't support. We beg, borrow and steal people to come in to sit for interviews with young people.*[628]

In summary, the actual or perceived unavailability of support people, particularly late at night and in the early hours of the morning, appears to be a factor contributing to poor compliance with this safeguard. In addition, it appears that there is limited recording of actions taken by police to contact support people, arrange for their presence for a strip search or explain why a support person is not present at a strip search in the custody management system.

Focus on support for interviews

While the COPS and Court survey data suggest that few strip searches of children appear to be conducted in the presence of a support person, information from our Children's Court survey indicates that all of the young people who reported being interviewed at a police station had a support person present for the interview.[629] This difference in support for interviews and strip searches may be due to a number of factors including the child's wishes, the urgency to conduct a search and legislative requirements.

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624 Focus group with general duties sergeants, LAC F, 29 October 2007.
625 Focus group with general duties sergeants, LAC B, 25 July 2007.
626 Focus group with senior constables, LAC G, 29 August 2006.
627 Focus group with general duties sergeants, LAC F, 29 October 2007.
628 Interview with duty officer, LAC B, 23 July 2007.
629 All 39 Children's Court respondents who reported being interviewed at a police station said that police organised for a support person to be present for the interview. See Appendix 1 (6.5).

In consultations we asked officers if they always have a support person present in circumstances where a strip search of a child is required. Most officers indicated that they endeavour to have a support person present if it is necessary to strip search a child because a support person would also be required for an interview of a person under 18 years of age under Part 9 of LEPRA,[630] as the following quotes suggest:

> *We generally like to have a support person there to explain what's going on and everything like that. Oasis are very good, Salvos are very good as well. Ambulance are our last resort because they're considered the friendly part of the emergency services. So they're just there to act if we've got nobody else. Of course if they're under 16 well then the only person you can have is a parent, which trust me is not always easy to find.*[631]

> *If you're going to have a child of 10 to 18 in custody you'd have a support person there anyway. Occasionally we've had to call on some of the Wesley Mission support, to act as a support person where the parents really couldn't give a toss or are not contactable.*[632]

> *Because they're juveniles, you need a support person anyway to interview them, so they'll have a support person there [for the strip search].*[633]

Section 112(1)(a) of LEPRA states that the requirements of Part 9 are modified by the Law Enforcement (Powers and Responsibilities) Regulation 2005 in relation to persons under the age of 18. Under Division 3 of the Regulation children are identified as vulnerable persons who are entitled to have a support person present during an investigative procedure. In particular, clause 29 of the Regulation states that a child cannot waive their right to a support person for an investigative procedure. These investigative requirements are also reinforced by section 10 of the *Young Offenders Act 1997* which states that an admission by a child who is under 16 years of age is not an admission for the purpose of the Act unless it takes place in the presence of a parent or person who has the care of the child. Division 3 also identifies people with impaired intellectual functioning as vulnerable people who are entitled to have a support person present during an investigative procedure. However, unlike a child, there is no equivalent provision precluding the person from waiving this right.[634]

Other sources of information suggest that while it may be a reasonably common practice for police to contact and wait for a support person to arrive before conducting an interview, on occasions police do not wait for the support person before conducting the strip search, as demonstrated in the following examples taken from our observation of strip searches recorded on CCTV and the youth street survey.

Case study 20

Observation of CCTV footage in which young person is searched before parent arrives

CCTV recording shows a 16 year old boy being taken to the search area of the charge room in the company of two male officers. The footage provides a full view of the two searching officers and a partial view of the young person being searched — namely his arms which can be seen when he hands an item to police.

The young person hands his shoes to police who search them and put them to one side. The young person then hands his shirt to one officer and pants to the other officer. Both items are searched and returned to the young person who is then allowed to dress. He is then escorted back to the charge room.

The entire search took no more than two minutes. Approximately 30 minutes later a woman (possibly his mother) enters the charge room and is allowed to speak to the child.[635]

630 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.112.
631 Interview with custody manager, LAC G, 20 November 2007.
632 Interview with custody manager, LAC F, 29 October 2007.
633 Focus group with constables, LAC G, 29 August 2006.
634 Law Enforcement (Powers and Responsibilities) Regulation 2005, cl.24 and 27.
635 CCTV record 7 and COPS record U105554597. The COPS record indicates that police contacted the child's support person 30 minutes before conducting the search.

Case study 21

Youth street survey report of a strip search before parents arrived

We spoke to a 15 year old boy who told us he was arrested and taken to the police station. He was first patted down in the park where he had been arrested, then searched again more thoroughly at the station. He reported that police asked if he would like to have a support person, he said yes, and his parents were called, but was then searched before his parents arrived.

In summary, the understanding and commitment demonstrated by police in contacting a support person and waiting for that person to arrive before interviewing a child must be extended to strip searches. While failure to obtain appropriate support for a strip search in accordance with section 33(3) may not affect the admissibility of evidence in the same way as failure to obtain support for an interview, lack of compliance has the potential to result in disciplinary action against the searching officer. In our view officers must be reminded that they have a duty to conduct a strip search of a child in the presence of a support person.

Not wanting a support person

Another aspect of the low rate of compliance with this safeguard relates to the issue of children advising police that they do not wish to have a support person present. As noted in the additional reasons provided by officers in section 16.4.1.2, when asked, children sometimes indicate that they do not wish to have a support person present.

A number of young people also reported that they did not wish to have a support person present in both our Children's Court and street survey. This was particularly true of young people who were 16 years of age or older, as the following case study shows.

Case study 22

Youth street survey report of a young person who advised police that he did not want a support person to be present for the strip search

We spoke to a 17 year old boy who told us he was arrested in relation to a fight earlier that day and taken back to a police station. At the station, police told him they would conduct a search for weapons and asked him to remove his shoes, socks, shorts and shirt. He reported that police called his parents but it was 3am and his mum was not willing to come to the station. He also reported that he did not want his mum to come, saying, 'I'm my own person'.

In comparison, none of the young people who said that they had a support person present during a strip search objected to the presence of that person, as shown in case studies 17, 18 and 19. Similarly, in consultations the IDRS explained that many of their clients experience high levels of anxiety when interacting with police. The IDRS indicated that having a support person can help to reduce the level of anxiety experienced by the person being searched, which may make it easier and quicker for police to conduct the search and less distressing for the person. In relation to the willingness of people being searched to have a support person present, the IDRS said:

> *We've never had somebody refuse a support person and we've found that quite interesting because we know people like to hide their disability but because of the anxiety levels and how difficult it is in the police station, people are always really happy to have somebody there. So they may be saying 'Oh I've only got ADHD', but they're still saying 'Yes, I want a support person'.*[636]

The notion that a person who may not be able to protect their own interests can waive this or any other safeguard designed to protect them cannot be reconciled with the stated aims of Parliament. The very reason why children and people with impaired intellectual functioning are identified as requiring support for a strip search is that they may not be able to protect their own interests. Yet the practices and comments of police in relation to children suggest that in circumstances where police consider the issue of support, they more often *ask* the person if they want support rather than arrange for that to happen. As discussed in section 14.7, the safeguards in sections 32 and 33 are *responsibilities* incumbent on police in the exercise of personal searches rather than rights that vest in the person being searched. Consequently, the onus rests with police to comply with the rule in section 33(3) by arranging for a support person to be present for a strip search of a child or person with impaired intellectual functioning.

636 Interview with Intellectual Disability Rights Service and Criminal Justice Support Network, 18 October 2006.

The role of a parent, guardian or other person who is present to support a person during a strip search is not set out in LEPRA or the Law Enforcement (Powers and Responsibilities) Regulation 2005. However, as mentioned above, the second reading speech provides some guidance that suggests two primary roles, namely, protecting the interests of the person and assisting police to conduct the search.

The very presence of a support person during a strip search can assist in protecting the interests of a young or intellectually impaired person. However, most importantly, such a person is able to observe the search as an adult with the interests of the person being searched in mind.

A support person may also be able to calm and help the person to communicate with police more effectively, and thereby assisting in two ways: firstly by providing moral support through what is potentially a traumatic experience for the person and secondly helping to facilitate a lawful search by police more easily.

In their report *Police Strip Searches in Queensland*, the CJC noted that the presence of a support person could in some instances be even more humiliating than having only the police officer present.[637] The CJC concluded that a support person should be present to help explain the reason for the strip search, but that the child should then be able to choose whether their support person remains in the room during the search or waits outside, and that the decision should be noted in the custody record.[638]

In the United Kingdom the *Police and Criminal Evidence Act 1984* provides:

> *Except in cases of urgency, where there is a risk of serious harm to the detainee or to others, whenever a strip search involves exposure of intimate body parts, there must be at least two people present. If the search is of a juvenile or a mentally disordered or otherwise mentally vulnerable person, one must be the appropriate adult — unless the juvenile, in the presence of the appropriate adult, says he does not want that adult there and the adult agrees.*[639]

While this support person safeguard is more limited in its application to strip searches that involve exposure of intimate body parts, it does suggest that a support person must be physically present for the explanation of any such procedure, but need not view the search itself if that is the child's wish and the support person agrees.

In summary, while there are certainly instances where a child may not wish to have a support person present, such situations appear to be rare. Moreover, if a child objects to having their parent, guardian, or another relevant person present, this does not limit the application of this safeguard. Although police are required to try to find someone who is acceptable to the person being searched, the unacceptability of an available support person does not necessarily constitute circumstances that make it impracticable to search in the presence of a support person.

If a child's preference not to have a support person present is substantially compromising the operation of this provision, consideration should be given to amending the section 33(3) safeguard. This could specify the requirement that a support person be present for the explanation of the search requirements but allowing the child to elect to be strip searched out of view of their support person if the support person agrees in person.

Urgency

In its submission to our issues paper, the Police Association of NSW argued that the level of urgency should also be considered in determining whether it is practicable to have a support person present for a strip search of a child or a person with impaired intellectual function, stating:

> *Obtaining a support person to oversight juvenile strip searches can be time consuming and steps should be recorded as to what inquiries were made BUT this should not restrict police from conducting the search if required as soon as possible and for the possible safety of all. It may also reduce the amount of time a juvenile is held in custody. Having procedures in place should not make it a legislative requirement.*[640]

Examples of urgency provided by the Police Association included 'secreting a knife or graffiti material that is being used in the charge room or even a lighter that is being used by the juvenile to melt the perspex off the cell door'.[641]

In our consultations, one officer told us:

> *Obviously if there's an immediate fear for their safety and others, unfortunately time may not permit [you to wait for a support person] and you have to do [the strip search]. If they've got a razor on them or something like that then they're going to use it against you or they're going to use it to slice their own wrist and this is unfortunately what we're up against.*[642]

637 Criminal Justice Commission, *Police Strip Searches in Queensland: An inquiry into the law and practice*, June 2000, pp.67–68.
638 Criminal Justice Commission, *Police Strip Searches in Queensland: An inquiry into the law and practice*, June 2000, pp.67–68.
639 *Police and Criminal Evidence Act 1984* (UK), Code C, Annex A, par. 11(c).
640 Police Association of NSW submission to LEPRA issues paper, February 2008, p.7.
641 Police Association of NSW submission to LEPRA issues paper, February 2008, p.7.
642 Interview with custody manager, LAC F, 29 October 2007.

The Deputy Senior Public Defender, Andrew Haesler SC noted that there are ways of managing these concerns while ensuring that appropriate safeguards are provided:

> *I don't see why it's not possible to get an independent adult in every case. Yes, it might mean they have to be more carefully watched if there is a fear that they'll do something [before the support person arrives] but the added inconvenience [is small] as opposed to the real risk to the kid. Sometimes, rights actually mean a little bit of inconvenience and if there is an inconvenience, then [police] have to think 'Is this really necessary?'*[643]

Ideally officers should take measures that allow for a support person to attend before conducting any strip search of a child at a police station. As discussed in section 14.4.2 it is also important to ensure that police have the power to conduct appropriate searches in circumstances where there are urgent safety or security reasons for doing so. Hence the qualification on the section 33(3) requirement to the extent that it is 'reasonably practicable in the circumstances'. In our view, if applied properly, the existing threshold already enables a search of a child in the absence of support if it is necessary to do so for urgent safety reasons.

In comparison, the Queensland PPRA is more specific about the circumstances in which a strip search involving the removal of clothing may be conducted in the absence of a support person. That Act specifies that a 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.[644] This slightly stricter formulation is in our view, a clearer statement of the support person safeguard as it specifies exactly what the officer must suspect in order to conduct a strip search in the absence of a support person.

In summary, as noted by the Police Association, urgent safety considerations are clearly an important factor for police to consider in determining whether an immediate strip search (in the absence of a support person) is required. In circumstances where the urgency of a situation requires a strip search of a child in the absence of a support person, the reasons for doing this must be included in the search record along with any efforts to contact potential support people. As indicated in recommendation 7 (section 14.4.2.5), recording information of this nature need only involve a short comment in the additional reasons field for strip searches, and should not therefore be onerous.

16.4.1.4. Protecting the interests of those who may not be able to do so themselves

At present section 33(3) operates as little more than a suggestion. In practice, there is little evidence to suggest that people with impaired intellectual functioning are appropriately identified as people requiring support — let alone provided with such support, while the COPS data, survey material and consultations with stakeholders all suggest that it is rare for a strip search of a child to be carried out in the presence of a support person.

Based on the available information, we are of the view that the current exception based on what is reasonably practicable in the circumstances has not been effective in protecting the interests of people who may not be able to do so themselves. In order to clarify that the exceptions to this safeguard requirement are limited, we are of the view that the presence of a support person must be compulsory unless police suspect on reasonable grounds that an urgent strip search is necessary for reasons of safety, security or the loss/destruction of evidence — the details of which must be recorded.

As discussed above, in order to give effect to the safeguard police must also:

- increase officer awareness about signs that may indicate impaired intellectual functioning through training, interaction with advocacy groups and community involvement
- reinforce that the presence of a support person is not optional and that there is an obligation on police to obtain a support person for the child or a person with impaired intellectual functioning
- improve the quality of recording the efforts to obtain support to ensure that officers do consider the safeguard requirements and to facilitate effective monitoring as discussed in section 14.4.2.5.

In comparison to LEPRA, requiring the presence of a support person is only one of a number of safeguards in place for a strip search of a child or person 'incapable of managing his or her affairs' under the Commonwealth *Crimes Act 1914*.[645]

643 Interview with Andrew Haesler SC, Public Defenders Office NSW, 17 December 2007.
644 *Police Powers and Responsibilities Act 2000* (Qld), s.631.
645 *Crimes Act 1900* (ACT), s.228 contains almost identical provisions.

Table 5. Comparison of NSW and Commonwealth strip search safeguards

	NSW — LEPRA		Commonwealth — *Crimes Act 1914*	
Threshold requirements for any strip search	s.31	1. Suspect on reasonable grounds: a. necessity b. seriousness, and c. urgency require the strip search to be carried out.	s.3ZH	1. Suspect on reasonable grounds: a. the person had a sizable item or evidential material, and b. it is necessary to conduct a strip search to recover that item. 2. Brought to a police station. 3. Approved by a superintendent or higher.
Additional safeguards **If the person is a child or a person with impaired intellectual functioning**	s.33(3)	2. Support person is present (to the extent that it is reasonably practicable in the circumstances).	s.3ZI(1)(f) and s.3ZI(2)	4. Person has been arrested and charged or strip search has been ordered by a magistrate who must have regard to: a. the seriousness of the offence b. the age or any disability of the person c. such other matters as the magistrate thinks fit in making an order. 5. Support person is present.

As shown in table 5, the Commonwealth provides a significantly more comprehensive raft of safeguards to ensure that the interests of children and people with impaired intellectual functioning are protected in the context of a strip search. The Commonwealth scheme provides alternative measures that could be introduced under LEPRA, if a stricter wording of section 33(3) along with further guidance and reporting requirements are ineffective in ensuring that the existing safeguard meets its stated aims.

Recommendations

28. Parliament consider amending section 33(3) of the *Law Enforcement (Powers and Responsibilities) Act 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.

Recommendations

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 of a child or a person with impaired intellectual functioning.
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.
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.

16.4.2. Support for people during strip searches generally

Section 33(2) provides that a parent, guardian or personal representative may be present during the strip search if it is reasonably practicable and the person being searched has no objection.

In order for a person to exercise this option to have a support person present, they must be aware that the safeguard exists. While this provision allows for the presence of a support person, it does not require police to tell the person of this entitlement. In fact, we have observed searches at events such as dance parties where friends of the person being searched have been asked to move away.

If this provision anticipates particular circumstances where a personal representative is needed, this should be made explicit. If on the other hand, the intention of the legislature is to ensure that any person who wants to have someone present for support during a strip search (if it is practical), the person subject to a search should be informed of this entitlement.

Recommendation

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.

16.5. Prohibition on strip searches of children under 10 years of age

It should also be noted that the COPS data has not revealed any strip searches of children under the age of 10, which is prohibited under section 34.

The prohibition against strip searching children under 10 years old in LEPRA is mirrored in both the Australian Capital Territory and Commonwealth regimes.[646] Neither Queensland nor Western Australia provide a prohibition against searching children under 10 but both provide that support persons should be present for such a search.[647]

646 *Crimes Act 1914* (Cth), s.3ZI(1)(e); *Crimes Act 1900* (ACT), s.228(1)(e).
647 *Police Powers and Responsibilities Act 2000* (Qld), s.631(1); *Criminal Investigation Act 2006* (WA), s.73(3)(g).

Chapter 17. Conclusion

The stated objectives of Part 4, Divisions 2 and 4 of LEPRA were to simplify the personal search powers without reducing or increasing existing powers so that they could be readily understood by police and the community, and provide safeguards that better define police responsibilities when conducting personal searches.[648]

17.1. The personal search powers

In terms of the personal search powers our review has found that the scope of the power to search a person in custody is not well defined — leaving the application of this broad power open to interpretation.

The introduction of ancillary powers to request that a person open their mouth or move their hair are problematic as they suggest a power to search those parts of a person's body, conflicting with safeguard provisions which prohibit the same. In our view sections 21A and 23A should be repealed and any replacement provision should clearly outline what power police have to search those parts of a person's body, what type of search (ordinary or strip) it constitutes (for the purpose of applying safeguards) and reconsider the need for an offence. Any amendments allowing for searches of this kind should be subject to review.

Both in theory and practice, there is little practical difference between a frisk and an ordinary search. At the operational level police do not generally distinguish between the two and legislatively, the same safeguard provisions apply. In our view it is appropriate that they be amalgamated.

Conversely, we are of the view that the search regime has over simplified the strip search requirements by prescribing the same threshold requirements for strip searches in the field and in custody. While the threshold requirements of seriousness, urgency and necessity are appropriate in the field, we are of the view that this is an overly restrictive requirement in custody which either requires that the situation become serious and urgent before police can conduct a strip search, or conversely, that police conduct a strip search where necessary (before the situation becomes serious) and risk the lawfulness of that search being contested.

17.2. The general safeguards

In terms of the general safeguards, section 201 appears to be overly complex, and that combined with the rigid, legalistic focus of training is resulting in low rates of compliance with the safeguards.

Amendments do not appear to consider the legislation or even the personal search provisions in LEPRA holistically. Nor is it clear that key amendments to provisions that are most frequently used by police such as section 201 are being adequately conveyed to officers on the front line.

With respect to the legalistic focus of police on this safeguard requirement, we note that there is considerable scope to promote the use of plain English in police dealings with the public.

17.3. The personal search safeguards

While our review found that there is broad support for the principles of privacy and dignity which the Part 4 safeguards embody, some aspects require greater compliance in order for the safeguard to be effective in meeting these aims. In particular, the safeguard requiring a support person for children and people with impaired intellectual functioning during a strip search has not been effective in protecting the interests of those who may not be able to do so themselves. Conversely, the practicality of some of these safeguards are reflected in the high level of compliance with some safeguards such as the requirement that searches be performed by officers of the same sex as the person.

Our review also found that there is considerable scope to increase the accuracy of record-keeping by improving the quality of data entry and cutting down on duplication, improve accountability in custody by pairing technology upgrades such as digital CCTV recording with appropriate policies and guidelines. Initiatives such as these will help to support police in their work.

Our recommendations, arrived at through consultation with relevant agencies, provide solutions to these issues and others. If implemented, we are of the view that they will enhance understanding and compliance with the law enforcement powers and responsibilities of police in relation to personal searches.

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648 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.

Part 3 — Crime scenes

Chapter 18. Introduction

Part 7 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) permits police to establish 'crime scenes' and to exercise 'crime scene powers' in certain circumstances.

The following discussion of crime scenes is structured as follows:

- the objectives of the crime scene provisions
- the legislative provisions under review
- comparable legislation in other jurisdictions
- the research methodology used to scrutinise the crime scene provisions
- implementation of the crime scene provisions
- the operation of the crime scene provisions
- issues concerning the crime scene provisions identified during the review period
- conclusion.

Chapter 19. Background

19.1. Objectives of the crime scene provisions

In June 2001, the then Minister for Police announced that a Bill would be introduced to codify and consolidate general police powers. In relation to crime scenes the Minister commented:

> *At present police powers to establish and manage crime scenes are implied from the common law. The problem with implied powers is that they can sometimes be vague and imprecise. We intend to clarify police powers to establish and manage a crime scene, so that evidence can be preserved and investigations can proceed unhindered.*[649]

The commentary for the Law Enforcement Powers and Responsibilities Bill stated that the crime scene provisions clarify police powers in relation to crime scenes:

> *Police regularly use these powers and it is preferable that the powers are express rather than implied. The ability to secure the safety of persons and ensure the preservation of evidence is fundamental to police business.*[650]

The model for this legislative regime in relation to crime scenes was Queensland's *Police Powers and Responsibilities Act 2000* (PPRA) which consolidated police powers.[651]

In the second reading speech for LEPRA the then Attorney General, the Hon. Bob Debus, described the rationale for the crime scene provisions as follows:

> *It is important that the public has confidence the evidence at a crime scene will not be interfered with, lost or destroyed.*[652]

The then Attorney General went on to say:

> *This Bill takes the opportunity to unequivocally clarify the powers that police currently exercise when establishing and undertaking certain actions at crime scenes.*[653]

19.2. Specific comments related to establishing crime scenes

In relation to establishing a crime scene, the then Attorney General made the following points:

- the Bill is not intended to detract from the powers of police to establish a crime scene in a public place
- the Bill does not prevent an officer from exercising a crime scene power or doing any other thing if the occupier consents
- the range of offences for which crime scenes may be established is limited to serious indictable offences and where there is an offence committed in connection with a traffic accident causing death or serious injury to a person
- the officer must be of the opinion that it is reasonably necessary to establish a crime scene to preserve or search for or gather evidence of such offences.[654]

19.3. Specific comments related to exercising crime scene powers and safeguards

In relation to exercising crime scene powers, the then Attorney General made the following points:

- police will only be able to exercise crime scene powers if they are already lawfully on premises or have been granted a crime scene warrant

649 The Hon. Paul Whelan MLC, NSWPD, Legislative Council, 6 June 2001, p.14517.
650 Law Enforcement (Powers and Responsibilities) Bill Commentary, 2001, p.10.
651 *Police Powers and Responsibilities Act 2000* (Qld).
652 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
653 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
654 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.

- a penalty for obstructing or hindering a police officer exercising crime scene powers, without reasonable excuse, will be introduced.[655]

The Bill adopted a two tiered approach to exercising crime scene powers — powers to preserve evidence and investigatory powers. The then Attorney General described this approach as follows:

> *If police are lawfully on the premises and establish a crime scene, certain basic powers to preserve evidence may be exercised in the first three hours without a crime scene warrant. The powers that may be exercised in the first three hours are aimed primarily at the preservation of evidence and include directing people to leave a crime scene and preventing persons entering a crime scene. The remaining crime scene powers are investigatory, and search and seizure powers. These powers may generally be exercised only once a crime scene warrant has been obtained.*[656]

In relation to the safeguards on the exercise of crime scene powers, the then Attorney General made the following comment:

> *The bill provides for a number of safeguards for the use of crime scene powers, such as providing time limits on the establishment of a crime scene.*[657]

19.4. Specific comments related to crime scene warrants

In relation to crime scene warrants, the then Attorney General made the following points:

- the application procedures for, and safeguards relating to, crime scene warrants are the same as those for a search warrant
- the authorised officer may issue a crime scene warrant authorising a police officer to exercise all reasonably necessary crime scene powers at, or in relation to, a specified crime scene
- police may, however, exercise any of the crime scene powers in the first three hours (that is, without a warrant) if the officer or another officer applies for a crime scene warrant AND the officer suspects on reasonable grounds that it is necessary to immediately exercise the power to preserve evidence
- the exception to the requirement for a warrant before the exercise of certain powers is vital as it allows officers to collect evidence in circumstances where waiting for a crime scene warrant to be issued would not be practicable, as the evidence would be destroyed
- these powers are not intended to detract from the search warrant powers.[658]

19.5. Parliamentary debate on the provisions

A number of the safeguards afforded in the Queensland legislation in relation to crime scenes were not reproduced in LEPRA. For example, the Queensland legislation provides that if it is necessary for a police officer to do anything that may cause structural damage to a building, the thing must not be done without a Supreme Court Judge issuing a crime scene warrant authorising the thing to be done. This issue was raised by the Hon. Richard Jones, MLC for the Australian Democrats, during parliamentary debate. He was of the view that the Bill should be amended to include a provision stating that police officers may only cause structural damage to a property if that officer is in possession of a warrant to that effect, as in the Queensland legislation. The Hon. Richard Jones was also of the view that the legislation should be amended to include a provision stating that police officers must exercise crime scene powers in a way that causes the least amount of damage to property. The Hon. Richard Jones, MLC, stated:

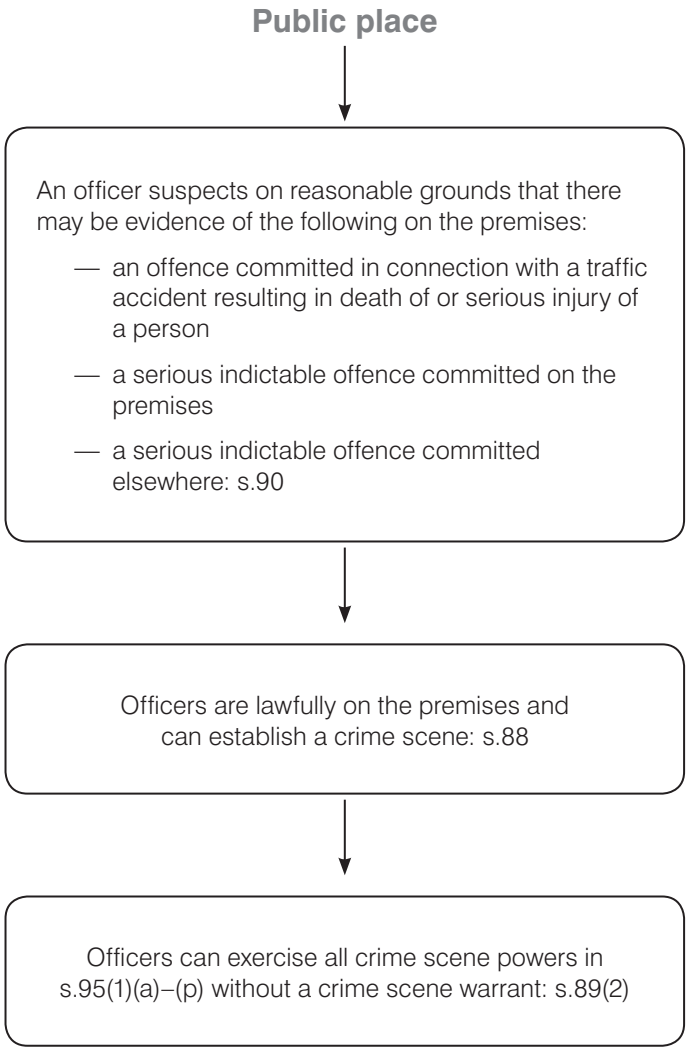
> *The officer must exercise those powers in a way that causes the least amount of damage to property … the restriction to cause "the least amount of damage as possible" should be more important than time, financial circumstances, resources or any other constraints.*[659]

655 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
656 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
657 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
658 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
659 The Hon. Richard Jones MLC, NSWPD, Legislative Council, 21 November 2002, p.7260.

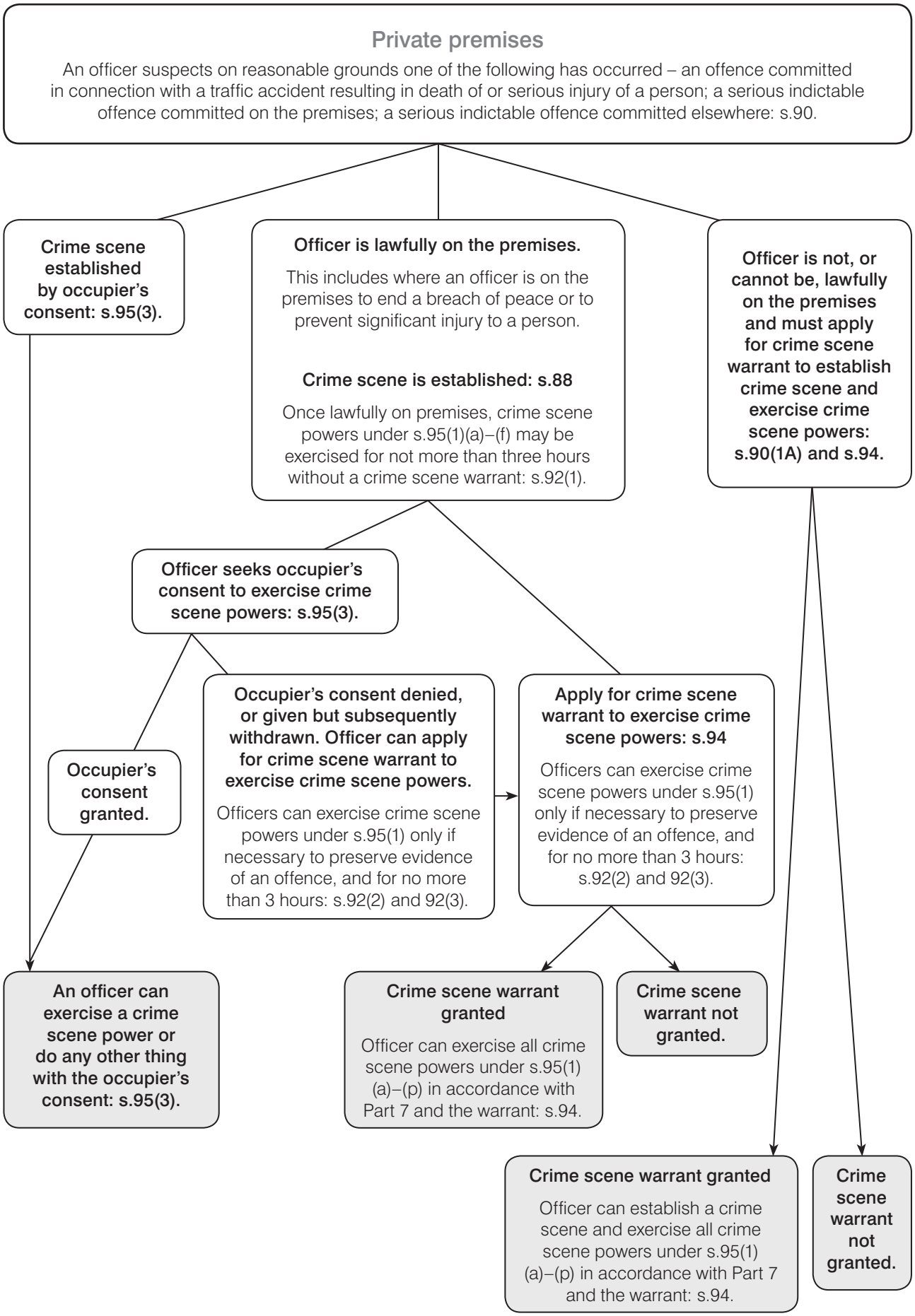
Chapter 20.
Overview of the crime scene provisions

Part 7 of LEPRA came into operation on 1 December 2005.[660] It was significantly amended twice during the review period.[661] An outline of the Part 7 provisions is provided below, including flow charts detailing the steps to be considered when exercising crime scene powers and a summary of the amendments introduced during the review period. A full listing of all amendments that occurred during the review period are detailed in Appendix 3.

20.1. Flow charts — exercise of crime scene powers in public places and on private premises



660 The *Law Enforcement (Powers and Responsibilities) Act 2002* was amended by the *Crimes and Courts Legislation Amendment Act 2005* before it commenced operation on 1 December 2005.
661 Part 7 was amended by the *Police Powers Legislation Amendment Act 2006*, and the *Law Enforcement Powers and Responsibilities Amendment Act 2007.*


Private premises
An officer suspects on reasonable grounds one of the following has occurred – an offence committed in connection with a traffic accident resulting in death of or serious injury of a person; a serious indictable offence committed on the premises; a serious indictable offence committed elsewhere: s.90.
Crime scene established by occupier's consent: s.95(3).
Officer is lawfully on the premises.
This includes where an officer is on the premises to end a breach of peace or to prevent significant injury to a person.
Crime scene is established: s.88
Once lawfully on premises, crime scene powers under s.95(1)(a)–(f) may be exercised for not more than three hours without a crime scene warrant: s.92(1).
Officer is not, or cannot be, lawfully on the premises and must apply for crime scene warrant to establish crime scene and exercise crime scene powers: s.90(1A) and s.94.
Officer seeks occupier's consent to exercise crime scene powers: s.95(3).
Occupier's consent granted.
Occupier's consent denied, or given but subsequently withdrawn. Officer can apply for crime scene warrant to exercise crime scene powers.
Officers can exercise crime scene powers under s.95(1) only if necessary to preserve evidence of an offence, and for no more than 3 hours: s.92(2) and 92(3).
Apply for crime scene warrant to exercise crime scene powers: s.94
Officers can exercise crime scene powers under s.95(1) only if necessary to preserve evidence of an offence, and for no more than 3 hours: s.92(2) and 92(3).
An officer can exercise a crime scene power or do any other thing with the occupier's consent: s.95(3).
Crime scene warrant granted
Officer can exercise all crime scene powers under s.95(1)(a)–(p) in accordance with Part 7 and the warrant: s.94.
Crime scene warrant not granted.
Crime scene warrant granted
Officer can establish a crime scene and exercise all crime scene powers under s.95(1)(a)–(p) in accordance with Part 7 and the warrant: s.94.
Crime scene warrant not granted.

20.2. The right of police to establish a crime scene and to exercise crime scene powers

Section 88 of LEPRA provides that a police officer who is 'lawfully' on 'premises' may establish a crime scene, exercise 'crime scene powers', and stay on the premises for those purposes.

LEPRA defines 'premises' very broadly to include 'any building, structure, vehicle, vessel or aircraft and any place whether built on or not'.[662]

Section 89(1) of LEPRA provides that Part 7 'applies to premises of any kind, whether or not a public place'. The effect of this provision is that police may establish a crime scene and exercise crime scene powers in a public place or on private premises.

20.3. Circumstances justifying the establishment of a crime scene

Section 90 of LEPRA specifies the grounds upon which police are entitled to establish a crime scene. Police must suspect on reasonable grounds that:

- an offence committed in connection with a traffic accident that has resulted in the death of or serious injury to a person, is being or was or may have been committed on the premises,[663] or
- a 'serious indictable offence' — that is, an offence punishable by a prison term of life or five years or more (for example, murder, sexual assault or kidnapping) — is being or was or may have been committed on the premises,[664] or
- there may be in or on the premises evidence of the commission of a serious indictable offence that may have been committed elsewhere[665] (this includes situations where the offence occurred outside New South Wales, and the matter would amount to a serious indictable offence if it had occurred in New South Wales).[666]

Police must also suspect that it is reasonably necessary to establish a crime scene in or on the premises to preserve, or search for and gather, evidence of the commission of the suspected offence.[667]

Alternatively, a crime scene may be established pursuant to the authority conferred by a crime scene warrant.[668]

20.4. Establishing a crime scene

Section 91 of LEPRA provides that police may establish a crime scene in any way that is reasonably appropriate in the circumstances.[669] Police who establish a crime scene must also give the public notice that the premises are a crime scene if it is reasonably appropriate to do so.[670]

20.5. Establishment of more than one crime scene on premises in a 24 hour period

Section 91(3) of LEPRA provides:

> *A crime scene may not be established under this Part on the same premises more than once in a 24 hour period unless a crime scene warrant is obtained in respect of the second and any subsequent occasion.*

It appears that section 91(3) is intended to prevent police establishing 'additional' crime scenes in relation to the same suspected offence within a 24 hour period with a view to artificially extending the three hour time limit for the exercise of their crime scene preservation powers and investigation powers.

20.6. The crime scene powers

Once a crime scene has been established, police may exercise certain 'crime scene powers'. These powers are set out in section 95 of LEPRA.

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662 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.3.
663 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.90(1A).
664 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.90(1)(b).
665 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.90(1)(c).
666 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.90(2).
667 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.90(1)(a)–(c).
668 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.90(1A).
669 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.91(1).
670 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.91(2).

The powers listed in section 95(1)(a)–(f) can conveniently be described as 'the preservation powers'. These powers can be exercised when police suspect on reasonable grounds that it is necessary to do so to preserve evidence of the commission of the offence in relation to which the crime scene was established.[671] Police may:

- direct a person to leave the crime scene, or remove a vehicle, vessel or aircraft from the crime scene
- remove a person who fails to comply with such a direction
- direct a person not to enter the crime scene
- prevent a person from entering the crime scene
- 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
- remove an obstruction from the crime scene.

The powers listed in section 95(1)(g)–(o) can conveniently be described as 'the investigation powers'. Police may:

- perform any necessary investigation, including, for example, searching the crime scene and inspecting anything in it to obtain evidence of the commission of an offence
- conduct any examination or process for the purpose of performing any necessary investigation
- open anything at the crime scene that is locked
- take electricity, gas or any other utility for use at the crime scene
- 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
- photograph or otherwise record the crime scene and anything in it
- seize and detain all or part of a thing that might provide evidence of the commission of an offence
- dig up anything at the crime scene
- remove walls or ceiling linings or floors of a building, or the panels of a vehicle.

Section 95(1)(p) entitles police to exercise any other function 'reasonably necessary or incidental to' the exercise of the preservation and investigation powers.

Unlike the preservation powers, the investigation powers can generally only be exercised pursuant to a crime scene warrant. However, the legislation permits the investigation powers to be exercised for a period of not more than three hours without a crime scene warrant, but only if police:

- have established a crime scene
- apply for a crime scene warrant
- suspect on reasonable grounds that it is necessary to exercise their investigation powers immediately, to preserve evidence of the commission of an offence.[672]

In his second reading speech, the then Attorney General explained the reason for allowing the investigation powers to be exercised in the absence of a crime scene warrant:

> *The exception to the requirement for a warrant before the exercise of [the investigation] powers is vital. For example, police may need to immediately take a photograph if a crime scene is being flooded, or gain access to a room that is on fire and which police suspect contains evidence of an offence. In these circumstances, waiting for a crime scene warrant to be issued would not be practicable, as the evidence would be destroyed.*[673]

Under the original legislation, police could exercise the investigation powers — but not the preservation powers — with 'the aid of any member of NSW Police Force responsible for examining or maintaining a crime scene'.[674] Amendments to the legislation in December 2006 provided that:

- police can exercise any preservation or investigation power with the aid of 'such assistants as the police officer considers necessary'[675]

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671 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.92(1).
672 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.92(2).
673 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
674 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.92(5) repealed on 15 December 2006.
675 Section 92(6) was inserted by the *Police Powers Legislation Amendment Act 2006* on 15 December 2006.

- a member of the NSW Police Force responsible for examining or maintaining a crime scene cannot exercise any of the preservation powers. However, they may exercise certain investigation powers with the authority of the police officer who established the crime scene or who is responsible for the crime scene at the time.[676]

This reference to members of the NSW Police Force 'responsible for examining and maintaining a crime scene' was designed to refer to scene of crime officers (SOCOs) who include civilian employees of the NSW Police Force.

This was clarified in further amendments to LEPRA in December 2007 which provided a definition of a SOCO, being a member of the NSW Police Force responsible for examining or maintaining crime scenes. References throughout LEPRA to 'a member of the NSW Police Force responsible for examining or maintaining a crime scene' were replaced by references to a 'scene of crime officer'.[677]

In December 2007, LEPRA was amended to ensure that police were able to exercise crime scene powers at crime scenes established by SOCOs as follows:

- references to crime scenes 'established by the police officer or another police officer' were removed and replaced with references to crime scenes *established under this part*[678]
- police officers were given the power to exercise crime scene powers in relation to a crime scene whether or not the police officer was the person who established the crime scene.[679]

In December 2007, LEPRA was also amended to allow SOCOs to establish crime scenes in relation to stolen vehicles. See section 20.18.2 of this report for further discussion on the role of a SOCO.

20.7. Safeguards relating to the exercise of crime scene powers

The general safeguards under Part 15 of LEPRA apply to the exercise of the crime scene powers. This means that prior to entering premises to establish a crime scene and exercise crime scene powers, the officer must provide the occupier (if they are present at the time, or when possible) with evidence that they are a police officer,[680] provide their name and place of duty[681] and explain to the occupier the reason for establishing the crime scene and exercising crime scene powers.[682]

20.8. Crime scenes in public places and on private premises

A crucial distinction that must be recognised in discussing the operation of the crime scene provisions is that between public places and private premises.

For the purposes of LEPRA, the term 'public place' includes:

- a place (whether or not covered by water), or part of premises, that is open to the public or is used by the public, whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used, and whether or not the public to whom it is open consists only of a limited class of persons
- a road or road related area.

However, the term 'public place' does not include a school.[683]

Examples of public places include national parks and toll roads (even if privately owned).

20.8.1. Establishing a crime scene in a public place

As noted in section 20.2 above, section 88 of LEPRA provides that a police officer who is 'lawfully' on premises may establish a crime scene.

676 Section 92(5) was amended by the *Police Powers Legislation Amendment Act 2006* on 15 December 2006.
677 A SOCO can exercise all investigation powers with the exception of the power under section 95(1)(k) to direct a person to maintain a continuous supply of electricity. Sections 92(5) and 94(4) were amended by the *Law Enforcement (Powers and Responsibilities) Amendment Act 2007* on 17 December 2007.
678 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.92(1)(a) and (2)(a), were amended so that police officers are able to exercise crime scene powers in circumstances where a scene of crime officer has established the crime scene. Prior to this amendment, crime scene powers could only be exercised at crime scenes established by police officers.
679 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.92(4).
680 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.201(1)(a).
681 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.201(1)(b).
682 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.201(1)(c).
683 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.3.

Where a relevant suspected offence has occurred in a public place, police will clearly be 'lawfully' on the 'premises' constituting the public place, and are therefore entitled to establish a crime scene in that place. As the *Policing Issues & Practice Journal* published in April 2006 explained:

> *Police officers, like any other person, may come and go on public premises as they please. As such, access by police to crime scenes in these places is not problematic.*[684]

20.8.2. Exercising crime scene powers at a crime scene in a public place

Section 89(2) of LEPRA provides that a police officer may exercise crime scene powers at a crime scene in a public place without obtaining a crime scene warrant.

20.8.3. Vehicles in public places

LEPRA was amended in 2007 to insert section 89(3) of LEPRA which provides that a crime scene may be established in a public place that includes any vehicle, vessel or aircraft in the public place, without obtaining a crime scene warrant. This section was inserted into LEPRA after the NSW Police Force identified two issues of concern about the use of the crime scene powers in relation to offences involving vehicles in public places.[685]

First, when a vehicle was involved in an accident on a public road, police were entitled to establish a crime scene to the extent that the road itself was a public place. However, because a vehicle itself constituted 'private premises', it was arguable that police could not exercise their crime scene investigation powers in relation to the vehicle unless they applied for a crime scene warrant for the vehicle itself.

Second, because a vehicle could be regarded as both 'premises' that could become a crime scene and a 'thing' that could be possibly seized and detained in the exercise of the crime scene investigation powers, it was unclear as to how a vehicle should be treated at a crime scene.

To address these issues, the *Police Powers Legislation Amendment Act 2006* inserted a new provision, section 89(3), into Part 7 of LEPRA. This provides that police may exercise crime scene powers in relation to a vehicle, vessel or aircraft that is within a crime scene established in a public place without obtaining a crime scene warrant. However, section 89(3) also provides that police can only search, or seize and detain, a vehicle, vessel or aircraft in the following circumstances:

a) where police suspect on reasonable grounds that it is necessary to do so to preserve, or search for and gather, evidence of the commission of the offence in connection with which the crime scene was established, or

b) where police are authorised to seize, detain or search the vehicle, vessel or aircraft by a crime scene warrant or under some other lawful authority.

Police who detain a vehicle, vessel or aircraft for a search pursuant to the exercise of the crime scene powers must not detain it for any longer than is reasonably necessary for that purpose.[686] The NSW Police Force advised in consultations that a vehicle within a crime scene is more likely to be 'seized' for as long as is reasonably necessary rather than 'detained'.[687]

In December 2007, LEPRA was further amended to allow a SOCO to establish a crime scene in relation to a vehicle in a public place where it has been reported stolen. Section 95A was inserted — *Special arrangements for investigation of stolen vehicles*.[688]

20.8.4. Establishing a crime scene on private premises

A police officer must be 'lawfully' on private premises to establish a crime scene.[689] Under the common law, police are lawfully on private premises where:

- they have the consent of the lawful occupier to be there, or

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684 *Policing Issues & Practice Journal*, 'Crime Scenes', April 2006, Vol. 14, No. 2, p.18. This volume of the journal provided guidance to police on the use of the crime scene provisions.

685 These issues were raised by the LEPRA Issues Working Group set up within the NSW Police Force. This group was responsible for examining the operation of LEPRA and was a sub-group of the LEPRA Implementation Project Steering Committee. It included representatives from operational policing areas within the NSW Police Force and the Police Association of NSW.

686 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.204.

687 NSW Police Force response to draft LEPRA issues paper, 14 May 2007, p.4.

688 See section 20.18.2 for further discussion of this amendment.

689 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.88.

- they have some other lawful authority to be on the premises.[690]

The latter requirement raises the issue of the circumstances in which police have 'lawful authority' to enter private premises.

In this respect, it should be noted that LEPRA itself permits police to lawfully enter private premises in certain circumstances.

Section 9 provides that police may enter premises if they believe on reasonable grounds that:

- a breach of the peace is being or is likely to be committed, and it is necessary to enter the premises immediately to end or prevent a breach of peace, or
- a person has suffered significant physical injury or there is imminent danger of significant physical injury to a person, and it is necessary to enter the premises immediately to prevent further significant physical injury or significant physical injury to a person.

Section 10 also provides that police may enter and stay for a reasonable time on premises to arrest a person, detain a person under an Act, or arrest a person named in a warrant.

The *Policing Issues & Practice Journal*,[691] in addition to noting the entitlement of police to be lawfully on premises under sections 9 and 10 of LEPRA, also discussed other circumstances in which police can lawfully be on private premises:

> *There are a number of ways that police officers can be lawfully on private premises, including:*
>
> Expressed or implied licence
>
> *Where the proprietor of private premises personally invites you in, the licence is expressed. If there is no expressed licence but the circumstances show that the proprietor intends that you can enter (for example there is an unlocked front gate and a door with a knocker on it), the licence to enter is implied to the extent of what that implication allows. It should be noted that circumstances which imply a licence to enter and knock on the door to see if a person is home (as in the above example) would not allow a police officer to enter premises if his/her purpose was rather to search for or to seize an exhibit, even if it was in plain view.*
>
> Pursuant to a warrant
>
> *… pursuant to Part 5 of LEPRA, [police] may enter premises and be on premises lawfully by executing a search warrant.*

If police are not lawfully entitled to be on private premises, they must apply for and obtain a crime scene warrant authorising them to establish a crime scene on the premises.[692]

The *Police Powers Legislation Amendment Act 2006* inserted a new provision into Part 7 of LEPRA, section 90(1A), which provides that police may establish a crime scene on premises pursuant to the authority conferred by a crime scene warrant. The reason for this new provision was to 'make it clear that a crime scene warrant may authorise the establishment of a crime scene on premises'.[693]

20.8.5. Exercising crime scene powers on private premises with the consent of the occupier

Section 95(3) provides that Part 7 does not prevent police who are lawfully on premises from exercising their crime scene powers or doing any other thing if the occupier of the premises consents. An occupier includes a person in charge of the premises.[694]

Current guidance provided to police suggests that in circumstances where an occupier consents to police establishing a crime scene and exercising crime scene powers on their premises, Part 7 does not apply. The *Policing Issues & Practice Journal* states:

> *The distinction needs to be made between acting on consent and exercising powers under LEPRA. Whilst you have consent to remain on premises and to exercise powers, there is no reason to enact your official LEPRA crime scene powers. In everyday language, the premises are referred to as a crime scene.*[695]

Likewise, the Code of Practice for CRIME advises police officers as follows:

690 *Plenty v Dillon* (1991) 171 CLR 635 at p.647.
691 *Policing Issues & Practice Journal*, 'Crime Scenes', April 2006, Vol. 14, No. 2, pp.19–20.
692 *Law Enforcement (Powers and Responsibilities) Act 2002,* ss.92(2) and 94(1).
693 Police Powers Legislation Amendment Bill 2006, explanatory notes.
694 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.3.
695 *Policing Issues & Practice Journal*, 'LEPRA: Consolidating Police Powers', Special Edition, July 2005, Vol. 13, No. 3, p.28.

If you are on premises and conducting investigations with the occupier's consent, there is no need to apply the provisions of Part 7.[696]

20.8.6. Exercising crime scene powers at a crime scene on private premises without the consent of the occupier

Where police have established a crime scene on private premises, and the occupier has not consented to police exercising their crime scene powers, police can exercise any of the preservation powers for up to three hours without a crime scene warrant.[697] Police can also exercise their crime scene investigation powers for up to three hours if:

- they apply for a crime scene warrant
- they suspect on reasonable grounds that it is necessary to exercise the crime scene investigation powers immediately to preserve evidence of the commission of an offence.[698]

At the expiration of three hours, police must cease exercising their crime scene powers, and can only exercise them again if and when a crime scene warrant has been obtained.

20.9. Notification of a senior police officer of the establishment of a crime scene for less than three hours

Section 93 provides that, when a crime scene is established without a warrant for less than three hours, the police officer who established the crime scene must notify a senior police officer of that fact. LEPRA defines a 'senior police officer' as a local area commander, a duty officer or any other police officer of the rank of inspector or above.[699]

20.10. Application for a crime scene warrant

Section 94(1) provides that police may apply to an authorised officer for a crime scene warrant where they suspect on reasonable grounds that it is necessary for police to exercise crime scene powers at a crime scene for the purpose of preserving, or searching for and gathering, evidence of the commission of:

- a serious indictable offence, or
- an offence that is being, or was, or may have been, committed in connection with a traffic accident that has resulted in the death of or serious injury to a person.

An 'authorised officer' is:

- a Magistrate or Children's Magistrate
- a registrar of a Local Court, or
- an employee of the Attorney General's Department authorised by the Attorney General as an authorised officer for the purposes of LEPRA.[700]

Generally, applications for crime scene warrants must be made in person, with the applicant verifying before an authorised officer, by oath, affirmation or affidavit, the information relating to the application.[701] However, a crime scene warrant can be applied for by telephone (including radio, facsimile and any other communication device)[702] if facilities are readily available for that purpose.[703] 'Facsimile' is defined in section 3 of LEPRA to include internet or other electronic transmission in a form from which written material is capable of being reproduced with or without the aid of any other device or article.

An authorised officer must not issue a crime scene warrant by telephone unless the authorised officer is satisfied that it is required urgently and it is not practicable for the application to be made in person.[704] Where an authorised officer refuses to issue a telephone application, police must apply for the crime scene warrant in person.

The Law Enforcement (Powers and Responsibilities) Regulation 2005 includes a form that police officers must fill in

696 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated May 2008, p.103.
697 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.92(3).
698 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.92(2).
699 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.3(1).
700 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.3.
701 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.60(2).
702 *Law Enforcement (Powers and Responsibilities) Act 2002,* section 3 provides that the definition of telephone 'includes radio, facsimile and any other communication device'.
703 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.61(3).
704 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.61.

when applying for a crime scene warrant. This application form requires police officers to insert information about 'the reasonable grounds on which the application for the crime scene warrant is based.'[705] A copy of the form is annexed to this report (Appendix 10).

20.11. Decisions by authorised officers

An authorised officer must not issue a crime scene warrant unless the application for the crime scene warrant includes:

- details of the authority of the applicant to make the application for the warrant
- the grounds on which the warrant is being sought
- the address or other description of the premises the subject of the application
- if the warrant is required to search for a particular thing — a full description of that thing and, if known, its location
- if a previous application for the same warrant was refused — details of the refusal and any additional information required by section 64 of LEPRA
- any other information required by the regulations.[706]

An authorised officer may issue a crime scene warrant if he or she is satisfied that there are reasonable grounds for doing so.[707]

An authorised officer, when determining whether there are reasonable grounds to issue a crime scene warrant, must consider (but is not 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 thing sought and the offence.[708]

Police must provide such further information, either verbally or in writing, as the authorised officer requires concerning the grounds on which the crime scene warrant is being sought. However, police are not required to disclose the identity of a person from whom information was obtained if they are satisfied that to do so might jeopardise the safety of any person.[709]

An authorised officer must make a record of the decision to grant or refuse an application for a crime scene warrant in the form prescribed by the regulations.[710]

An authorised officer who issues a crime scene warrant must record 'all relevant particulars of the grounds the authorised officer has relied on to justify the issue'.[711] The Law Enforcement (Powers and Responsibilities) Regulation 2005 contains a form on which an authorised officer must record such information. Completed forms are returned, with a copy of the crime scene warrant[712] and a copy of the occupier's notice,[713] to the Local Court named in the occupier's notice.[714] Copies of these forms are annexed to this report (Appendix 10).

The occupier's notice specifies the name of the applicant, the name of the authorised officer who issued the warrant, the date and time of the issue of the warrant and the address of the premises that are the subject of the warrant.

On 17 December 2007 LEPRA was amended to remove the requirement that the name of the authorised officer who issued the crime scene warrant be included in the occupier's notice.[715] In his second reading speech on the *Law Enforcement (Powers and Responsibilities) Amendment Act 2007*, the Attorney General, the Hon. John Hatzistergos described this amendment as 'in the interests of officer safety'. He noted that:

> *The name of the authorised officer issuing the warrant is contained on the application, which is open for inspection by the occupier at the registry. The additional requirement for the name to be recorded on the occupier's notice is unnecessary to meet the requirements of open justice and accountability.*[716]

705 Law Enforcement (Powers and Responsibilities) Regulation 2005, Schedule 1, Form 4 — Application for crime scene warrant/record of application, Part 1 — Application.
706 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.62(1).
707 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.94(2).
708 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.62(2)(a)–(b).
709 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.62(4).
710 Law Enforcement (Powers and Responsibilities) Regulation 2005, cl.5(d).
711 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.65(1).
712 Law Enforcement (Powers and Responsibilities) Regulation 2005, Schedule 1, Form 12 — Crime scene warrant.
713 Law Enforcement (Powers and Responsibilities) Regulation 2005, Schedule 1, Form 19 — Occupier's notice for crime scene warrant.
714 Law Enforcement (Powers and Responsibilities) Regulation 2005, Schedule 1, Form 4 — Application for crime scene warrant/record of application, Part 2 — Authorised officer's record of application for a crime scene warrant.
715 Section 67(2)(b)(ii) was removed by the *Law Enforcement (Powers and Responsibilities) Amendment Act 2007*, Schedule 1, Item [3] on 17 December 2007
716 The Hon. John Hatzistergos MLC, NSWPD, Legislative Council, 7 November 2007, p.3583.

20.12. Procedures to be followed if an application for a crime scene warrant is refused

If an application for a crime scene warrant is refused by an authorised officer, a further application may be made, but only if the further application provides additional information that justifies the making of the further application. A further application must contain information about the previous application,[717] including details of the refusal.[718] If the first application was made to an authorised officer who was not a magistrate, the further application may be made to a magistrate whether or not additional information is provided.[719]

20.13. Duration and extension of crime scene warrants

An authorised officer who issues a warrant other than a telephone warrant must specify when the warrant is to expire.[720] This time is 72 hours after the issue of the warrant unless the authorised officer is satisfied that the warrant cannot be executed within 72 hours.[721] If the warrant fails to specify a time of expiry, the warrant expires 72 hours after its issue.[722]

Where a warrant is to expire 72 hours after its issue, an authorised officer can extend the warrant if satisfied that it cannot be executed within 72 hours.[723] The time for expiry of a warrant can be extended only once[724] and must not extend the period of the warrant beyond 144 hours after its issue.[725] Any application for an extension of a warrant must be made before the expiry of the warrant.[726]

When an authorised officer issues a telephone warrant, the warrant expires 24 hours after the time of its issue.[727] A telephone warrant may be extended for up to 60 hours at a time.[728] The time for expiry of a telephone warrant may be extended twice.[729] Any extensions of a telephone warrant must not extend the period for the warrant beyond 144 hours after its issue.[730] Again, any application for the extension of a telephone warrant must be made before the expiry of the warrant.[731]

Originally, LEPRA required the same authorised officer who issued the warrant to grant the extension. As a result, when the authorised officer who issued the warrant was not available to extend the warrant, police had to apply to a different authorised officer for a fresh crime scene warrant. The *Police Powers Legislation Amendment Act 2006* remedied this problem by allowing any authorised officer to extend a crime scene warrant where the authorised officer who initially issued the warrant had died, had ceased to be an authorised officer, or was absent.[732]

20.13.1. Extension of crime scene warrants connected with terrorism offences

On 17 December 2007, LEPRA was amended to allow for crime scene warrants only in connection with terrorism offences to be extended for a period of up to 30 days. This extension can only be granted once an authorised officer is satisfied that there are reasonable grounds for extending the warrant beyond the current maximum period of six days.[733] In the second reading speech of the *Law Enforcement (Powers and Responsibilities) Amendment Act 2007*, the Attorney General, the Hon. John Hatzistergos described the rationale for this amendment as follows:

> *Overseas experience had shown that effective investigation of terrorism offences necessarily requires the examination of particularly complex crime scenes, with investigations more often than not taking weeks rather than days. The amendment will reduce demands upon police time by alleviating the need to make fresh applications for warrants in such cases.*[734]

717 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.62(1)(e).
718 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.64.
719 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.64.
720 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73(2).
721 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73(3) and (4).
722 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73(5).
723 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(1)(b).
724 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(4).
725 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(6)(a).
726 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(6)(d).
727 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73(1)(d).
728 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(2).
729 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(5).
730 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(6)(a).
731 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(6)(d).
732 Section 27 was amended by the *Police Powers Legislation Amendment Act 2006*, Schedule 1, Clause [10] on 15 December 2006.
733 Section 73A(7) and (8) were inserted and section 73A(6)(a) was amended by the *Law Enforcement (Powers and Responsibilities) Amendment Act 2007,* Schedule 1, Item [4] and Item [5] on 17 December 2007.
734 The Hon. John Hatzistergos MLC, NSWPD, Legislative Council, 7 November 2007, p.3583.

20.14. Execution of crime scene warrants

Where an authorised officer issues a crime scene warrant, police may exercise all reasonably necessary crime scene powers in accordance with the warrant and the provisions of Part 7.[735]

The *Police Powers Legislation Amendment Act 2006* inserted an additional provision into Part 7, section 94(4), which provides that any member of the NSW Police Force responsible for examining or maintaining a crime scene may exercise a crime scene power under a warrant — other than the preservation powers under section 95(1)(a)–(f), and the power under section 95(1)(k) to direct a person to maintain a continuous supply of electricity — with the authority of a police officer responsible for executing the warrant. This amendment meant that some crime scene powers can be exercised at a crime scene by a member of the NSW Police Force who is not a commissioned officer, for example a SOCO. These people are responsible for examining or maintaining a crime scene, but only with the authority of the police officer who is responsible for executing the warrant.[736]

This was further clarified when in 2007, LEPRA was further amended by the *Law Enforcement (Powers and Responsibilities) Amendment Act 2007* and the reference to 'any member of the NSW Police Force responsible for examining or maintaining a crime scene in section 94(4)' was replaced with 'a scene of crime officer'.[737]

20.15. Requirements following execution of a crime scene warrant

Within 10 days of a crime scene warrant being executed or the expiry of the warrant, whichever occurs first, a report must be provided to the authorised officer who issued the warrant by the person who applied for the crime scene warrant. If the crime scene warrant was executed, the report must set out briefly the result of the execution, including a brief description of items seized. If a crime scene warrant expires without being executed, the reasons for not executing the crime scene warrant must be provided. The report must also provide details of whether an occupier's notice was served in connection with the execution of the crime scene warrant and such other particulars prescribed by the Law Enforcement (Powers and Responsibilities) Regulation.[738]

The Law Enforcement (Powers and Responsibilities) Regulation contains a form which police must fill in and return to the authorised officer as a means of providing this information. Completed forms must be forwarded to the Local Court named in the occupier's notice.[739] A copy of this form is annexed to this report (Appendix 10).

20.16. The interaction of the crime scene provisions with other police powers

The crime scene provisions in Part 7 of LEPRA do not prevent a police officer from applying for a search warrant under LEPRA, or exercising any other function under LEPRA in relation to a crime scene if required.[740]

20.17. Offences

Part 7 of LEPRA creates two offences. During the second reading speech the then Attorney General, Bob Debus, stated:

> *Consistent with the existing Search Warrants Act 1985, the bill provides a penalty for obstructing or hindering a police officer exercising crime scene powers, without reasonable excuse.*[741]

Section 96(1) provides:

> *A person must not, without reasonable excuse, obstruct or hinder a person executing a crime scene warrant.*
>
> *Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.*

735 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.94(2). The original legislation only provided for a warrant to enter premises and exercise all reasonably necessary crime scene powers. The *Police Powers Legislation Amendment Act 2006* added a power for an authorised officer to issue a warrant authorising a police officer 'to establish a crime scene on the premises (if a crime scene has not already been established).' This amendment clarifies that in circumstances where police officers were not on the premises when they applied for a crime scene warrant, the warrant allows them access to the premises to establish the crime scene and exercise crime scene powers.

736 The crime scene powers that can be exercised in this context are limited to powers relating to forensic investigation.

737 *Law Enforcement (Powers and Responsibilities) Amendment Act 2007*, Schedule 1, Item [9].

738 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.74.

739 Law Enforcement (Powers and Responsibilities) Regulation 2005, Schedule 1, Form 20 — Report to authorised officer about execution of warrant.

740 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.97.

741 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.

Section 96(2) provides:

> *A person must not, without reasonable excuse, 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.*
>
> *Maximum penalty: 10 penalty units.*

20.18. NSW Police Force operational units involved in establishment and investigation of crime scenes

20.18.1. Forensic Services Group

The NSW Police Force has 80 Local Area Commands (LACs) which, generally speaking, are responsible for the investigation of suspected offences occurring in the relevant local area. The LACs are grouped into six regions, which are responsible for certain units such as the Forensic Services Group (FSG) in their area. LACs investigating major crimes are required to notify the FSG immediately. The FSG includes the Crime Scene Services Branch (CSSB), which is responsible for the location, collection and recording of physical evidence at a crime scene.

20.18.2. Scene of crime officers

The NSW Police Force has scene of crime officers (SOCOs), who may either be police officers or civilian employees of the NSW Police Force. In practice, SOCOs are attached to individual LACs. SOCOs are authorised to attend and examine crime scenes arising from certain types of incidents, such as break, enter and steal; stealing; malicious damage; goods in custody and receiving; and traffic offences. These types of incidents are referred to as 'volume' crime incidents because of the frequency of their occurrence. On 17 December 2007, LEPRA was amended to include a definition of 'scene of crime officer' being 'a member of the NSW Police Force responsible for examining or maintaining crime scenes'.[742]

In December 2007, LEPRA was also amended to allow a scene of crime officer to establish a crime scene in relation to a vehicle in a public place where it has been reported as stolen by an owner or authorised user of the vehicle.[743] The SOCO may exercise the investigatory powers set out in section 95(1)(g)–(p) and (l)–(o) including (p) in relation to the crime scene if reasonably necessary to preserve, or search for and gather, evidence of the theft of the vehicle. However, those SOCOs who are not police officers remain unable to use coercive crime scene powers, which are reserved for sworn officers. See Appendix 3 for further details of this amendment.

SOCOs can only attend the scene of more serious incident types with the express permission of a police officer. When they do so, they perform an 'assisting role' under the direct supervision of the relevant senior investigator of the Major Crime Response section of the CSSB.[744]

20.18.3. State Crime Command

The State Crime Command (SCC) provides advice and direction to the NSW Police Force response to crime at all levels 'through the development and implementation of strategy, policy and intelligence products, fostering best practice and the provision of specialist investigative services'.[745] The SCC is divided into various specialist squads, which have 'a key role on focusing LAC and region response to their particular crime types through statewide monitoring'.[746]

742 Section 3 was inserted by the *Law Enforcement (Powers and Responsibilities) Amendment Act 2007* on 17 December 2007.
743 Section 95A was inserted by the *Law Enforcement (Powers and Responsibilities) Amendment Act 2007* on 17 December 2007.
744 NSW Police Force Forensic Services Group, Standard Operating Procedures, *Scene of Crime Officers*, effective 1 January 2006.
745 'State Crime Command: Business Rules' (Version 10, December 2004), sourced from the NSW Police Force Intranet, February 2007.
746 'State Crime Command: Business Rules' (Version 10, December 2004), sourced from the NSW Police Force Intranet, February 2007.

Chapter 21.
Comparable legislation

Very few states and territories in Australia have legislation comparable to Part 7 of LEPRA. In the Australian Capital Territory, Northern Territory, South Australia, Tasmania, Victoria, and under the Commonwealth jurisdiction police officers rely on the common law to establish and control crime scenes, preserve evidence and conduct criminal investigations. This was the situation in New South Wales prior to the introduction of LEPRA. The only states that have crime scene legislation comparable to Part 7 of LEPRA are Queensland and Western Australia.

The following discussion outlines the comparable crime scene provisions in Queensland, Western Australia and overseas jurisdictions.

21.1. Queensland

In 2000, the Queensland Parliament passed the *Police Powers and Responsibilities Act 2000* (PPRA) which included provisions relating to the establishment of crime scenes and the exercise of crime scene powers. A primary crime scene may be established where 'a seven year imprisonment offence or an offence involving deprivation of liberty has happened'.[747] It should be noted that the crime scene provisions in Part 7 of LEPRA were largely modelled on the provisions in the Queensland legislation and are similar.[748]

A major difference between the two legislative schemes is that in Queensland police officers have to apply to the Supreme Court for a crime scene warrant prior to causing any structural damage to the private premises involved. Under LEPRA this is not required. In Queensland occupiers are able to apply for an order revoking a crime scene warrant if the application was made in the absence, and without knowledge, of the occupier. The Queensland legislation also makes provisions for alternative accommodation for occupiers where they cannot continue to live in premises where a crime scene has been established. Under LEPRA, occupiers have no right to challenge the crime scene warrant, nor does the legislation state that they must be provided with alternative accommodation if required.

21.2. Western Australia

Like LEPRA, the Western Australian *Criminal Investigation Act 2006* codifies police powers at crime scenes. The Western Australian legislation contains provisions permitting the establishment of a 'protected forensic area' (PFA).[749] Police can enter a place and establish a PFA if they reasonably suspect that a serious offence has been or is being committed in the place or that there is, in the place, a thing relevant to a serious offence.[750] A serious offence is an offence carrying a maximum penalty of at least five years imprisonment.[751] An officer executing a search warrant can also establish a PFA.[752] Once a PFA is established, the officer can preserve the area.[753] Investigation of the area can be carried out with the consent of the occupier or once a search warrant is obtained in relation to the area.

However, unlike LEPRA the legislation in Western Australia does not introduce a warrant specifically for the purpose of establishing crime scenes and exercising crime scene powers. Rather, it uses search warrants for this purpose. Unlike New South Wales, in Western Australia a police officer does not have to name the exact items being searched for on the search warrant. An application for a search warrant is made to a justice of the peace, whereas a crime scene warrant application, under LEPRA, is made to an authorised officer. The legislation in Western Australia allows an occupant who consents to the establishment of a PFA to challenge the continuation of the PFA. Under LEPRA the occupier cannot challenge any aspect of Part 7.

Where appropriate, we have referred to the provisions of the Queensland and Western Australian legislation in discussing issues and concerns that have arisen in relation to the operation of the crime scene provisions in New South Wales.

747 *Police Powers and Responsibilities Act 2000* (Qld), s.164(1) and Schedule 6.
748 Griffith G., *Police Powers in NSW: Background to the Law Enforcement (Powers and Responsibilities) Bill 2001*, NSW Parliamentary Library Briefing Paper No. 11/2001, August 2001, p.66.
749 *Criminal Investigation Act 2006* (WA), s.46.
750 *Criminal Investigation Act 2006* (WA), s.40.
751 *Criminal Investigation Act 2006* (WA), s.40(2).
752 *Criminal Investigation Act 2006* (WA), s.44(2)(f).
753 *Criminal Investigation Act 2006* (WA), s.47(2).

21.3. Overseas jurisdictions

We have examined comparable legislation in the United Kingdom (UK), United States of America (USA), New Zealand and Canada and did not identify legislation codifying and consolidating police powers in relation to crime scenes as can be found in Part 7 of LEPRA.

In these jurisdictions, police establish and investigate crime scenes using a raft of common law and statutory powers available to them. For example, in the UK police use common law powers to enter premises and it is a statutory offence to obstruct police in the execution of their duty.[754] In the USA, federal legislation, the *Patriot Act 2001*, authorises 'sneak and peek' and 'sneak and steal' searches, which allow law enforcement agents to enter, inspect, photograph items, seize items (in the case of sneak and steal) while the owner is absent and without a search warrant. These warrantless searches are lawful when there is a 'probable cause' to do so, or a 'reasonable necessity for the seizure'. This legislation applies to all type of criminal activity.[755]

In most of these jurisdictions occupiers are protected from unlawful entry by police on their private premises through human rights legislation, their Constitution or a Bill of Rights specific to the jurisdiction. For example, in the UK the *Human Rights Act 1998* can be invoked to protect individuals from unlawful entry by police to their private premises.[756] The USA Constitution can be referred to in the USA to protect the rights of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.[757]

754 *Police Act 1996* (UK), s.89(2)
755 *Patriot Act 2001* (USA), s.213.
756 *Human Rights Act 1998* (UK), Article 8 states the right to respect for private and family life, home and correspondence.
757 The Fourth Amendment of US Constitution.

Chapter 22. Methodology

In reviewing the operation of the crime scene provisions we undertook a number of research activities to obtain information from a range of sources and gain different perspectives about the way crime scenes are established and crime scene powers are exercised under Part 7.

The overall research methodology for this review is discussed in Part 1 of this report. Only those research methods and activities that relate specifically to the crime scene provisions are discussed here.

22.1. Data

22.1.1. COPS data

COPS provides a structure for police officers to record details of crime scenes through two new 'action type' screens entitled 'Crime scene established for less than 3 hours action' and 'Crime scene warrant action'. It is not mandatory for officers to complete these screens.

Arrangements were made with the NSW Police Force to provide the Ombudsman with relevant information from the NSW Police Computerised Operational Policing System (COPS) throughout the review period. This data included information about:

- the total number of COPS entries where the crime scene 'action type' screens were activated for the review period
- the related offences and station involved
- in the case of crime scene warrants — the date the warrant was applied for, the method of application and outcome.

22.1.2. Local Court data provided by the Attorney General's Department

Crime scene warrant applications are primarily heard in the Local Court. NSW Local Courts forward statistical information on crime scene warrant applications to the statistics section of the Attorney General's Department on a monthly basis. The Attorney General's Department provided us with this data which identified:

- the number of crime scene warrant applications made during court hours
- the number of crime scene warrant applications made out of court hours
- the outcome of crime scene warrant applications
- the number of crime scene warrant applications made at each Local Court.

22.1.3. BOCSAR data

Information on charges for offences relating to Part 7 was obtained from the NSW Bureau of Crime Statistics and Research (BOCSAR).[758] See section 24.4 for discussion of results.

22.2. Documentation supplied by the NSW Local Court

22.2.1. Court proceedings

Based on the information provided to us by BOCSAR about charges for offences relating to Part 7, we obtained related court transcripts and other relevant documents from NSW Local Courts.

758 *Law Enforcement (Powers and Responsibilities) Act 2002,* section 96(1) provides that it is an offence to fail or refuse to comply with a request or direction made by a police officer in relation to the exercise of crime scene powers at a crime scene. *Law Enforcement (Powers and Responsibilities) Act 2002,* section 96(2) provides that a person must not without reasonable excuse, 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.

22.2.2. Crime scene warrant documentation

To obtain a sample of crime scene warrants, we contacted five Local Courts in New South Wales. They provided us with the documentation relating to the crime scene warrant applications heard at their court for the review period. For each application they provided us with copies of the following:

- Form 4 — Application for crime scene warrant/record of application
- Form 12 — Crime scene warrant (where warrant granted)
- Form 19 — Occupier's notice for crime scene warrant (where warrant granted)
- Form 20 — Report to authorised officer about execution of warrant (where warrant granted).

The five courts contacted were those where the greatest numbers of crime scene warrants were issued during court hours in the review period. We were able to identify these courts through data provided by the Attorney General's Department. Through this process, we analysed documents relating to 48 crime scene warrants obtained during court hours.[759] See section 24.2 for the analysis of this data.

Crime scene warrant applications made out of hours are made to either the Extended Registry or the After Hours Panel. Documentation relating to crime scene warrant applications made to the Extended Registry is held at Parramatta Local Court. We obtained all documentation relating to crime scene warrant applications made to the Extended Registry from Parramatta Local Court. Documentation relating to crime scene warrant applications made to the After Hours Panel is held at the court where the member of the Panel, who heard the application, sits. From these courts we obtained and analysed the documentation relating to 79 crime scene warrants obtained out of hours.

During the review period, we contacted seven Local Courts to obtain the documentation relating to refused crime scene warrants. Through this process we obtained crime scene warrant applications for 52% of the crime scene warrant applications (57) refused during the review period. See section 24.2.5 for further discussion of refused crime scene warrant applications.

22.3. Documentation supplied by NSW Police Force

Police provided us with documentation relating to a number of events where the 'Crime scene warrant action' was activated on COPS. For further discussion of the use of COPS in relation to the crime scene provisions see section 24.3.

22.4. Consultations

22.4.1. NSW Police Force Local Area Command visits

As discussed in Part 1, we conducted two rounds of consultations with seven NSW Police Force Local Area Commands (LACs).[760] During those consultations we discussed the implementation and operation of the crime scene provisions with officers ranging from probationary constables to superintendents performing a variety of functions. Police performing functions of particular relevance to crime scenes included: commanders, crime managers, duty officers, detectives, education development officers, scene of crime officers (SOCOs), Aboriginal community liaison officers (ACLOs), police prosecutors and other members of the NSW Police Force.

22.4.2. Specialist police units

We consulted with senior members of the Homicide Squad and the Crash Investigation Unit. We also consulted with a number of members of the Forensic Services Group (FSG) including the manager of FSG Crime Scene Services. These specialist police units were consulted as the introduction of Part 7 of LEPRA had a major impact on their policing practice.

759 Based on the Local Court data provided, we expected to receive at least 97 crime scene warrant applications from the five Local Courts where the greatest number of crime scene warrants were issued during hours during the review period. The amount actually received was significantly lower due to two of the courts providing incorrect data on the number of 'crime scene warrant' applications made at their court. For example, one of the courts listed as having received a high number of crime scene warrant applications during hours had in fact included crime scene warrants heard after hours in their total figure.

760 The LACs that we visited covered metropolitan and regional areas and are identified as LACs 'A' to 'G' for the purpose of this report.

22.4.3. Victims' and prisoners' rights groups

We consulted with members of victims' and prisoners' rights groups on the impact of Part 7 on victims and perpetrators of crime including the Homicide Victim's Support Group, Enough is Enough and Justice Action. We also consulted NSW Health Sexual Assault Services.[761]

We distributed an information sheet through a number of organisations that have contact with victims of crime asking people who had been affected by the crime scene provisions to contact us with their experiences. Organisations who distributed our information sheet included the NSW Rape Crisis Centre, NSW Office of the Director of Public Prosecutions, NSW Health Sexual Assault Services, CRC Justice Support Group and the Homicide Victim's Support Group.Through NSW Health Sexual Assault Services our information sheet was disseminated to every area health service and sexual assault centre throughout the state including the North Coast Children's Hospital.

22.4.4. Other consultations

We consulted with the NSW Coroner and Deputy Coroner as Part 7 had implications for the investigation of deaths. In 2006 amendments were made to the *Coroner's Act 1980* which had implications for some aspects of the establishment of crime scenes.

We also consulted with officers from the NSW Local Court, the Public Defenders Office, Legal Aid, Aboriginal Legal Services, academics and legal centres.

22.5. Issues paper

As discussed in Part 1 of this report, we released an issues paper on the sections in LEPRA under review in June 2007. The paper included 13 questions specifically on the crime scene provisions. In response, we received 14 submissions from a range of stakeholders. Six of these submissions addressed the issues relating to the crime scene provisions. A full list of the submissions can be found in Appendix 4.

22.6. Direct observation of crime scene investigations via FSG

We attended various branches of the Crime Scene Services Branch (CSSB) across Sydney in anticipation of call outs to potentially observe the establishment of crime scenes and the exercise of crime scene powers under Part 7. The CSSB is part of the Forensic Services Group (FSG) within the NSW Police Force. It is responsible for location, collection and recording of physical evidence at a crime scene. CSSB responds to calls from police officers requiring their assistance at crime scenes. We accompanied the CSSB to crime scenes that had been established under Part 7. This occurred on six of the 19 occasions we attended CSSB branches.[762] These observations allowed us to see how Part 7 operates in practice.

22.7. Surveys

22.7.1. Survey of authorised officers

In December 2007 we arranged for the Attorney General's Department to distribute an email survey to all Local Court Registrars and other Attorney General employees identified as authorised officers for the purpose of LEPRA. We also arranged for the Chief Magistrate to distribute this survey to all Local Court Magistrates.

These authorised officers were surveyed because of their responsibilities in relation to issuing crime scene warrants. The survey included questions about their experience in the use of the provisions, whether they had been given any training regarding the provisions and what they saw as concerns, issues or problems with the legislation.

761 NSW Health Sexual Assault Services are part of NSW Department of Health. These services provide free counselling, medical services and information for anyone who has been sexually assaulted. They are based in 63 hospitals and community health centres across NSW.

762 We arranged for Ombudsman officers to attend CSSB offices to await opportunities to observe the establishment of crime scenes in the review period. This was organised through the Director of the Forensic Services Group in February 2006. We attended the CSSB offices throughout the metropolitan area on 19 occasions. On six of these occasions we were in attendance when CSSB staff were called out to a crime scene. On these occasions Ombudsman officers accompanied CSSB staff to the crime scene and observed the establishment of the crime scene and associated activities.

22.7.2. Survey of police prosecutors

In December 2007, we arranged for NSW Police Force Legal Services to distribute an email survey to all NSW Police Force prosecutors. Police prosecutors are responsible for prosecutions under LEPRA, including prosecutions under section 96 for obstruction or hindrance of people executing a crime scene warrant. They also handle evidence briefs and would be aware of circumstances where there had been a failure to comply with Part 7.

The survey included questions designed to establish prosecutors' handling of matters where a crime scene had been established under LEPRA or in prosecutions for offences under section 96. Questions also related to education and training received by police prosecutors on the legislation and what they saw as concerns, issues or problems with the legislation.

22.7.3. Telephone survey of people affected by the establishment of a crime scene

Between December 2007 and January 2008 we conducted a telephone survey of people who had crime scenes established at their homes or workplaces during the review period. From the COPS data and media reports of crime scenes, we identified 14 cases where we believed it was appropriate to contact people affected by the establishment of a crime scene. The people contacted were occupiers of the premises where the crime scene was established. They were either victims of, or witnesses to, a crime.

We did not contact people if the crime scene had been established in circumstances where the alleged offences were domestic violence related. We were concerned that in such cases the victim may still be in contact with the perpetrator and contacting them about this incident may compromise their safety. We also determined not to contact victims of sexual assault who were under the age of 18 at the time of the alleged assault due to the sensitive nature of the offence and risk of re-traumatisation. Likewise, we did not contact people who were intoxicated or in hospital at the time the crime scene was established as they were either not on the premises at the time the crime scene was established or their recollection of events may not have been accurate.

The survey included questions on how the crime scene was established, what crime scene powers were exercised, if any damage was caused as a result of the crime scene being established and whether alternative accommodation was required or provided.

We sent registered letters to the 14 people we intended to contact by telephone informing them of our survey. Participation was confidential and voluntary. We telephoned those people over a two week period. Nine of the 14 people contacted took part in the survey.

22.8. Review of complaints received by the NSW Ombudsman

During the review period the NSW Ombudsman received two complaints that involved a crime scene being established under Part 7 of LEPRA. These complaints have been considered for the purpose of this review.

22.9. Research limitations

There were several limitations in the information that was available to us as outlined below.

22.9.1. COPS data

There was a very low recording rate of uses of powers under Part 7 on COPS. According to COPS data, during the review period 104 crime scene warrant applications were made. In all cases, the crime scene warrant application was granted.

However, according to the data provided to us by the Attorney General's Department, which recorded all crime scene warrant applications heard in the NSW Local Court, 1,436 crime scene warrant applications were made during the review period. Of these applications, 1,325 were granted and 109 were refused.[763]

Therefore the COPS data did not provide a comprehensive or representative picture of the number of crime scene warrant applications made during the review period. For this reason we chose to use the COPS data as a sample of crime scene warrants obtained during the review period only. This sample of applications should be treated with care as police may have been more likely to record certain types of applications than others. This may influence any analysis of this data. Recommendations on how these record-keeping issues can be addressed beyond the review are discussed in more detail in section 29.1.

763 In two cases, the outcome of the crime scene warrant application was not recorded.

22.9.2. Local Court data provided by the Attorney General's Department

The data provided by the Attorney General's Department provides the most comprehensive picture of crime scene warrant applications made in the NSW Local Court. However, there were certain limitations to the data due to error in the collation of monthly court statistics by Local Courts as follows:

- It was identified that six authorised officers, who sat on the After Hours Panel, included after hour applications in the number of crime scene warrant applications issued during hours. To rectify this problem we obtained the list of After Hours Panel members and contacted them to confirm how many crime scene warrants were issued by them during hours and after hours, when they were on the After Hours Panel. This process revealed a further problem, two courts which had magistrates on the After Hours Panel, informed us that they issued crime scene warrants during hours, yet according to the data they had provided to the Attorney General's Department they had not issued any crime scene warrants during hours. We sought further clarifying information and corrected the statistics accordingly.
- One court had recorded no refused crime scene warrants during the review period when in fact one had been refused at this court. We corrected the statistics accordingly.
- One court counted search warrants as crime scene warrants. We removed these search warrants from the data.

Although we have addressed these issues, errors in the collation of statistics may have caused other similar inaccuracies, of which we are not aware.

22.9.3. Telephone survey of people affected by crime scenes

All people contacted during our telephone survey were victims of crime or witnesses to a crime. We did not contact people who were charged following crime scenes being established on their premises. People charged may have had different, and possibly less positive, experiences of crime scenes being established on their premises which were not captured through our survey.

Chapter 23. Implementation

In Part 1, we outlined the broad activities undertaken by the NSW Police Force and the Attorney General's Department to implement LEPRA. Below we identify the activities undertaken by the NSW Police Force specifically to implement the crime scene provisions.

23.1. NSW Police Force

The implementation of LEPRA involved mandatory training for all police officers. The crime scene provisions were addressed in the training session 'Operation Entry'. The crime scene provisions were also discussed in Chapter 7 of the *Policing Issues & Practice Journal* special edition dedicated to LEPRA.[764]

In addition, the NSW Police Force undertook the following activities specific to the implementation of the crime scene provisions:

- In December 2005 the *Code of Practice for Custody, Rights, Investigation, Management and Evidence* (Code of Practice for CRIME) was updated to include a section on the crime scene provisions.[765] To date, the Code of Practice for CRIME has not been updated to include any amendments made to the crime scene provisions since the legislation was originally introduced.
- In April 2006, Education Services published a *Policing Issues & Practice Journal* that included an article on crime scenes.[766]
- On 24 July 2006, the *Police Weekly* included an article on the distinction between search warrants and crime scene warrants.[767]
- In October 2006, the *Policing Issues & Practice Journal* provided an update on LEPRA in relation to search warrants and crime scene warrants including advice regarding recent amendments.[768]
- On 11 December 2006, the *Police Weekly* included an article on the recent amendments to LEPRA, which included an explanation of the nature of the amendments to the crime scene provisions of Part 7.[769]
- The Business and Technology Section made changes to COPS which included the introduction of new event action types to capture the details of the crime scene warrants and changes to the intranet forms; new incident categories and creation of an incident process for establishing a crime scene.

We note that, while the *Policing Issues & Practice Journal* and the Code of Practice for CRIME provide guidance for police about the application of the crime scene provisions, to date no standard operating procedures (SOPs) have been developed governing how police should implement the provisions.

23.2. NSW Attorney General's Department

Crime scene warrants are issued by authorised officers who are personnel of the Attorney General's Department.[770] In order to implement the provisions the Attorney General's Department was required to make a number of policy and procedural changes and provide information and training to authorised officers regarding their new responsibilities under LEPRA. The Attorney General's Department undertook the following activities in relation to crime scenes:

- The *Local Courts Bulletin* published the following articles on the crime scene provisions:
  - — 'Law Enforcement (Powers and Responsibility) Act 2002' — *Local Courts Bulletin* 2005/0130
  - — 'Crime Scene Warrants' — *Local Courts Bulletin* 2005/0132

764 *Policing Issues & Practice Journal*, 'LEPRA: Consolidating Police Powers', Special Edition, July 2005, Vol. 13, No. 3.
765 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998. Latest version published May 2008.
766 *Policing Issues & Practice Journal*, 'Crime Scenes', April 2006, Vol. 14, No. 2, pp.17–22.
767 NSW Police Force, *Police Weekly*, Vol. 18, No. 26, 24 July 2006, pp.16–17.
768 *Policing Issues & Practice Journal*, October 2006, Vol. 14, No. 4, pp.53–55.
769 NSW Police Force, *Police Weekly*, 'Understanding LEPRA 06/09', Vol.18, No. 46, 11 December 2006, pp.12–13.
770 Registrars and other Local Court staff who formerly had powers as 'authorised justices' have powers as 'authorised officers' in LEPRA. This change was notified through the *Local Courts Bulletin* 2005/013.

— '*Law Enforcement (Powers and Responsibilities) Act 2002* — Contact Officers' — *Local Courts Bulletin* 2005/0141

— '*Law Enforcement (Powers and Responsibilities) Act 2002* and Law Enforcement (Powers and Responsibilities) Regulation 2005' — *Local Courts Bulletin* 2005/0145.

- The following forms were created and circulated with *Local Courts Bulletin* 2006/0145:[771]
  - — Form 4 — Application for a Crime Scene Warrant
  - — Form 12 — Crime Scene Warrant
  - — Form 19 — Occupier's Notice Crime Scene Warrant
  - — Form 20 — Report to Authorised Officer about execution of Warrant.
- A number of LEPRA contact officers were appointed and their details circulated in the *Local Courts Bulletin* to assist with questions regarding the legislation.
- The Attorney General's Department of NSW *Policy and Procedure Manual* was updated to include summaries of crime scene warrants.[772]

When LEPRA was introduced, training was provided to Attorney General's Department staff by representatives from the Legal Services Section (NSW Police Force). Two training/information sessions were conducted on LEPRA for Extended Registry staff, registrars and chamber registrars between September and October 2005.

At the Local Courts Annual Conference in August 2006, the Judicial Commission and Local Courts conducted a session for magistrates entitled *'A User's Guide to LEPRA'*. A paper which accompanied the session, entitled '*The Consolidation of Police Powers; the Law Enforcement (Powers and Responsibilities) Act 2002'*, was also distributed to all magistrates.

Our authorised officer survey found that most authorised officers became aware of the crime scene provisions in LEPRA through the *Local Courts Bulletin*. Half of the authorised officers surveyed had received some training around LEPRA and the majority were in favour of receiving additional training on the crime scene provisions.

771 These forms were also uploaded to the Lotus Notes Forms Library and the Local Courts website.
772 Attorney General's Department of NSW, NSW Local Courts Policy and Procedures Manual, Court Services, Attorney General's Department of NSW, p.43.

Chapter 24.
Use of crime scene provisions

24.1. Introduction

This chapter provides an overview of crime scene warrant applications made during the review period. We document the number of crime scene warrant applications made, the outcome of these applications and when and where the applications were made. We consider the length of time it took authorised officers to consider crime scene warrant applications during court hours and after hours. We also look at the types of incidents for which crime scene warrant applications were made and methods used to apply for crime scene warrants.

As discussed in Chapter 22, during the review period we obtained data on crime scene warrants from two sources:

- The Attorney General's Department provided data on crime scene warrant applications considered across all NSW Local Courts.
- The NSW Police Force provided data from COPS entries where police indicated they had applied for crime scene warrants.

As discussed in section 22.9.1 there was a low recording rate of the use of powers under Part 7 on COPS meaning that the COPS data did not provide a comprehensive picture of the number of crime scene warrant applications made by police during the review period. To overcome this problem, we have used the COPS data as a sample of crime scene warrant applications. This is reflected in the analysis below of the operation of the provisions which considers the data provided by the Attorney General's Department and NSW Police Force separately.

24.2. Analysis of data obtained from the NSW Local Court

24.2.1. Number of crime scene warrant applications made, 1 December 2005 — 30 November 2007

Information obtained from the NSW Local Court indicates that during the review period, 1,436 crime scene warrant applications were made.

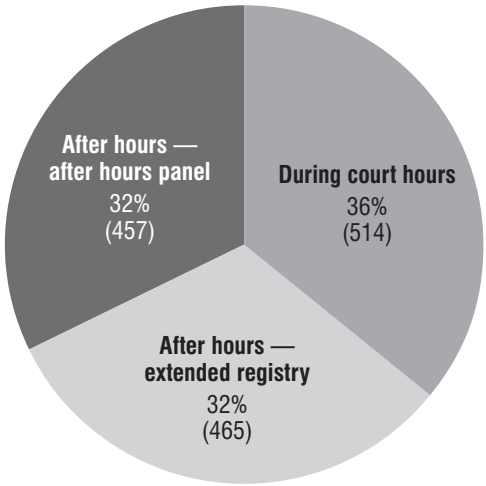
24.2.2. Timing of crime scene warrant applications

Crime scene warrant applications can either be heard during or outside of court hours. Court hours are 9am — 5pm weekdays. Out of court hours, police officers can apply for a crime scene warrant via the Extended Registry at Parramatta (3pm — 11pm) or to a member of the After Hours Panel (11pm — 8am on weekdays, weekends and public holidays).

During the review period, 36% of crime scene warrant applications (514) were made during court hours and 64% of applications (922) were made out of court hours. Thus, almost two-thirds of the crime scene warrant applications were made out of court hours. As figure 17 details, half of the crime scene warrant applications made after hours were made to the Extended Registry at Parramatta and half were made to the After Hours Panel.

Figure 17 shows when crime scene warrant applications were made during the review period.

Figure 17. Timing of crime scene warrant applications

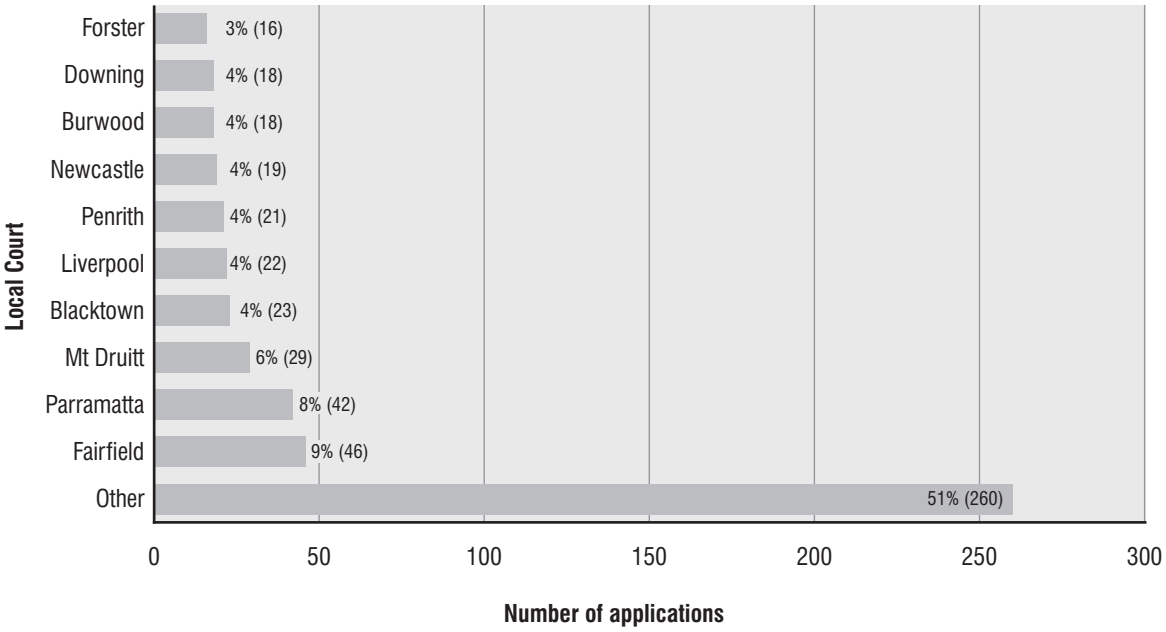


Source: NSW Local Court data, 1 December 2005 — 30 November 2007. n=1,436.

24.2.3. Crime scene warrant applications — during hours

During court hours, 514 crime scene warrant applications were made in the review period. These applications were made in 53% (85 of 160) of Local Courts throughout New South Wales. As shown in figure 18, ten Local Courts handled 49% of applications for crime scene warrants (254) during court hours in the review period.

Figure 18. Applications for crime scene warrants during court hours by Local Court



Source: NSW Local Court data, 1 December 2005 — 30 November 2007. n=514.

During the review period, Fairfield and Parramatta Local Courts received the most crime scene warrant applications. Other courts where crime scene warrant applications were made included Mt Druitt, Blacktown, Liverpool and Penrith.

Courts in the Sydney metropolitan region heard the majority of crime scene warrant applications. Eight of the 10 courts where crime scene warrant applications were frequently made during the review period were in Sydney's greater metropolitan region.

24.2.4. Crime scene warrant applications — after hours

As discussed above, crime scene warrant applications made after hours are either made to the Extended Registry at Parramatta (3pm — 11pm weekdays) or to a member of the After Hours Panel (11pm — 8am weekdays, weekends and public holidays). The After Hours Panel is made up of registrars from various courts around New South Wales. They are on call throughout the year according to a roster system. Each After Hours Panel member is supplied with a fax machine at their home and when on call they receive, by fax, crime scene warrant applications, along with applications relating to other matters such as search warrants. Any subsequent discussion about the application takes place by telephone.

During the review period, members of the After Hours Panel were based at Ballina, Blacktown, Burwood, Cowra, Fairfield, Gosford, Grafton, Lismore, Manly, Mt Druitt, Newcastle, Newtown, Nowra, Parramatta, Parramatta Children's Court, Tamworth, Tweed Heads and Wagga Wagga.

24.2.5. Outcome of crime scene warrant applications

Of the total crime scene warrant applications, 92% (1,325) were granted and 8% (109) were refused. Of the crime scene warrant applications made after hours 10% (92) were refused. In comparison, only 3% (17) of the applications made during hours were refused.[773]

773 In two cases the outcome of the crime scene warrant application was not recorded on the documentation received. As a result the total number of crime scene warrant applications in this discussion is 1,434.

In order to assess the reasons for authorised officers refusing crime scene warrant applications we examined a sample of applications that were refused. This involved obtaining a copy of the crime scene warrant application which outlined the reason for the refusal.[774] We were able to obtain these application forms in 52% (57 of 109) of cases where the crime scene warrant was refused.

Table 6 shows the reasons authorised officers refused crime scene warrant applications in the sample analysed.

Table 6. Reason for refusal of crime scene warrant application

Sample for review period	Number of refusals
No evidence of a serious indictable offence having occurred	29
Crime scene not established	9
Insufficient information in application	4
Crime scene warrant not required — public place	3
Not satisfied address is where offence occurred/insufficient link between address and serious indictable offence	3
Crime scene warrant not required — occupier's consent obtained	2
Crime scene warrant not required — police have power to search vehicle s.36(1)	2
Not satisfied that evidence will be found on premises	2
Telephone application refused as not satisfied that crime scene warrant was required urgently	1
Refused because search warrant issued five minutes earlier for same premises	1
Application made more than three hours after crime scene established	1

Source: NSW Local Court documents, 1 December 2005 — 30 November 2007.

Just over half of the crime scene warrants examined (29) were refused because there was a lack of evidence of a serious indictable offence having occurred. As discussed in section 20.3 police officers can establish a crime scene and exercise crime scene powers under LEPRA in circumstances where they reasonably suspect that either a serious indictable offence has taken place or there is evidence of a serious indictable offence on the premises. The requirement of 'reasonable suspicion' has raised problems for police officers in certain circumstances. For example, when there was a deceased person but no evidence that the death was a result of a serious indictable offence. This is discussed in detail in section 25.2.

Case study 23

Crime scene warrant refused for lack of evidence that death resulted from a serious indictable offence

Police attended a house after a woman heard a gunshot and found her son dead. It was unknown if the death was self-inflicted. Police were unable to obtain consent from the woman to establish a crime scene and exercise crime scene powers as she was highly distressed and did not speak English. The police applied for a crime scene warrant which was refused as there was no evidence that a serious indictable offence had taken place.[775]

774 Law Enforcement (Powers and Responsibilities) Regulation 2005, cl.5(d). This clause provides that the decisions of authorised officers relating to crime scene warrant applications be documented in Part 2 of Form 4 which is the application for the crime scene warrant.
775 Details obtained from NSW Local Court documents.

Case study 24

Crime scene warrant refused for lack of evidence that death resulted from a serious indictable offence

A man went to his nephew's apartment. He entered the apartment and found his nephew deceased. He called 000. When police arrived, the man told police his nephew had a history of drug abuse. Police located drug paraphernalia and a plastic bag containing brown powder substance. They also noted an amount of Human Growth Hormone and other prescription drugs in the kitchen area. Police requested a crime scene warrant to 'search for and seize the above items'. The authorised officer refused to grant the crime scene warrant on the grounds that there was 'no suspicion of the commission of a serious indictable offence having been committed on the premises'.[776]

Case study 25

Crime scene warrant refused for lack of evidence that death resulted from a serious indictable offence

Police attended premises and found the deceased in bed with a suicide note next to him indicating that he was 'sick of the pain and could not go on'. A number of syringes and bottles of insulin were located in the room. The initial opinion of police officers present was that the deceased had overdosed on a cocktail of drugs to reduce the pain associated with a serious medical condition. Police applied for a crime scene warrant on the grounds that they 'require access to the premises to investigate suspicions further'. The authorised officer refused to grant a crime scene warrant on the grounds that there was no evidence to suggest that a serious indictable offence had been committed.

In 16% of cases, crime scene warrants were refused because no crime scene had been established. When LEPRA was first introduced, the legislation suggested that a crime scene had to be established prior to the application for a crime scene warrant.[777] In some circumstances, entry onto premises and therefore the establishment of a crime scene, occurred as the result of a crime scene warrant. The legislation was amended to reflect the fact that a crime scene can be established on the authority of a crime scene warrant.[778]

As discussed in section 20.12, if an application for a crime scene warrant is refused by an authorised officer, a further application may be made, but only if the further application provides additional information that justifies the making of the further application. A further application must contain information about the previous application,[779] including details of the refusal.[780] The following case studies concern further applications relating to refused crime scene warrants.

Case study 26

Crime scene warrant granted following provision of additional information

A man was murdered on private premises. His grandson was the suspect. The mother of the suspect gave written consent for police to investigate the premises. However, police still applied for a crime scene warrant 'due to the sensitive nature of the incident involving family members.' The authorised officer refused the crime scene warrant application on the grounds that incomplete information concerning the consent was provided. Police provided additional information that the alleged murderer (the grandson) had made part admissions to his sister about killing his grandfather. This resulted in the crime scene warrant being granted.[781]

776 Details obtained from NSW Local Court documents. In these circumstances, police may have been able to apply for a search warrant.
777 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.94(1), now repealed, stated that a crime scene warrant may be applied for if the police officer suspects on reasonable grounds that it is necessary for crime scene powers to be exercised at a crime scene. A crime scene could only be established once the police officer was lawfully on the premises: *Law Enforcement (Powers and Responsibilities) Act 2002,* s.88(a).
778 See Appendix 3 for detailed discussion of this amendment.
779 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.62(1)(e).
780 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.64.
781 Details obtained from NSW Local Court documents.

Case study 27

Crime scene warrant refused due to delay in application

Two women made separate complaints to police that while working as sex workers they were raped by the suspect. One woman alleged she was raped three days before complaining to police, while the other woman alleged she was raped two months prior to making her complaint to police. Both women told police their blood and hair could be found in the suspect's car. Three months after the complaints were made, police located the suspect's car and officers from FSG indicated that if there were any stains on the seat of the car which contained biological matter they would be visible under certain lighting conditions and would require sections of the car seats to be removed. Police applied for a crime scene warrant to investigate the car. The authorised officer refused to grant the crime scene warrant on the grounds that there was a delay between the offence and crime scene warrant application. The authorised officer said the application would be reconsidered if further information about the likely success of the forensic procedure was submitted.

Police submitted additional information that prior to applying for the crime scene warrant they had examined the car and stains, which were possibly biological material, had been identified. For a DNA sample to be derived from this material police needed to remove certain sections of the car seat, as a swab would not be sufficient. In light of this additional information the authorised officer granted the crime scene warrant.[782]

24.2.6. Applications for extension of warrant

As discussed in section 20.13, a crime scene warrant, other than a telephone crime scene warrant, expires at the time specified on the warrant or, if no time is specified, 72 hours after issue.[783]

Where a warrant is due to expire 72 hours after its issue, an authorised officer can extend the warrant if satisfied that it cannot be executed within 72 hours.[784] The time for expiry of a warrant can be extended only once[785] and must not be extended beyond 144 hours after the warrant is issued.[786]

In the case of a telephone crime scene warrant, the warrant expires 24 hours after the time of its issue.[787] A telephone warrant may be extended for up to 60 hours at a time.[788] The time for expiry of a telephone warrant may be extended twice.[789] Any extensions of a telephone warrant must not extend the period for the warrant beyond 144 hours after its issue.[790]

During the review period, we are aware of seven applications for crime scene warrant extensions. One of these was refused on the grounds that the application for extension was made to an authorised officer who had not issued the warrant. Originally, LEPRA required the same authorised officer who issued the warrant to grant the extension. The *Police Powers Legislation Amendment Act 2006* amended the legislation to allow any authorised officer to extend a crime scene warrant where the authorised officer who initially issued the warrant had died, had ceased to be an authorised officer, or was absent.[791] This case study highlights the situation prior to the amendment.

Case study 28

Crime scene warrant refused due to unavailability of the issuing officer

Police were investigating a murder on private premises and requested an extension of the crime scene warrant on the grounds that they required additional time so that they could bring a firearms detection dog onto the premises. The authorised officer who issued the original crime scene warrant was not on duty the day the application was made and as a result the crime scene warrant was refused.[792]

782 Details obtained from NSW Local Court documents.
783 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73(2), (3) and (5).
784 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(1)(b).
785 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(4).
786 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(6)(a).
787 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73(1)(d).
788 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(2).
789 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(5).
790 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(6)(a).
791 Section 75 was amended by the *Police Powers Legislation Amendment Act 2006*, Schedule 1, Clause [10] on 15 December 2006. See section 20.13 for further discussion.
792 Details obtained from NSW Local Court documents.

24.2.7. Length of time for warrant applications to be considered by authorised officer

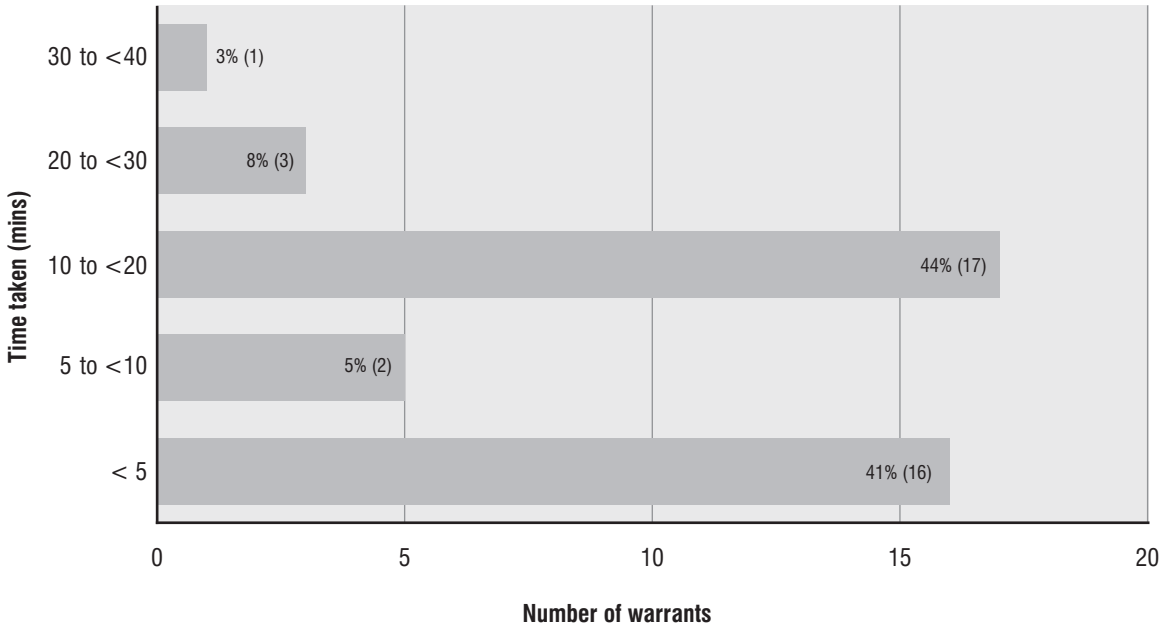
We examined 107 crime scene warrant applications to analyse how long authorised officers took to consider these applications. We have separated our discussion into two sections — applications made during hours and applications made after hours.

24.2.7.1. Applications made during court hours

As discussed in section 22.2.2 we requested copies of crime scene warrant application forms from five courts that received a high number of crime scene warrants during hours, during the review period. We received 48 crime scene warrant applications and were able to analyse 81% (39) of these applications to determine how long it took authorised officers to consider the crime scene warrant application. Figure 19 shows how long it took for authorised officers to consider the crime scene warrant applications in these cases.

In the remaining nine cases we were unable to determine how long it took authorised officers to consider the crime scene warrant application as the time the crime scene warrant application was received and/or granted was not recorded on the crime scene warrant application form. This included the three cases in the sample where crime scene warrant applications were refused.

Figure 19. Time taken to consider crime scene warrant applications during hours



Source: NSW Local Court data, 1 December 2005 — 30 November 2007. n=39.

Our analysis of how long it took authorised officers to consider these crime scene warrant applications found that from the time the authorised officers received the crime scene warrant application, it took them an average of eight minutes to grant the crime scene warrant. In 16 cases it took less than five minutes for the authorised officer to decide to grant the crime scene warrant.

The maximum time it took an authorised officer to consider a crime scene warrant application was 30 minutes and the minimum time was less than one minute. In the 15 cases where the time the warrant was received and granted was recorded as the same, the time taken to consider the crime scene warrant was noted as zero.

Case study 29

Crime scene warrant granted within 10 minutes during business hours

An 18 month old child was taken to the hospital by its parents, with severe head trauma. The father told hospital staff that the child had been sick and vomiting. The father also reported the hospital that he had slapped the child with an open hand. Hospital staff informed police of this information. Police made a crime scene warrant application in relation to the family home. The crime scene warrant application was received by the authorised officer at 2.20pm and granted at 2.30pm.[793]

Case study 30

Crime scene warrant granted within 15 minutes during business hours

A woman occupied a house with her de facto partner and ex-de facto partner. The woman was last seen alive by her brother at 9pm the night before she was found dead in her home with congealed blood on her face. The de facto and ex-de facto partner were not on the premises when police arrived. While enquires were being made as to their whereabouts, police applied for a crime scene warrant in relation to the premises. The application was received by the authorised officer at 10.45am and granted at 11am.[794]

24.2.7.2. Applications made after hours

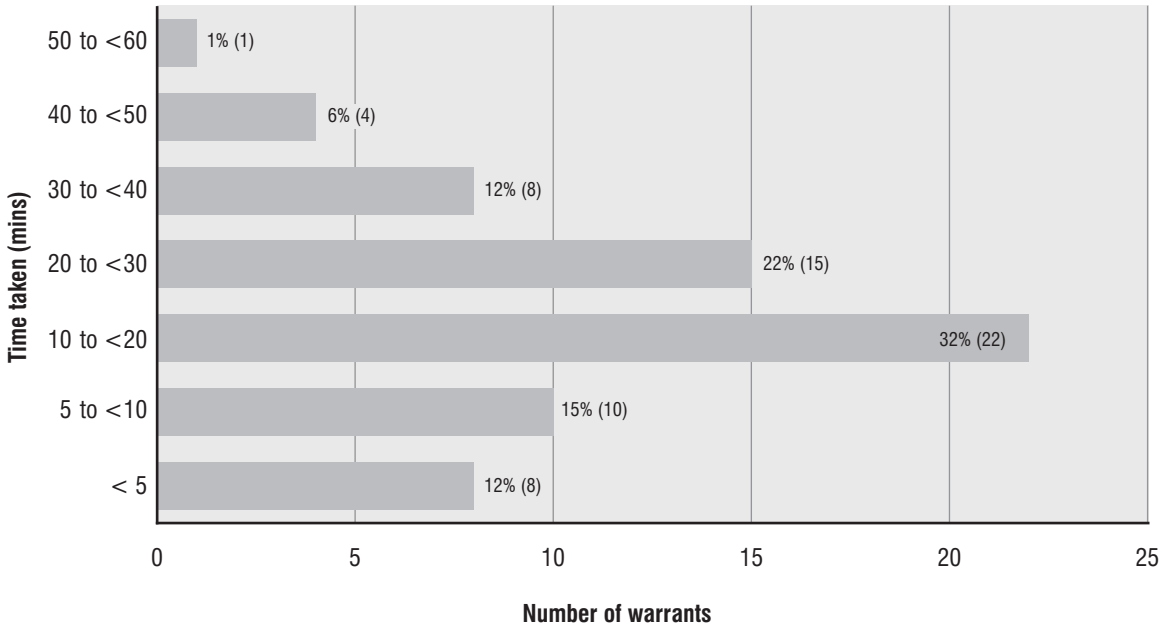
As discussed in section 24.2.4, after hours crime scene warrant applications are made to the Extended Registry at Parramatta or members of the After Hours Panel. We analysed a sample of after hours crime scene warrant applications to determine the time it took authorised officers to consider crime scene warrant applications after hours, and to see if there was any difference to the time it took to determine crime scene warrant applications during hours.

We obtained 79 crime scene warrant applications heard after hours during the review period. For 86% (68) of the crime scene warrants analysed it was possible to establish how long it took authorised officers to consider crime scene warrant applications. The time taken to consider the warrant in the two cases where the application was refused was unknown.

Figure 20 shows the length of time it took authorised officers to consider crime scene warrant applications received after hours.

793 Details obtained from NSW Local Court documents.
794 Details obtained from NSW Local Court documents

Figure 20. Time taken to consider crime scene warrant applications after hours



Source: NSW Local Court data, 1 December 2005 — 30 November 2007. n=68.

In the 68 cases where the time taken to consider the crime scene warrant application was known, it took authorised officers an average of 17 minutes to consider the crime scene warrant application. This is double the time taken for authorised officers to consider crime scene warrant applications during hours.

The maximum time it took an authorised officer to consider a crime scene warrant application, after hours, was 55 minutes and the minimum time was less than one minute. Again, where the time the warrant was received and granted was recorded as the same, the time taken to consider the crime scene warrant was noted as zero. In 74% (50) of cases it took 20 minutes or less for the authorised officer to consider the crime scene warrant application.

Case study 31

Crime scene warrant granted within 15 minutes after hours

Police attended premises in the early hours of the morning following a call from neighbours that they heard screaming, yelling and glass breaking in the premises. A man answered the door and was hostile to police. He would not let them inside. A curtain drew back and a woman called to police to help her, she allowed police to enter the premises, which she occupied with the man. The woman was bleeding and informed police that she had been sexually assaulted by the man. The man was arrested and the woman was taken to hospital. There were blood splatters in kitchen, bathroom and lounge, smashed kitchen windows and a large kitchen knife outside a window. Police applied for a crime scene warrant for the premises on the grounds that they wanted to obtain evidence of a serious indictable offence that had taken place on the premises. The crime scene warrant application was received by the authorised officer on the After Hours Panel at 5.45am and granted at 6am.

Case study 32

Crime scene warrant granted within 45 minutes after hours

Police were called to premises following an armed robbery and assault. The occupier told police she was not involved in the robbery/assault and allowed police to access the premises at 6pm. The occupier was taken to the police station to give a statement and returned to the premises at 9.10pm. At this stage the occupier was no longer co-operating with the investigation and the police officers investigating the alleged offence decided to apply for a crime scene warrant. The application was made on the grounds that the occupier may withdraw consent to allow police on the premises. The application was received by the Extended Registry at Parramatta at 9.25pm and the crime scene warrant was granted at 10.10pm.

24.3. Analysis of data obtained from NSW Police Force

As discussed in section 22.9.1, the COPS data relating to crime scene warrants is not comprehensive and so it was determined to use the data as a sample for the purposes of this review. Scrutiny of this sample involved the examination of COPS entries where the 'crime scene warrant obtained' screen had been activated.[795]

There were 104 COPS entries where the crime scene warrant screen had been activated. According to the data forwarded from the Attorney General's Department, this represents approximately 7% of crime scene warrant applications made during the review period.

Scrutinising the COPS sample data enabled us to:

- examine the reason for the crime scene warrant application
- examine the methods used by police officers to apply for crime scene warrants.

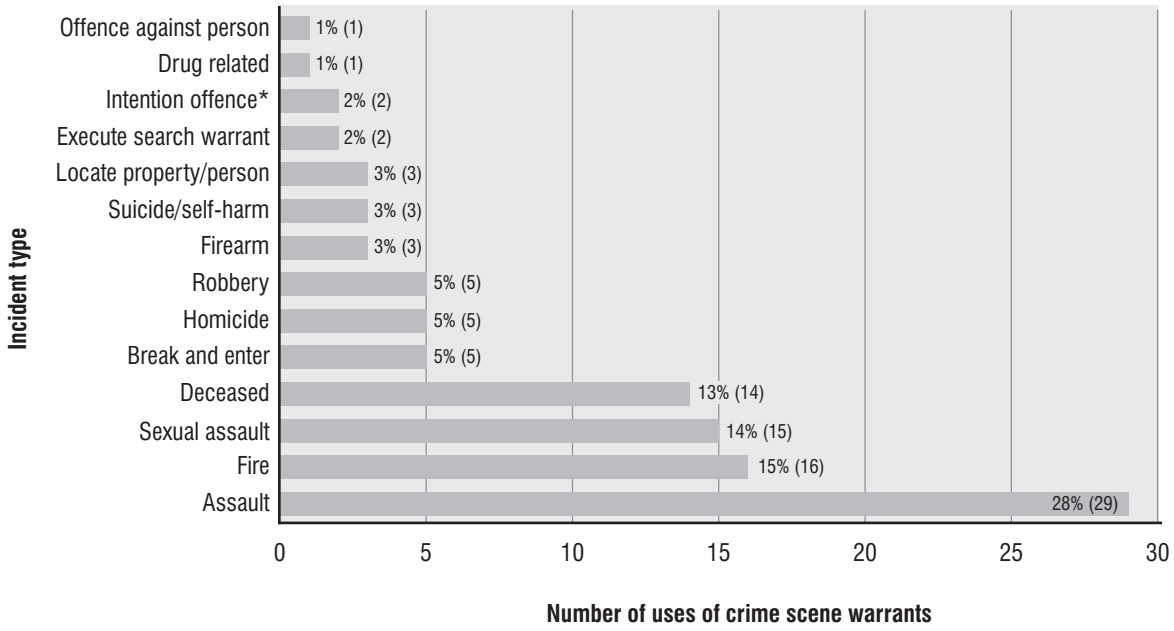
24.3.1. Types of incidents where applications for crime scene warrants were made

Crime scene warrants were applied for and executed by police in response to a range of incident types. Of the 104 reported crime scene warrants on the COPS system executed in the period 1 December 2005 to 30 November 2007, 28% related to suspected assaults, 15% to fire related incidents, 14% to suspected sexual assaults and 13% to attending premises where deceased people were located.[796]

Figure 21 shows the shows the types of incidents for which crime scene warrants were recorded by police in the sample.[797]

795 See section 29.1 for a discussion of the COPS screens relating to the crime scene provisions.
796 Fire related incidents include fires believed to be accidentally and deliberately lit.
797 Figure 21 only shows the primary incident type recorded in relation to each crime scene warrant. In some instances a number of incident types were recorded in relation to a crime scene warrant, for example, assault and malicious damage.

Figure 21. Crime scene warrants by incident type — COPS sample

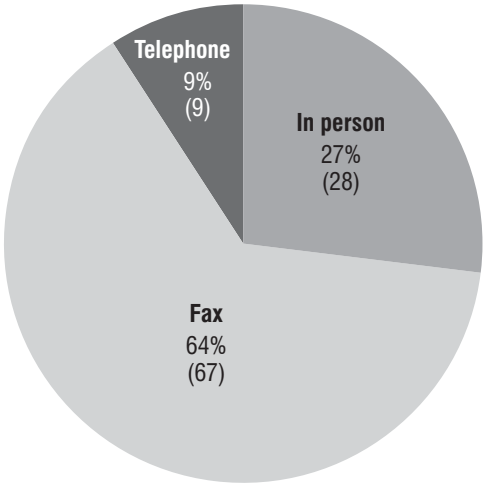


Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2007.
*** Intention offences are offences where the person meant to engage in the offence. n=104.**

24.3.2. Methods used to apply for crime scene warrants

Figure 22 shows the percentage of cases in which police applied for crime scene warrants in person, by telephone, and by facsimile. Police applied for crime scene warrants by telephone or facsimile in 73% (76 of 104) of cases in the sample between 1 December 2005 and 30 November 2007. The sample includes both crime scenes applied for during court hours and out of court hours.

Figure 22. Methods used to obtain crime scene warrants — COPS sample



Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2007. n=104.

24.4. Offences under section 96

LEPRA makes it an offence for people to obstruct or hinder a person executing a crime scene warrant.[798] During the review period two people where charged with offences under section 96(1) — obstructing or hindering a person executing a crime scene warrant without reasonable excuse. The details of each case are outlined.

798 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.96.

Case study 33

Matter involving charge for failing to comply with police request in relation to a crime scene

Police attended a fire at a house and established a crime scene with the occupier's consent. Crime scene tape was hung across the back verandah and police stood guard at the house to prevent entry. On a number of occasions the defendant, also an occupier of the premises, asked police if he could enter the premises to get his phone. Officers refused and loaned the defendant a phone to make a phone call. The defendant kept wanting to enter the premises to get his phone and eventually ducked under the tape and dove head first into the premises through an open window. Officers pulled the defendant back out through the window and handcuffed him. The defendant said that he had not entered the premises, only leant through the window to answer a ringing landline. The defendant was removed from the scene and taken to the police station where he was charged with failing to comply with a police request in relation to a crime scene. At court the magistrate dismissed the matter under section 10(1)(a) on the following grounds:

- the defendant has a disability
- the matter was 'very, very minor', and
  - police achieved their aim by restraining and removing the defendant from the premises.[799]

Case study 34

Matter involving charge for failing to comply with police request in relation to a crime scene

A serious assault took place on the front steps and in the front yard of a private residence. Police arrived and established a crime scene. A male occupier of the premises was not home when the assault occurred. Upon returning home, police told him not to enter the premises through the front, and rather to use the back entrance. The man refused to listen to the police request and entered the house through the front entrance. Police stopped the man from entering the premises. This happened a second time and the man was placed under arrest and charged with failing to comply with a police request relating to a crime scene power. At court the man received a section 10 dismissal on the condition of a bond.[800]

During the review period there were no charges against people for offences under section 96(2) — failing to comply with a request or direction given by a police officer pursuant to the exercise of crime scene powers at a crime scene.

799 Details obtained from BOCSAR and NSW Local Court documents.
800 Details obtained from BOCSAR and NSW Local Court documents. The *Crimes (Sentencing Procedure) Act 1999*, section 10 dismissal involves the dismissal of charges and conditional discharge of an offender upon a plea or finding of guilty.

Chapter 25.
Issues relating to establishing crime scenes

25.1. Extending Part 7 to include other offences

Crime scenes can be established under LEPRA only in relation to serious indictable offences and offences committed in connection with a traffic accident that has resulted in death or serious injury. Serious indictable offences includes offences such as murder, sexual assault or kidnapping, that is an offence punishable by a prison term of life or five years or more.

For the purpose of the review we wished to clarify whether any other offence should be included as justifying the establishment of a crime scene and exercise of crime scene powers under LEPRA. Our issues paper asked what, if any, additional offences should be considered as justifying the establishment of a crime scene and exercise of crime scene powers. In response, one stakeholder commented:

> *It would be appropriate to wait for the current legislation to be in force for several years and wait until there have been judicial reviews through the court process and a larger number of complaints and subsequent investigations before adding to the current list.*[801]

Most police officers we consulted during the review period advised that they were not in favour of including any other offences in Part 7. In particular, officers felt it was unnecessary and inefficient to extend Part 7 to more frequently occurring offences, as there is the potential that a crime scene warrant will then be required to investigate more minor offences, for example, theft. One crime manager commented:

> *Well how far are you going to go? You're going to have a crime scene warrant for a shoplifter? No, I think it should be a serious indictable offence [only].*[802]

A number of officers suggested that certain circumstances warranted extending Part 7 to domestic violence offences. Currently, police enter and investigate premises where there has been a domestic violence offence under Part 6 of LEPRA.[803] A common problem encountered by police responding to domestic violence incidents is entering premises by invitation and then being asked to leave by the occupier in circumstances where the police officer felt it was necessary to remain on the premises to investigate the suspected domestic violence offence.[804] This situation usually occurs when the victim is not the occupier of the premises where the alleged domestic violence took place or the victim and perpetrator occupy the premises together and the victim feels pressured to ask the police to leave. During our consultations with police one sergeant commented:

> *Domestic violence is the area where you're going to get the least cooperation from victims and suspects.*[805]

Currently officers are advised in these circumstances that 'if the victim is not an occupier and the occupier asks both the victim and police to leave the premises, then you must leave'.[806] This was confirmed in a recent High Court decision where it was held that the police had no authorisation to remain on premises after the occupier had asked them to leave. In this case, police had been called to the premises in response to a domestic dispute. When police arrived, the woman involved was no longer on the premises and the man involved allowed police to look around the premises. Police remained on the premises after the man had asked them to leave. The central issue of this decision was that by the time police attended the premises there was no ongoing breach of the peace and none was threatened. The man brought proceedings against the state in the District Court of NSW claiming damages for trespass to land, trespass to person and false imprisonment. The High Court held that in this case police had neither the statutory nor common law justification to remain on the premises.[807]

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801 NSW Aboriginal Justice Advisory Council submission to LEPRA issues paper, 14 August 2007, p.8.
802 Interview with crime manager, LAC C, 20 June 2007.
803 When responding to a domestic violence incident police may also be able to enter the dwelling under Part 2, section 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* — power in emergencies. Alternatively police may be able to exercise the common law power to enter premises without a warrant to stop a breach of the peace or prevent one which is imminent.
804 *Crimes Act 1900* (NSW), section 562ZR provides that police may need to continue investigating the domestic violence as they are obliged to apply for an Apprehended Violence Order (AVO) if they suspect or believe that a domestic violence offence has recently been committed, or is imminent, or is likely to be committed against a person. This is regardless of whether the victim or potential victim wishes to take out an AVO. Evidence at the scene may be necessary to support their AVO application.
805 Focus group with general duties sergeants, LAC B, 25 July 2007.
806 *Policing Issues & Practice Journal*, 'LEPRA: Consolidating Police Powers', Special Edition, July 2005, Vol. 13, No. 3, p.20. Under common law, police can remain on premises to keep the peace.
807 *Kuru v NSW* [2008] HCA 26. Under common law, police can remain on premises to keep the peace. This case related to an incident that occurred in 2001 (pre-LEPRA). The relevant statutory provisions in place at the time, the *Crimes Act 1900* (NSW), ss.357F–357I have since been repealed and replaced by the *Law Enforcement (Powers and Responsibilities) Act 2002,* ss.81–87. The powers in relation to entry in domestic violence incidents are identical in both Acts.

Currently in circumstances where police officers wish to remain on premises in relation to an incident of domestic violence, they have to leave the premises and re-enter. There are a number of means by which officers can re-enter premises including by obtaining a crime scene warrant. For example:

- Section 10 — Police could use Section 10 of LEPRA to re-enter the premises to arrest the offender.[808]
- Section 83 warrant — Section 83 (within Part 6) of LEPRA allows officers to apply for a warrant to enter premises if they suspect that a domestic violence offence is being, or may have been recently, committed, or is imminent, or is likely to be committed in the dwelling and it is necessary for a police officer to enter the dwelling immediately in order to investigate whether a domestic violence offence has been committed or to take action to prevent the commission or further commission of a domestic violence offence.

However, section 83 does not permit the officer to preserve the scene prior to obtaining a warrant which means there is a risk that vital evidence will be lost or destroyed prior to the warrant being issued. If, as suggested by a number of police officers, Part 7 was extended to domestic violence offences, officers in these circumstances would be able to establish a crime scene and preserve and investigate all incidents of domestic violence without the risk of evidence being lost. This would allow police to remain on premises and collect evidence in circumstances where they believe the occupier may destroy it in the time that it took for a crime scene warrant to be obtained.[809]

However, based on our observations and feedback received during the review period, it appears that it would be more appropriate for Parliament to give consideration to amending Part 6 of LEPRA to enable the preservation and investigation of domestic violence incidents. Part 6 covers search, entry and seizure powers relating to domestic violence offences. Therefore it would appear to be more consistent to provide preservation powers for domestic violence situations in this Part.

Recommendation

34. Parliament consider amending Part 6 of the *Law Enforcement (Powers and Responsibilities) 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.

25.2. Changes to the Coroner's Act subsequent to the introduction of LEPRA

As a result of the introduction of LEPRA, the *Coroner's Act 1980* was amended in November 2006.[810] The amendments addressed the problem of applying for a crime scene warrant in circumstances where the requisite threshold, that the police officer must 'suspect on reasonable grounds' the commission of a serious indictable offence, could not be met. These circumstances include:

- deceased people who are sole occupants where there is no obvious indication that the death is as a result of a serious indictable offence[811]
- suspected suicides, since suicide is not a serious indictable offence
- fire scenes.[812]

Our analysis of a sample of refused crime scene warrant applications found that 51% of these crime scene warrants were refused because there were no grounds to reasonably suspect the commission of a serious indictable offence.

One authorised officer in response to our survey, described refusing a crime scene warrant application in the following circumstances:

> *A deceased person was found inside a house and no occupier could be found to give consent to enter the premises … the deceased had most probably died of natural causes and there was no evidence of the commission of any serious indictable offence.*[813]

808 *Law Enforcement (Powers and Responsibilities) Act 2002,* section 10(1) provides police with the power to enter premises to arrest a person under an Act.
809 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.92(2).
810 *Coroner's Act 1980,* section 25 was repealed and section 23D was introduced. Section 23D came into operation on 29 November 2006.
811 The problem of entering premises when there has been a sole occupant deceased arises when the person is found in privately rented or owned premises. When a sole occupant is found in Department of Housing accommodation, police obtain occupier's consent from the Department of Housing, avoiding the need to form reasonable suspicion of a serious indictable offence so that a crime scene can be established.
812 LEPRA Issues Working Group, *Operational Policing Issues as at 10 April 2006*, p.10.
813 Authorised officer survey response 5.

The following case study provides an example of a crime scene warrant being refused on the grounds that no serious indictable offence had occurred.

Case study 35

Crime scene warrant refused for lack of evidence of a serious indictable offence

Police attended premises and found a man who appeared to have hanged himself. He lived alone so there were no other occupants who could give consent to a crime scene examination being conducted on the premises. In the crime scene warrant application the officer stated 'as death is an apparent suicide, crime scene police, detectives and other police need to enter the premises and conduct the examination. Police need to enter both the house and granny flat and other associated buildings on the property so that the house can be searched for evidence that may be linked to the suicide.'

The authorised officer refused to grant a crime scene warrant on the grounds that a suspected suicide is not a serious indictable offence.[814]

The amendments to the *Coroner's Act 1980* provide that the Coroner may consider that an investigation should be carried out at a particular place for the purpose of an inquest into a death[815] or an inquiry into a fire or explosion.[816] In such a case, the Coroner may issue an order in writing or by telephone to a police officer or other person to establish a 'coronial investigation scene' at a specified place and exercise 'coronial investigation scene powers'. Significantly, these 'coronial investigation scene powers' are, in substance, the same as the crime scene powers under section 95(1) of LEPRA. It should also be noted that the coronial investigation scene powers may be exercised at a place of 'any kind, whether or not a public place'[817] that is, they may be exercised on private premises.

Following these amendments to the *Coroner's Act 1980*, the Coroner issued a direction that, in practice, circumvents the need for a coronial investigation scene order. On 8 August 2007 the NSW State Coroner issued the following direction to all police:

> *In circumstances where a person is alone on the premises and possibly deceased and:*
>
> — *there are no reasonable grounds for suspecting a serious indictable offence has occurred,*
>
> — *no occupier's consent, and*
>
> — *no verifiable death so that officers cannot apply for a coronial investigation order,*
>
> *officers can gain lawfully entry onto premises using section 9 of LEPRA (which allows police to enter premises if they believe on reasonable grounds a person has suffered significant physical injury).*
>
> *Once entry has been made, should the officer find that there are no reasonable grounds for establishing a crime scene warrant they do not have to apply for a coronial investigation order to remain on the premises and investigate the death.*[818]

This direction was circulated to all police via email. In practice, this direction means that as soon as officers believe the death to be suspicious they must establish a crime scene and apply for a crime scene warrant. In circumstances where the officers conclude the death is not suspicious they can lawfully enter the premises by invoking section 9 and investigate the scene without seeking a coronial investigation warrant. In consultations, the Coroner advised that the direction was issued to circumvent the need to apply for a coronial investigation scene order when officers were investigating a deceased sole occupant and the death was non-suspicious.

The amendments to the *Coroner's Act 1980* have addressed the problem encountered when police officers cannot meet the threshold reasonable suspicion of a serious indictable offence required when applying for a crime scene warrant in circumstances where there is a deceased sole occupant (and no suspicious circumstances), and suspected suicides and fire scenes. However, during our observations and consultations with police officers we became aware most officers remain uncertain about how to gain entry to a premises where a person is in premises alone and unconscious and there are no reasonable grounds for suspecting a relevant offence has occurred without first exercising investigative powers.

Our present view is that the power under section 9 of LEPRA to enter in emergencies should allow police to enter premises in these circumstances. For example, the power to enter premises if police believe on reasonable grounds

814 Details obtained form NSW Local Court documents.
815 *Coroner's Act 1980*, section 4 defines an 'inquest' to mean an 'inquest' concerning the death or suspected death of a person.
816 *Coroner's Act 1980*, section 4 defines an 'inquiry' to mean an 'inquiry' concerning a fire or explosion.
817 *Coroner's Act 1980,* s.23D(3).
818 Direction issued by NSW Coroner, 8 August 2007.

that a person 'has suffered significant physical injury or there is an imminent danger of significant injury to a person and it is necessary to enter the premises immediately to prevent further significant physical injury or significant injury to a person'.[819] In these circumstances police can also rely upon the common law power to enter premises to preserve life or property.[820]

Some jurisdictions provide police with a specific power to enter premises to attend to a dead or injured person. In Western Australia the *Criminal Investigation Act 2006* provides police with the power to enter a place to attend to a dead or seriously injured person.[821] In South Australia, the *Summary Offences Act 1953* provides senior police officers with a special power of entry when an occupant of premises has died and his or her body is in the premises, or an occupant of premises is in need of medical or other assistance.[822]

However, it appears it would be unnecessary to introduce a similar provision in New South Wales. Coronial investigation scene orders and subsequent directions from the Coroner have addressed the problems associated with establishing crime scenes in circumstances where there has been a death. Powers to enter in emergencies can be used in circumstances where a person is in premises alone and unconscious.

During our consultations with police officers that took place after the amendments to the *Coroner's Act 1980* were introduced it was apparent that a number of junior and senior police were not aware of the amendments. In a number of LACs, police officers continued to refer to the problems associated with entering premises and investigating deceased sole occupants where there is no obvious indication that the death is the result of a serious indictable offence. Lack of awareness of the amendments to the *Coroner's Act 1980* should be addressed during ongoing training of police officers. This training should also reinforce the changes introduced through the Coroner's direction and the options available to enter premises in emergencies where a person is alone.

Finally, officers could also be made aware of the amendments through any standard operating procedures (SOPs) introduced around LEPRA's crime scene provisions. To date there have been no SOPs directing how police should implement Part 7. The LEPRA Issues Working Group within the NSW Police Force noted in 2006 that it would be desirable to finalise appropriate SOPs on the crime scene provisions in light of the amendments to the legislation that were due to commence.[823] Subsequent advice from police to this office in 2007, however, indicated that the need for these SOPs for LEPRA has not been raised as an issue since these amendments and 'the comprehensive initial education campaign for LEPRA followed by additional educative material and, of course, a 'settling down period' has made the need for SOPs redundant'.[824]

Our review has found, however, that there remain a number of issues related to the establishment of crime scenes and the exercise of crime scene powers where clarification through SOPs would be highly desirable. We thus recommend the development of SOPs on the crime scene provisions in LEPRA. These SOPs would have the added benefit of drawing together relevant information, direction and advice on crime scenes currently located in the *Policing Issues & Practice Journal*, Code of Practice for CRIME and the relevant coroner's direction. Throughout Chapters 25 to 28 of this report we recommend information and advice to be included in these SOPs.

Recommendations

35. The NSW Police Force develop standard operating procedures to provide guidance in relation to the crime scene provisions in the *Law Enforcement (Powers and Responsibilities) Act 2002*.
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.
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
    b. the options available to police to lawfully enter premises in emergencies where a person is alone and unconscious.

819 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.9(1)(b).
820 *Kuru v NSW* [2008] HCA 26 which refers to *Maleverer v Spinke* (1538) 1 Dyer 35b at 36b [73 ER 79 at 81].
821 *Criminal Investigation Act 2006* (WA), s.36.
822 *Summary Offences Act 1953* (SA), s.83C.
823 The amendments to the *Law Enforcement (Powers and Responsibilities) Act* contained in the *Police Powers Legislation Amendment Act 2006* commenced on 15 December 2006.
824 Letter from R. Smith, Superintendent, NSW Police Force, 30 March 2007.

25.3. Physically establishing the crime scene

LEPRA states that a crime scene may be established in any way that is reasonably appropriate in the circumstances.[825] Public notice that the premises are a crime scene must be given if it is reasonably appropriate to do so.[826]

The *Policing Issues & Practice Journal* sets out general principles that police should follow when establishing crime scenes. It advises police as follows:

> *Create a larger rather than smaller perimeter. Remember that you can always decrease the size of the scene later, but you can't necessarily increase it*
>
> *Endeavour to ensure minimal impact*
>
> *Avoid contamination of evidence*
>
> *Use tape, vehicles, personnel or similar to define the boundaries of the crime scene; and*
>
> *Notify the public as appropriate.*[827]

During the review period we directly observed police establishing a crime scene on a number of occasions. In all cases observed it was evident that police followed the *Policing Issues & Practice Journal* guidelines in relation to establishing crime scenes. For example, we saw police establish a crime scene involving a deceased person lying in the middle of a road. Officers put police tape at one end of the street and a police car blocked off the other end of the street.[828] In another case we observed police tape being used to cordon off a street where evidence lay of a suspected explosive related offence.

25.3.1. Establishing crime scenes in relation to suspected sexual assaults

During consultations with NSW Health Sexual Assault Services we were advised that clients of these services sometimes felt that police had been excessive and insensitive in the way they had established the crime scene when an assault had taken place on a victim's premises.[829] Due to the intimate nature of the crime, sexual assault victims generally require that the investigation of the offence be dealt with discreetly and sensitively, yet a large police presence on their premises may make it impossible for the victim to maintain their privacy. We were advised that in a number of cases, this resulted in the victim not proceeding with charges as they were concerned that their privacy would be further compromised throughout the police investigation. According to NSW Health Sexual Assault Services, the initial contact that victims of sexual assault have with police can also influence the victim's decision to proceed with charges. If the victim feels publicly exposed and as though they have no control over the process they are less likely to continue with the police investigation.

In addition to affecting whether the victim proceeds with charges, police interaction with victims of sexual assault has the potential to affect whether the victim contacts other relevant support services. Research undertaken by the Australian Institute of Criminology concluded:

> *Negative social reactions and unhelpful responses, or the fear of negative reactions and stigmatisation, can act as deterrents to reporting or to further help-seeking.*[830]

The following case studies provided by NSW Health Sexual Assault Services highlight the impact that the initial police contact can have on the victim's decision to proceed with charges.

Case study 36

Impact of establishment of crime scene on victim of an alleged sexual assault

An international student was sexually assaulted in her university dorm room. At least fifteen police officers arrived to establish the crime scene which resulted in a large crowd of students gathering outside her room. The student did not share the room so everyone knew something had happened in her room. She described the scene as looking as though a murder had taken place. The student decided not to press charges as she did not want to illicit further attention.[831]

825 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.91.
826 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.91.
827 *Policing Issues & Practice Journal*, 'LEPRA: Consolidating Police Powers', Special Edition, July 2005, Vol. 13, No. 3, p.24.
828 Crime scene observation number 7.
829 Focus group with NSW Health Sexual Assault Services, 26 February 2008.
830 Denise Lievore, *No Longer Silent: A study of women's help-seeking decisions and service responses to sexual assault*, a report prepared by the Australian Institute of Criminology for the Australian Government's Office for Women, June 2005, p.38.
831 Details obtained from NSW Health Sexual Assault Services.

Case study 37

Impact of establishment of crime scene on victim of an alleged sexual assault

A woman called police after she was sexually assaulted in her home. Police arrived at her home while she was out dropping her child at school and waited for her to return. A number of police vehicles and officers in forensic uniforms were waiting outside her home. At this stage the woman had not told anyone about the assault. She withdrew her complaint as she was concerned that a police investigation would draw further attention to her.[832]

In discussing how a crime scene should be established in these circumstances, we recognise the balance that must be struck when investigating sexual assault. Evidence is crucial to a successful conviction for sexual assault and the scene must be thoroughly investigated. However, the investigation must also be conducted in a way that remains sensitive to the privacy of the people involved.

We directly observed one occasion where this balance appeared to be achieved. During our review period we observed a crime scene being established following a sexual assault in a hotel room. Hotel management did not want to alarm other guests with police presence so the two police officers who attended the scene were quickly ushered through the hotel lobby and discussions with management were held in a more secluded area. No police tape was placed near the room where the assault took place, rather the room was guarded by one uniformed police officer. The victims were not present when the police arrived. They had been taken to the hospital so that forensic sexual assault examinations could be conducted on them.[833]

Currently, there are SOPs available to police officers on the investigation and management of adult sexual assault.[834] They were released in 1999 and last updated in 2002. They contain guidance on dealing with victims with specific needs, including victims 16–18 years of age. The SOPs emphasise that the police interaction with victims of sexual assault is important. They state:

> *International research indicates that it is not the gender of the police officer responding to the complainant but rather the manner in which the officer responds that is integral in establishing trust with the victim.*[835]

Guidance on responding to sexual assault is also provided in the *NSW Police Force Handbook* where it emphasises the need to treat the victim with respect. The Handbook states:

> *Your manner and contact will influence the victim's recovery and cooperation.*[836]

There is also a training course available to detectives on investigation and management of adult sexual assault.

The comments from NSW Health Sexual Assault Services suggest that any SOPs created around Part 7 should provide guidance on dealing with victims of sexual assault with sensitivity, while still ensuring a thorough police investigation of the offence. SOPs currently available on managing the investigation of sexual assault should be updated to provide specific guidance on the sensitive establishment of crime scenes when investigating sexual assault offences. In devising and amending these SOPS the NSW Police Force should consult with NSW Health Sexual Assault Services. Police would also benefit from training on these principles. In particular it would also be useful to provide this training to officers within the FSG who are responsible for collecting evidence when a sexual assault has occurred.

Recommendation

38. The NSW Police Force, in consultation with Department of Health — 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.

832 Details obtained from NSW Health Sexual Assault Services.
833 Crime scene observation number 7.
834 *Investigation and Management of Adult Sexual Assault Policy and Standard Operating Procedures*, 2002, on NSW Police Force intranet, 14 May 2008.
835 *Investigation and Management of Adult Sexual Assault Policy and Standard Operating Procedures*, 2002, NSW Police Force intranet. Accessed 14 May 2008.
836 *NSW Police Force Handbook*. NSW Police Force intranet. Accessed 14 May 2008.

Recommendations

39. The NSW Police Force, in consultation with Department of Health — 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.
40. The NSW Police Force provide training to police officers on the sensitive establishment of crime scenes in circumstances of an alleged sexual assault.

25.4. Police entry onto private premises

25.4.1. The right to protect private premises from intrusion by others

The crime scene provisions in LEPRA allow police to enter private premises and exercise crime scene powers, including the search and seizure of items they believe to be evidence of the commission of a serious indictable offence.

LEPRA allows police to establish a crime scene and exercise crime scene powers without a crime scene warrant if they have the consent of the occupier to be on the premises and investigate the offence. Current police practice is that in these circumstances Part 7 does not apply.

During the review period we became aware that in certain circumstances officers are applying for crime scene warrants even when they have occupier's consent to establish a crime scene and exercise crime scene powers. During consultations, a number of police officers told us that they apply for a crime scene warrant regardless of consent if they are concerned that the occupier may withdraw their consent at some stage during the investigation. These officers believe that consent is most likely to be withdrawn when the occupier, who provided the consent, becomes a suspect during the course of the investigation. Officers also expressed concerns with regard to the admissibility of evidence obtained in these circumstances. One crime manager described an investigation where the occupier, who consented to police officers establishing a crime scene and investigating the murder that took place on the premises, became a suspect during the initial investigation.[837]

> *All of a sudden halfway through it, [this person's] basically not answering questions properly … and you think well hang on, the person may have done this. So all of a sudden, the consent you've got from that person is in question because everything you've obtained during that consent period is evidence you're going to use against that person … all of a sudden that consent issue has got massive implications in the Supreme Court later, or High Court.*

Since Part 7 of LEPRA was introduced we are not aware of any cases that have come before NSW courts where consideration was given to whether evidence was inadmissible due to the crime scene being established without the consent of the occupier. If such a case did arise, the court has discretion to admit evidence even if the occupier was found not to have consented to police being on the premises.[838] It also should be noted that none of the police officers consulted had actually experienced occupier's consent being withdrawn during the course of an investigation.

In other circumstances officers are applying for crime scene warrants even when they have occupier's consent as certain Crime Scene Services Branches (CSSBs) will not attend the crime scene unless a crime scene warrant has already been obtained. During our consultations with Forensic Services Group (FSG) we heard that this is due to concerns that occupier's consent will be withdrawn and CSSBs will have to stop investigating while a crime scene warrant is obtained. FSG is made up of small teams of CSSBs which service large geographical areas. These CSSBs often have a number of jobs to attend at one time and advised that they do not have the resources to be waiting long periods of time at a crime scene, while a crime scene warrant is obtained. During consultations we heard that this is predominately an after hours issue. An officer from FSG commented:

> *It's really annoying when you arrive at a 12 hour job and know you are going to wait three hours before you can even start. It's a waste of time and resources as people need to man the scene. We don't go to a scene without a warrant to save us sitting around. We can be doing other work or preparation in the office.*[839]

837 Interview with crime manager, LAC C, 20 June 2007.
838 Part 3.11 of the *Evidence Act 1995* allows the court to admit evidence that has been illegally or improperly obtained if the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.
839 Focus group with FSG, 4 October 2006.

Another member of the FSG said:

> *[Our] preference is to get a crime scene warrant on the big jobs — homicide investigation, any major stabbing incident, sexual assault … We can't be questioned later down [the track], saying 'You obtained this [evidence] under duress, so it's not going to be admissible'.*[840]

FSG does not seem to have a consistent approach on this issue across the state as some CSSBs told us that they do attend crime scenes established with occupier's consent.

A number of authorised officers surveyed during the review were critical of the practice of applying for a crime scene warrant in circumstances where officers already had occupier's consent to enter and investigate the premises. An authorised officer commented:

> *Police sometimes make applications unnecessarily. On occasion police have informed me that they have the consent of the occupant to exercise crime scene powers but apply anyway 'just in case' or because 'consent may be withdrawn'. I have also been informed that specialist crime scene officers will not attend unless police have applied for and been granted a crime scene warrant even if the consent has been asked for and obtained.*[841]

We are aware of at least two cases during the review period where the authorised officer refused to grant a crime scene warrant on the grounds that the occupier had already consented to the police officers entering and investigating the premises.

Case study 38

Crime scene warrant refused as consent of the occupier had been obtained

Following a break and enter where the offenders attempted to commit a serious indictable offence, the victim (occupier) consented to a crime scene being established on the premises. The offenders were known to the victim as they had been involved in an extortion matter together. Police were unclear exactly what involvement the victim had in the extortion matter and there was potential that the victim may become a suspect in relation to that matter. Police applied for a crime scene warrant to overcome any potential problems with consent that may arise should legal proceedings be initiated against the victim. The crime scene warrant was refused on the grounds that police officers had occupier's consent to establish a crime scene and exercise crime scene powers and the possibility that the occupier may withdraw consent in the future is not in itself reasonable grounds for the issue of a crime scene warrant. The authorised officer noted that the withdrawal of consent may be grounds for a future crime scene warrant to be issued.[842]

Current guidance available to police officers on circumstances in which they should apply for a crime scene warrant appears inconsistent.

The Code of Practice for CRIME advises police:

> *You should consider obtaining written consent from the occupier … particularly if any examination is likely to result in damage …*
>
> *When the occupier is not also the owner of the premises the occupier's consent should not be relied upon to permit damage to the premises. In this case you should obtain a crime scene warrant.*
>
> *Similarly an owner who is not the occupier cannot consent to you entering and remaining on the premises against the wishes of the occupier. Again, in these circumstances, obtain a crime scene warrant. It is strongly urged that you consider obtaining a crime scene warrant in all cases where significant examinations are likely to occur.*[843]

The *Policing Issues & Practice Journal* of July 2005 stated:

> *Legal advice has suggested that, where damage to premises is likely to be occasioned as a result of any examination that is going to take place, it would be wise to obtain a crime scene warrant in the first instance. This is regardless of whether permission has been given by the owner/occupier to conduct that examination.*
>
> *This is particularly the case where damage is likely to be occasioned and the occupier does not own the premises or where it is thought that the owner may withdraw consent that has been given.*

840 Focus group with senior officers, FSG, 7 June 2006.
841 Authorised officer survey response 12.
842 Details obtained from NSW Local Court documents.
843 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated May 2008, p.103.

Example: You are at the scene of a murder and you require the removal of a large section of carpet for analysis. The owner has previously given consent for you to do whatever is required, though when they discover what you are going to do, they withdraw consent and tell you to leave. If you haven't already obtained a warrant, you would now be required to stop and obtain one, so it may be easier in such situations to obtain a warrant before investigation of the scene commences.[844]

The *Policing Issues & Practice Journal* also contains the following:

If and when that consent is withdrawn by the owner, you would then formally exercise your LEPRA crime scene powers … in order to preserve evidence relating to the commission of an offence …

The most efficient option is to apply for a crime scene warrant from the outset.[845]

Both the Code of Practice for CRIME and *Policing Issues & Practice Journal* advise that, in circumstances where there is likely to be damage to the premises as a result of the exercise of crime scene powers, police should apply for a crime scene warrant. However, there does appear to be a difference of emphasis between the Code of Practice for CRIME and *Policing Issues & Practice Journal* as to whether police should rely on the consent of the occupier or apply for a crime scene warrant in other circumstances. The Code of Practice for CRIME appears to emphasise that it is appropriate for police to rely upon the consent of the occupier in most circumstances to exercise crime scene powers. On the other hand, the *Policing Issues & Practice Journal* appears to emphasise that the most efficient option is to apply for a crime scene warrant at the outset.

In our issues paper we asked whether the exercise of crime scene powers should be only on the basis of a warrant regardless of occupier's consent. The NSW Police Force responded as follows:

A warrant should not have to be obtained when an occupier consents to the carrying out of crime scene powers. The necessity to obtain a crime scene warrant even when consent has been obtained should remain as it is now, an operational decision to be made by the investigator. There are occasions when an investigator might be wise to obtain a warrant despite consent being given but it should not be a legal requirement to do so.[846]

It appears that police guidance and practice, concerning what circumstances the consent of the occupier should be relied upon and when to apply for a crime scene warrant, is inconsistent. It would be beneficial for police practice to develop consistent guidance on this issue which takes into account the practice of some authorised officers of refusing to grant crime scene warrants when consent has been obtained. We recommend that any SOPs introduced around the crime scene provisions in LEPRA clarify these issues and address the following:

- the circumstances, if any, in which officers should apply for a crime scene warrant, regardless of occupier's consent
- the circumstances in which FSG attend crime scenes. Should FSG attend crime scenes where the occupier has consented to police being on the premises or only if a crime scene warrant has been obtained?

Recommendation

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
    b. the circumstances in which FSG attend crime scenes.

25.4.2. Occupier's consent: Should it be written?

Police entry onto, and search of, private premises is a considerable exercise of state power in the lives of private citizens and derogates or detracts from common law rights protecting people's homes and property from intrusion by anyone.[847] The significance of this intrusion is recognised in practical terms — police can only enter private premises with the occupier's consent, lawful authority or the authority of a warrant. The significance of the intrusion has also long been recognised by the courts when considering the issuing of warrants to police to enter and search private premises. In *Crowley v Murphy*, Lockhardt J said:

844 *Policing Issues & Practice Journal*, 'LEPRA: Consolidating Police Powers', Special Edition, July 2005, Vol. 13, No. 3, p.22.
845 *Policing Issues & Practice Journal*, 'LEPRA: Consolidating Police Powers', Special Edition, July 2005, Vol. 13, No. 3, p.28.
846 NSW Police Force submission to LEPRA issues paper, 24 August 2007, p.6.
847 Justice Fox in *R v Tilley; Ex parte Newton* (1969) 14 FLR 101 (FCA), at p.108.

> *The justice must take into account the rights of the citizen who is not before him in a proceeding that cuts across the ancient principle that a person's home is inviolable. It is a power to be exercised with great care and circumspection. The warrant is not to be granted lightly.*[848]

The crime scene provisions in LEPRA provide police with the power to enter the premises of private citizens in derogation of these common law protections and accordingly must be considered when reviewing the operation of all aspects of Part 7.

In circumstances where police have relied upon occupier's consent to enter and investigate premises in relation to a serious indictable offence, LEPRA does not specify if this consent must be written, or if verbal consent is sufficient.

The Code of Practice for CRIME advises police officers as follows:

> *You should consider obtaining written consent from the occupier … particularly if any examination is likely to result in damage. A suggested consent form is at Annexure M.*[849]

During consultations, the majority of officers said that they preferred to obtain written consent from occupiers to enter and investigate premises on the grounds that written consent provided evidence of the occupier's consent, should it be challenged at a later date. A general duties sergeant commented:

> *Usually [officers] record the consent. Some try and record it electronically on a handheld cassette recorder.*[850]

One officer described filming the occupier's consent on video, however, this does not appear to be common practice. A sergeant noted:

> *There's a pre-formatted document [Annexure M of Code of CRIME] or alternatively writing in your notebook … we'd get them to sign and that would go in as a case file [note] with all your other investigation paperwork.*[851]

During our direct observations we saw detectives obtaining written consent from occupiers to enter premises and investigate the offence on all occasions. Consent was documented either in the Annexure M form or their notebooks.

In our telephone survey of people affected by crime scenes we asked respondents how police gained entry to their premises. The majority of people interviewed reported that they consented to police officers being on their premises. However, only one respondent recalled police obtaining written consent to enter the premises. Three respondents said that they gave police verbal permission to enter their premises.

This suggests that in practice an ad hoc approach exists amongst police officers when obtaining occupier's consent — some are obtaining written consent while others rely on verbal permission.

Support for written consent appears to be widespread among stakeholders. In its response to our issues paper the Police Association of NSW commented:

> *If the occupier grants consent, it should be obtained in a written format.*[852]

Another stakeholder, in its response, noted:

> *Occupier's consent should remain sufficient however, consent documentation should be recorded in an officer's notebook.*[853]

We believe that obtaining written consent from occupiers to enter premises and investigate the premises is preferable to consent that is verbal only. Written consent provides documented evidence of the consent. It also provides a stronger safeguard for an intrusion onto private premises than verbal consent as occupiers may be less willing to sign something they do not understand. This is important given that currently police are operating under guidance that once an occupier consents to police officers entering their premises and investigating an offence, Part 7 and the associated safeguards found in LEPRA, no longer apply.[854]

We recommend that Parliament give consideration to amending LEPRA to direct police to obtain written consent when the occupier has consented to police entry and investigation of the premises.

Currently withdrawal of consent is not required to be in writing. We recommend that this remains the situation even if written consent is introduced as a requirement as it may be difficult to insist that all occupiers who wish to withdraw consent place this in writing.

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848 (1981) 52 FLR 123 at 144. Ross, D., *Crime,* Second Edition, Lawbook, 2004, p.823.
849 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated May 2008, p.103.
850 Focus group with general duties sergeants, LAC D, 6 November 2007.
851 Focus group with general duties sergeants, LAC B, 25 July 2007.
852 Police Association of NSW submission to LEPRA issues paper, February 2008, p.10.
853 NSW Aboriginal Justice Advisory Council submission to LEPRA issues paper, 14 August 2007, p.6.
854 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.95(3).

Recommendation

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.

25.4.3. Clarifying occupier's consent

LEPRA does not define 'occupier's consent' or clarify who can provide occupier's consent to enter and investigate premises.

During consultations, there seemed to be general consensus that occupier's consent should only be relied upon when it is clear that the occupier understands the police actions to which they are consenting. A number of police officers described obtaining 'informed' consent from occupiers to establish a crime scene and exercise crime scene powers.[855]

While there is no written guidance on consent or informed consent specifically in relation to LEPRA, there is general guidance on informed consent available to police in New South Wales.

A NSW Police Force Legal Services publication, *Law News*, included an article *Informed consent — whether knowledge of the right to refuse consent is critical to the validity of consent*, which states:

> *The propriety of the police officer's conduct in a search situation will depend on whether the officer can reasonably assume that the consent … [was] given by someone who understands that they have a right to refuse.*

The article also states that on most occasions this will not require someone being told that they have a right to refuse:

> *The mere fact that the officer ASKED FOR PERMISSION, and the way that such language is usually understood by members of the community, should allow the officer to safely assume that consent is valid.*

However, it identifies circumstances where a person may have to be specifically told that they have the right to refuse for consent to be valid. These situations may arise from:

- *circumstances of the person — vulnerable people, for example, children, elderly people, intellectually disabled people, people with poor language skills, people who are subject to relevant cultural considerations, Aboriginal and Torres Strait Islander people*
- *the objective circumstances of the investigation.*[856]

Other jurisdictions provide useful guidance on informed consent in the context of entering and investigating premises in relation to crime scenes. In Western Australia crime scenes are investigated by officers establishing a protected forensic area and obtaining a search warrant for this area.[857] The Western Australian *Criminal Investigation Act 2006* specifies that an officer may exercise without a search warrant any of the powers that could be exercised under a search warrant in respect of a place with the informed consent of the occupier.[858]

The *Criminal Investigation Act 2006* states that consent is informed if the occupier consents after being informed by the officer:

- of the powers that the officer wants to exercise in respect of the place
- of the reason why the officer wants to exercise those powers
- that the occupier can refuse to consent to the officer doing so.[859]

Our issues paper asked whether the 'occupier's consent' provision in LEPRA should, in any way, be clarified.

The NSW Aboriginal Justice Advisory Council commented that in obtaining the consent of the occupier police should consider:

855 Focus group with detective sergeants, LAC E, 18 October 2007.
856 NSW Police Force Legal Services 'Informed Consent — Whether knowledge of the right to refuse consent is critical to the validity of consent', Law News 61. NSW Police Force intranet. Accessed 14 May 2007.
857 *Criminal Investigation Act 2006* (WA).
858 *Criminal Investigation Act 2006* (WA), s.30(1).
859 *Criminal Investigation Act 2006* (WA), s.30(2).

> *'the age, responsibility, vulnerability and capacity of such a person … what safeguards exist to ensure that an 'occupier' as stated in section 95(3) has sufficient authority to provide consent? This would be particularly problematic in Indigenous communities where there is still some level of communal 'ownership' and acceptance'.*[860]

In its response, the Community Relations Commission commented:

> *In situations where the occupier does not speak or understand English, it may be necessary to specify a requirement for police to obtain a crime scene warrant.*[861]

During the review we analysed a total of 127 crime scene warrant applications. We found that in many circumstances police officers established crime scenes on private premises where there were people under the age of 16, intoxicated, from non-English speaking backgrounds and/or seriously injured. In some cases it was apparent that the intoxication, age, level of English language or state of physical or mental health of the occupant were the grounds for making a crime scene warrant application. This is highlighted in the following case study.

Case study 39

Crime scene warrant application granted due to intoxication of the occupiers

Police officers attended private premises to find three occupants seriously injured and heavily intoxicated. The officers were satisfied that the occupiers were assaulted on the premises. They applied for a crime scene warrant as they reasonably suspected that there may be evidence of an intention to maliciously inflict grievous bodily harm on the premises and that the occupants were too intoxicated to give informed consent. The crime scene warrant was granted.[862]

As discussed in section 25.4.2, police entry onto, and search of, private premises is a considerable exercise of state powers in the lives of private citizens and a derogation from common law rights protecting people's homes and property from intrusion by anyone.[863] We believe that it is crucial that occupier's consent to police entry onto, and investigation of, private premises be informed. However, relevant case law in New South Wales states that consent may still be regarded as informed in circumstances where the person consents to an investigative procedure without being aware they have the right to withhold consent.[864] Thus, we recommend consideration be given to legislative change to specify that consent in these circumstances is informed if the occupier consents after being informed of the powers that the officer wants 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. In their formal response to the consultation draft report, Police advised that while they do not support the obtaining of a person's consent through legislation they concede that doing so 'would not unduly inconvenience police'.[865]

We also recommend that any SOPs introduced in relation to Part 7 clarify the following:

- the factors that must be considered by police officers when obtaining occupier's consent including the age, intoxication, physical health, mental state and language skills of the occupant
- when obtaining occupier's consent in Indigenous communities, police officers should consider if the occupier has sufficient authority to provide consent.

Recommendation

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.

860 NSW Aboriginal Justice Advisory Council submission to LEPRA issues paper, 14 August 2007, covering letter and p.6.
861 Community Relations Commission submission to LEPRA issues paper, 14 August 2007, p.2.
862 Details obtained from NSW Local Court documents.
863 Justice Fox in *R v Tilley; Ex parte Newton* (1969) 14 FLR 101 (FCA), at p.108.
864 *DPP v Leonard* [2001] NSWSC 797.
865 Letter from Mr Les Tree, Director General, Ministry for Police, 9 January 2009.

Recommendation

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
    b. obtaining occupier's consent in Indigenous communities where a concept of communal ownership is common.

25.5. Establishing a crime scene on licensed premises

As discussed in section 20.8.1 above, under LEPRA a crime scene may be established in a public place without a crime scene warrant or occupier's consent.[866]

LEPRA defines a public place as 'a place … or part of a premises that is open to the public or is used by the public, whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used and whether or not the public to whom it is open consists of only a limited class of persons.'[867]

During consultations, a number of police officers told us that they believed licensed premises to be private premises and therefore either occupier's consent or a crime scene warrant was required to enter and investigate premises in relation to a serious indictable offence.[868] They described the occupier as the management staff present at the licensed premises. Officers told us they believed licensed premises were private premises for the following reasons:

- Only people over the age of 18 can use licensed premises.
- Management of licensed premises can deny members of the public access to the premises by enforcing dress codes, behaviour standards, only allowing access to members of the licensed premises or to people holding invitations to the licensed premises for a particular event, including a private party.

We sought counsel's advice as to whether licensed premises are public premises for the purpose of establishing a crime scene under Part 7. That advice reinforced our view that the above factors do not prevent the public bar areas, that is, the areas where the public are ordinarily allowed to occupy, from being public premises for the purpose of LEPRA as the definition of public places allows the following:

- Public places can be limited to a certain class of people, in this case, people over the age of 18.
- Access to public places can depend upon payment of money or other considerations. In the case of licensed premises, access can be dependent on dress code, behaviour, membership to the premises or holding an invitation to a particular event being held on the licensed premises.

We do not believe that it is necessary to obtain a crime scene warrant or occupier's consent when a crime scene is to be established in public bar areas.

Similarly, we do not believe it is necessary to obtain a crime scene warrant or occupier's consent when establishing a crime scene relating to a serious indictable offence in the private function rooms of a licensed premises or areas within the licensed premise cordoned off for private functions. This is because these areas can be included in the definition of public place as areas open to or used by the public, 'whether or not the public to whom it is open consists only of a limited class of persons.[869]

However, we are of the view that there are some areas that are part of the licensed premises that may not come within the definition of public place. Such areas would be regarded as private premises for the purpose of LEPRA and require either occupier's consent or a crime scene warrant if they are to be entered and investigated in relation to a serious indictable offence. For example, the offices of licensed premises, as long as they are clearly defined and closed off from the part of the premises which come within the 'public place' definition.

In other circumstances it may be difficult to determine if an area of a licensed premises is within the definition of a public place for the purpose of LEPRA. For example, the area behind the bar from which staff serve drinks. Although such an area would not be open to the public or used by the public, whether it could be excluded from the definition of 'public place' would depend on whether the area could be characterised as sufficiently separate from the public

866 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.89(2).
867 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.3.
868 No officers we consulted described obtaining a crime scene warrant in relation to licensed premises because, in their experience, the occupier always gave consent.
869 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.3.

part of the premises. In these circumstances we suggest it would be advisable that the area be regarded as private premises and occupier's consent or a crime scene warrant be obtained if officers wish to enter and investigate the area in relation to a serious indictable offence. This will avoid a crime scene being unlawfully established on the premises, which has the potential to create confusion in an operational context and may subsequently affect the admissibility of evidence.

To help police officers differentiate between public and private areas of licensed premises, we recommend that officers be provided with guidance on factors to consider when determining whether a particular area of a licensed premises falls within the definition of: a private area — requiring a crime scene warrant or occupier's consent to investigate; or a public area — rendering a crime scene warrant unnecessary in order to exercise the crime scene powers in Part 7.

Recommendation

45. That the NSW Police Force ensure that standard operating procedures developed for crime scenes provide guidance on what constitutes a public and private part of a licensed premises.

25.6. Establishment of more than one crime scene on premises in a 24 hour period

Under section 91(2) of LEPRA, a crime scene may not be established on the same premises more than once in a 24 hour period unless a crime scene warrant is obtained in respect of the second or any subsequent occasion.[870] This section is intended to prevent police establishing 'additional' crime scenes in relation to the same suspected offence within a 24 hour period and artificially extending the three hour time limit for the exercise of their crime scene preservation and investigation powers.

An unintended consequence is that police are unable to return to the same premises to establish a subsequent unrelated crime scene without a crime scene warrant. For example, when police are investigating an assault on a premises and a second unrelated incident occurs within 24 hours. Even in circumstances where occupier's consent has been provided, officers will have to obtain a crime scene warrant in relation to the second incident.

The need to prevent artificial extensions of crime scenes on premises must be balanced against the need to efficiently and appropriately investigate further crime scenes on the premises. Under the current regime, a crime scene warrant can lawfully be extended for a maximum period of six days.[871]

Our issues paper asked in what circumstances, if any, police should be permitted to establish a crime scene without a warrant within a 24 hour period of an earlier crime scene on the same premises. In its submission to our issues paper, the NSW Aboriginal Justice Advisory Council (AJAC) stated 'a further establishment of a crime scene on the same premises should only occur on the basis of an 'unrelated event'.[872]

It appears that section 91(2) operates as a necessary safeguard to prevent the creation of artificial crime scene extensions. However, as discussed, an unintended consequence of this section is that police officers may have to apply for a crime scene warrant where a second unrelated crime scene has occurred on the premises, even if they have occupier's consent to establish the second crime scene. To avoid this unnecessary application for a crime scene warrant, we recommend that Parliament give consideration to amending section 91(2) of the legislation to allow a crime scene to be established on the same premises more than once in a 24 hour period without a crime scene warrant in circumstances where the crime scene relates to an unrelated offence.

Recommendation

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.

870 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.91(2).
871 See section 20.13 for further discussion on extending crime scene warrants.
872 NSW Aboriginal Justice Advisory Council submission to LEPRA issues paper, 14 August 2007, p.6.

25.7. Disestablishing a crime scene in a public place

There are no provisions in Part 7 of LEPRA specifically limiting the time during which crime scene powers may be exercised in a public place. This is in direct contrast to the establishment of crime scenes on private premises where strict time limits are imposed. However, since section 88 only entitles police to stay on any premises for the purpose of exercising crime scene powers, there appears to be, in practice, a time limit for the exercise of any crime scene powers. The duration of the crime scene will be determined by when police decide that they no longer need to exercise their crime scene powers.

We note that Western Australia's *Criminal Investigation Act 2006* provides that an officer must disestablish a 'protected forensic area' when the purpose for which it was established ceases to exist.[873]

In our issues paper we asked whether the legislation should specifically require police to disestablish a crime scene following the exercise of crime scene powers or execution of a crime scene warrant.

A member of the public, who supported an amendment to the legislation requiring police to disestablish the crime scene, stated that '[It would] enable people to get back to normal as soon as possible'.[874]

The NSW Police Force was not supportive of introducing a legislative requirement to disestablish a crime scene. In its response the NSW Police Force stated:

> *In its current form the legislation already implies that crime scene powers be exercised as quickly as reasonably practicable … specifically stating these facts in legislation is unnecessary.*[875]

AJAC was uncertain whether introducing this requirement into legislation would be helpful. It commented:

> *[It] makes it clear to other officers who may be involved in the investigation that they are no longer authorised to utilise that particular power. The converse of this is that police may be inclined to leave the scene established up to the maximum period regardless of whether or not they have completed the requisite investigations so that they have another opportunity if required.*[876]

During our research for the review we did not find any evidence that police had established a crime scene in a public place, for prolonged periods. In consultations, police consistently advised that crime scenes were established in public places within reasonable time limits. In these circumstances we are of the view that there are no compelling reasons to amend the legislation to require police officers to disestablish a crime scene following the exercise of crime scene powers.

873 *Criminal Investigation Act 2006* (WA), s.46(6).
874 B. Rowe submission to LEPRA issues paper, 7 August 2007, p.7.
875 NSW Police Force submission to LEPRA issues paper, 24 August 2007, p.9.
876 NSW Aboriginal Justice Advisory Council submission to LEPRA issues paper, 14 August 2007, p.8.

Chapter 26.
Issues relating to the exercise of crime scene powers to preserve evidence

26.1. The three hour time limit

Following the establishment of a crime scene on private premises, police can exercise any of the preservation powers for up to three hours without a crime scene warrant.[877] Police can also exercise their crime scene investigation powers for up to three hours if:

- they apply for a crime scene warrant
- they reasonably suspect that it is necessary to exercise the crime scene investigation powers immediately, to preserve evidence of the commission of an offence.

Other jurisdictions provide different time limits for police officers to exercise certain crime scene powers.

For instance, under the Queensland PPRA there is no specific time limit for officers exercising crime scene powers to preserve evidence. A police officer must apply to a Supreme Court judge or magistrate 'as soon as reasonably practicable after the responsible officer establishes the crime scene'.[878] The legislation also states that after establishing the crime scene, 'the responsible officer must immediately take the steps he or she considers to be reasonably necessary to protect anything at the crime scene from being damaged, interfered with or destroyed'.[879]

The Western Australian *Criminal Investigation Act 2006* provides that once a protected forensic area (PFA) is established, an officer has six hours to apply for a search warrant before the PFA will be disestablished in circumstances where:

- a PFA is not established in a place that is a public open place, or
- a PFA is not established under a search warrant
- the occupier has refused or withdrawn consent to police entering and searching the place and establishing a PFA.[880]

In Western Australia, once a crime scene is established, and prior to the occupier's consent or a search warrant being issued, an officer may exercise any power that could be exercised under a search warrant with the approval of a senior police officer.[881]

The majority of police we consulted were of the view that three hours was a sufficient time limit on the exercise of crime scene powers without a warrant and a reasonable timeframe in which to obtain a crime scene warrant in metropolitan areas. However, a number of police officers believed that three hours should be the minimum time available to them to obtain a crime scene warrant and referred to situations in remote and rural areas where, at the time, they had been concerned that the three hours would expire before they could obtain a warrant. No officers consulted had experienced this time limit expiring prior to them obtaining a warrant. One officer commented:

> *Three hours out in the bush is not long enough … you're trying to chase up an after hours magistrate because you're 50kms out of town, mobile phones don't work, the radio's next to nothing … if you've got no phone or no radio contact and you'd have to leave someone and then go back to the nearest station which could be 100kms away.*[882]

In general, officers believed that problems with the three hour limit were more likely to arise when crime scene warrant applications needed to be made during the night. One officer commented:

> *Three hours is sufficient during business hours. However, in the middle of the night, particularly if you are recalling staff who live in outer areas, it becomes a bit harder to work within the three hour limit.*[883]

877 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.92(3).
878 *Police Powers and Responsibilities Act 2000* (Qld), s.166(1).
879 *Police Powers and Responsibilities Act 2000* (Qld), s.168(1).
880 *Criminal Investigation Act 2006* (WA), s.48(4) and (5).
881 *Criminal Investigation Act 2006* (WA), s.47(3).
882 Focus group with detective constables, LAC F, 29 October 2007.
883 Focus group with detective sergeants, LAC G, 20 November 2007.

Delay caused by authorised officers was another issue raised by police officers during consultations. A senior member of the Homicide Squad commented:

> *Crime scene warrants are not prioritised by magistrates — it goes [telephone interim orders], then search warrants, then crime scene warrants. Issuing warrants should be prioritised according to each situation.*

A number of authorised officers were also of the view that three hours was not a sufficient timeframe to obtain a crime scene warrant. One authorised officer commented:

> *From my end it is not always feasible for a small registrar to be available at such short notice, particularly in a small registry. These applications are given priority but the three hour limit is fairly restrictive on police and can be a problem for the authorised officer.*[884]

During our review, we found very little evidence of crime scene warrants being refused because they were applied for outside the three hour time period. In our analysis of 57 refused crime scene warrant applications, only one was refused because the officer had applied for the warrant more than three hours after the crime scene had been established.

Case study 40

Crime scene warrant refused due to application being made more than three hours after establishment of a crime scene

Police attended private premises at 10pm following a call from neighbours who had heard a domestic argument and then gunshots on the premises. When police arrived the victim had already been taken to hospital due to the gunshot wound. The family were not forthcoming in supplying information to police about the incident or the whereabouts of the accused. A crime scene was established at the scene of the shooting at 11.05pm. At 2.46am police made an application for a crime scene warrant for the premises. The application was refused as it had been applied for over three hours after the crime scene was established.

During the review period, police officers and authorised officers made a number of suggestions for more appropriate time limits, or other arrangements, to allow for officers to submit their applications within the three hours as discussed in the following sections.

26.1.1. Time out provisions

The legislation could provide certain times to be disregarded in calculating the three hours, including time taken to drive to the police station to prepare the application, time taken to prepare the application and have the application delivered to and considered by the authorised officer.

In its submission to our issues paper, the NSW Police Force commented:

> *The time taken to apply and obtain a warrant should be considered to be a 'time out'. Time outs could also be established for the time it takes to clear a contaminated site, for example, a clandestine laboratory, or for travel times in remote locations where crime scene investigators may not be readily available.*[885]

Similar provisions are available in relation to detention after arrest warrants. Section 117 of LEPRA provides a list of times that will be disregarded when calculating the four hour investigation period when detaining people prior to a detention warrant being required. Included is time spent by a person communicating with a friend, relative, guardian, legal practitioner or independent person.[886]

We believe that calculating the time to be disregarded in relation to crime scene warrants is likely to be operationally difficult. Records of time outs in relation to detained people are relatively easy to keep, as detained people are held in a charge room, and all activity is recorded by a custody manager and monitored by CCTV. It would be difficult to achieve this level of accountability in relation to time outs for crime scene warrants. For example, it would be difficult to keep an independent record of how much time officers spent typing the crime scene warrant application and accessing an authorised officer.

884 Authorised officer survey response 17.
885 NSW Police Force submission to LEPRA issues paper, 24 August 2007, p.7.
886 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.117(d).

26.1.2. Amending the timeframe to as soon as reasonably practicable

The legislation could be amended so that officers can apply for crime scene warrants 'as soon as reasonably practicable', as occurs in Queensland. The NSW Police Force submission to our issues paper supported such an amendment as they believe it provides flexibility and takes into consideration factors such as travel distance and officer safety.[887]

We believe that amending the legislation to 'as soon as reasonably practicable' introduces a subjective test into the legislation and requires authorised officers to make a further assessment when issuing crime scene warrants.

Our analysis of refused crime scene warrant applications across metropolitan and non-metropolitan Local Courts in NSW found few cases where warrants have been refused because they are applied for out of hours.[888] In the circumstances it appears unnecessary to introduce a potentially unlimited period of time for officers to exercise crime scene powers without a warrant.

26.1.3. Amending the timeframe to establish a crime scene without a warrant

During consultations, officers commonly suggested four or six hours as a more appropriate period in which to establish a crime scene without a warrant. Officers in regional areas were particularly interested in extending the timeframe. One regional officer commented:

> *Three hours … is not long enough, it is nowhere near long enough for anything … It should just be a reasonable time and if you can justify waiting six hours because you're 400kms out of the nearest town and mobile phones don't work, that's reasonable but if you're five minutes out from the [police station] and you're waiting around for six hours and no one bothered to do something well that's unreasonable.*[889]

In the circumstances we believe consideration should be given to amending the timeframe for exercising crime scene powers without a warrant to four hours. This would respond to the concerns of police officers and authorised officers that three hours is not a sufficient timeframe while still providing a limited time period. During the review period, we were not provided with any evidence to suggest that a period of time longer than four hours is necessary. This amendment would have the additional benefit of creating uniformity within LEPRA around the periods of time officers can operate without warrants in different circumstances.[890]

Recommendation

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 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.

26.2. Directing people to leave, or not to enter, a crime scene

Section 95 of LEPRA confers powers on police to direct people to leave a crime scene, remove a person who fails to comply with such a direction, direct a person not to enter a crime scene, and prevent people from doing so.[891]

During consultations, police advised us that it was useful having these 'preservation powers' provided for in the legislation.[892] For example, a member of the FSG described using the powers to secure evidence in a street shooting. Two gun cartridges could not be immediately located. Police were able to secure a number of front yards in the street to prevent the cartridges being removed, by directing people not to enter their front yards.

Our survey of people affected by crime scenes found that most people had been directed by police to leave the crime scene, or police officers had prevented them from entering a crime scene.[893]

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887 NSW Police Force submission to LEPRA issues paper, 24 August 2007, p.6.
888 See section 24.2.5 for analysis of refused crime scene warrant applications.
889 Focus group with detective constables, LAC F, 29 October 2007.
890 *Law Enforcement (Powers and Responsibilities) Act 2002,* section 115(2) provides that four hours is the maximum investigation period during which police can hold a person without a detention warrant.
891 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.95(1)(a)–(f).
892 Focus group with officers, FSG, 19 October 2006.
893 Our telephone survey of people affected by crime scenes asked respondents if police directed people to leave the scene, not enter the scene or prevented a person from entering the scene.

Police indicated that the power to prevent people coming back into their house, when it is a crime scene, may also assist police investigations. An FSG officer advised:

> *All the time people are trying to get back into their house while the FSG are in there collecting evidence … obviously because they want to get at something they don't want you to find, for example, firearms, cash, pot.*[894]

Police also said that they often used these powers to prevent the media from entering a crime scene. An FSG officer stated:

> *The media tries to get in at every major scene. It's a circus. They'll turn up and they'll camp wherever they can.*[895]

26.2.1. Access to deceased people at a crime scene

The Executive Director of the Homicide Victims Support Group, Ms Martha Jabour, described the conflict that can arise when family and/or friends of a victim of crime want access to a crime scene and the deceased person contained therein:

> *Family turn up at a crime scene … and they want to go in … and there is always quite a struggle, like a physical struggle, to keep people away.*[896]

In consultation, Ms Jabour raised the need for police to be sensitive when dealing with family members at the scene of a homicide. She described the experience of a father who had to go to a crime scene to identify his six year old son:

> *This police officer … put his hand across the door [to block the father from entering] and said to him 'Is that your son?' and this father said it was like putting a red flag in front of a wounded bull. All he wanted to do was just go and hold him … That's the big thing that is holding him from moving on.*[897]

Ms Jabour described how crime scene investigations can prevent a family from having access to their dead relative. Following a homicide, the body is usually kept undisturbed and under police guard at the crime scene and then taken to a mortuary where a post mortem is performed. It is only after the completion of the post mortem that families can have access to the body and death or burial rites can be conducted. In the case of an Islamic burial, this can mean family members miss out on saying goodbye to their relative in the customary manner. Ms Jabour commented:

> *The post mortem is done and then the elders take the body back to their mosque where they bathe it, anoint it and dress it, and the family never get to say goodbye … especially wives and children … and that tends to be part of the big problem with our families moving on.*

Very few police officers consulted during the review period had experienced situations where these conflicts become unmanageable or resulted in family members being arrested. When investigating a death, police officers explained that the priority always remained an uncompromised investigation into the death, which was also of paramount concern to the family. In its submission to our issues paper AJAC commented:

> *[We] feel very strongly in relation to assisting members of a familial unit being able to access deceased persons. However, we wish to iterate that the collection and continuity of evidence needs to be paramount whilst being balanced with sensitivity and empathy.*

During consultations, police expressed a range of views on allowing access to the body at the crime scene. A detective constable commented:

> *It's a communication thing I think more than anything else. I'm all for that if they want to go in as long as we've got our stuff done … just need to make sure that they don't take something off the body … that may be relevant later on down the track.*[898]

While a duty officer advised:

> *If it's a suspicious death they don't go near the body because you're looking for other forensic evidence … microscopic stuff you find later at the morgue … you would liaise with the morgue for viewing but at the end of the post mortem … more for the integrity so we can find out exactly what's happened.*[899]

The Homicide Victim's Support Group advised that it had been having informal discussions with police about developing protocols relating to families' access to the body at a crime scene once the police investigation is completed and before the body is taken to the morgue.[900]

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894 Focus group with senior officers, FSG, 7 June 2006.
895 Focus group with senior officers, FSG, 7 June 2006.
896 Interview with Ms Martha Jabour, Executive Director, Homicide Victims Support Group, 7 November 2006.
897 Interview with Ms Martha Jabour, Executive Director, Homicide Victims Support Group, 7 November 2006.
898 Focus group with detective constables, LAC F, 29 October 2007.
899 Interview with duty officers, LAC G, 19 November 2007.
900 Interview with Ms Martha Jabour, Executive Director, Homicide Victims Support Group, 7 November 2006.

We have also heard from both police and Aboriginal community members about the difficulties encountered in managing crime scenes in Aboriginal communities. An officer from the FSG described how tensions between police and community members can run high in such situations and how, on one occasion, police decided that it was preferable to allow people from the Aboriginal community entry to the premises at the same time as they were preserving and investigating a scene.[901] During consultations, an Aboriginal Community Liaison Officer (ACLO) with the NSW Police Force informed us the rituals around death are different for each tribe and that some Aboriginal people will not want the body to be touched. The ACLO commented:

> *Usually the family just want time with the body. They need to grieve there and then.*[902]

Our issues paper asked whether police should be required to consider the needs of family members where the crime scene is established because of a suspicious death of a family member. It also asked whether police should be required to consider any religious or cultural sensitivities in exercising the preservation powers.

In its response the NSW Police Force commented that considering the needs of family members where a crime scene is established because of a suspicious death of a family member should not be a legislative requirement. Nor should there be legislation requiring police to consider any particular religious or cultural sensitivities when preserving a crime scene.[903]

In its submission, the Community Relations Commission stated:

> *The conduct of a crime scene investigation … can create problems for some cultural and religious groups with customary ways of coping with loss and dealing with the dead … Given the diversity of customary practices that exist for dealing with the dead and the sensitivities involved in such situations, it would be beneficial if police could develop some operational guidelines or code of practice in relation to this particular issue.*[904]

In some circumstances it appears it would be appropriate to allow family members access to the deceased at the crime scene once the police investigation is completed and before the body is taken to the morgue. This may assist in the grieving process for some family members. Obviously, this access should only be allowed in circumstances where the criminal investigation into the death will not be compromised.

Based on the evidence presented to us during the review period, it appears that the treatment of family members when a crime scene is established following a suspicious death of a family member and the consideration of cultural, religious or privacy sensitivities when exercising preservation powers could be best dealt with through continuing education and guidance for police.

Any SOPs created around Part 7 could provide guidance on dealing with family members of deceased people at crime scenes. This guidance should highlight the need to conduct an uncompromised police investigation into the death while, as far as possible, being sensitive to the diverse religious and cultural practices that exist around dealing with the dead.

Recommendation

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.

26.2.2. Sexual assaults and the establishment of crime scenes

Another area where police need to balance the need for thorough investigation and sensitivity towards the person affected by the crime scene is in relation to sexual assaults. During our consultations we heard from the NSW Health Sexual Assault Services that in their experience in the majority of cases police are very sensitive in their dealings with victims of sexual assault when investigating the offence. However, they also informed us of the following concerning scenarios:

901 Interview with crime scene officer, LAC F, 26 July 2006.
902 Interview with ACLO, LAC F, 31 October 2007.
903 NSW Police Force submission to LEPRA issues paper, 24 August 2007, p.7.
904 Community Relations Commission submission to LEPRA issues paper, 14 August 2007, p.3.

- A woman was at the hospital following a sexual assault by her partner. The woman was prescribed Lithium for depression. Her Lithium was in her home, where the assault had occurred. Despite her consent, police would not allow the Lithium to be removed by a family member, as the house was a crime scene. NSW Health Sexual Assault Services were trying to get the woman into a refuge and needed to move her quickly. There was not enough time to get her another prescription for Lithium.[905]
- A 14 year old girl was sexually assaulted in her home. Police officers asked the girl's mother to pack up the bed sheets and other evidence for them. The mother was traumatised by performing this task.

This last incident took place before LEPRA commenced, however, we have included it in this report as it is a highly concerning incident that compromised the evidence and caused additional distress to a person affected by the crime scene. The principle, discussed in section 25.3.1 above, of striking a balance between an uncompromised police investigation and sensitivity to the people affected by the crime clearly needs to be applied when investigating sexual assault. Again, this could be best dealt with through education and guidance for police. In section 25.3.1 we have made a number of recommendations around guidance and education of police relating to the establishment of a crime scene and exercise of crime scene powers where an alleged sexual assault has occurred. We believe the implementation of these recommendations will assist in this balance being struck.

26.3. Removal of animals from a crime scene

LEPRA does not provide police with powers in relation to dealing with animals at a crime scene. We note that the Queensland legislation specifically provides police with a power to remove animals from a crime scene but there is no such power conferred on police by Part 7 of LEPRA.[906]

Our issues paper asked whether police required additional preservation powers, such as a specific power to remove animals from a crime scene.

One stakeholder suggested amending the legislative power to preserve a scene to include the removal of animals as follows:

> *It could be as simple as 'take whatever steps reasonably necessary including the removal of a person, people, animal or object'.*[907]

In its submission, the NSW Police Force commented:

> *Police should have the powers necessary to ensure the preservation of evidence within a crime scene. However, a specific power to remove animals would probably be unnecessary.*[908]

The Police Association of NSW stated:

> *The officer in charge of the matter should have the power to use their discretion to make necessary decisions in order to protect the crime scene by ensuring that evidence is not tampered with by person, animals …* [However] *it should not be a legislative requirement.*[909]

During the review period we did not find that the lack of a legislative power to remove animals from a crime scene created difficulties when establishing a crime scene or exercising crime scene powers. However, as highlighted in the submissions, it is important that police be able to control all aspects of a crime scene to ensure evidence is preserved and the contents of the premises are appropriately handled. In light of this, we recommend any SOPs created on LEPRA's crime scene provisions include 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.

Recommendation

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.

905 Focus group with NSW Health Sexual Assault Services, 26 February 2008.
906 *Police Powers and Responsibilities Act 2000* (Qld) s. 177(b)(ii).
907 NSW Aboriginal Justice Advisory Council submission to LEPRA issues paper, 14 August 2007, p.7.
908 NSW Police Force submission to LEPRA issues paper, 24 August 2007, p.7.
909 Police Association of NSW submission to LEPRA issues paper, February 2008, p.12.

Chapter 27.
Issues relating to crime scene warrants

27.1. Police resources

As discussed in section 24.3.2, the majority of crime scene warrant applications are written and then either faxed or presented to the authorised officer in person. Currently, the preparation of a crime scene warrant application involves an officer leaving the scene of the crime and returning to the police station to type or write the crime scene warrant application.[910] During consultations, a number of police officers commented that the need to return to the station to prepare the crime scene warrant application reduced police resources at the crime scene to perform other tasks, for example, interviewing witnesses. A sergeant commented:

> *Somebody has to come back [to the station] and type up the paperwork, and it's not something that takes five minutes. It's something that takes in excess of an hour to put all your reasonable suspicion … before you fax it off or drive it down to Parramatta.*[911]

A member of the Homicide Squad commented that there was a general reluctance on the part of authorised officers to deal with crime scene warrant applications by telephone.[912] This was reflected in our authorised officer survey which found that very few authorised officers had issued crime scene warrants via the telephone. One authorised officer commented that the telephone was only ever used 'to elicit further information on an application sent by facsimile.'[913]

There are a number of circumstances in policing where police do make telephone applications to authorised officers. For example, officers apply for telephone interim orders (TIOs) when it is not practicable to apply for an interim AVO at the court. TIOs are concerned with providing urgent protection to individuals whose safety may be compromised due to domestic violence or an offence under section 25 of the *Child (Care and Protection) Act 1987*.

Written applications provide better accountability than verbal processes and careful consideration should be given before replacing them with less accountable processes allowing police officers to intrude on private premises. They may also be an important piece of evidence for police officers if they are required to justify their entry onto, or investigation of, private premises at a later date. Given that the purpose of an interim AVO is to provide urgent protection of individuals whose safety is at risk, it is understandable that the requirement to have a written AVO application can be waived in certain circumstances.

While crime scene warrants are concerned with the collection of evidence of a serious indictable offence, they are not concerned with the urgent protection of individuals from imminent danger, making it difficult to justify the removal of a written application. Urgency around crime scenes usually relates to concern that evidence will be lost or destroyed. LEPRA already allows crime scene powers to be exercised without a warrant in the case of an emergency, which covers circumstances where the evidence is likely to be lost or destroyed.[914] Viewed in this light it seems unnecessary to have application by telephone as the standard method for applying for crime scene warrants.

However, if police do feel that having to return to the police station to type the crime scene warrant application is overly time consuming, consideration should be given to providing police with appropriate resources to complete written crime scene warrant applications in a timely manner. Some suggestions provided by officers included being provided with resources to allow them to complete the crime scene warrant applications at the scene of the crime, including portable technology devices and remote access internet. Such devices would be useful in a range of circumstances beyond crime scene warrant applications, such as AVO and search warrant applications. Providing officers with appropriate resources to expedite their responsibilities is an issue that should be considered by the NSW Police Force.

Recommendation

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 the most efficient use of police resources.

910 See Form 4 in Appendix 10.
911 Focus group with general duties sergeants, LAC B, 25 July 2007.
912 Interview with member of Homicide Squad, 18 December 2007.
913 Authorised officer survey response 9.
914 *Law Enforcement (Powers and Responsibilities) Act 2002,* section 92(2)(c) allows officers to exercise crime scene powers without a warrant when the police officer suspects on reasonable grounds that it is necessary to immediately exercise the power to preserve evidence of the commission of an offence. For example where evidence may be lost due to weather conditions.

27.2. Undue delays in processing crime scene warrant applications

During consultations, a number of police suggested that, because of the possibility of undue delay in processing a crime scene warrant via authorised officers, they should be able to seek appropriate authorisation for the exercise of crime scene powers from a senior police officer. Police told us that this devolvement of crime scene warrant authorisations to senior police officers was advantageous as senior police officers could attend the scene themselves and make an assessment of whether a crime scene warrant was required. Police frequently identified a duty officer as the appropriate senior officer in this respect. One sergeant commented:

> *You've got a bloke here 24/7. Why not use him? He can make a decision.*[915]

The acting commander at one LAC supported devolving crime scene warrant authorisation to police officers of a 'substantive rank' such as a crime manager or commander.[916] One submission made to our issues paper by a member of the public also commented on this issue:

> *I do not believe that senior police should become responsible for authorising a crime scene warrant. However, if this is … included in legislation, I would suggest that no one under the rank of Superintendent should do this. The higher rank the police officer, one hopes greater responsibility and accountability will take place.*[917]

Our issues paper, asked for feedback on whether senior police, as opposed to authorised officers, should be responsible for authorising a crime scene warrant. In its response, the Police Association of NSW commented:

> *Senior police of the rank of inspector or above … should be responsible for authorising a crime scene warrant … Authority needs to be given back to senior police who possess the working knowledge to declare a crime scene as opposed to the current time consuming process.*[918]

During the review period we considered the cause for any delay around processing of crime scene warrants. Authorised officers told us that determinations of crime scene warrant applications can regularly be delayed due to police officers incorrectly filling in crime scene warrant application forms. In these circumstances, authorised officers have to request additional information from the police officer before determining the crime scene warrant application, which can be time consuming. Authorised officers identified the following problems with the way crime scene warrant applications are completed by police officers:

- insufficient information provided as reasons for applying for a crime scene warrant, including the failure to establish the requisite reasonable suspicion that a serious indictable offence has occurred
- the warrant and occupier's notice are left blank and the magistrate has to fill in information that should have been placed on the form by police
- Acts and sections of Acts relevant to the application are often not included, for example the section of the Act relating to the offence requires clarification by the authorised officer
- police officers put their names where the authorised officer should sign.

Ensuring that crime scene warrant applications are filled out correctly in the first instance would reduce delay in processing the crime scene warrant application.

In our survey of authorised officers we asked whether the issuing of crime scene warrants should be devolved to senior police officers. The majority of authorised officers surveyed were not in favour of devolving the authorisation of crime scene warrant applications to senior police officers. Their main concern was lack of independence of senior police officers. One authorised officer commented:

> *An authorised officer is independent of the investigator who may become the prosecutor. This independence is essential in the interests of natural justice and the protection of individual rights.*[919]

Another authorised officer commented:

> *In many cases, crime scene warrants are going to uncover important forensic evidence in serious indictable offences such as murders and sexual assaults, and the basis for the issue of the warrant (and subsequent evidence obtained) can be subject to challenges in the Supreme Court. I do not think that it would be in the interests of justice or the community if trials are miscarried because warrants have wrongly or inappropriately been issued.*

915 Focus group with sergeants, LAC D, 24 May 2006.
916 Interview with acting commander, LAC G, 19 November 2007.
917 B. Rowe submission to LEPRA issues paper, 7 August 2007, p.7.
918 Police Association of NSW submission to LEPRA issues paper, February 2008, p.13.
919 Authorised officer survey response 6.

> *The role of the judicial officer in determining whether the basis for the issue of a warrant meets the criteria set forward in the legislation are quite distinct from those of the police in investigating offences.*[920]

A number of police officers consulted were also not in favour of devolving the crime scene warrant authorisation process to senior police. During consultations, a detective senior constable commented:

> *Probably on 99.9% of occasions it wouldn't make one lot of a difference whether an authorised officer or a senior police officer … had authorised it … but it would be that one time when invariably it would be when something crucial came out of the crime scene warrant that had been issued by a police officer and that just leaves it open for criticism … if you already go to the trouble of typing it up anyway, I'd leave it with the authorised officer, someone completely independent.*[921]

Another detective senior constable commented:

> *I like the fact that we have to produce paperwork to a magistrate … down the track when I'm sitting in the witness box, it's going to save me some dodgy questions because a crime scene warrant has been issued.*[922]

Some officers in favour of devolving the crime scene warrant authorisation process to senior police officers argued that the scrutiny of the courts would prevent senior police officers making improper or inappropriate decisions. In this respect, a detective commented:

> *We are the ones sitting in the witness box accountable at the Supreme Court … so the accountability side and the seriousness of the situation would dictate that you're going to be making all of these decisions.*[923]

However, the accountability provided by the courts, would only apply to crime scene warrants used in matters which went to court. A Senior Public Defender commented on this issue:

> *The retrospective justification at court offers no real protection because the ones that don't actually get to court will never be tested … If it doesn't get to court, there's no protection. The person still had their rights infringed but there's no remedy in that sense unless they sue the police for doing something unlawful and that's so rare because of the costs involved and most people don't want to further antagonise them.*

As discussed above in section 20.10, a crime scene warrant application must be made to an authorised officer, that is, a magistrate, Local Court clerk or authorised employee of the Attorney General's Department.[924] Police officers can make crime scene warrant applications to authorised officers as follows:

- during court hours
- via the Extended Registry (the Extended Registry operates from Parramatta Court between 3–11pm)
- by applying to an on call magistrate after hours (on call magistrates are available between 11pm and 8am/until court opening hours).

Our research for the review did not reveal any evidence to support the claim that there was undue delay in the crime scene warrant application process because police officers had to wait long periods of time for authorised officers to consider crime scene warrant applications. Our analysis of 37 crime scene warrant applications made during court hours found that majority of these crime scene warrant applications were determined within an average of nine minutes of being received by the authorised officer. Our analysis of 70 crime scene warrant applications made after hours found that the majority of applications were determined within an average of 17 minutes of being received by the authorised officer.

A crime scene warrant is similar to a search warrant in that it allows an intrusion onto private premises. The importance of having an independent assessment of a police intrusion onto private premises was discussed in case law in relation to search warrants in *George v Rocket* where the court stated:

> *The justice of the peace should stand between the police and the citizen, to give real attention to the question whether the information proffered by the police does justify the intrusion they desire to make into the privacy of the citizen.*[925]

27.3. Other jurisdictions in Australia

In Queensland and Western Australia — states with legislation comparable to Part 7 of LEPRA — police officers have to apply to authorised officers prior to exercising investigative powers on premises. In Queensland police

920 Authorised officer survey response 11.
921 Focus group with detective senior constables, LAC D, 6 August 2007.
922 Focus group with detective senior constables, LAC D, 6 August 2007.
923 Focus group with detectives, LAC D, 24 May 2006.
924 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.94(1).
925 (1990)170 CLR 104 at 111.

officers have to apply to an authorised officer for a crime scene warrant. In South Australia certain police officers are provided with general search warrants by the Police Commissioner which they use to establish and investigate crime scenes. In Western Australia, police officers investigate a protected forensic area using a search warrant, which is granted by a justice of the peace.

27.3.1. South Australia

In South Australia there is no specific legislation that allows police to establish and investigate crime scenes. In some circumstances police can use a general search warrant to enter and search premises that are the scene of a crime. Under the *Summary Offences Act* the South Australia Police Commissioner can issue a police officer with a 'General Search Warrant'.[926] A general search warrant operates as a standing search warrant. It is pre-approved by the Commissioner for use by officers in a range of circumstances including entering, breaking open and searching any house, building, premises or place where the officer has reasonable cause to suspect that an offence has recently been committed, or is about to be committed.[927]

A member of the South Australian Police Legal Service commented that the general search warrant is 'an exceptional authority for police' and was surprised by the low number of issues that arise around its use. The South Australia Police Complaints Authority told us that they receive very few complaints about entry via general search warrants.[928]

A number of members of the NSW Police Force consulted during the review period mentioned the search warrant system in South Australia as a preferable system to apply in relation to crime scenes in New South Wales. A duty officer commented:

> *[South Australia's] warrant card empowers them to enter without actually applying for a warrant and it's obviously a decision that they have to consider carefully because if they abuse that process it could be removed.*[929]

27.3.2. Western Australia

In Western Australia, a Royal Commission report published in 2004 (the Kennedy Report) concerning questions of police corruption examined the most appropriate officers to issue search warrants.[930] The report does not specifically address police issuing search warrants (or crime scene warrants). However, it illustrates some of the problems that can arise when a robust system is not in place regarding the application and granting of such warrants.

At the time the report was published, search warrants in Western Australia were issued by justices of the peace. The Kennedy Report concluded that this system was open to abuse, citing examples of search warrants being forged, obtained on false or misleading information and blank warrants being signed by obliging justices of the peace. Concern was also expressed that justices of the peace were laypeople with no legal skills and often achieve a state of inappropriate familiarity with police officers. The report praised the legislative frameworks in New South Wales and the Commonwealth whereby magistrates, authorised officers or other particular designated people are responsible for issuing warrants, concluding that it led to a more thorough and independent review of applications for warrants.[931]

27.3.3. Conclusion

Crime scene warrants allow an intrusion onto private premises, and like search warrants in New South Wales should be subject to an independent authorisation to ensure natural justice and the protection of rights. Authorised officers provide this independent scrutiny. It is also difficult to establish why a lesser standard should be applied in relation to crime scene warrants compared with search warrants, since both involve the intrusion into private premises. A recent High Court decision reinforced the importance of an independent authorisation of a warrant allowing entry onto private premises. The majority of the High Court held that:

> *Although the grant of a warrant is an administrative act, it is performed by an office-holder who is also a judicial officer enjoying independence from the Executive Government and hence from the police. This facility is thus an important protection, intended by Parliament, to safeguard the ordinary rights of the individual to the quiet enjoyment of residential premises. When a case for entry can be made out to a magistrate, the occupier' refusal or withdrawal of permission to enter or remain may be overridden. However, this is done by an officer*

926 *Summary Offences Act 1953*, (SA), s.67.
927 *Summary Offences Act 1953*, (SA), s.67(4)(a)(i). Officers are given broad powers to enter premises without authority from a senior or independent source.
928 In 2006 the South Australian Police Complaints Authority received three complaints and two allegations relating to general search warrants. In 2005, they received one complaint and two allegations. The complaints around these warrants focus on the reason these warrants were issued or the way that they were executed.
929 Interview with duty officer, LAC C, 19 June 2007.
930 The Hon. G. A. Kennedy AO QC, *Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer: Final Report,* January 2004.
931 For further discussion on the Kennedy Report see Part 4 of this report, section 38.2.4.

> *who is not immediately involved in the circumstances of the case and who may thus be able to approach these circumstances with appropriate dispassion and attention to the competing principles at stake.*[932]

Even if senior police officers were making independent determinations of crime scene warrant applications, it is unlikely that the public would perceive these decisions as independent. It is important that justice is not only done, but seen to be done. An authorised officer commented:

> *Even if it is simply a perception within the community, it is important that the consideration and granting of warrants needs to be an independent determination.*[933]

Based on the evidence presented to us during the review period, we recommend that authorisation of crime scene warrants remain with authorised officers.

27.4. The inclusion of multiple crime scenes on one crime scene warrant

During the review period it was suggested by some police officers that the process of applying for a crime scene warrant was particularly complicated where there was a series of connected premises or offences and more than one crime scene warrant was required. In circumstances where evidence of one offence has spread across multiple premises, a separate crime scene warrant must be sought for each premises on which a police officer wishes to establish a crime scene. This may occur when there is a blood trail across a number of premises, or a motor vehicle has traversed a number of private premises before coming to rest. In these circumstances, officers generate multiple crime scene warrant applications, each specifying a different address but relying on the same facts. During a consultation, a senior constable provided 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.*[934]

A member of the Homicide Squad, during consultations, provided a further example of where a homicide involved six potential crime scenes — the site where the bodies were found, the home of the potential suspects, a burnt out car in a public place, the victims' home, the premises where the potential suspects were staying and other potentially related vehicles located on the road. In this case, three identical crime scene warrant applications had to be drafted for three of the locations. The other three locations did not require crime scene warrants as they were public places.

Our issues paper asked whether a crime scene warrant should be able to specify a number of places in which crime scene powers can be exercised. The NSW Police Force supported the introduction of a single warrant which enabled an authorised officer to specify multiple places where a crime scene may be authorised, commenting that it would 'save police time and resources.'[935]

An authorised officer commented that a single crime scene warrant for multiple locations would save time on preparing and determining multiple applications and reduce red tape. The authorised officer commented:

> *[The authorised] officer would need to be satisfied that … a crime scene should be established at each premises. Therefore the form would need some flexibility in addressing each premises.*[936]

In circumstances where evidence of an offence has extended over a number of premises, it appears that the need to make a crime scene warrant application for each premises connected to the offence is generating unnecessary paperwork for police officers and requires authorised officers to consider multiple identical applications. We recommend that one crime scene warrant be able to specify a number of related private premises on which crime scenes can be established and crime scene powers can be exercised. This would reduce paperwork while still subjecting each intrusion onto private premises to the scrutiny of an authorised officer, who would have to be satisfied that a crime scene should be established at each premises specified in the warrant. In their formal response to the consultation draft report, Police advised that they supported this recommendation.[937]

27.4.1. Occupier's right to inspect the crime scene warrant

The occupier of premises where a crime scene warrant has been executed can go to the Local Court where the crime scene warrant was issued and inspect the following documents:

932 *Kuru v NSW* [2008] HCA 26 at p.44.
933 Authorised officer survey response 18.
934 Focus group with senior constables, LAC G, 29 August 2006.
935 NSW Police Force submission to LEPRA issues paper, 24 August 2007, p.8.
936 Authorised officer survey response 13.
937 Letter from Mr Les Tree, Director General, Ministry for Police, 9 January 2009.

- the crime scene warrant application
- any record made by the authorised officer relating to the crime scene warrant
- the occupier's notice
- the report about the execution of the crime scene warrant.[938]

This public inspection process provides a safeguard on the use of crime scene warrants by allowing occupiers to assure themselves that police had authority to establish a crime scene and exercise crime scene powers on their premises.

In circumstances where one crime scene warrant application (and relevant crime scene warrant) lists multiple addresses, the privacy of occupiers may be compromised during this inspection process as any occupier inspecting the documents will see the details of the other premises listed on the warrant. While we support the public inspection of these documents, it is important that this does not occur at the expense of individual privacy. For this reason, separate occupier's notices should continue to be issued for each premises.

In relation to the crime scene warrant application and other documents, we recommend that when a crime scene warrant involves multiple locations, inspection of these documents by the occupier of one of the premises involved should only be allowed if details of the other premises are suppressed. For example, the details of other premises could be blacked out during inspection. In their formal response to the consultation draft report, Police advised that they supported this recommendation.[939]

Recommendations

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.
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.

27.5. Removing the name of the authorised officer from crime scene warrant applications

As discussed in section 20.11, on 17 December 2007 LEPRA was amended to remove the requirement that the name of the authorised officer who issued the crime scene warrant be included on the occupier's notice.[940] During the second reading speech the Attorney General, the Hon. John Hatzistergos, said that this amendment was made in the interests of authorised officer safety. He noted:

> *The additional requirement for the [authorised] officer's name to be recorded on the occupier's notice is unnecessary to meet the requirements of open justice and accountability. The occupier's notice provides sufficient information about the occupier's rights to inspect the application at the registry.*[941]

In its submission to our issues paper the Attorney General's Department Court Services recommended that the name of the authorised officer who issued the crime scene warrant be removed from the crime scene warrant application. The submission stated:

> *The name of the authorised officer should be removed from the application as it could pose a security threat.*[942]

It is our view that as crime scene warrants allow an intrusion onto private premises they should be obtained through a process of accountability and open justice. The name of the authorised officer who issued the crime scene warrant has already been removed from the occupier's notice, making the crime scene warrant application and the warrant itself the only documents that contain this information. It is common for the name of authorised officers to appear on forms and orders available to the public and there appears to be no reason to exempt crime scene warrant applications from this practice. For example, the name of the issuing magistrate appears on the forms relating

938 Law Enforcement (Powers and Responsibilities) Regulation 2005, cl.10(1).
939 Letter from Mr Les Tree, Director General, Ministry for Police, 9 January 2009.
940 This also applies to occupier's notices issued in relation to search warrants.
941 The Hon. John Hatzistergos MLC, NSWPD, Legislative Council, 7 November 2007, p.3583.
942 Attorney General's Department Court Services submission to LEPRA issues paper, 23 August 2007, p.1.

to entry into a house to investigate a suspected domestic violence offence. In light of this we do not recommend removing the name of the authorised officer from the crime scene warrant application.

27.6. Administration related to the processing of crime scene warrants

27.6.1. Insufficient information supplied by police officers

As detailed in table 6 (section 24.2.5), in the sample of refused crime scene warrant applications examined during this review we identified four occasions where applications had been refused due to insufficient information being supplied by police officers. There were also indications from authorised officers that on a number of occasions they had to clarify information provided in crime scene warrant applications with police.

Delays in processing crime scene warrant applications may be reduced by refresher training for police on filling in forms related to crime scene warrants. This may potentially reduce inefficient use of time caused by authorised officers having to follow up with the police officer when forms are inaccurate or incomplete.

27.6.2. Reporting to the authorised officer following the execution of a crime scene warrant

As discussed in section 20.14, within 10 days of a crime scene warrant being executed or the expiry of the warrant, whichever occurs first, a report must be provided to the relevant authorised officer by the person who applied for the crime scene warrant. The Law Enforcement (Powers and Responsibilities) Regulation 2005 contains Form 20 which the police officer must fill in and return to the authorised officer as a means of providing this information. A copy of this form is annexed to this report (Appendix 10).

A number of authorised officers advised us that police officers often return the report after the expiry of the 10 day period, if at all, which creates problems for record-keeping.

We recommend that police officers be reminded to provide the Form 20 to the authorised officer within 10 days of the execution of the warrant or the expiry of the warrant. The reminder could be in the form of a memo or email circulated to police officers. Alternatively, a reminder could be provided during any refresher training on Part 7. This requirement should also be included in any SOPs on Part 7.

An authorised officer noted that the Form 20 does not provide for the address where the crime scene warrant was executed which is also problematic for record-keeping. To ensure that record-keeping is accurate, we recommend Form 20 be amended to include this information.

We are mindful that one of the primary ways of achieving accountability is through reporting and the keeping of comprehensive records which can be scrutinised. In the case of crime scenes, it is clear that the Form 20 requirement achieves this purpose. However, we are also aware that the rationale behind compliance requirements following the execution of crime scene warrants and other types of independently authorised warrants may benefit from review from time to time in the interest of reducing red tape. In our view reporting back to authorised officers on the execution or expiration of a crime scene warrant or other type of warrant should be subject to further review in accordance with section 243 of LEPRA.[943]

Recommendations

53. The NSW Police Force provide refresher training on completing all documentation relating to crime scene warrant applications.
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.
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.

943 The Attorney General and the Minister for Police are to conduct a review of the Act to determine whether the policy objectives of the Act remain valid, as soon as possible after the period of 3 years from 1 December 2005.

Recommendations

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.
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.

27.7. The impact of the introduction of crime scene warrants on the use of search warrants

When LEPRA was introduced, concerns were expressed that the codification of crime scene powers could result in the use of crime scene warrants where search warrants are more appropriate. It was suggested that this may occur as crime scene warrants provide police officers with broader powers to investigate, seize and detain.

Crime scene warrants are meant to be applied for when the police officer suspects on reasonable grounds that it is necessary for the purpose of preserving, searching for and gathering evidence of a serious indictable offence.

Search warrants are meant to be applied for when the police officer reasonably believes that an item(s) connected with an indictable offence (or other prescribed offences) is at a particular premises.

The major differences between search warrants and crime scene warrants are shown in table 7.

Table 7. Comparison between crime scene warrants and search warrants

Crime scene warrant	Search warrant
Police officer does not have to identify items they intend to search for prior to entry on the premises.	Police officer must identify the items they intend to search for prior to entry on the premises.
Apply only in relation to serious indictable offences.	Apply in relation to any indictable offences (or other prescribed offences).
A requisite standard of 'reasonable suspicion' must be met before a crime scene warrant is issued.	A requisite standard of 'reasonable belief' must be met before a search warrant is issued.

In his second reading speech, the then Attorney General, Bob Debus, stated:

> *[Part 7] powers are not intended to detract from the search warrant powers.*[944]

In circumstances where either a crime scene warrant or search warrant could be sought, a number of authorised officers felt that police officers preferred to use crime scene warrants as the requisite standard is lower (reasonable suspicion as opposed to reasonable belief), and police officers do not have to specifically state what they intend to seize. An authorised officer commented:

> *The introduction of crime scene warrants has effectively made the need to apply for a search warrant superfluous where the crime under investigation is a serious indictable offence because a crime scene warrant allows police to do anything that can be done under a search warrant but the test is much weaker.*[945]

Another authorised officer noted:

> *It is now more common for some offences such as sexual assaults, for police to apply for a crime scene warrant, where they would have traditionally applied for a search warrant, because of the broader powers*

944 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
945 Authorised officer survey response 16.

related to the exercise of a crime scene warrant. I don't think this is necessarily a bad thing, although any legislative reform should try to clarify where and when a crime scene warrant should be applied for as opposed to a search warrant.[946]

Authorised officers also commented on there being confusion among police officers over when to apply for a crime scene warrant and when to apply for a search warrant:

I have often refused an application for a crime scene warrant when I have not been satisfied that a crime has actually taken place on the premises, but have been satisfied that the items sought are on the premises and that a search warrant would be more appropriate.[947]

To address this confusion, in July 2006, an article in the *Police Weekly* set out the LEPRA provisions that apply to search warrants and crime scene warrants. It identified the features of each warrant. For example, the circumstances in which each type of warrant may be applied for are specified.[948]

Our second round of consultations with police in 2007 revealed that there was still some confusion amongst police as to how to determine in what circumstances it is more appropriate to use a search warrant or a crime scene warrant. In particular, confusion around the relationship between search warrants and crime scene warrants arose in circumstances where police officers were investigating a crime scene for one offence and found evidence of an unrelated offence. For example when police officers are investigating a murder and find evidence of supply of prohibited drugs. A duty officer commented:

Now this is where the confusion lies … Do we need a search warrant to go and seize those drugs? …Whether it affects the evidentiary value of the seizure at a later court case is yet to be seen because I don't think it's been tested.[949]

Difficulties also arose when police entry to premises was by virtue of a search warrant, and officers wanted to establish a crime scene on the premises. The *Policing Issues & Practice Journal* addressed this issue as follows:

A search warrant does not really allow a crime scene to be established on private premises against the consent of the proprietor. In some ways it can have the same effect in that if police are searching for the particular thing named in the warrant on private premises, persons may be excluded from the immediate area where police are searching on the basis that if the person remained in that area, the execution of the warrant would be frustrated.

A search warrant does not, however, convey the power to set up a general perimeter in or around premises to be searched in order to prevent people coming in. A search warrant is the evidence gathering tool you would use if you wished to enter premises to search for and seize a specific thing you already know you want as evidence. It allows you only to enter, locate, seize and leave. If you don't know exactly what it is you are looking for, or what you are looking for could be anywhere and everywhere on the premises (so you need to cordon off an area to preserve it), a crime scene warrant is the appropriate tool.[950]

In light of this ongoing confusion, it is recommended that police be provided with further clarification and guidance on the different circumstances under which crime scene warrant and search warrants should be applied for and utilised. In particular, police officers should be provided with guidance on whether in exercising a crime scene warrant for a serious indictable offence police are able to seize evidence found relating to other offences. This clarification should be included in any SOPs introduced in relation to Part 7.

Recommendation

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.

946 Authorised officer survey response 11.
947 Authorised officer survey response 13.
948 NSW Police Force, *Police Weekly*, Vol. 18, No. 26, 24 July 2006, pp.16–17.
949 Interview with duty officer, LAC C, 19 June 2007.
950 *Policing Issues & Practice Journal*, 'Crime Scenes', April 2006, Vol. 14, No. 2, pp.19–20.

Chapter 28.
Issues relating to the occupiers of private premises

28.1. Alternative accommodation for people whose home is a crime scene

A public area or private premises may be blocked from access for a period of time while crime scene powers are being exercised. Crime scene investigators from the FSG advised us that, on average, it takes three days to collect evidence in premises where there has been a homicide, and that it would be unlikely that the residents would be able to stay there during the investigation of the crime scene.[951] This may require alternative living arrangements to be made. The Charter of rights for victims of crime, contained in the *Victims Rights Act 1996*, states that a victim should have access, where necessary, to available welfare.[952] The Act states that the Charter is 'as far as practicable and appropriate to govern the treatment of victims in the administration of the affairs of the state'.[953] This includes the administration of justice, the provision of police services and the administration of any government department.[954]

During consultations, police officers described assisting people to find alternative accommodation. We were advised that in the majority of cases, family, friends or neighbours provided alternative accommodation for the affected people. A duty officer commented:

> *We've had some very helpful neighbours assist us in the past but unfortunately they are not under any compulsion to do that … [Otherwise] we'd be relying on the Salvos or one of the hostels or maybe even split the family because we might find a spot for the wife and children but not the husband because it's a women's hostel. Especially if they're victims of crime, it's really disruptive … I think we've just been lucky … more than good management basically. Lucky that people have helped.*[955]

In the rare circumstances where these arrangements could not be made, the NSW Police Force and other agencies have access to other resources. A general duties constable commented:

> *A refuge is often relied upon in domestic violence situations. Department of Housing will give you a small allowance to spend a night or two in a motel.*[956]

A member of the Homicide Squad said that assisting victims and other people affected by the establishment of a crime scene to find alternative accommodation is 'something we do just as a matter of common courtesy'. The officer commented:

> *Homicide Squad has the financial delegation to put people up at a motel room or house. We had to vacate people from a terrace house and cut the floors up.We put them up in a house of equal standing and gave them supplementary amount for meals because they couldn't cook their own food. It's in our working budget.*[957]

Victims and prisoners rights groups consulted during the review period were not aware of any issues arising around the provision of alternative accommodation.

The Homicide Victims Support Group provides alternative accommodation for families who are unable to stay in their home during the investigation of a homicide. The group runs the Ebony House Recovery Centre, which provides its clients with clothing, food, toiletries and toys for children for as long as necessary. Ms Martha Jabour, Executive Director of the Homicide Victims Support Group informed us that this service has been provided to families for periods ranging from a few days to several weeks. However, the unique service provided by the Ebony House Recovery Centre, is accessible only to families of homicide victims and is not available to victims of other crimes. As Ms Jabour explained:

> *If you've been sexually assaulted in your own home and your home's a crime scene … you've got to find family or friends to go and live with.*[958]

951 Interview with crime scene officer, LAC D, 24 May 2006.
952 *Victims Rights Act 1996*, s.6(3).
953 *Victims Rights Act 1996*, s.7(1).
954 *Victims Rights Act 1996*, s.7(3).
955 Interview with duty officer, LAC C, 19 June 2007.
956 Focus group with general duties constables, LAC C, 20 June 2007.
957 Interview with member of Homicide Squad, 18 December 2007.
958 Interview with Ms Martha Jabour, Executive Director, Homicide Victims Support Group, 7 November 2006.

In our survey of people affected by crime scenes, the majority of crime scenes were established at people's workplaces so it was not necessary to provide alternative living arrangements. In the one case where the crime scene was on someone's private premises, the occupiers were allowed to stay in the house while the police worked on the perimeter.

It is noted that the Queensland PPRA provides that police must provide an occupier of premises with alternative accommodation where the occupier cannot continue to live in the dwelling as a result of a direction given at a crime scene, or because of damage caused to the dwelling in the exercise of crime scene powers, and where the occupier asks for alternative accommodation. The accommodation must, if reasonably practicable, be in the same locality as, and of at least a similar standard to, the occupier's dwelling.[959]

Our issues paper asked for responses as to whether police or some other government agency should be required to take steps to assist people affected by crime scenes by providing alternative accommodation where a person cannot live in private premises as a result of the exercise of crime scene powers.

In its response, the NSW Police Force commented:

> *Police officers are aware of their duty of care to the community and would arrange to meet it, but this should not be a legislative requirement.*[960]

Currently, in circumstances where alternative accommodation is required for tenants of Department of Housing (DOH) accommodation, DOH will provide emergency accommodation as outlined in their Emergency Response policy.[961] This accommodation can take one of the following forms:

- a transfer to more appropriate DOH accommodation on a permanent or temporary basis
- assisted rental in the private sector
- emergency temporary accommodation, for example at a motel.

Of particular relevance to crime scenes, the DOH Emergency Response policy states:

> *Transfer to alternative accommodation may be temporary or permanent depending on the degree of damage to their home or other serious emotional and/or other situations that require sensitive consideration.*[962]

Thus it appears that a range of alternative accommodation arrangements are currently available for people unable to remain in their homes following the establishment of a crime scene on their premises. Police officers and other government agencies, such as the DOH, appear to be fulfilling their duty to assist in finding alternative accommodation for people affected by crime scenes. Our research has revealed, however, that the approach to these matters is somewhat ad hoc and officers do not have clear guidance on providing alternative accommodation. To ensure that officers are aware of the range of options available to them when assisting people to find alternative accommodation, we recommend that any SOPs introduced in relation to Part 7 should provide guidance on the provision of assistance in providing alternative accommodation to people affected by crime scenes.

Recommendation

59. The NSW Police Force 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 of a crime scene and who require alternative accommodation.

28.2. Unaccompanied children at a crime scene

During parliamentary debate on the Law Enforcement (Powers and Responsibilities) Bill, some members of Parliament raised concerns about unaccompanied minors at crime scenes. Ms Lee Rhiannon commented:

> *Where police direct an unaccompanied child to leave or not enter a crime scene where the child lives, the police should be obligated to ensure that the child has a safe place to go and should assist the child to get to that safe place.*[963]

959 *Police Powers and Responsibilities Act 2000* (Qld), s.179.
960 NSW Police Force submission to LEPRA issues paper, 24 August 2007, p.9.
961 Department of Housing policy EST0009A. http://www.housing.nsw.gov.au, accessed 14 May 2007.
962 Department of Housing policy EST0009A. http://www.housing.nsw.gov.au, accessed 14 May 2007.
963 Ms Lee Rhiannon MLC, NSWPD, Legislative Council, 21 November 2002, p.7260.

The Hon. Ian Cohen proposed an amendment that would require police to take reasonable steps to ensure that a child was able to go to, or be taken to, a safe place if the child was not in the care or custody of a responsible adult.[964]

This proposed amendment was not supported.[965] We note that, during debate on the issue, the Hon. Ian MacDonald said that the Bill 'contains appropriate levels of safeguards, which in turn are supported by internal police guidelines on the exercise of relevant powers'.[966]

LEPRA does not provide specific safeguards in relation to directing unaccompanied children to leave, or not to enter, crime scenes and arranging alternative accommodation for them and we were unable to identify any NSW Police Force guidelines in relation to these issues.

Our issues paper asked whether police or some other government agency be required to take reasonable steps to ensure the safe care of children affected by crime scene powers.

In response, AJAC commented:

> *AJAC is particularly concerned about the issue concerning unaccompanied children at crime scenes. There is some level of police responsibility depending upon the age of the child to report the matter to the Department of Community Services (DoCS) as the child would be considered to be 'at risk'. However, this would not necessarily produce an immediate response from DoCS. AJAC recommends that the legislation expressly provide for an unaccompanied child and that the requisite standard be that police TAKE ALL STEPS NECESSARY rather than merely 'reasonable steps'.*[967]

AJAC also noted:

> *Police need to be able to collect evidence without too much distraction, however, ultimately police need to compare the need to locate evidence against the immediate needs of those on whose premises they are in. For example, if police were investigating a matter and a parent/carer required some clothing for their child, then police should balance the needs of the child against the need to collect evidence in relation to the seriousness of the crime being investigated. This issue is one of pure common sense which cannot be codified completely.*[968]

In its submission, the NSW Police Force noted:

> *Police officers are aware of their duty of care to the community and would for example arrange for the safe care of children in circumstances where this was necessary, but this should not be a legislative requirement.*[969]

Comparable legislation in Queensland and Western Australia does not provide legislative directions in relation to unaccompanied children at crime scenes.

Research for the review did not identify any evidence of problems at crime scenes involving unaccompanied children.[970] While there has been concern expressed in Parliament and by AJAC around the care of unaccompanied children at crime scenes, the evidence available does not suggest that it is necessary to address this potential issue through legislative amendments. Certainly, police officers must consider the needs of children affected by the establishment of a crime scene but we recommend that this issue be addressed through the provision of guidance in any SOPs introduced in relation to Part 7. This guidance should reinforce the need for police to be aware of their duty of care to ensure the safety of children affected by crime scenes, particularly if they are unaccompanied.

Recommendation

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 matter. In particular, any standard operating procedures should make clear that police officers have a duty to ensure the safety of children affected by crime scenes, particularly if they are unaccompanied.

964 The Hon. Ian Cohen MLC, NSWPD, Legislative Council, 21 November 2002, p.7260.
965 The Hon. Ian Cohen MLC, NSWPD, Legislative Council, 21 November 2002, p.7260.
966 The Hon. Ian MacDonald MLC, NSWPD, Legislative Council, 21 November 2002, p.7260.
967 NSW Aboriginal Justice Advisory Council submission to LEPRA issues paper, 14 August 2007, p.iii.
968 NSW Aboriginal Justice Advisory Council submission to LEPRA issues paper, 14 August 2007, p.8.
969 NSW Police Force submission to LEPRA issues paper, 24 August 2007, p.9.
970 In particular, this issue was not raised by groups concerned with victims' rights. We have no record of complaints involving unaccompanied children at crime scenes.

28.3. Damage to premises and property

Part 7 of LEPRA does not provide for how premises or property should be restored following the exercise of crime scene powers, nor does it contain any provisions addressing compensation for damage to premises or property as a result of the exercise of crime scene powers.

However, the July 2005 *Policing Issues & Practice Journal* provides the following advice to police:

> *The situation is one of common sense. Leave the scene, as far as is practicable in the circumstances, as close to that in which you found it.*[971]

28.3.1. Cleaning premises

It may be necessary for the premises to be cleaned following the exercise of crime scene powers as fingerprint dust or chemical and dye substances used during investigations can leave residue. Depending on the circumstances, cleaning expenses may be shared among the LAC involved in the investigation, FSG and the Homicide Squad. A detective constable commented:

> *FSG have their contract cleaners … if it's a normal break and enter you tell the [occupier] to clean it but when you've really gone through the whole house … in the case of murders and things … they have brought contractors in to clean.*[972]

In October 2007, the NSW Police Force introduced guidance on the use of forensic crime scene cleaners by the Crime Scene Services Branch (CSSB). The guidance was introduced due to the increased use of enhancement techniques during crime scene investigation. Many of the chemicals used contain ingredients that can be detrimental to the health of the user and owner/occupier of the premises or vehicles where they have been applied. Specialist cleaning techniques are required to remove these chemicals. The CSSB guidance states that the payment for cleaning of crime scenes should occur as follows:

- When the CSSB staff use chemical enhancement techniques to locate or enhance trace biological evidence at crime scenes the cleaning of the residues left by these chemicals is the responsibility of the CSSB.
- The Commander CSSB will pay for the forensic cleaning of crime scenes including premises and other vehicles in extenuating circumstances where allowing biological material to remain at a crime scene would create a significant occupation health and safety risk to CSSB staff or other police.
- The Commander CSSB will not pay for the cleaning costs incurred when removing fingerprint powders.
- It is the responsibility of the user/owner/relatives/occupiers of the premises and/or vehicles to clean up biologically contaminated crime scenes such as suicides, deceased people, shootings, decomposed bodies where no chemical enhancement techniques have been used by CSSB staff.
- Where any doubt exists about who is responsible for cleaning a crime scene, CSSB staff should contact the referral officer.

Cleaning a crime scene may be important in allowing the victim to move on from the trauma of the crime. NSW Health Sexual Assault Services advised us that the remnants of a police investigation can have a psychological effect on victims of crime. They provided the example of a woman who was sexually assaulted in her home. Chemicals used during the crime scene investigation left a mark on her carpet. Every time the woman looked at the mark she was reminded of the assault.[973] However, even with the best efforts of police, it may not be possible to completely remove evidence of the police investigation or the offence.

28.3.2. Compensation for damage to premises

In some cases, the exercise of crime scene powers will result in premises or certain items within premises needing to be repaired or replaced. This may be due to chemical investigation techniques causing permanent damage to items within the premises. For example, the Homicide Squad described using a chemical which allows for traces of blood to be detected. If applied on tiled floors it cannot be removed.[974] In other circumstances, structural damage may have occurred to premises or there may be health risks associated with allowing items, on which chemicals have been used, to remain in houses. A detective sergeant described a situation where police removed the carpet from a house following the use of chemical investigation techniques:

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971 *Policing Issues & Practice Journal*, 'LEPRA: Consolidating Police Powers', Special Edition, July 2005, Vol. 13, No. 3, p.29.
972 Interview with detective constables, LAC E, 17 October 2007.
973 Consultation with NSW Health Sexual Assault Services, 26 February 2008.
974 Interview with member of Homicide Squad, 17 December 2007.

The chemicals that were used were carcinogenic and [officers] wanted to keep the carpet for further examination so it was kept and may have been destroyed … [the occupier] was compensated for the carpet that we'd seized and the scene was cleaned afterwards.[975]

Police officers told us that it is rare for claims for compensation to be made following the exercise of crime scene powers. It is more of an issue when the Major Crime Scene Squad or Homicide Squad are involved in investigations due to the nature of their investigations and more frequent use of chemical investigation techniques. A detective constable commented:

A lot of the houses we're in are Housing Commission and the Department of Housing doesn't claim compensation. Basically they're just like no we'll fix the wall and put someone else in there.[976]

Occupiers' claims for compensation are considered by the commander at the relevant LAC. During consultations, police officers advised that it was less likely for the occupier to be compensated for damage caused during the investigation of a crime scene when the occupier is the person who committed the offence. A crime manager described compensating the owners of a nightclub where a drive by shooting had taken place. During the investigation of the shooting, structural damage occurred to the nightclub. The owners of the nightclub had been uninvolved in the shooting:

We had to pull half the ceiling down to try find out where the bullets had gone to. We made restitution, it's not their fault.[977]

A member of the Homicide Squad described how police dug up a pool to try find a gun used in a murder that they believed may have been hidden underneath the pool. The gun was not found. The owner of the pool was a suspect in the murder. The Homicide Squad member commented:

[The owner] made an application to us and we paid. If we had found evidence and charged her, we would never have paid … if it's the offender's premises … we don't worry about it too much. If it's the victim, we give them a payment if they make an application to us.[978]

Our issues paper asked whether police (or some other government agency) should be required to take steps to restore premises to the condition that they were in before the exercise of crime scene powers, or to otherwise compensate the person affected by the exercise of crime scene powers.

In its response AJAC was supportive of introducing such a requirement, particularly in circumstances where no evidence was located on premises following the exercise of crime scene powers.[979] However, the NSW Police Force was not in favour of introducing a requirement to restore premises to their previous condition. Their issues paper response stated:

This would require police (or another government agency) to expend resources in fulfilling this suggested obligation. It should be noted police officers are aware of their duty of care to the community and would arrange to meet it, but this should not be a legislative requirement.[980]

During the review period, the NSW Ombudsman did not receive any complaints about structural damage to premises, or the condition in which police left premises, following the exercise of crime scene powers. However, we received a letter from a woman who had a crime scene established at her home in 2003 (pre-LEPRA). She was not involved in the murder being investigated. The woman's house was a crime scene for four days, during which time she was not allowed to enter the premises. When she was allowed back in, she walked into what she described as 'a distressing and horrific scene'. She described it as follows:

There was not a cushion in place, not one drawer in the kitchen was closed, every cupboard door was open. There were empty nebulas of chemicals strewn all over, stickers were all over the wall marked in circles with permanent marker. There were at least 40 pairs of disposable gloves lying around. The walls and floors of the garage, store room and laundry was covered with cyanocrylate fuming dye … At no time was I advised of a forensic clean up team. At no time was I directed to a counselling service … I had to replace the front door. The carpets had to be cleaned, windows replaced. I felt so violated that I couldn't stay at my home any longer. I threw out most of my belongings … I helped and cooperated totally with the police. The lack of respect afforded me was distressing … I have since been advised that I could have asked for assistance in having my unit cleaned. I was not advised of this. I was not advised about any of my rights in relation to the police presence … I hope that four and a half years on, police practices involving someone's home would be a little more considerate of who lives there.

975 Interview with detective sergeant, LAC E, 16 October 2007.
976 Interview with detective constable, LAC F, 29 October 2007.
977 Interview with crime manager, LAC G, 19 November 2007.
978 Interview with member of Homicide Squad, 18 December 2007.
979 NSW Aboriginal Justice Advisory Council submission to LEPRA issues paper, 14 August 2007, p.7.
980 NSW Police Force submission to LEPRA issues paper, 24 August 2007, p.9.

The Homicide Victims Support Group also advised us that it was aware of some cases where police could have cleaned the premises more thoroughly:

> *For a lot of families … there's fingerprint powder all over the place and the carpet's been soiled or the blood is still there.*[981]

Despite being able to provide financial compensation for damages caused during crime scene investigations, police officers informed us that they try to cause the minimal amount of damage possible from the outset when exercising crime scene powers. A crime manager commented:

> *Police may pay for damages but we're not liable … but in saying that it doesn't give you open slather to just go and damage property either. You've got to do it reasonably like if you have to open a particular door, you wouldn't have to knock the whole wall down. You would try and target that lock.*[982]

28.3.2.1. Causing structural damage to premises

We note that in Queensland, an application for a crime scene warrant must be made to a Supreme Court judge if 'it is intended to do something that may cause structural damage to a building'.[983] This requirement applies 'whether or not a magistrate has issued a crime scene warrant for the place'.[984]

Our issues paper asked whether a provision similar to that in the Queensland legislation, should be introduced into LEPRA. In its response, AJAC commented:

> *It is difficult to understand why this was not in the original legislation … this would provide independence, transparency and accountability beyond what is currently in existence.*[985]

In its submission, the NSW Police Force was not supportive of a similar provision being introduced into the legislation. During consultations, a member of the Homicide Squad argued that given how rarely crime scenes result in structural damage, introducing this provision was unnecessary.

The Homicide Victims Support Group said that where there had been structural damage to premises as a result of the exercise of the crime scene investigation powers, families had made insurance claims in relation to the damage. However, this was a problem where a family did not have appropriate insurance.

28.3.2.2. Negotiating compensation

Currently there are no formal guidelines around providing compensation for damage caused by the exercise of crime scene powers.

The Homicide Squad told us that they prefer to determine who will be responsible for paying for premises to be repaired or items to be replaced prior to exercising any crime scene powers likely to cause damage:

> *We really look at do we need to do It? … we'd have to look at how much it's going to cost and are there OH&S issues for our people, are there health issues for the people that might move back into the house later on? … FSG will pay for the clean up but if it becomes like structural work … we'll negotiate with the LAC and either they'll pay for it or we meet them half way.*[986]

However, the Homicide Squad also advised they would be in favour of guidelines which 'set in concrete' how police should negotiate compensation for damages caused by an exercise of crime scene powers.[987]

The *Victims Support and Rehabilitation Act 1996* allows for compensation for certain prescribed expenses incurred by a primary victim following an act of violence.[988] These expenses are set out in the Victims Support and Rehabilitation Regulation. The expenses must total at least $200 and cannot exceed $1,500.[989] One of the prescribed expenses is cleaning property other than clothing or wearable items.

We recommend that any SOPs introduced around Part 7 include a section on dealing with damages to premises caused by the exercise of crime scene powers. Guidance should be provided on how police should negotiate compensation for damages and list the potential resources and alternatives available.

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981 Interview with Ms Martha Jabour, Executive Director, Homicide Victims Support Group, 7 November 2006.
982 Interview with crime manager, LAC C, 20 June 2007.
983 *Police Powers and Responsibilities Act 2000* (Qld), s.166(4).
984 *Police Powers and Responsibilities Act 2000* (Qld), s.166(5).
985 NSW Aboriginal Justice Advisory Council submission to LEPRA issues paper, 14 August 2007, p.8.
986 Focus group with Homicide Squad, 4 December 2007.
987 Focus group with Homicide Squad, 4 December 2007.
988 We note that when the primary victim dies they cease to be eligible for statutory compensation, however, their family becomes eligible for compensation under this Act. *Victims Support and Rehabilitation Act 1996*, s.14(2).
989 *Victims Support and Rehabilitation Act 1996*, s.14A.

Recommendations

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 under the *Law Enforcement (Powers and Responsibilities) Act 2002*.
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.

28.4. Occupiers' rights to challenge the use of Part 7

As discussed in section 25.4.2, police entry onto, and search of private premises is a considerable exercise of state power in the lives of private citizens and detracts from common law rights protecting people's homes and property from intrusion by anyone. Circumstances may arise where an occupier wishes to challenge the establishment of a crime scene or exercise of crime scene powers on their premises. For example, the occupier may question the grounds on which the crime scene was established or believe that investigations carried out on the premises were unnecessary.

LEPRA makes no specific provision for an occupier to challenge the use of a crime scene warrant or the establishment of a crime scene or exercise of crime scene powers on their premises.

Currently, an occupier wishing to legally challenge the presence of police on their premises to investigate an offence has to do so under common law. For example, they could commence proceedings against police for trespass. For most people, commencing litigation in these circumstances is an expensive, lengthy and inaccessible option.

28.4.1. Challenging evidence obtained from a crime scene established under LEPRA

In circumstances where the matter relating to the establishment of the crime scene goes to court, and the occupier becomes the defendant in the proceedings, there may be scope for the occupier to challenge the admissibility of any evidence obtained under Part 7.

Where police relied upon occupier's consent to enter the premises, the defendant may challenge the admissibility of evidence obtained from the crime scene by arguing that they never consented to police being on their premises.

In circumstances where police have entered premises under a crime scene warrant, there may be grounds for the defendant to argue that the crime scene warrant was defective and challenge the admissibility of any evidence obtained under it. However, there is the chance that the court will allow the evidence to be presented, regardless of any challenge made by the defendant about the lawfulness of how it was obtained, as the court can allow evidence that has been illegally or improperly obtained if the 'desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained'.[990]

Regardless of the outcome, challenging the admissibility of evidence obtained in a crime scene established under LEPRA is only available to those occupiers who become defendants in matters that go to court.

To date, we are not aware of any legal challenges that have been made to evidence obtained under Part 7. A number of police prosecutors commented that this is probably due to the legislation having only commenced two years ago. They expect these challenges to be more common in the future and made the following comments during consultations:

> *At the moment it's all quiet on LEPRA … when we changed the Evidence Act in 1995 it took a long time for defence to pick up on it.*[991]
>
> *I think [defence] are just unaware. It's just a matter of time before there are more issues.*[992]

990 *Evidence Act 1995*, s.138(1).
991 Interview with police prosecutor, LAC F, 31 October 2007.
992 Interview with police prosecutor, LAC B, 25 July 2007.

28.4.2. Occupiers' rights in other jurisdictions

28.4.2.1. USA and Canada

In the USA and Canada there is no legislation comparable to Part 7. However, legislative safeguards exist when government agencies intrude into areas where there is a reasonable expectation of privacy, for example houses.[993] In cases where the courts decide there is a reasonable expectation of privacy, police must generally obtain a warrant before conducting any search — including a crime scene search.[994]

28.4.2.2. Australia

In Queensland and Western Australia, states with legislative schemes comparable to Part 7, the relevant legislation provides scope for the occupier to challenge the use of a crime scene warrant (Queensland) or the continued establishment of a protected forensic area (Western Australia).

Queensland

In Queensland, a police officer applies to either the Supreme Court or a magistrate for a crime scene warrant. The occupier of the place must, if reasonably practicable, be given notice of the making of the application.

If the police officer reasonably suspects that giving the notice would frustrate or otherwise hinder the investigation of the offence, the occupier does not have to be given notice of the making of the application. If the occupier is present when the crime scene warrant application is made, the occupier may make a submission to the issuer, provided it does not unduly delay the consideration of the application.[995]

Where the application for a crime scene warrant is made in the absence, and without the knowledge, of the occupier of the place, or the occupier has a genuine reason for not being present when the application for the crime scene warrant was made, the occupier may apply for a crime scene warrant to be revoked. The issuer may revoke or refuse to revoke the warrant.[996]

This safeguard was introduced to protect victims of crime from having their property searched for an extended period of time or having major structural damage done to their house during a criminal investigation.

The Queensland Police Legal Service informed us that to date there have been no applications by occupiers to revoke crime scene warrants. They believe that this is because the investigation of most crime scenes is completed within a 24 hour period, and with minor damage and disturbance.

Western Australia

In Western Australia a police officer may establish a protected forensic area (PFA) on private premises. Once a PFA is established, police officers may exercise preservation powers in relation to this area. The occupier of the premises may consent to the continuation of the PFA or a search warrant can be obtained for the premises. A search warrant allows officers to investigate the scene and seize evidence.[997] An officer has six hours in which to make the application for a search warrant.[998]

A person aggrieved by the establishment of a PFA may apply to the Magistrate's Court to review the grounds for the continued establishment of the PFA.[999] In practice, this allows the aggrieved person to challenge the power given to police to preserve the area.[1000] Both the aggrieved person and the police officer involved in the application appear before the court.[1001] The court can make an order to allow the PFA to be continued, disestablished or mitigate the inconvenience caused by the PFA.[1002]

The Western Australian Police Legal Services advised us that since the introduction of the *Criminal Investigation Act 2006*, there have been no challenges to the continued establishment of a PFA. In the future, they envisage challenges occurring in cases where police wish to keep a PFA for a longer period of time, for example one week.

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993 In the US, the Fourth Amendment to the USA Constitution protects the rights of Americans from unreasonable searches and seizures. In Canada, Section 8 of the Charter of Rights fulfils this purpose.
994 In the US there are exceptions to the obligation to obtain a warrant, however, a crime scene search is not a recognised exception.
995 *Police Powers and Responsibilities Act 2000* (Qld), s.170.
996 *Police Powers and Responsibilities Act 2000* (Qld), s.174(1).
997 *Criminal Investigation Act 2006* (WA), s.44(2).
998 *Criminal Investigation Act 2006* (WA), s.48(4) and (5).
999 *Criminal Investigation Act 2006* (WA), s.49(1).
1000 There are no grounds to challenge the investigation of the area as the legislation does not permit the occupier to challenge a search warrant application.
1001 *Criminal Investigation Act 2006* (WA), s.49(3).
1002 *Criminal Investigation Act 2006* (WA), s.49(7).

28.4.3. Introducing occupier's rights to challenge crime scene warrants

Under LEPRA an occupier does not have a right to challenge an application for a crime scene warrant — unlike Queensland and Western Australia which both provide the occupier with a right to challenge the warrant as discussed above in section 28.4.2. Where occupiers are affected by the use of a crime scene warrant on their premises we are of the view that they should have a means available to them to challenge the use of the warrant. This right should be available to all people affected by the use of a crime scene warrant, regardless of whether the matter goes to court, and therefore should operate independently of the right to challenge the admissibility of evidence obtained under the crime scene warrant.

We recommend that consideration be given to amending Part 7 of LEPRA to introduce a provision that provides 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 for issuing the warrant. In their formal response to the consultation draft report, Police expressed a legitimate concern that the introduction of a right to review might stall an investigation by delaying the execution of a crime scene warrant and indicated they did not support this recommendation for that reason.[1003] 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.

The Occupier's Notice (Form 19), currently provided to occupiers when a crime scene warrant is executed on their premises, could be amended to inform occupiers of their right to have the grounds for the issue of the crime scene warrant reviewed.

Recommendation

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.

1003 Letter from Mr Les Tree, Director General, Ministry for Police, 9 January 2009.

Chapter 29.
Additional issues

29.1. COPS recording of uses of crime scene powers under Part 7

For the purposes of the implementation of the crime scene provisions in LEPRA, the NSW Police Force introduced into the Computerised Operational Policing System (COPS) two new 'action type' screens entitled:

- 'Crime Scene established for less than 3 hours Action'
- 'Crime Scene Warrant Action'.

These screens are not mandatory but can be filled in when entering events on COPS.[1004] The screens were set up at the request of the NSW Ombudsman to collect data on the use of Part 7 during the review period. At our request, the NSW Police Force extracted data from these COPS screens about the use of the crime scene provisions. This data has been provided to us for the two year review period.

As discussed in section 24.3 there appears to be a very low recording rate of uses of powers under Part 7 on COPS. This was identified by comparing the COPS statistics with those provided by the Attorney General's Department on NSW Local Court crime scene warrant applications. This problem was first identified during the first year of the review and raised with the NSW Police Force which advised that it intended to circulate a reminder to police to record 'these actions in accordance with the COPS LEPRA Users Guide'.[1005] This did not seem to address the problem as the data we received for the second year of the review also showed low recording on COPS by police officers in relation to uses of powers under Part 7 of LEPRA.

Currently, the COPS LEPRA User Guide directs users when to create the crime scene screens. For the screen, 'Crime Scene established for less than 3 hours Action', the COPS LEPRA User Guide directs:

> *If a crime scene was established for less than 3 hours then a crime scene warrant is not required. However, the general action of Crime Scene Powers — 3 hrs or less must be created.*

For the screen 'Crime Scene Warrant Action' the COPS LEPRA User Guide directs 'when applied for should be recorded as a General Action in the Event'.

We believe that the main reason for the low recording of uses of Part 7 on COPS is that the crime scene screens are not mandatory. By way of contrast, it is mandatory for courts to provide the Attorney General's Department with certain data on a monthly basis, including the number of crime scene warrant applications heard every month. Hence, more comprehensive data was available from the Attorney General's Department.

Currently, there are a number of mandatory screens on COPS. We believe there are other ways the recording of uses of crime scene powers under Part 7 can potentially be increased without introducing further mandatory screens on COPS.

The direction in the COPS LEPRA User Guide in relation to 'Crime Scene Powers –3 hrs or less' is misleading as the direction suggests that in all circumstances where a crime scene has been established for three hours or less a crime scene warrant is not required. However, if police in these circumstances wish to use investigative powers (section 95 (g)–(p)) at the crime scene within these three hours — then a warrant is required (unless necessary to immediately preserve evidence of the commission of an offence).

Clarifying these directions may encourage more accurate recordings of the use of Part 7 on COPS. We acknowledge that the recording of uses of Part 7 on COPS was introduced for the purpose of our review. However, we believe that it is important for police to have accurate data on the exercise of their powers and for any ongoing monitoring the police or any other agency wish to undertake. Accurate police data is also essential for the NSW Police Force to fulfil its commitment to an evidence based approach to addressing crime. This approach is promoted in the NSW State Plan, which identifies, as a new direction, evidence based practical solutions to target crimes affecting the community.[1006] According to the NSW State Plan, a powerful tool in this approach is 'sharing analysis and intelligence between local agencies'.[1007] For this approach to be effective, the data supplied by all agencies involved must be

1004 Police record information about crime scenes in the narrative section of COPS. Searching the narrative section of COPS captures all references to crime scenes, not specifically crime scenes established under Part 7. A search of all COPS narratives for the period 1 December 2005 — 30 September 2006 found 'crime scene' mentioned over 12,000 times in COPS narrative entries.
1005 Letter from NSW Police Force, 21 December 2006.
1006 NSW Government, *NSW State Plan*, 14 November 2006, pp.26–28.
1007 NSW Government, *NSW State Plan*, 14 November 2006, p.28.

accurate including the data collected by the NSW Police Force which is the lead agency on the NSW State Plan Priority R1 — Reduced rates of crime, particularly violent crime.[1008]

The low recording rate and inaccuracy of the screens makes it difficult to effectively establish the extent of the use of the crime scene powers and address issues that may arise in relation to the use of these powers. Therefore we recommend that the directions in the COPS LEPRA User Guide be replaced.

We also recommend that a further reminder be forwarded to police officers about entering these screens, as appropriate, when they exercise powers under Part 7 of LEPRA. Finally, it would be beneficial if during training on COPS or LEPRA, police be reminded to activate the crime scene action type screens when exercising powers under Part 7 of LEPRA.

Recommendation

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'
    b. remind all police officers that the use of the crime scene provisions in the *Law Enforcement (Powers and Responsibilities) Act 2002* be recorded in accordance with the COPS LEPRA User Guide.

29.2. Additional review of extension to crime scene warrants for terrorism related offences

As discussed in section 20.13.1, on 17 December 2007, LEPRA was amended to allow for crime scene warrants connected with terrorism offences to be extended for a period of up to 30 days once an authorised officer is satisfied that there are reasonable grounds for extending the warrant beyond the current maximum period of six days.[1009]

The rationale for this amendment was that overseas experience has shown that effective investigation of terrorism offences potentially requires the examination of complex crime scenes over a number of weeks.[1010]

During parliamentary debate around this amendment, Attorney General, the Hon. John Hatzistergos, provided the example of the examination of the bomb factory in the United Kingdom used to produce peroxide explosives in support of terrorist attacks in London on 7 July 2005. The examination of the factory involved several agencies and took 48 days. The Attorney General stated:

> *While it is possible for a fresh crime scene warrant to be issued [after six days] it will reduce police time in making fresh applications if the maximum period is extended in special cases, such as in the case of terrorist attacks.*[1011]

The Attorney General went on to say:

> *The extent of terrorism crime scene warrants falls within the ambit of the New South Wales Ombudsman's review of crime scene powers generally.*[1012]

The *Law Enforcement Powers and Responsibilities Amendment Act* commenced on 17 December 2007. Our review period for LEPRA ended on the 30 November 2007. This has meant that we were not able to review the extended crime scene warrants for terrorism as part of our review, as intended by Parliament. In the circumstances we recommend that Parliament consider whether any additional monitoring of the impact of this provision is required and, if so, an amendment should be made to the legislation to allow monitoring of this provision to occur. In their formal response to the consultation draft report, Police indicated that they would not support this recommendation on the basis that the power has not been used.[1013] However, given that this provision was introduced on the basis that it would be reviewed by our office we are of the view that any exercise of these functions must be subject to external monitoring. In addition, the Attorney General should ensure that this provision is brought to the attention of the

1008 NSW Government, *NSW State Plan*, 14 November 2006, pp.26–28.
1009 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73(A)6.
1010 The Hon. John Hatzistergos MLC, NSWPD, Legislative Council, 7 November 2007, p.3583.
1011 The Hon. John Hatzistergos MLC, NSWPD, Legislative Council, 7 November 2007, p.3583.
1012 The Hon. John Hatzistergos MLC, NSWPD, Legislative Council, 7 November 2007, p.3583.
1013 Letter from Mr Les Tree, Director General, Ministry for Police, 9 January 2009.

Standing Committee of Attorneys General to be considered as part of any independent cross-jurisdictional review of counter-terrorism powers.[1014]

Recommendation

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.

29.3. Training for authorised officers

As discussed in section 23.2, the majority of authorised officers from the Attorney General's Department who responded to our survey were in favour of receiving additional training on the crime scene provisions. Only half of those surveyed reported they had received training on LEPRA when the legislation was introduced.

In light of the number of amendments made to the crime scene provisions since LEPRA was introduced and the support among authorised officers for further training, we recommend that refresher training be provided to authorised officers on the crime scene provisions in LEPRA.

Recommendation

66. The NSW Attorney General's Department provide refresher training for authorised officers on the crime scene provisions in the *Law Enforcement (Powers and Responsibilities) Act 2002*.

1014 Consistent with our recommendations in relation to the exercise of covert search powers in NSW Ombudsman, *Review of Parts 2A and 3 of the* Terrorism (Police Powers) Act 2002, September 2008, Recommendations 36 and 37. The report was provided to the relevant Ministers in September 2008, but has not been tabled at the time of writing.

Chapter 30. Conclusion

The stated objective of Part 7 of LEPRA was to codify, consolidate and clarify police powers in relation to crime scenes. Prior to the introduction of these crime scene provisions, police powers to establish and manage crime scenes were implied in common law.

After keeping these provisions under scrutiny over a two year period, we found that this objective has largely been achieved. Our consultations revealed widespread support among a broad range of stakeholders for the codification of police powers at crime scenes. Comments about the new legislation included:

> *It cuts out any anomalies and misconceptions.*[1015]

> *Generally well drafted and clear legislation.*[1016]

> *It's a change in the way of thinking but I can see the benefits.*[1017]

Comments were also made on the benefits of having the powers codified as follows:

> *You've got something written down you can refer back to … In a court they're always asking where you get your powers from … It's a lot easier to just go to one Act and say 'Right here'.*[1018]

> *It's a good thing that we now have a codified power to do what we had been doing before under common law.*[1019]

> *It's very nice to have most of it wrapped up in legislation rather than … in common law and bluff which was always used.*[1020]

A number of police officers informed us that the crime scene provisions were 'fairly easy and straightforward' to implement.[1021] Other police officers, while they generally supported codification, felt that the legislation was overly complex for establishing and investigating crime scenes. For example, some police officers felt that the introduction of crime scene warrants was unnecessary. A detective commented:

> *It takes a lot of time to do the protocols that LEPRA demands and whilst you're mucking around doing these other things basically you're taking your eye off the ball game a bit.*[1022]

During the review period we conducted an in-depth analysis of 184 crime scene warrant applications. This represents 13% of all crime scene warrant applications issued during the review period. Our analysis found that while crime scene warrants introduce an additional process for police officers investigating serious indictable offences, the application process on the whole did not appear to be onerous to undertake. No evidence was presented during the review period to suggest the introduction of the crime scene provisions has adversely affected the investigation of serious indictable offences. To the contrary, many police had commented that crime scene warrants have legitimised and simplified their management and investigation of crime scenes and reduced uncertainty.

The view that the legislation was confusing and onerous was more commonly expressed during our first round of consultations with police officers, which took place within the first six months of the legislation being introduced. Prior to our second round of consultations, 18 months after the legislation was introduced, a number of legislative amendments to LEPRA occurred including amendments to the crime scene provisions. These amendments addressed some of the areas causing confusion. For example, an amendment to LEPRA in December 2006 made it clear that when a crime scene occurs on a road, police do not need to obtain a crime scene warrant in relation to the vehicle involved. Rather, the vehicle involved is automatically considered part of the crime scene.[1023] Amendments were also made to related legislation to allow LEPRA to operate more effectively. For example, the *Coroner's Act 1980* was amended to allow police officers to investigate deaths where there is no reasonable suspicion of a serious indictable offence.[1024]

1015 Interview with crime manager, LAC G, 29 August 2006.
1016 Authorised officer survey response 17.
1017 Interview with the commander, LAC A, 2 March 2006.
1018 Focus group with senior officers, FSG, 7 June 2006.
1019 Focus group with general duties sergeants, LAC C, April 2006.
1020 Interview with the acting commander, LAC B, 27 March 2006.
1021 Focus group with general duties constables LAC G, 20 November 2007.
1022 Focus group with detectives, LAC B, 23 July 2007.
1023 See Appendix 3 for further discussion of this amendment.
1024 See section 25.2 of this report for further discussion of this amendment.

During the second round of consultations with police officers there were fewer issues of concern raised around the codification of crime scenes. Officers advised us that part of the initial confusion around the crime scene provisions in LEPRA was due to officers getting to know the new legislation. However, we still identified a number of legislative and procedural issues for consideration by Parliament and relevant agencies. These include:

- The identification of a number of areas where there is confusion around how the crime scene provisions should be implemented by police officers. For example, officers were unclear whether a licensed premises is a public place, and therefore a crime scene warrant is not required to establish a crime scene, or a private premises, and therefore occupier's consent or a crime scene warrant is required to establish a crime scene. They were also unclear about the relationship between crime scene warrants and search warrants.
- The crime scene provisions allow police to enter and investigate private premises. This is a significant derogation from common law rights protecting people's homes and property from intrusion by anyone, yet there are very limited mechanisms available to occupiers to challenge this exercise of power.
- The legislation does not codify the form that occupier's consent should take when occupiers allow police officers to enter and investigate their premises. In particular, the legislation does not state whether consent needs to be informed, nor does it specify if consent should be written or verbal.
- In rural and remote areas, three hours may not be sufficient time in which to make a crime scene warrant application as travel distances are great and in some areas phone and radio contact is unavailable.

Our recommendations, arrived at through consultation with relevant agencies, provide solutions to these issues and others. If implemented, they will enhance the use of Part 7 when entering and investigating premises in relation to serious indictable offences and certain traffic accidents.

Part 4 — Notices to produce

Chapter 31. Introduction

Part 5, Division 3 of LEPRA allows police to apply for a 'notice to produce documents' (notice to produce) from an authorised deposit-taking institution (ADI) , when it is believed, on reasonable grounds, that the institution holds documents that may be connected 'with an offence committed by someone else'.[1025]

The following discussion of notices to produce is structured as follows:

- the objectives of the notice to produce provisions
- the legislative provisions under review
- comparable legislation in other jurisdictions
- the research methodology used to scrutinise the notice to produce provisions
- implementation of the notice to produce provisions
- the operation of the notice to produce provisions
- issues concerning the notice to produce provisions identified during the review period
- conclusion.

1025 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.53.

Chapter 32. Background

32.1. Objectives of the notice to produce provisions

The primary aim of the notice to produce provisions in LEPRA was to amend the statutory basis for enabling police to obtain financial records from ADIs. Prior to the introduction of LEPRA, if police wished to obtain documents from an ADI in relation to an offence committed by someone else, they would apply to an authorised justice for a search warrant under the (now repealed) *Search Warrants Act 1985*.[1026]

In the second reading speech for LEPRA the then Attorney General, the Hon. Bob Debus, outlined the perceived problems with using search warrants to obtain documents from financial institutions:

> *The provisions in this Part regarding notices to produce clarify and provide a legislative basis for the practice of obtaining documents held by financial institutions. Search warrants, in this context, are considered a blunt instrument: a search warrant may authorise police to search the entire premises for documents held by the financial institution, when only a specific customer's records are sought. In practice, banks produce the documents sought when presented with a search warrant, rather than have police search through all of their records.*[1027]

The Attorney General went on to say:

> *Although the new power imposes a duty on financial institutions to produce particular documents which does not now exist, the change is largely one of process. The provision will not alter the type of documents that can be obtained — a document, for example, can include a document in electronic format — but merely the process in which the documents are obtained.*[1028]

The Attorney General also noted that the notice to produce provisions do not replace search warrants, and that 'the intention of the provision is that police may apply for either a notice to produce or a search warrant, depending on the circumstances'.[1029] The Attorney General further noted that the provisions were not meant to detract from or replace search warrant provisions, but were designed to be used in conjunction with these powers, whenever appropriate and depending on the circumstances.

This intent is reflected in section 53(2) of LEPRA, which states 'An application under this section [for a notice to produce documents] may be, but is not required to be, made instead of an application for a search warrant.'

Thus, the notice to produce provisions essentially provide a more meaningful and purposeful legislative means by which police can obtain records from ADIs. A background briefing paper on the LEPRA Bill prepared by the NSW Parliamentary Library described the changes as follows:

> *The new power to apply for notices to produce documents is largely an administrative measure, designed to facilitate the more efficient gathering of evidence from banking institutions.*[1030]

Rather than use the 'blunt instrument' of a search warrant, police now have a more appropriate and refined tool of extracting the same information from ADIs as they were capable of doing with a search warrant.

It should be noted, either by way of comparison or contrast to the power provided to police under LEPRA, that statutory powers to require production for the purposes of an investigation have long been available to a number of investigative agencies in New South Wales, including the NSW Ombudsman, the Independent Commission Against Corruption (ICAC), the Police Integrity Commission (PIC) and the NSW Crime Commission (NSWCC). These powers, although provided under different statutes, have a number of similarities but in particular they empower the agencies to require (some on a more limited basis) of both the production of documents and, more broadly, things, for the purposes of an investigation. In addition, the exercise by these agencies of the power to require production does not require external authorisation but is authorised by the chief executive officer of that agency or delegate.

1026 The *Search Warrants Act 1985* was repealed by the *Law Enforcement (Powers and Responsibilities) Act 2002,* with effect from 1 December 2005. The Search Warrants Regulation 1999 was impliedly repealed at the same time. Provisions relating to search warrants are now contained in the *Law Enforcement (Powers and Responsibilities) Act 2002,* Part 5.
1027 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
1028 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
1029 The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p.4846.
1030 Griffith G., *Police Powers in NSW: Background to the* Law *Enforcement (Powers and Responsibilities) Bill 2001*, NSW Parliamentary Library Briefing Paper No. 11/2001, August 2001, p.74.

32.2. An additional power, not a replacement for a search warrant

As noted by the Attorney General, in reality, the introduction of the notice to produce provisions constituted a recognition of what was already occurring in practice. Our review has confirmed that whilst police were required to obtain search warrants to procure documents from ADIs prior to LEPRA, in doing so, they rarely implemented the full gamut of search warrant procedures.

According to the *NSW Police Force Code of Practice for Custody, Rights, Investigation, Management and Evidence* (Code of Practice for CRIME), when police need to issue a search warrant on premises, they are required to apply for and execute a search warrant in accordance with the NSW Police *Execution of Search Warrant Procedures* (or standard operating procedures) and the applicable law.[1031] These SOPS map out a step by step guide as to what should occur when a search warrant application is made, listing the various roles to be played by each search warrant team member. Executing a search warrant comprises a substantial number of police resources led by an operating commander, with scope for case officers, searching officers, exhibit officers, an independent observer and a video operator.[1032]

In accordance with the standard operating procedures (SOPS), an independent police observer is appointed to oversight the execution of the search warrant and where available and appropriate another police officer is required to video the search. As the main purpose of executing a search warrant on premises — often at the home of a person of interest in an investigation — is for the seizure of property or any items of interest in the investigation of a suspected crime, the approach is quite different to a less intrusive request for an ADI's financial documentation in relation to a particular customer, for the purposes of a criminal investigation. The financial institution, in effect, is the repository for documents, and generally does not have a vested interest in withholding documents from police in the execution of their duty. The ADI's primary concern is to provide documents to police in a lawful manner.

The need for an independent observer and a video operator when issuing a search warrant to an ADI would generally be unnecessary and we have been advised by police that this has rarely — if ever — occurred. As one duty officer advised:

> *I don't know of anybody who's taken an officer along and videotape[d] it. Just wouldn't do it.*[1033]

In determining whether a search warrant or notice to produce would be the most appropriate tool to obtain documents from an ADI, the police officer must also be satisfied that the ADI is itself not a party to the offence. As the *Police Issues & Practices Journal* states:

> *The decision as to whether you apply for a notice to produce or a search warrant rests with you [police]. Note, however, that if the financial institution was connected with the commission of the offence, a search warrant is required.*[1034]

1031 NSW Police Force Legal Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated May 2008, p.72.
1032 Standard Operating Procedures, Search Warrants Griffith LAC. NSW Police Force intranet. Accessed 17 March 2008.
1033 Focus group with duty officer, LAC F 30 October 2007.
1034 *Policing Issues & Practice Journal*, 'LEPRA: Consolidating Police Powers', Special Edition, July 2005, Vol. 13, No. 3, p.54.

Chapter 33.
Overview of the notice to produce provisions

33.1. Application for a notice to produce

Police may apply to an authorised officer for a notice to produce documents from an ADI, when it is believed on reasonable grounds that the institution holds documents that may be connected with an offence committed by someone else.[1035]

An ADI is a body corporate which has been granted authority by the Australian Prudential Regulation Authority to carry on banking business in Australia.[1036] The current list of ADIs is made up of:

- Australian-owned banks
- foreign subsidiary banks
- branches of foreign banks
- building societies
- credit unions
- specialist credit card institutions
- other ADIs
- authorised non-operating holding companies.[1037]

A police officer must apply to an 'authorised officer' for a notice to produce documents from an ADI. An authorised officer is:

- a Magistrate or Children's Magistrate
- a registrar of a Local Court, or
- an employee of the Attorney General's Department authorised by the Attorney General as an authorised officer for the purposes of LEPRA.[1038]

Generally, applications for notices to produce must be made in person, with the applicant verifying before an authorised officer, by oath, affirmation or affidavit, the information relating to the application.[1039] However, a notice to produce can be applied for by telephone (including radio, facsimile and any other communication device)[1040] if facilities are readily available for that purpose.[1041]

An authorised officer must not issue a notice to produce by telephone unless the authorised officer is satisfied that it is required urgently and it is not practicable for the application to be made in person.[1042] Where an authorised officer refuses to issue a telephone application, police must apply for the notice to produce in person.

The Law Enforcement (Powers and Responsibilities) Regulation 2005 includes a form that police officers are to fill in when applying for a notice to produce. This application form requires police officers to insert information about 'the reasonable grounds on which the application for the notice to produce documents is based'.[1043]

1035 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.53.
1036 *Banking Act 1959* (Cth), ss.5 and 9. See also *Interpretation Act 1987*, s.21.
1037 Australian Prudential Regulation Authority. http://www.apra.gov.au/ADI/ADIList.cfm, accessed 27 August 2008.
1038 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.3.
1039 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.60(2).
1040 *Law Enforcement (Powers and Responsibilities) Act 2002*. section 3 provides that the definition of telephone 'includes radio, facsimile and any other communication device'.
1041 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.61(3).
1042 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.61.
1043 Law Enforcement (Powers and Responsibilities) Regulation 2005, Schedule 1, Form 6 — Application for notice to produce documents/record of application, Part 1 — Application.

33.2. Decisions by authorised officers

An authorised officer may issue a notice to produce documents if satisfied there are reasonable grounds to suspect that the ADI holds documents that may be connected with an offence, and the institution is not a party to the offence.[1044] In addition, an authorised officer must not issue a notice to produce documents unless the application for the notice includes:

- details of the authority of the applicant to make the application for the notice to produce
- the grounds on which the notice to produce is being sought
- the address or other description of the premises the subject of the application
- if the notice to produce is required to search for a particular thing—a full description of that thing and, if known, its location
- if a previous application for the same notice to produce was refused—details of the refusal and any additional information required by section 64 of LEPRA
- any other information required by the regulations.[1045]

An authorised officer, when determining whether there are reasonable grounds to issue a notice to produce documents must consider (but is not 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 thing sought and the offence.[1046]

Police must provide such further information as the authorised officer requires concerning the grounds on which the notice to produce is being sought. However, police are not required to disclose the identity of a person from whom information was obtained if they are satisfied that to do so might jeopardise the safety of any person.[1047]

An authorised officer who issues a notice to produce must record 'all relevant particulars of the grounds the authorised officer has relied on to justify the issue'.[1048] The Law Enforcement (Powers and Responsibilities) Regulation 2005 contains a form on which an authorised officer can record such information. Completed forms are to be returned, with a copy of the notice to produce, to the Local Court at which the notice was issued or nearest to the place at which it was issued.[1049]

The notice can specify that the documents are to be produced to a police officer within a stated time and at a stated place and in a stated form (whether electronic or otherwise).[1050]

33.3. Procedures to be followed if an application for a notice to produce documents is refused

If an application for a notice to produce documents is refused by an authorised officer, one further application may be made, but only if the further application provides additional information that justifies the making of the further application. If the first application was made to an authorised officer who was not a magistrate, the further application may be made to a magistrate whether or not additional information is provided.[1051]

33.4. Applications to a magistrate for an order to access the documents

If an ADI claims that documents required to be produced are privileged and may not be produced the police must, if they propose to proceed to enforce the notice, apply to a magistrate as soon as reasonably practicable for an order to access the documents.[1052]

In such cases, a magistrate may order that police be given access to the document, or that the document be given to the police and copied by police and the original document be returned to the ADI. Alternatively, the magistrate may order that the document is not required to be produced by the ADI.[1053]

1044 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.54(1).
1045 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.62(1).
1046 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.62(2)(a) and (b).
1047 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.62(4).
1048 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.65(1).
1049 Law Enforcement (Powers and Responsibilities) Regulation 2005, Schedule 1, Form 6 — Application for notice to produce documents/record of application, Part 2 — Authorised officer's record of application for a notice to produce documents.
1050 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.54(2).
1051 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.64.
1052 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.56(1).
1053 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.56(2).

33.5. Duration and extension of notices to produce documents

An authorised officer who issues a notice to produce other than by telephone must specify when the notice is to expire.[1054] This time is 72 hours after the issue of the notice unless the authorised officer is satisfied that it cannot be executed within 72 hours.[1055] If the notice to produce fails to specify a time of expiry, it expires 72 hours after its issue.[1056]

Where a notice to produce expires 72 hours after its issue, an authorised officer can extend the notice if satisfied that it cannot be executed within 72 hours.[1057] The time for expiry of a notice to produce can be extended only once[1058] and must not be extended beyond 144 hours after its issue.[1059] Any application for an extension must be made before the notice expires.[1060]

When an authorised officer issues a notice to produce by telephone, it expires 24 hours after the time of issue.[1061] Notices to produce issued by telephone may not be extended.[1062]

Originally, LEPRA required the same authorised officer who issued the notice to produce to grant the extension. As a result, when the authorised officer who issued the notice was not available to extend it, police had to apply to a different authorised officer for a fresh notice to produce. The *Police Powers Legislation Amendment Act 2006* remedied this problem by allowing any authorised officer to extend a notice to produce where the authorised officer who initially issued the warrant has died, ceased to be an authorised officer, or is absent.[1063]

33.6. Execution of notices to produce documents

LEPRA regulates the manner in which a notice to produce documents must be executed. In particular, police:

- must give the notice to produce to the ADI named in the notice as soon as reasonably practicable after it is issued[1064]
- must produce the notice for inspection by an occupier of the premises if requested to do so by the occupier[1065]
- may use such force as is reasonably necessary for the purpose of entering the premises[1066]
- may execute the notice with the aid of such assistants as considered necessary[1067]
- may execute the notice at night if the notice authorises its execution by night, and if the person authorised to execute the warrant is satisfied there are reasonable grounds for executing the notice at night.[1068]

33.7. Requirements following execution of a notice to produce documents

Within 10 days of a notice to produce being executed or expiring, a report must be provided to the relevant authorised officer, by the person who applied for the notice. If the notice to produce was executed, the report must set out briefly the result of the execution, including a brief description of items produced. If a notice expires without being executed, the reasons for not executing the notice must be provided.[1069] The LEPR Regulation contains a form which police must fill in and return to the authorised officer as a means of providing this information. Completed forms are to specify the person responsible for the documents produced by the ADI, and the place where they are located. In addition, copies of any receipts provided for items produced under the notice must be attached to the completed form.[1070]

1054 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73(2).
1055 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73(3) and (4).
1056 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73(5).
1057 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(1)(b).
1058 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(4).
1059 *Law Enforcement (Powers and Responsibilities) Act 2002*, s.73A(6)(a).
1060 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(6)(d).
1061 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73(1)(d).
1062 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.73A(3).
1063 Section 75 was amended by the *Police Powers Legislation Amendment Act 2006*, Schedule 1[10] on 15 December 2006.
1064 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.54(3).
1065 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.69.
1066 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.70(1).
1067 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.71.
1068 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.72.
1069 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.74.
1070 Law Enforcement (Powers and Responsibilities) Regulation 2005, Schedule 1, Form 21 — Report to authorised officer about notice to produce documents. Note that the place where the documents are held does not need to be specified if this would adversely affect the security of the documents.

33.8. Offences

An ADI, or an officer of an ADI must not, without reasonable excuse, fail or refuse to comply with a notice to produce documents. The maximum penalty for breaching this provision is 100 penalty units (currently $11,000) and/or two years imprisonment.[1071]

33.9. Protection from liability

An ADI that complies with a notice to produce documents or with a related order by a magistrate, or which produces something in the honest belief that it was complying with such a notice or order, is not subject to any action, liability, claim or demand.[1072]

1071 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.57(2).
1072 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.57(1).

Chapter 34.
Comparable legislation

Other jurisdictions in Australia have introduced provisions allowing police officers to apply for specific documents from financial institutions. In addition, in some jurisdictions, police and other officers have much broader powers which allow them to seek to obtain documents from a range of people and agencies.

The following discussion outlines the different types of legislative frameworks operating around Australia which relate to obtaining documents from financial institutions and other agencies.

34.1. Queensland

Queensland's *Police Powers and Responsibilities Act 2000* (PPRA) provides that, if a police officer reasonably suspects that a cash dealer holds documents that may be evidence of the commission of an offence by someone else, or confiscation related evidence in relation to a confiscation related activity involving someone else, the police officer may, instead of applying for a search warrant, apply to a magistrate for the issue of a production notice requiring the cash dealer to produce the documents stated in the notice to a police officer.[1073]

The term 'cash dealer' applies not only to financial institutions, but also to (among others) insurers, securities dealers, persons operating gambling houses or casinos, bookmakers, and those issuing, selling or exchanging items such as bullion, travellers cheques or currency.[1074] Allowing Queensland police officers to obtain production notices in relation to a broader range of agencies than is the case in New South Wales appears to indicate that the Queensland laws are aimed at facilitating evidence gathering against any persons or institutions that may be involved in money laundering activities generally.[1075]

Both cash dealers and ADIs under the relevant state legislation can make a claim of privilege regarding communications between the ADI or cash dealer and someone else. In this instance, a police officer in both Queensland and New South Wales may apply to a magistrate for an order to access the documents.

Unlike the LEPRA provisions, failure to comply with a production notice is not considered an offence under the PPRA. However, failure to comply with a production order[1076] is considered an offence and could result in a maximum penalty of 350 penalty units (currently $26,250) or seven years imprisonment.[1077]

34.2. Western Australia

In Western Australia, the *Criminal Investigation Act 2006*, which commenced in July 2007, provides that a police officer or public officer may apply to a justice of the peace (JP) for an order to produce a business record.[1078] A JP may issue an order if satisfied that there are reasonable grounds for the applicant to have a suspicion that an offence has been committed. By way of comparison, in LEPRA a police officer must believe on reasonable grounds that an institution holds documents that may be connected with an offence before applying to an authorised officer. In Western Australia, a JP cannot issue an order to a person in relation to an offence that the person is suspected of having committed.[1079]

LEPRA provides that a notice to produce can only be issued by a police officer to certain financial and banking institutions, whereas an order to produce in Western Australia applies broadly to 'any business, including a business of a governmental body or instrumentality or of a local government, or any occupation, trade or calling'.[1080]

The order to produce must be served on the person to whom it applies as soon as practicable after it is issued.[1081] It may be personally served or posted, or with the consent of the person being served, sent by email or fax.[1082]

1073 *Police Powers and Responsibilities Act 2000* (Qld), s.180.
1074 *Financial Transaction Reports Act 1988* (Cth), s.3.
1075 Griffith G., *Police Powers in NSW: Background to the* Law *Enforcement (Powers and Responsibilities) Bill 2001*, NSW Parliamentary Library Briefing Paper No. 11/2001, August 2001, par. 5.10.
1076 Production orders pertain to property tracking documents and an application for such an order must be made to a Supreme Court judge. *Police Powers and Responsibilities Act 2000* (Qld), s.189.
1077 *Police Powers and Responsibilities Act 2000* (Qld), s.194(3).
1078 A public officer is a person appointed under a written law for a public purpose and the functions of which are or include investigating or prosecuting offences. *Criminal Investigation Act 2006* (WA), s.9(1).
1079 *Criminal Investigation Act 2006* (WA), s.51(1).
1080 *Criminal Investigation Act 2006* (WA), s.50.
1081 *Criminal Investigation Act 2006* (WA), s.54(1).
1082 *Criminal Investigation Act 2006* (WA), s.54(2).

Officers are able to apply for search warrants in relation to business records, regardless of whether an order to produce has been, or will be, issued.[1083]

Failure to comply with the order can result in a penalty of $12,000 and 12 months imprisonment.[1084] By comparison, under LEPRA an ADI who fails or refuses to comply with a notice to produce may be subject to a maximum penalty of 100 penalty units (currently $11,000) or two years imprisonment, or both.[1085]

34.3. South Australia

In South Australia, police may apply to a magistrate or judge for an order to inspect and copy banking records.[1086] The application may be lodged by a member of the police force or an officer of the Corporate Affairs Commission and must satisfy the judge or magistrate that it would be in the interests of the administration of justice to permit the applicant to inspect and take copies of banking records.[1087] A judge may also order that an applicant of any party to a legal proceeding may be at liberty to inspect and take copies of a banking record for any of the purposes of such proceedings.[1088]

Under the *Summary Offences Act 1953* (SA) the Commissioner of Police may appoint a senior police officer to carry a general search warrant (GSW) card enabling them to exercise instant powers of break, search and enter, where the officer has reasonable cause to suspect that 'there is anything that may afford evidence as to the commission of an offence'.[1089] South Australian police are able to use the general search warrant power if the original document, rather than a copy of the banking record is required. The ability to use the powers is pre-approved by the Commissioner for a period of six months or less[1090] and is generally regarded as exceptional power for police which is monitored carefully and allocated sparingly.[1091]

34.4. Other jurisdictions

Tasmania's *Search Warrants Act 1997* allows police to obtain documentation from ADI type institutions.[1092] The Northern Territory relies upon search warrants, general cooperation and common law to obtain documents from ADIs.[1093]

In the Australian Capital Territory (ACT), there is no general notice to produce provisions[1094] but there are provisions under the *Confiscation of Criminal Assets Act 2003* (ACT) for inquiry notices to be served on financial institutions. A police officer of the rank of commander (or higher) may give an inquiry notice to a financial institution in certain circumstances.[1095]

1083 *Criminal Investigation Act 2006* (WA), s.51(2).
1084 *Criminal Investigation Act 2006* (WA), s.55(2).
1085 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.57(2).
1086 Advice from Legal Services Branch, South Australia Police, 18 July 2007.
1087 *Evidence Act 1929* (SA), s.49(1a).
1088 *Evidence Act 1929* (SA), s.49(1).
1089 *Summary Offences Act 1953,* s.67(4)(a)(iii).
1090 *Summary Offences Act 1953,* s.67(3).
1091 Advice from South Australia Police Legal Department, 22 January 2008.
1092 Advice from Legal Services Branch, Tasmania Police 10 September 2007.
1093 Advice provided by the Legal Services Branch, Northern Territory Police, 16 July 2007.
1094 Advice from Research and Evaluation Officer — Legal, Australian Federal Police, 23 July 2007.
1095 *Confiscation of Criminal Assets Act 2003* (ACT), ss.144 and 145.

Chapter 35. Methodology

In reviewing the operation of the notice to produce provisions we undertook a number of research activities to obtain information from a range of sources and gain different perspectives about the way notice to produce documents are processed and executed.

The overall research methodology for this review is discussed in Part 1 of this report. Only those research methods and activities that relate specifically to the notice to produce provisions are discussed here.

35.1. Data

35.1.1. COPS data

Arrangements were made with the NSW Police Force to provide the Ombudsman with relevant information from the NSW Police Computerised Operational Policing System (COPS) throughout the review period. This data included information about:

- the total number of COPS entries in which a notice to produce application had been sought (as gathered from an action attached to a case)
- the related offences and police station involved
- the date the notice was applied for, the method of application and outcome.

35.1.2. Local Court data provided by the Attorney General's Department

Applications for notices to produce documents are primarily considered in the Local Court. NSW Local Courts forward statistical information on notice to produce applications to the statistics section of the Attorney General's Department on a monthly basis. The Attorney General's Department provided us with the following data and information for the review period, including the:

- total number of notice to produce applications made
- total number of applications made during business hours
- total number of applications made out of hours
- total number of applications made at each Local Court
- total number of applications where extensions were applied for
- outcome of each of the notice to produce applications.

35.1.3. BOCSAR data

Information on charges for offences relating to notices to produce was obtained from the NSW Bureau of Crime Statistics and Research (BOCSAR).

35.2. Documentation supplied by the NSW Local Court

35.2.1. Court proceedings

Based on the information provided by the Attorney General's Department including BOSCAR, we obtained court transcripts and other relevant documents from NSW Local Courts where a notice to produce had been used to obtain evidence for the purpose of court proceedings.

35.2.2. Notice to produce application documentation

To obtain a sample of notice to produce applications and associated documents, we contacted five Local Courts in New South Wales. They provided us with the documentation relating to the notices to produce applications heard at their court during the first period of the review. For each application they provided us with copies of the following:

- Form 6 — the application to an authorised officer for the notice to produce documents
- Form 15 — the notice to produce documents issued by an authorised officer
- Form 21 — the report to an authorised officer about execution of warrant (where warrant granted).

In addition, the following documents were provided where relevant:

- if a claim of privilege was made by the deposit-taking institution, any information in support of enforcing the notice[1096]
- the report to the authorised officer about the execution of the warrant[1097]
- any other documents supporting the application for the notice to produce, or relevant to the notice.

The five courts contacted were those where the greatest number of notice to produce applications were issued during the first year of the review period, identified through the data provided to us by the Attorney General's Department as discussed in section 37.1.4. Through this process, we obtained sample documentation of 69 notices to produce applications which were then closely examined to determine how effectively the provisions operated throughout the period under review.

Additionally, we also contacted the 14 Local Courts where an application was refused or extended, according to the data supplied by the Attorney General's Department and obtained all the documentation relating to those applications and determinations.[1098]

35.3. Consultations

35.3.1. NSW Police Force Local Area Command visits

As discussed in Part 1, we conducted two rounds of consultations with seven NSW Police Force Local Area Commands (LACs).[1099] During those consultations we discussed the implementation and operation of the notice to produce provisions with officers ranging from probationary constables to superintendents performing a variety of functions. Police performing functions of particular relevance to notices to produce included: commanders, crime managers, duty officers, detectives, education development officers and police prosecutors.

35.3.2. Specialist police units

We consulted with members of the Fraud Squad and Assets Confiscation Unit within the NSW Police Force. These specialist police units were consulted as they regularly utilise the notice to produce provisions in the course of their work. When visiting LACs we also endeavoured to speak to those detectives who dealt with the bulk of fraud matters within the command.

35.3.3. Authorised deposit-taking institutions

We wrote to several banking and financial industry bodies informing them about our review, and inviting their comments about the operation of the notice to produce provisions. A questionnaire was also sent to the compliance division of five of the major banks in order to gather information about their perspective on the notice to produce provisions and associated process. Responses were received from four of these banks.

35.3.4. The Banking and Financial Services Ombudsman

We consulted the Banking and Financial Services Ombudsman to determine whether that office had received any complaints in relation to the execution of notices to produce documents.

1096 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.56.
1097 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.74.
1098 According to the data supplied by the Attorney General's Department, there were 19 refused applications and three extension applications. However, once the data recording issues were corrected, there were in fact 17 refused applications and no instances where an extension application was sought.
1099 The LACs that we visited covered metropolitan and regional areas and are identified as LACs 'A' to 'G' for the purpose of this report.

35.4. Issues paper

As discussed in Part 1 of this report, we released an issues paper on the sections in LEPRA under review in June 2007. The paper included seven questions specifically about the notices to produce provisions. We received 14 submissions. Four submissions addressed the issues relating to notices to produce. A full list of the submissions can be found in Appendix 4.

35.5. Surveys

35.5.1. Survey of authorised officers

In December 2007 we arranged for the Attorney General's Department to distribute an email survey to all Local Court registrars and other departmental employees identified as authorised officers for the purpose of LEPRA. We also arranged for the Chief Magistrate to distribute this survey to all Local Court Magistrates.

These authorised officers were surveyed because of their responsibilities in relation to issuing notices to produce. The survey included questions about their experience in the use of the provisions, whether they had been given any training regarding the provisions and what they saw as concerns, issues or problems with the legislation.

35.5.2. Survey of police prosecutors

In December 2007, we arranged for NSW Police Force Legal Services to distribute an email survey to all NSW police prosecutors. The survey included questions designed to establish the number of times prosecutors had handled matters concerning refusal to comply with section 57 of LEPRA.[1100] Questions also related to education and training received by police prosecutors about the legislation and what they saw as concerns, issues or problems with the legislation.

35.6. Research limitations

35.6.1. COPS data

As discussed in our issues paper released in June 2007, there appeared to be some significant shortfalls in the COPS data provided by the NSW Police Force. At that stage of our review a search on the relevant 'actions' on COPS (where information about any notices to produce applied for should have been recorded) revealed 80 records only. These records fell far short of the numbers of notices to produce expected to be applied for by police at this stage. Inquiries with the NSW Police Force about the possible reasons for this low recording revealed under reporting by officers on COPS was the major reason.

NSW Police Force provided us with all the relevant COPS data available for the review period. According to the COPS data, there were 143 notice to produce applications made during the entire review period. This data indicated that in all but one instance, the notice to produce application was granted.[1101]

According to the data provided to us by the NSW Local Court, which recorded all notice to produce applications considered across all Local Courts in New South Wales, 2675 notice to produce documents were applied for during the review period. Of these applications, 2630 were granted and 45 were refused. The data recorded the NSW Police Force and the NSW Local Court should correspond, as both agencies are required to keep a record of each instance where an application for a notice to produce documents was made during the review period. It is clear the COPS data does not provide a comprehensive picture of the number of notice to produce documents applied for during the review period. We have therefore used the data provided from COPS as a sample of notices to produce obtained during the review period.

It also became apparent during our analysis of the COPS data that there were data entry errors in some of the COPS records. These errors were verified and the statistics were adjusted accordingly.

1100 *Law Enforcement (Powers and Responsibilities) Act 2002,* section 57 provides that an ADI must not without reasonable excuse fail or refuse to comply with a notice to produce documents.

1101 An annotation provided with that refusal seemed to indicate that the application would eventually be approved but had been delayed due to a request on the bank's part as it required more time to locate the relevant documents.

35.6.2. Local Court data provided by the Attorney General's Department

The data provided by the Attorney General's Department provides the most comprehensive picture of notice to produce applications made in the NSW Local Court in the review period. However, we identified errors in the collation of monthly court statistics by the Local Court as follows:

- The statistics provided indicated that there were three extensions applied for in the Local Court sample. However, when we asked Local Court staff for further details on these applications we were advised that the extensions had been entered in error.
- The statistics provided indicated that there were 19 refused applications in the Local Court sample. However, when we asked Local Court staff for further details on all of these applications we were advised that two of these refusals had been entered in error.
- Two court registrars advised that the court staff responsible for completing the statistical forms were unaware of the amendments to the forms during the second year of the review and consequently, had not accurately recorded the number of notice to produce applications lodged during the second year. A manual count was conducted and the statistics were then included in our overall tally.
- All of these statistical errors were corrected accordingly for our data analysis and discussion below.

Chapter 36. Implementation

In Part 1, we outlined the broad activities undertaken by the NSW Police Force and the Attorney General's Department to implement LEPRA. Below we identify the activities undertaken by the NSW Police Force specifically to implement the notice to produce provisions.

36.1. NSW Police Force

The implementation of LEPRA involved mandatory training for all police officers. The notice to produce provisions were addressed in the online training session 'Operation Property'. The notice to produce provisions were also discussed in Chapter 5 of the *Policing Issues & Practice Journal* special edition dedicated to LEPRA.[1102]

In addition, the Business and Technology Section made changes to COPS which included the introduction of new action types in the case management system for notices to produce and search warrants.

36.2. NSW Attorney General's Department

Notices to produce documents are issued by authorised officers who are personnel of the Attorney General's Department.[1103] In order to implement the provisions the Attorney General's Department was required to make a number of policy and procedural changes and provide information and training to authorised officers regarding their new responsibilities under LEPRA. The Attorney General's Department undertook the following activities in relation to notices to produce:

- The following articles which referred to the notice to produce provisions were published in the *Local Courts Bulletin*:
  - '*Law Enforcement (Powers and Responsibility) Act 2002*' — *Local Courts Bulletin* 2005/0130
  - 'Search Warrants — *Law Enforcement (Powers and Responsibilities) Act 2002*' — *Local Courts Bulletin* 2005/0131
  - 'Notices to Produce Financial Documents — Criminal Investigations' — *Local Courts Bulletin* 2005/0133.
- The following forms were created and circulated with *Local Courts Bulletin* 2006/0145:[1104]
  - Form 6 — Application for Notice to Produce Documents/Record of Application
  - Form 15 — Notice to Produce Documents
  - Form 20 — Report to Authorised Officer about execution of a notice to produce.
- A number of LEPRA contact officers were appointed and their details circulated in the *Local Courts Bulletin* to assist with questions regarding the legislation.
- The Attorney General's Department *Policy and Procedure Manual* was updated to include summaries of the notice to produce provisions.[1105]

Training on the notice to produce provisions was provided to Extended Registry staff, registrars and chamber registrars between September and October 2005. The training was conducted by representatives of the Legal Services Section of the NSW Police Force.

Our authorised officer survey found that most authorised officers became aware of the notice to produce provisions in LEPRA through the *Local Courts Bulletin*. Half of the authorised officers surveyed had received some training about LEPRA and several were in favour of receiving additional training about the notice to produce provisions.

1102 *Policing Issues & Practice Journal*, 'LEPRA: Consolidating Police Powers', Special Edition, July 2005, Vol. 13, No. 3.
1103 Registrars and other Local Court staff who formerly had powers as 'authorised justices' have powers as 'authorised officers' in LEPRA. (This change was notified through the *Local Courts Bulletin* 2005/013).
1104 These forms were also uploaded to the Lotus Notes Forms Library and the NSW Local Court website.
1105 Attorney General's Department of NSW, NSW Local Courts Policy and Procedures Manual, Court Services, p.44.

Chapter 37.
Use of notice to produce provisions

This section details the use of the notice to produce provisions during the review period.

We obtained data about notices to produce documents for the review period from two sources:

- the Attorney General's Department provided monthly data on applications for notices to produce documents considered in the NSW Local Court
- the NSW Police Force provided data about COPS entries where police indicated they had applied for a notice to produce documents.

As discussed in section 35.6.1, the number of records where a notice to produce documents had been applied for according to the COPS data was much lower than expected. This presented a difficulty in terms of our ability to review the operation of the Act using COPS data only, as a low recording rate on COPS meant that we did not have comprehensive data on notices to produce documents for the entire review period. This situation was rectified by obtaining data on all notice to produce applications and determinations for the review period from the NSW Local Court.

The 143 COPS entries recorded for the review period represents approximately 5% of the 2,675 records of applications for notices to produce documents collected by the NSW Local Court. We have therefore used the COPS data as a sample of the overall number of notices to produce documents applied for by police during the review period. This is reflected in the analysis below of the operation of the provisions which separately considers the data provided by the NSW Local Court and the NSW Police Force.

37.1. Analysis of data from the NSW Local Court

37.1.1. Number of notice to produce applications

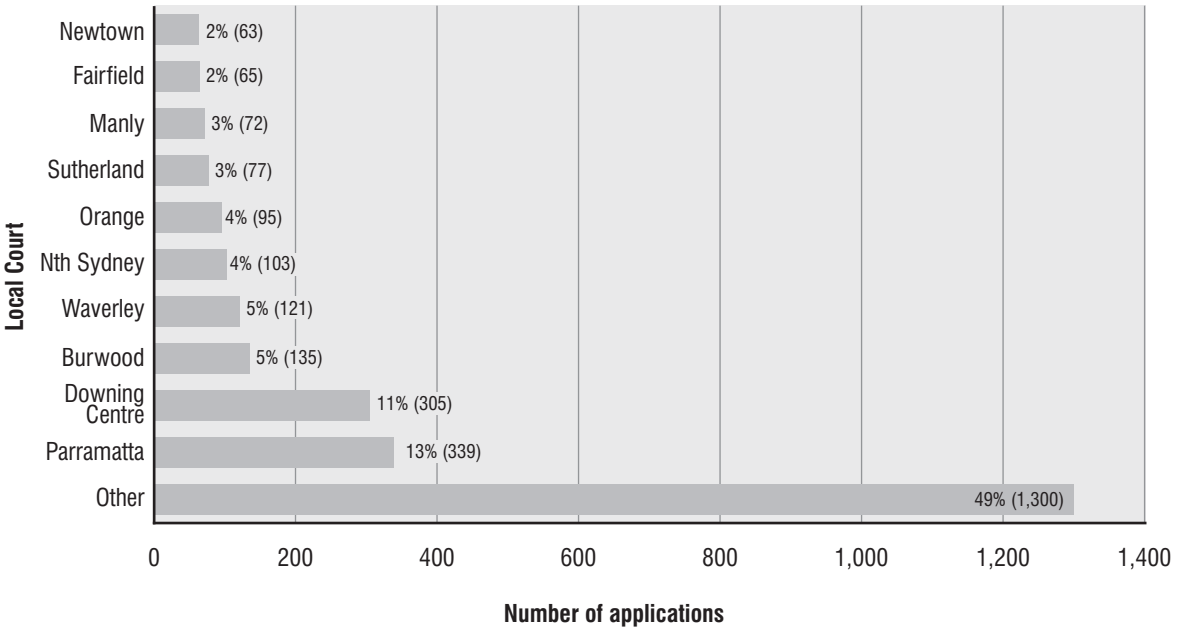
Information obtained from the NSW Local Court indicates that during the whole review period a total of 2675 applications for a notice to produce documents were lodged at 96 Local Courts across the state. There are 160 Local Courts across New South Wales therefore applications for notices to produce documents were considered at 60% of the Local Courts in New South Wales during the review period.[1106]

37.1.2. Outcome of notice to produce applications

Of the 2675 notice to produce documents applications, 98% (2,630) were granted and 2% (45) were refused. There were no out of hours applications made. Although records indicated that there were three instances where an extension for an application was made, inquiries with each of the registrars or deputy registrars at those courts indicated that this was data entered in error.

1106 Local Courts NSW. http://www.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/lc_aboutus, accessed 26 March 2008.

Figure 23. Applications for notices to produce by Local Court



Source: NSW Local Court data, 1 December 2005 — 30 November 2007. Note: percentage points total 101% due to rounding. n=2,675

Figure 23 shows that 10 Local Courts handled 51% (1,375) of all applications for notices to produce in the review period. Applications for notices to produce documents were most commonly handled at Parramatta Local Court and the Downing Centre,[1107] which handled 158 and 150 respectively during the first year of the review and then 181 and 155 during the second year of the review. This can largely be explained by the location of specialist policing units in both the Parramatta and Sydney central business districts.[1108] Metropolitan courts such as Burwood, Waverley, North Sydney, Sutherland, Manly, Fairfield and Newtown processed the second highest level notice to produce applications, although some regional courts such as Orange also recorded high application rates. Nine out of the 10 courts where notice to produce documents applications were frequently made during the review period were in Sydney's Greater Metropolitan region.

37.1.3. Number of out of hours notice to produce applications

During the review period there were no notice to produce applications lodged outside of standard court hours which are 9am–5pm weekdays. The reason for this appears to be because ADIs are usually only able to provide documents during business hours. Unlike the execution of a crime scene warrant or a search warrant, the need to preserve evidence does not typically apply in the retrieval of banking documents from ADIs. During our LAC consultations, we asked officers whether they could think of a circumstance where a notice to produce documents would need to be executed out of hours, but no scenarios could be provided. As one officer noted:

> *The thing with frauds is that you generally don't have [to worry] as much [about time] as you do with a serious assault where you might be losing evidence because stuff goes away. So I've never had … time pressure … on a fraud …*[1109]

37.1.4. Analysis of the Local Court sample

We obtained a sample of notice to produce applications by contacting the five courts that processed the highest number of notice to produce applications, according to the NSW Local Court data from the first year of the review (1 December 2005 — 31 December 2006). We asked each court registrar to supply a random sample of 10 notice to produce applications and associated documents. We also requested documentation on all extended and refused applications processed at all courts for the same period. The total sample comprised 69 notice to produce applications.

1107 Downing Centre Local Court is located in Liverpool St, Sydney.
1108 Specialist units located at Parramatta include the Drug Squad, Fraud Squad, Asset Confiscation Unit, Robbery and Serious Crime Squad. Specialist units located in Sydney include the Professional Standards Command and Operational Communications and Information Command.
1109 Focus group with detective constables, LAC G, 19 November 2007.

37.1.4.1. Outcome of applications from Local Court sample

Of the 69 applications obtained for the sample, 52 were granted and 17 were refused. The application was sworn before an authorised officer in 66 of those applications. Three notices were not sworn, which formed part of the reason for those applications not being granted.[1110]

Of the 66 sworn applications, 64 were sworn and determined on the date applied. This means that in 97% of cases, the matter was applied for, sworn and determined all on the same day. In the two matters where there was a time lapse in applying for a notice and it being determined by an authorised officer, the delays were one day and 13 business days. It is not clear why either of these delays occurred.

37.1.4.2. Length of time to determine an application

Analysis of the sample of notice to produce documentation revealed that authorised officers spent on average seven minutes assessing each notice to produce application. This average was determined by measuring the time between a police officer swearing an application before an authorised officer and the time the authorised officer actually determined the notice application.

An analysis of the 52 granted applications only showed that on average those applications were considered within six and a half minutes.[1111]

Of the 17 notice to produce applications that were refused in the Local Court sample, only four applications had times recorded on them. The average length of time an authorised officer spent considering each of these four matters was just under 14 minutes.

37.1.4.3. Institutions served with a notice to produce documents

Table 8 shows which institutions had a notice to produce documents served upon them from the sample data. The 'major' banks — Commonwealth Bank, ANZ Bank, Westpac Bank and St George Bank — comprised the largest group of institutions that were served notices to produce (44), being 64% of the total number of applications.

Table 8. Institutions served with notices to produce documents

Name of Institution	Number of notices to produce issued
Commonwealth Bank	14
Westpac Bank	11
ANZ Bank	10
St George Bank	9
NAB	3
Bendigo Bank	3
Other ADIs	14
Institutions other than authorised deposit-taking institutions (including a telecommunications provider, a municipal library, a government department, a television station and a hospital)	5
Total	69

Source: NSW Local Court data, 1 December 2005 — 31 December 2006. n=69.

37.1.4.4. Applications involving institutions other than ADIs

There were five instances in the Local Court sample where police applied for a notice to produce documents from an institution other than an ADI which the Act does not provide for. Three of these applications were refused by authorised officers and two were granted. The case study below discusses an instance where a notice to produce documents was issued to a non-financial institution inappropriately.

1110 Law Enforcement (Powers and Responsibilities) Regulation 2005, Schedule 1, Form 6 states that a notice to produce application may be sworn before the authorised officer to whom the application is made.

1111 The authorised officer recorded the same time for both the time sworn and the time issued for 31% (16 of 52) of granted applications.

Case Study 41

Matter involving the issue of a notice to produce to a hospital

A young male was allegedly assaulted with a baseball bat outside his home during the reprisal attacks that occurred in the wake of the Cronulla riots in December 2005. The hit apparently caused the man to momentarily lose consciousness, during which time he believed his mobile phone was opportunistically stolen by the attacker. The victim was treated at a Sydney hospital the next day for severe bruising and swelling to the face and later provided written consent for his medical records to be released to police. Police applied for, and were subsequently granted, a notice to produce documents which it issued on the hospital to gain access to the victim's medical records, despite having the victim's consent. The hospital provided the document in accordance with the request. When the matter went before the court the improperly granted notice to produce was not raised.[1112]

The other instance identified in the Local Court sample where an application for a notice to produce on an institution other than an ADI was granted involved police accessing television programming information from a television station for the purpose of investigating a charge of wilfully exposing a child under 14 to indecent material.[1113]

The applications to institutions other than ADIs that were refused included requests to a telecommunications provider, the Department of Corrective Services and a municipal library. The case studies below describe instances identified in the Local Court sample where a notice to produce documents application was refused as the application related to an institution other than an ADI.

Case Study 42

Refusal to issue notice to produce as library not an ADI

A woman who was found dead with multiple stab wounds had been seen arguing with a man earlier the same day. The person who witnessed the altercation recognised the man when visiting a local library soon after and ascertained the man's first name from another library attendee. When the person reported this to police, investigators made enquiries with the library about the man's membership and borrowing patterns, in order to establish whether or not the man had been present in the local area at the time of the murder. The library refused to provide any details to investigators citing privacy legislation. The police investigators then attempted to obtain a notice to produce documents to serve on the library, directing it to produce the required documents. The authorised officer refused to approve the application as the library did not fulfil the criteria of being an authorised deposit-taking institution as required by the Act.[1114]

Case Study 43

Refusal to issue a notice to produce as government department not an ADI

Police investigating a serious indictable offence attempted to obtain copies of telephone recordings from the Department of Corrective Services by way of a notice to produce documents. The suspect, who was remanded in custody at a NSW Correctional Centre, had allegedly made several phone calls, of which the content directly related to the police investigation. When the application went before the authorised officer it was declined on the basis that the Department of Corrective Services is not an ADI.[1115]

1112 Details obtained from NSW Local Court documents.
1113 Details obtained from NSW Local Court documents.
1114 Details obtained from NSW Local Court documents.
1115 Details obtained from NSW Local Court documents.

Case Study 44

Refusal to issue a notice to produce as telecommunications company not an ADI

A man contacted triple-0 from his mobile phone in order to report the murder of his two flatmates. He requested connection to both police and ambulance services. The first minute of the conversation was electronically recorded. The man was then transferred to an ambulance operator and proceeded to have a lengthy conversation relating to the incident. Some months later the man was charged with the murders of the two flatmates and as a result was to appear in the Supreme Court to answer the charges. Senior Counsel for the Department of Public Prosecutions requested all documentation in relation to the triple-0 call be obtained from Telstra in preparation for the court proceedings. Preliminary inquiries with Telstra by an investigating police officer revealed that the audio recordings and documents were on hand and would be produced once a search warrant was presented. However, it appears that police applied for a notice to produce rather than a search warrant. The application was refused by the authorised officer on the grounds that a notice to produce can only be issued to a financial institution.

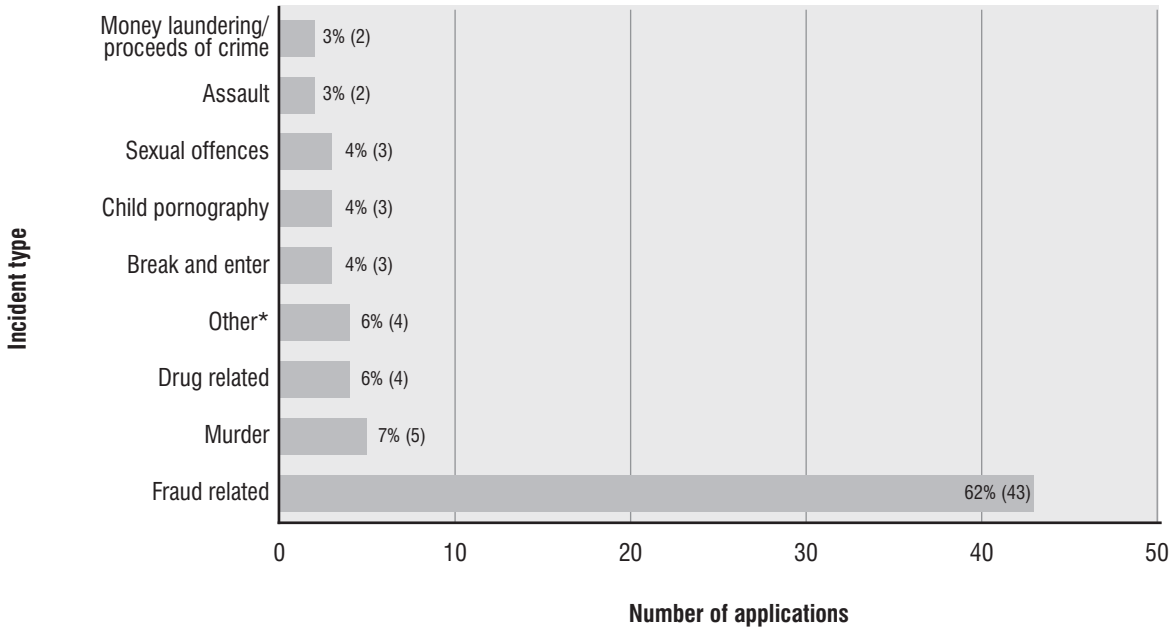
In establishing the reasonable grounds upon which the notice was sought, the police officer who applied for the notice to produce stated that the Telstra worker had confirmed that the documents were on hand and would be produced upon presentation of a search warrant.[1116]

Notably, the application referred to in the case study above was lodged only five months after the commencement of LEPRA. Inexperience with the new provisions is a likely explanation for the lodgement of a notice to produce application rather than a search warrant.

37.1.4.5. Type of offence for which a notice to produce was sought

Figure 24 indicates the types of offences for which applications for a notice to produce documents were sought in the Local Court sample. The majority of applications (62%) were for fraud related offences, 7% were for murder related offences and 6% were for drug related offences.

Figure 24. Applications for notices to produce by offence type



Source: NSW Local Court data, 1 December 2005 — 31 December 2006. Note: percentage total is 99% due to rounding.
*** includes malicious damage 1% (1); extortion/blackmail 1% (1); escape from lawful custody 1% (1) and coronial investigation 1% (1). n=69.**

The case study below demonstrates a typical use of a notice to produce in common fraud related matters.

1116 Details obtained from NSW Local Court documents.

Case Study 45

Use of a notice to produce in an investigation of a fraud allegation

A woman was employed as the payroll manager at a private Sydney school in 1999 to preside over the payroll system for a staff of over 400 people. It was suspected that the woman may be manipulating the payroll system to generate several hundred thousand dollars worth of gross wages being directed into accounts of fictitious employees. After nearly five years the fraud was uncovered after the woman's lawyer contacted the school to alert management. She voluntarily participated in a police interview and advised police that she had siphoned the net amount into three of her personal accounts with differing names, all of which were held at Westpac Bank. The gross amount of money defrauded totalled in excess of three quarters of a million dollars. She informed police that she had withdrawn the funds to support a poker machine gambling habit.

Police applied for notices to produce documents in relation to each of the accounts, seeking documents relating to authority to operate the account, withdrawal slips and statements on the accounts. The authorised officer noted that he was satisfied from the information contained in the application that the person of interest had committed the offences and the items to be seized would be present at the ADI.[1117]

37.1.4.6. Method used to apply for a notice to produce in the sample

According to the Local Court sample data, all of the applications for a notice to produce were lodged in person.

37.1.4.7. Compliance with legislative requirement to report to authorised officer in the sample

Police are required to fill in and return Form 21 to the authorised officer within 10 days of a notice to produce being executed or expiring.[1118] Form 21 which is located in the LEPR Regulations requires the applicant to detail the result of the execution, including a brief description of the items produced.[1119] If a notice expires without being executed, the reasons for not executing the notice must be provided.[1120]

Analysis of the Local Court sample revealed that there was a relatively high rate of compliance in regard to the Form 21 requirements. Of the 52 granted notices to produce 69% (36) met the requirement to submit a Form 21 report to the authorised officer. Four of the 36 were not dated on the day received by the court so it was not possible to calculate the turnaround times. However, of the 32 that were dated, 75% (24) of those were submitted within the ten day period. Overall, the average time it took police to submit the Form 21 forms based on the sample of 32, was seven days.

37.1.4.8. Outcome of refused applications

Of the 17 applications refused by an authorised officer in the sample, a further application was made with additional information included in three instances. Those applications were subsequently granted by an authorised officer. The majority of refused applications were not resubmitted, usually because the notice was to be served on an institution other than an ADI or because the information sought could be more readily obtained via a search warrant. In other words, the notice to produce was not the most appropriate vehicle to be used for obtaining the information required.

Case Study 46

Notice to produce application granted following provision of further information

An officer submitted an application for a notice to produce documents to an authorised officer as part of an investigation into allegations that a woman had been passing valueless cheques to obtain various goods at a local shopping centre. The authorised officer initially refused to issue the notice due to insufficient bank details and information being supplied in the application. Later that day, a further application was submitted containing specific additional information relating to the name of the account holder, bank account details and the precise information sought by the investigating officer. The application was subsequently approved.[1121]

1117 Details obtained from NSW Local Court documents.
1118 Law Enforcement (Powers and Responsibilities) Regulation 2005, Schedule 1, Form 21 — Report to authorised officer about notice to produce documents. Note, the place where the documents are held does not need to be specified if this would adversely affect the security of the documents.
1119 Law Enforcement (Powers and Responsibilities) Regulation 2005.
1120 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.74.
1121 Details obtained from NSW Local Court documents.

Case Study 47

Refusal to issue notice to produce due to lack of evidence of connection between the documents sought and the alleged offence

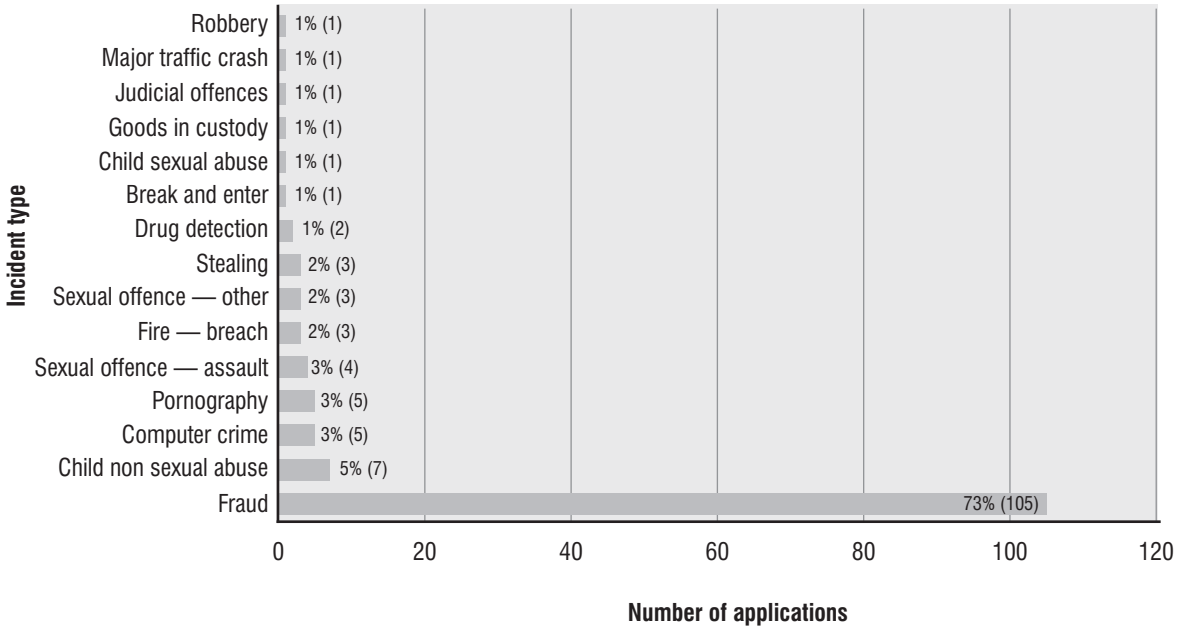
A notice to produce documents was sought to assist in the investigation of a case of suspected 'shaken baby syndrome' upon a six month old baby conveyed to a local hospital by ambulance officers. Once the matter was referred to the Joint Investigation Response Team and interviews were conducted with all persons nominated as suspects, it became apparent that further investigation was required. [1122] In particular, in order to verify certain information provided by the child's mother a notice to produce application was submitted to enable police to track her movements via her banking activities to corroborate some information she had provided. The authorised officer was not satisfied that there was a sufficient connection between the commission of the offence and the items sought and refused to approve the application. No subsequent application was made in this matter.[1123]

37.2. Analysis of the COPS sample

As discussed previously in this chapter, the number of COPS events available for analysis was much lower than expected. According to the information extracted from COPS, there were a total of 143 uses of notices to produce by police during the review period. We know that actual usage of notices to produce was far greater during this period than these COPS records reveal as the information provided by the Attorney General's Department recorded 2,675 instances of notices to produce being applied for during the same period. We have therefore used the COPS data as a sample only of the overall number of notices to produce applied for by police during the review period.

Figure 25 illustrates the types of incidents where police applied for a notice to produce documents from an ADI in the COPS sample.

Figure 25. Applications for notices to produce by incident type — COPS sample



Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2007. n=143.

The types of incidents for which notices to produce were sought remained relatively constant over the period of the review.

1122 Joint Investigation Response Teams (JIRTs) jointly investigate child care matters. They are staffed by officers from the Department of Community Services, NSW Health and the NSW Police Force.
1123 Details obtained from NSW Local Courts documents.

Similar to the Local Court sample analysis the COPS sample revealed that notices to produce were most frequently obtained for fraud related matters accounting for 73% of the sample. Child non-sexual abuse was the next most frequent offence (5%), followed by pornographic offences and computer crime, both totalling 3% each in the sample. The following are some examples from the COPS sample of the types of incidents for which an application for a notice to produce was made:

- During a break and enter a blank cheque was stolen from a woman's handbag. Four days later a female attended a bank with a cheque made out for a sum of nearly $5,000. The victim of the break and enter contacted her bank when she realised that her account was overdrawn. Police spoke to the bank which issued the cheque, and the bank in which it was deposited, and sought to obtain copies of the security footage at the latter, as well as copies of the deposit slip, the cheque, and transaction records for the relevant account.[1124]
- A woman was employed as an accounts clerk for a retail firm, and it was her role to pay the company's accounts and purchase items for the company. During the course of her employment the woman fraudulently took money and used it to pay personal bills and make personal purchases to the value of over $30,000. Police sought bank records in an effort to confirm the allegations made by the woman's employer.[1125]
- A couple put an advertisement in a newspaper seeking a truck motor. They were contacted by a man who claimed to have such a motor. The couple paid a deposit of $200 directly into a bank account nominated by the man, but did not receive the motor and were subsequently unable to contact him. Police inquiries identified a number of similar events which appeared to involve the same offenders and the same bank account. Police wished to determine the identity of the account holder of the relevant bank account.[1126]
- A couple separated and sold their house. The real estate agent made out separate cheques for nearly $9,000 to each of them. The woman contacted the real estate agent when she did not receive her cheque. It was alleged that her ex-partner kept both cheques, and deposited the cheque made out to the woman into a joint account before transferring the funds into a personal account. Police wished to obtain documents from the bank to determine whether or not this had in fact occurred.[1127]
- A young woman separated from her male partner and reported to police that he had sexually assaulted her from a young age prior to their relationship. She told police that he paid her $32,000 when they separated. The accused denied sexually assaulting the young woman and claimed that she had threatened to go to the police alleging sexual assault unless he paid her more money following their separation. Police wished to obtain bank records to verify the payment of the money.[1128]
- A man was charged with sexually assaulting two teenage males. The males claimed the man had paid them money for consensual sex. The man acknowledged that he had paid the males for sex with cash withdrawn at a particular automatic teller machine, but claimed he thought the males were over 16 years of age. Police sought bank records to corroborate the victims' version of events and confirm the dates when the alleged assaults took place.[1129]
- During a search of a residence police located illegal drugs, drug paraphernalia and over $20,000 in cash. The occupier acknowledged the money was his, but refused to inform police where he obtained it. It is likely police sought bank records to obtain additional information about the financial dealings of the accused.[1130]

37.2.1. Locations where notices to produce applications were made

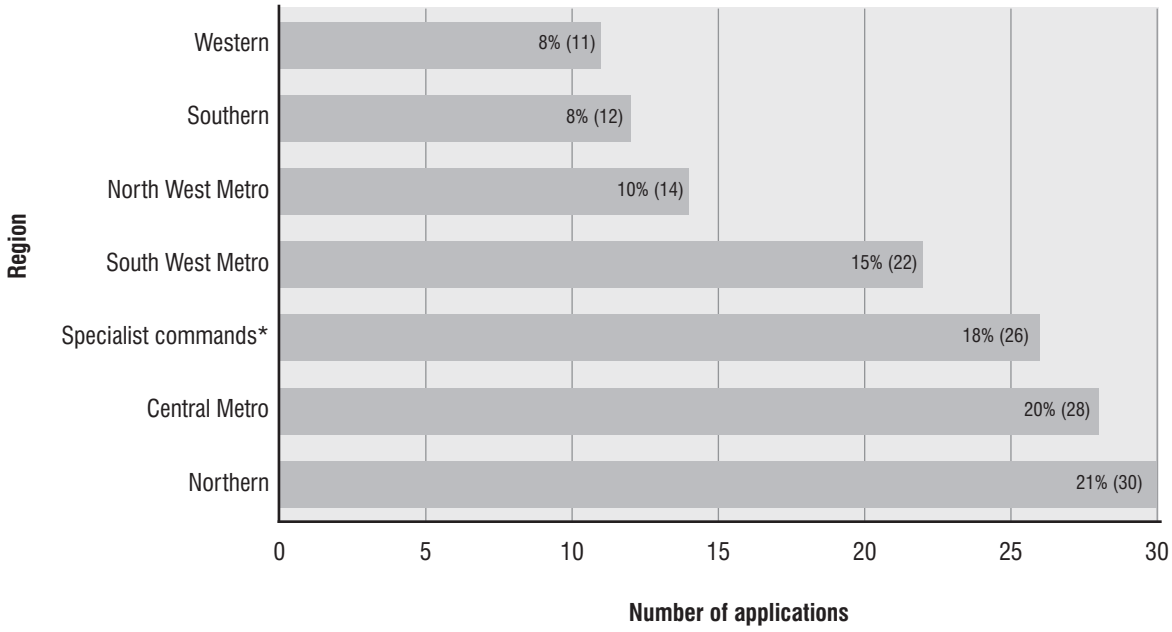
For policing purposes, New South Wales is divided into six regions with each region comprising a number of LACs. Figure 26 shows the number of notice to produce applications applied for in each region, according to the COPS sample data. The number of notice to produce applications lodged by specialist commands has also been recorded although it should be noted that the specialist commands are not region specific and include commands such as the Counter Terrorism Coordination Command, State Crime Command, Forensic Services Group, Fraud Squad, Drug Squad and Middle Eastern Organised Crime Squad which investigate crimes across the state relevant to the specialised fields.

According to the COPS sample, the Northern Region whose commands stretch from the Central Coast to the Tweed/Byron area applied for the highest number of notices to produce in the review period, recording the most applications in both the first and second year of the review. Specialist commands recorded a significant increase

1124 Example 1. NSW Police Force COPS data.
1125 Example 2. NSW Police Force COPS data.
1126 Example 3. NSW Police Force COPS data
1127 Example 4. NSW Police Force COPS data.
1128 Example 5. NSW Police Force COPS data.
1129 Example 6. NSW Police Force COPS data.
1130 Example 7. NSW Police Force COPS data

in the number of applications made throughout the review. In the first year of the review period specialist commands applied for 9% of the total number of applications and the number applied for by specialist units in the entire review period was 18%.

Figure 26. Applications for notices to produce by region



Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2007.
***Specialist commands are not region specific but operate on a statewide basis targeting particular types of crime. Examples include the Counter Terrorist Coordination Command, Serious Crime Squad, Fraud Squad, Drug Squad and Middle Eastern Organised Crime Squad. n=143.**

37.2.2. Methods used to apply for notices to produce in the COPS sample

Table 9 provides a snapshot of the methods by which notices to produce were sought.

Table 9. Methods used to apply for notices to produce — COPS sample

Application method	Total number
Fax	10
In person	131
Letter	1
Memo	1
Total	143

Source: NSW Police Force COPS data 1 December 2005 — 30 November 2007. n=143.

This shows that 92% (131) of applications were lodged in person, 7% (10) were faxed, and 1% (2) of applications were lodged by other means, one by memo and one by letter.

In the NSW Local Court, if documents or orders such as crime scene warrants, search warrants, apprehended violence orders (AVOs) and the like, are required urgently and the court is not open, warrants are applied for and issued by telephone by an after hours panel. The After Hours Panel is made up of registrars from various courts around New South Wales. They are on call throughout the year according to a roster system. Each After Hours Panel member is supplied with a fax machine at their home and when on call they receive by fax, crime scene, search and other warrant applications. Any subsequent discussion about the application takes place by telephone.

During the review period, members of the After Hours Panel were based at Ballina, Blacktown, Burwood, Cowra, Fairfield, Gosford, Grafton, Lismore, Manly, Mt Druitt, Newcastle, Newtown, Nowra, Parramatta, Parramatta Children's Court, Tamworth, Tweed Heads and Wagga Wagga.

We have been advised by the Attorney General's Department that it is not common for notices to produce to be issued by telephone. This is because ADIs are generally closed outside business hours, and employees would therefore usually be unavailable to locate and produce the required documents.[1131]

In addition, whilst police may wish to obtain a search warrant outside court hours so that they can urgently conduct a search of a suspect's house to minimise the risk of evidence being lost, damaged or tampered with, this is not necessary for documents from ADIs. In cases where a notice to produce documents is sought, the likelihood of the required documents being subject to such risks is much smaller, particularly as the relevant ADI itself is not a party to the offence being investigated.

These factors mean that the requirements for an authorised officer to issue a notice to produce by telephone, which include that the authorised officer must be satisfied that the notice is required urgently and that it is not practicable for the application to be made in person[1132] are not often likely to be present when a notice to produce documents is sought.

We only identified one instance according to the COPS data sample of a notice to produce being applied for and granted by telephone. A close examination of the COPS entry indicated that the matter being investigated was a standard fraud matter where the person of interest had made admissions and had been taken into custody on a weekday during business hours at a very busy police station in metropolitan Sydney. As it was not clear what urgency surrounded the case to require a notice to produce to be granted via telephone, we contacted the officer in charge of the matter to obtain some further background information. Upon checking his records the officer indicated that he had in fact sworn out the application in person and that the COPS information had been entered in error.[1133]

37.3. Offences under section 57 of LEPRA

According to information obtained by BOCSAR, there were no charges against people for offences under section 57(2) — failure or refusal to comply with a notice to produce documents without reasonable excuse, during the review period.

1131 Email from Attorney General's Department, 6 December 2006.
1132 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.61(2).
1133 Details obtained from COPS data.

Chapter 38.
Issues relating to notices to produce

This section discusses the issues relating to the notice to produce provisions that have been identified through our scrutiny of the implementation of the legislation.

38.1. Issues related to operation and interpretation of provisions

38.1.1. Threshold requirements when applying for and determining notice to produce applications

For the purposes of the review we conducted a survey of authorised officers and asked them whether they had any concerns or issues relating to the operation of the notice to produce provisions. In their survey responses a number of officers questioned why there were differing thresholds or tests in section 53 and 54 of LEPRA for police and authorised officers to consider when applying for or determining a notice to produce application.

Section 53 of LEPRA provides that a police officer *who believes on reasonable grounds* that an ADI holds documents that may be connected with an offence committed by someone else may apply to an authorised officer for a notice to produce the documents.[1134] Section 54 of LEPRA provides that an authorised officer may issue a notice to produce documents *if satisfied there are reasonable grounds to suspect* that an ADI holds documents that may be connected with an offence and the ADI is not a party to the offence.[1135]

In contrast, police applying for a search warrant *must believe on reasonable grounds* there is or will be a thing connected with a particular indictable offence and the authorised officer *must be satisfied that there are reasonable grounds for doing so*.[1136]

One authorised officer commented on the differing thresholds as follows:

> *Why is the test different? If a police officer believes (section 53) why does an authorised officer only have to be satisfied as to suspicion? What is the appropriate test? Belief or suspicion?*[1137]

It is difficult to determine the rationale of Parliament in providing different tests for applying for and issuing a notice to produce documents. In the second reading speech the Attorney General did not refer to the thresholds required for police to apply for or an authorised officer to issue a notice to produce.

In *George v Rockett*[1138] the High Court distinguished 'belief' from 'suspicion'. In particular, the High Court approved the formulation in *Hussein v Chong Fook Kam*[1139] that 'suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking'. In comparison the court held 'the objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief' such that the belief is 'an inclination of the mind towards assenting to, rather than rejecting, a proposition'.

Accordingly, the different wording of sections 53 and 54 causes a lower threshold to apply to the issue of a notice than to an application for a notice in circumstances where there appears to be no operational reason for the differing tests for notices to produce.

It is noted that the parliamentary background briefing paper document titled *Police Powers in NSW: Background to the Law Enforcement (Powers and Responsibilities) Bill 2001* stated the following in relation to the thresholds:

> *The new power to apply for a notice to produce documents from banks is subject to the more stringent 'reasonable belief' test. There can be no doubt that this last power, by which police can inquire into a persons financial assets, is one that constitutes an intrusion into the privacy of the individual and is not to be exercised without consultation and a degree of reflection.*[1140]

1134 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.53(1).
1135 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.54(1).
1136 *Law Enforcement (Powers and Responsibilities) Act 2002,* ss.47 and 48. The *Police Powers and Responsibilities Act 2000* (Qld), sections 180 and 181 provide that a police officer applying for a production notice may do so if they reasonably suspect connection with an offence. A magistrate may issue a notice if satisfied there are reasonable grounds for suspecting a connection with an offence.
1137 Authorised officer survey response 9.
1138 (1990)170 CLR 104 at p.104.
1139 (1970) AC 942 at p.948.
1140 Griffith G., *Police Powers in NSW: Background to the* Law *Enforcement (Powers and Responsibilities) Bill 2001*, NSW Parliamentary Library Briefing Paper No. 11/2001, August 2001, p.74.

The briefing paper suggests that it may have been Parliament's intention to have the higher 'reasonable belief' test apply to both the application for, and the issuing of, notices to produce.

In light of this there appears to be no demonstrable basis for the apparent anomalous situation of requiring different standards to be imposed on police and authorised officers when applying for and issuing a notice to produce.

Recommendation

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.

38.1.2. Meaning of 'document' for the purposes of notice to produce provisions

The main objective of the notices to produce provisions within LEPRA is to allow police to obtain documents from a financial institution when it believes on reasonable grounds that the institution holds documents that may be connected with an offence.

In the course of our analysis of the Local Court data on notices to produce, it was identified that the scope of the term 'document' was raised as an issue on a number of occasions, particularly in regard to the retrieval of closed circuit television (CCTV) footage filmed from bank premises.

Case Study 48

Notice to produce refused on basis that CCTV footage is not a 'document'

A report was made to police that a member of the public had been throwing rocks in the main strip of a popular tourist spot late one evening which resulted in significant damage to the glass panels of a particular shopfront located in close proximity to a bank. On attending the scene, police were unable to locate the person of interest but noted the presence of a security camera at the front of the bank nearby to the damaged shopfront. Police applied to an authorised officer for a notice to produce documents from the bank. In particular, police requested the bank's CCTV footage from the evening in question in order to identify a suspect for the malicious damage.

The authorised officer refused the application on the basis that he did not consider CCTV footage to be a 'document' of the type envisaged by the Act. The authorised officer later sought advice from the Attorney General's Department who informed him that the *Evidence Act 1995* contains a broad definition of a document and that it would have been appropriate to issue a notice to the bank in this instance.

The authorised officer commented to the Attorney General's Department that he believed a definition of 'document' should be added to the Act to provide clarity on the issue.[1141]

Case Study 49

Notice to produce refused on basis that CCTV footage is not a 'document'

A man reported to police that $300 had been withdrawn from his account at an ATM without his permission. The man was able to give police an exact date and time of the incident and also knew the location of the ATM used for the withdrawal according to his personal bank statement. Police made an application for a notice to produce documents to be issued on the bank to retrieve a CD of footage depicting the suspect accessing the ATM at the time reported by the victim. The authorised officer refused the application on the grounds that the item sought was not a document, but an object and advised the officer in charge of the investigation to apply for a search warrant instead. A search warrant was subsequently applied for, granted and successfully executed.[1142]

1141 Details obtained from NSW Local Court documents.
1142 Details obtained from NSW Local Court documents.

In our LAC consultations we were also advised of a further instance of an authorised officer refusing to issue a notice to produce documents for CCTV footage. In this case the police officer reportedly outlined in the application that he/she wished to obtain written documentation and also CCTV footage. The police officer was told by the authorised officer that a search warrant would be needed to obtain the CCTV footage, as a notice to produce did not authorise retrieval of such material. The police officer's supervisor commented on the matters as follows:

> *So I'm not particularly happy with a notice to produce. I think search warrants are a better facility at this stage but I know the guys are still applying for them … I don't see an advantage I've got to be honest and in light of the recent incident where the officer applied for the notice to produce and then she couldn't get the CCTV footage, so she had to go back and get a search warrant anyway. It just wasted one of my officer's hours typing when she could have just done one search warrant and got the whole lot.*[1143]

It is interesting to note that of the four instances where bank CCTV footage had been requested by police by way of a notice to produce application, two of those applications were granted by authorised officers and two applications were refused.

The term 'document' is not defined in LEPRA, so that the definition of document in section 21 of the *Interpretation Act 1987* may apply 'unless the contrary intention appears'.[1144] Section 21 of the Interpretation Act defines document as follows:

*'**document**'* means any record of information, and includes:

(a) anything on which there is writing, or

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or

(d) a map, plan, drawing or photograph.[1145]

It is clear that subparagraph (c) of the above definition, on any reasonable interpretation, operates to include CCTV or similar visual recordings within the meaning of documents in the context of the notice to produce provisions. No intention to limit the operation of the provisions to financial records only is disclosed in the second reading speech or the legislation, only that the documents to be produced must be 'connected with an offence'. It should be noted however, that it is still necessary for police to utilise a search warrant in some circumstances, for example when requiring the contents of a bank customer's safe custody packet or box.

Recommendations

68. The NSW Police Force ensure that standard operating procedures developed for notices to produce include guidance on the definition of a 'document' in the context of notices to produce documents.
69. The NSW Attorney General's Department 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.

38.1.3. Meaning of 'offence'

Section 53 and 54 of LEPRA require that to apply for and issue a notice to produce documents a police officer and authorised officer must respectively have a reasonable belief or suspicion that the documents may be connected with an offence.[1146]

In response to our survey one authorised officer expressed some uncertainty as to whether the term 'offence' in the context of the provisions is limited to the particular categories of offences set out in the search warrant provisions of LEPRA, in particular the limits set out in section 47 of LEPRA. Section 47 details the specific offences for which a search warrant may be applied for and indicates a deliberate intention by Parliament to deal with search warrants separately.[1147]

1143 Focus group with Detective Sergeant, LAC E, 16 October 2008.
1144 *Hall v Jones* (1942) 42 SR (NSW) 203.
1145 *Interpretation Act 1987,* s.21.
1146 *Law Enforcement (Powers and Responsibilities) Act 2002,* ss.53(1) and 54(1).
1147 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.47.

In our view 'offence' in the context of sections 53 and 54 is not ambiguous and there is nothing to indicate an intention that its operation be constrained in a manner similar to that set out in section 47.

38.1.4. Timeframe for the provision of documentation

Section 54(2) of LEPRA provides that when issuing a notice to produce the authorised officer may specify in the notice that the documents are to be produced within a stated time and at a stated place and in a stated form (whether electronic or otherwise). Section 57(2) further requires that an ADI, or an officer of an ADI must not, without reasonable excuse, fail or refuse to comply with a notice to produce documents. The maximum penalty for a breach of this section is 100 penalty units ($11,000) or two years imprisonment or both. There were no prosecutions for this offence during the review period.

During our consultations with police the issue of what constitutes a breach of a notice to produce was raised. In particular it was noted that the legislation did not specify a timeframe within which ADIs have to supply the documents requested. One police officer commented:

> *[The] time issue … I don't think there's any real penalty for the financial institution for not comply[ing] with it either unlike … with a search warrant, it's very clear what you can and can't do if they don't comply but I'm not entirely sure what you do when they don't comply with a notice to produce.*[1148]

It appears that this uncertainty is not limited to police, as one of the ADIs also raised the issue, questioning the timeframe within which it is required to produce the documents:

> *There are issues surrounding the terms of expiry on a notice to produce. Some police advise that the document expires within 72 hours and that we must supply the documents within 72 hours.*
>
> *Others claim that the notice to produce needs to be served on the bank within 72 hours and that it does not matter when the documents are supplied to them.*[1149]

The ADI was of the view that the matter required clarification by way of legislative amendment.[1150]

In our survey of authorised officers we asked whether they specify the time, place and form in which the documents should be provided. Responses to this question varied, with some authorised officers imposing 24, 48 and 72 hour deadlines, whilst others did not impose a deadline at all as they rely on the information of the applicant (police) as to when the ADI will have the documents available.

It is clear that both the police and ADIs would prefer certainty in this context. In the circumstances, we are of the view that standard operating procedures developed for notices to produce should clearly outline the terms of expiry for a notice to produce and also highlight that an authorised officer may specify a timeframe in which the documentation must be provided once police have issued a notice to produce to an ADI as outlined in section 45(2) of the Act.

Recommendation

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.

38.1.5. Applications to institutions other than ADIs

Police may apply to an authorised officer for a notice to produce documents from an ADI, when it is believed on reasonable grounds that the institution holds documents that may be connected with an offence committed by someone else.[1151]

An ADI is a body corporate which has been granted authority by the Australian Prudential Regulation Authority to carry on banking business in Australia.[1152]

1148 Focus group with Asset Confiscation Unit and Fraud Squad, 11 December 2007.
1149 ADI survey response, Bank D.
1150 ADI survey response, Bank D.
1151 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.53.
1152 *Banking Act 1959 (Cth),* ss.5 and 9. See also *Interpretation Act 1987*, s.21. See section 33.1 for current list of ADIs.

As detailed in section 37.1.4.4 there were five instances in the local court sample where police inappropriately applied for a notice to produce documents from an institution other than an ADI. Three of these applications were refused by authorised officers and two appeared to be inappropriately granted by authorised officers.

The applications that were granted and executed included a notice to produce documents issued to a Sydney hospital for medical records and an application for a notice to produce to access television programming information from a television station for the purposes of investigating a charge of wilfully exposing a child under 14 to indecent material.

The applications made by police to institutions other than ADIs that were refused by authorised officers included requests to a telecommunications provider, the Department of Corrective Services and a municipal library.

Clearly there is some misunderstanding amongst police and authorised officers as to the institutions that may be subject to a notice to produce documents.

Recommendations

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.
72. The NSW Attorney General's Department ensure that advice and guidance is provided to authorised officers about the types of institutions that may be subject to these notices.

38.1.6. Discrepancies in information requested and supplied through notices to produce

Our consultations with police and ADIs revealed a number of issues related to the request and delivery of documentation by way of notices to produce.

38.1.6.1. Police concerns

Police officers from units specialising in fraud matters raised the issue of ADIs failing to provide all the documents requested in an application for a notice to produce or providing incorrect documents. Officers explained that currently, prior to applying for a notice to produce, police usually contact an ADI's compliance review section to request certain documentation in relation to the investigation of a particular offence. After some duration they are then contacted by the bank informing them that the documentation, upon presentation of a notice to produce, is ready for collection at the nominated local branch. Police contend that it is often the case that when they attend the ADI for execution of the notice to produce it is only then that they discover that some of the documentation is missing. As one officer explained:

> *Sometimes you find that you ask for six different things but … they'll say the documents are ready and [you] go down and find that there was only two there and it's either, they don't exist but they don't tell you that or they can't be located or they haven't complied with them 'cause they didn't understand the documentation … it gets very frustrating especially when you're going through compliance review because you can't ring up and say "well did you read the thing" and you have to start from scratch again and go through the whole process … But once they've supplied those documents the warrant has been completed.*

In effect, once a notice to produce has been executed, there is currently no scope for it to be amended and re-submitted. If irrelevant documents were inadvertently requested in the notice or if the wrong documents were provided in response to the notice, officers must prepare a fresh notice to produce application, have it determined by an authorised officer and then execute it on the bank in order to obtain the correct documents.

Some police officers suggested that in order to rectify this situation amendment should be made to the legislation to allow police to vary their original application.

38.1.6.2. ADI concerns

In consultations, ADIs expressed the following concerns in relation to the information requested by police through notices to produce that:

- the ADI often does not understand the information request from police
- there is often not enough information contained in the request to allow ADIs to identify and locate the documents requested and to enable them to comply with the request in a timely manner

- the contact details of police making the request are often not supplied in the request making it difficult for the ADIs to clarify the information sought with the requesting officer
- the information requested can be substantial and wide-ranging making it difficult for ADIs to comply with the request.

In relation to the last point, an example was given by one ADI who advised of an instance where a request for cheque butts and deposit slips spanned years. Another bank commented:

> *At times the requestor is unsure as to exactly what they want, therefore, they request everything.*[1153]

38.1.6.3. Information and training for police and ADIs

In the circumstances, it appears that the above issues would be most constructively addressed through the provision of information and guidance for both police and ADIs on applying for and issuing documentation arising from notices to produce.

Delays, misunderstandings and inefficiencies could be reduced through training for police on effective scoping of requests and correct procedures for completing notice to produce applications. In particular this could be beneficial for police located in units who are involved in criminal investigations where notices to produce are regularly utilised.

In the circumstances we are of the view that the NSW Police Force should give consideration to holding discussions with representatives from major ADIs with a view to developing appropriate SOPs for police about requesting information from ADIs. In addition, consideration should be given to developing a step by step information/instruction sheet for ADIs which outline the key aspects of the notice to produce provisions and provide guidance on supplying documentation in response to notices to produce. These information sheets could then be distributed to compliance divisions within ADIs and made accessible for bank staff on-line.

Recommendations

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.
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.

38.1.7. Compliance with legislative requirement to report to authorised officer

Police are required to fill in and return Form 21 to the authorised officer within 10 days of a notice to produce being executed or expiring. Form 21, which is located in the LEPR Regulations requires the applicant to detail the result of the execution, including a brief description of the items produced.[1154] If a notice expires without being executed, the reasons for not executing the notice must be provided.[1155] Completed forms are to specify the person responsible for the documents produced by the ADI, and the place where they are located. In addition, copies of any receipts provided for items produced under the notice must be attached to the completed form.[1156]

During our LAC consultations, some officers were of the view that reporting back to the relevant authorised officer within 10 days of a notice to produce being executed or expiring, is an onerous requirement.[1157] As one officer stated:

> *… for notices to produce, the only thing I don't like about it is the report to the authorised justice. We've no chance of getting rid of it but it just seems like you're wasting their time as well as yours.*[1158]

In consultations, some police commented that unlike search warrants, there are no major repercussions if a notice to produce documents is improperly executed and thus reporting back to authorised officers is unnecessary. Once officer commented:

1153 ADI survey response, Bank A.
1154 Law Enforcement (Powers and Responsibilities) Regulation 2005.
1155 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.74.
1156 Law Enforcement (Powers and Responsibilities) Regulation 2005, Schedule 1, Form 21 — Report to authorised officer about notice to produce documents. The place where the documents are held does not need to be specified if this would adversely affect the security of the documents.
1157 Focus group with detective constables, LAC G, 19 November 2007.
1158 Focus group with detective constables, LAC G, 19 November 2007.

> *Repercussions about search warrants are so much … worse than the repercussions about notice[s] to produce. It's probably much lower on their [authorised officers'] priority and they've got plenty of other things to be doing.*[1159]

The police officers indicated that their experience with notices to produce so far is that the level of compliance from ADIs is quite high. Therefore, submitting a report to an authorised officer detailing what documents they are provided with, seems superfluous. However, in the event of a bank claiming privilege and refusing to supply documents, the officers conceded it would be beneficial:

> *You tick the boxes to let them know who now has possession of that. Obviously it's going to be me. I was the one — it would be good if they [the ADI] didn't cooperate but like I said I've never had that.*[1160]

Despite the misgivings expressed by many officers we found from our analysis of the Local Court sample that there was a relatively high rate of compliance in regard to the Form 21 requirement. Of the 52 granted notices to produce, 69% (36) met the requirement to submit a Form 21 report to the authorised officer. In terms of measuring whether these were submitted within the 10 day timeframe, four of the 36 were excluded as they were not dated on the day received by the court so it was not possible to calculate the turnaround times. However, of the 32 that were dated, 75% (24) of those were submitted within the 10 day period. Overall, the average time it took police to submit the Form 21 forms based on the sample of 32, was approximately seven days.

We are mindful that one of the primary ways of achieving accountability is through reporting and the keeping of comprehensive records which can be scrutinised. In the case of notices to produce, it is clear that the Form 21 requirement achieves this purpose. However, we are also aware that the rationale behind compliance requirements following the execution of notices to produce and other types of independently authorised warrants may benefit from periodic review from time to time in the interest of reducing red tape. In our view reporting back to authorised officers on the execution or expiration of a notice to produce or other type of warrant should be subject to further review. See recommendation relating to this matter in section 27.6.2.

38.2. Devolving the authority to determine applications for notices to produce

During our consultations with police a number of officers suggested that to expedite the process for obtaining documents from ADIs they should be able to seek authorisation for the issue of a notice to produce documents from a senior police officer. Police frequently identified a duty officer or inspector as the appropriate senior officer in this respect.

In response to our issues paper, the NSW Police Force commented that 'consideration should be given to allowing senior police to authorise notices to produce'.

The main arguments to devolve authority to determine applications for notices to produce to senior police are discussed below.

38.2.1. Timeliness

38.2.1.1. Police concerns

Some police officers are of the view that the requirement to appear at court for the purpose of obtaining a notice to produce creates an unnecessary time impost and contributes to delays in the investigation of an offence. As one officer explained:

> *You might have to drive 20 minutes, half an hour to get to that magistrate and park the car and all that. It's a couple of hours out of your shift to get something that is only a procedural document so it keeps the bank happy.*[1161]

Coupled with this, some officers also stated that once an application is put before an authorised officer it can take a long time for a determination. As one officer commented:

> *They've got to review everything and … I have had [to answer] a few questions outside of [the] circumstances of the case.*[1162]

1159 Focus group with detective constables, LAC G, 19 November 2007.
1160 Focus group with detective constables, LAC G, 19 November 2007.
1161 Focus group with Fraud Squad and Assets Confiscation Unit, 11 December 2007.
1162 Focus group with detective constables, LAC G, 19 November 2007.

A number of police referred to the South Australian method of dealing with search warrants as something which would be desirable to replicate in New South Wales. These officers were referring to the power exercised by the South Australian Commissioner of Police under the *Summary Offences Act 1953* (SA) allowing a senior officer appointed by the Commissioner to carry a general search warrant (GSW) card. The card enables them to exercise instant powers of break, enter and search, where the officer has reasonable cause to suspect that 'there is anything that may afford evidence as to the commission of an offence'.[1163] The ability to use the powers is pre-approved by the Commissioner for a period of six months or less[1164] and is generally regarded as an exceptional power for police which is monitored carefully and allocated sparingly.[1165]

One officer in commenting on the issue that the change from search warrants to notices to produce has not expedited the process explained his frustration in light of the South Australian model:

> *I just find it no different and it will be better off sticking with the search warrant because the only difference … is that … it's mainly aimed at financial institutions. I believe if you said you wanted to address the quickness of obtaining documents, and the fact is that often they are only documents, pieces of paper and I had dealings like the South Australian model, they can just go and seize that. They can't seize drugs, [but] they can do property and banks just because they carry the warrant card around.*[1166]

A number of police suggested that if a senior member of the NSW Police Force was authorised to grant or refuse applications for a notice to produce, this would undoubtedly speed up the process thereby alleviating one of their major frustrations with the notice to produce provisions. Other timeliness issues relating to the determination process for notices to produce raised by police include that:

- the time between the police officer making initial contact with the ADI and then receiving advice that the documents are ready for collection apparently can vary between a few days to a few weeks
- there can be delays in scheduling an appointment with an authorised officer.

38.2.1.2. Research findings

During the review period we considered the cause of any delay in the processing of notice to produce applications.

Our analysis of the notice to produce sample documentation provided by the NSW Local Court found that applications are generally considered in a timely manner by authorised officers. In 97% of the cases we analysed, the application for a notice to produce was applied for, sworn and determined all on the same day. Authorised officers recorded the times the notice was sworn and determined in all 52 of the granted applications and in four of the 17 refused applications. The difference between these two times was used to calculate the average time taken by authorised officers to determine an application. In these 56 applications we found that authorised officers took an average of seven minutes to determine each application. There were no matters identified in the sample where an investigation appeared to be hindered due to the inability to access an authorised officer or have an application determined in a timely manner.

Additionally, in consultations with police we asked to be provided with examples of where the determination of a matter by an authorised officer had unduly delayed police investigations. We were not provided with any direct examples. On the contrary many police informed us that generally notices to produce are not required urgently. One officer noted:

> *Admittedly there's usually no rush on financial records because it's normally a fraud, there's no urgency.*[1167]

In the event that documentation is required from an ADI urgently, an authorised officer may issue a notice to produce by telephone and outside normal hours if they are satisfied that it is urgently required and it is not practicable for the application to be made in person.[1168]

Analysis of the Local Court data for the review period revealed that there were no notice to produce applications lodged outside of standard court hours and that according to the Local Court sample no applications were made by telephone or other communication device — all of the applications for a notice to produce were lodged in person. The COPS sample for the review period indicates that 8% of applications were lodged by fax. [1169]

Some possible reasons for any delay or perception of delay came to light in responses received to our survey of authorised officers. A number of authorised officers advised that police often do not fulfil the information

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1163 *Summary Offences Act 1953* (SA), s.67 (4)(a)(iii).
1164 *Summary Offences Act 1953* (SA), s.67(3).
1165 Advice from South Australia Police Legal Department, 22 January 2008.
1166 Focus group with Fraud Squad and Assets Confiscation Unit, 11 December 2007.
1167 Focus group with detective senior constable, LAC D, 7 August 2007.
1168 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.61.
1169 8% (10 of 130) applications.

requirements to enable them to approve an application. This requires authorised officers to clarify and seek further information from police which may increase the processing time for an application. One authorised officer noted:

> *The main problem I have encountered is that the police have difficulty in identifying the correct name of an institution and often do not include the address. Further, the police do not provide any information on how the documents are to be produced.*[1170]

It is our view that these procedural issues could be addressed through the provision of guidance to police through the development of SOPs for notices to produce as discussed at 38.1.2. Similarly, the issues related to delays between the police officer making initial contact with the ADI and then receiving advice that the documents are ready for collection could be remedied through the facilitation of better communication between ADIs and police also discussed at 38.1.6.3.

During the course of our review we did not uncover any examples where an investigation had been jeopardised due to the inability to access an authorised officer in a timely manner and thus we do not believe that concerns with timeliness in determining applications provides a compelling argument in favour of devolvement.

38.2.2. Complexity of specialist agency work

Police located in units regularly utilising notices to produce were the strongest advocates for the devolvement of authority to determine an application for a notice to produce to a senior member of the NSW Police Force. Officers in the Fraud Squad, for example argued that due to the nature of their work, they frequently deal with matters that are particularly complex and therefore the need to go before an authorised officer to explain their reasons for requiring a notice to produce and 'join the dots,'[1171] is an unnecessary burden. As one fraud officer commented:

> *Imagine retyping whole stories of where it all fits in and ultimately most chambers [authorised officers] would struggle to connect the dots anyway in relation to the information we supply. I suppose I don't understand the whole concept of why we're justifying to someone else that knows nothing about the brief why we require a piece of paper.*[1172]

Whilst we appreciate that matters investigated by specialist agencies are often complex, authorised officers are required in the course of their day to day work to understand complex legal issues and factual scenarios and apply them to police requests for a variety of warrants and orders, including crime scene warrants, search warrants and apprehended violence orders.

In response to our survey one authorised officer commented on the complexity of determining notice to produce applications as follows:

> *Notices to produce by and large are relatively simple, and are usually granted if properly prepared. Also, apart from determining whether police have discharged the requirements of the legislation in their applications, [authorised officers] also often pick up problems or mistakes in applications that could be challenged if they were not fixed up before process was issued.*[1173]

38.2.3. Police can already authorise other similar procedures

Some police officers who favoured devolvement raised the argument that there are other procedures already being authorised by police with adequate accountability mechanisms in place to support them. Controlled operations were mentioned as one such example. Controlled operations are covert operations that allow exemption from criminal liability for law enforcement agencies and certain other persons for the purpose of obtaining evidence of criminal activity.[1174]

Approval to conduct a controlled operation is given by the chief executive officer of the law enforcement agency without reference to any external authority. The Ombudsman plays a significant role, however, in monitoring the actual approval process to ensure accountability for these operations.[1175] It is a requirement of law enforcement agencies to notify the Ombudsman within 21 days if an authority to conduct an operation has been granted or varied. Inspection of law enforcement agency records must occur at least once every 12 months to ensure the agency is complying with the requirements of the *Law Enforcement (Controlled Operations) Act 1997*. The Ombudsman also has the authority to inspect records at any time and can issue a special report to Parliament if there are concerns that should be made public.[1176]

1170 Authorised officer survey response 5.
1171 Focus group with Fraud Squad and Assets Confiscation Unit, 11 December 2007.
1172 Focus group with Fraud Squad and Assets Confiscation Unit, 11 December 2007.
1173 Authorised officer survey response 11.
1174 *Law Enforcement (Controlled Operations) Act 1997*, s.3(1).
1175 NSW Ombudsman, *Annual Report 2006–2007*, p.69.
1176 *Law Enforcement (Controlled Operations) Act 1997*, s.22.

Our experience in monitoring controlled operations indicates that the application and authorisation process is not significantly more streamlined or efficient than the notice to produce process. Detailed applications and authorities are required as is a report back to the authorising officer. The only time saving is that the application does not have to be sworn in person and the report on the operation is required within two months of completion of the operational expiry of the authority rather than 10 days.

38.2.4. The issue of an independent determination

Some police officers claimed in consultations that there are enough checks and balances in place to counter any perception that police are not accountable enough to determine their own applications. As one officer said:

> *I don't think it should be particularly an authorised justice. I think it should just be kept in house. I think the days are gone of the Royal Commission, where you have to be all babysat and treated like kids and we're all adults and we've all got a job to do and there are enough safeguards in place … We're all here to serve the public interest.*[1177]

Support for devolvement to senior police was also expressed by the Police Association of NSW which commented in its submission to our issues paper that 'police resources [are] still being tied up unnecessarily through the current notice to produce process.'[1178]

Some support for the devolvement of the authority to grant notices to produce to senior police was also evident from authorised officers' responses to our survey. The survey asked whether:

> *Authorised officers are the appropriate persons to be responsible for issuing notices to produce? If no, in your opinion should the issuing of notices to produce be devolved to senior police officers?*[1179]

Some of the comments from authorised officers included the following:

> *It is purely an administrative function. If a senior police officer signed off the notice then there would be some savings in terms of time and confidentiality would be maintained.*[1180]

> *[It is] a more timely way for police to conduct the investigation, rather than applying via the court registry for a notice to produce.*[1181]

Whilst a number of authorised officers expressed support for the devolvement of the function others put forward strong views on why it should not be devolved. For example, one commented:

> *Yes — authorised officers are the most appropriate. Reasons: separation of powers, independent, and … better qualified to consider applications in a fair and appropriate manner. In my experience even very senior police officers lack judgement.*[1182]

Whereas some authorised officers expressed a view that because there is nothing onerous to consider in a notice to produce application the function should be devolved, others saw this as the very reason to keep the function under their jurisdiction:

> *Nothing onerous to consider therefore should remain with an authorised justice.*[1183]

Several authorised officers also spoke of the lack of independence if the function is devolved, with one expressing the belief that this was what the *Search Warrant Act 1985* was specifically intended to address.[1184] Another, commenting on the devolvement of the authorisation of both notices to produce and crime scene warrants said:

> *I am of the opinion that authorised justices need to consider the applications as they are impartial … Even if it is simply a perception within the community, it is important that the consideration and granting of warrants needs to be an independent determination.*[1185]

Some police officers also expressed a view that the current system where authorised officers, rather than senior police officers issue notices to produce documents should remain. As one sergeant commented:

> *I don't think it needs to be [devolved]. I think it's quite okay like it is. I don't see any reason.*[1186]

1177 Focus group with Fraud Squad and Assets Confiscation Unit, 11 December 2007.
1178 Police Association of NSW submission to LEPRA issues paper, February 2008, p.8.
1179 Authorised officer survey.
1180 Authorised officer survey response 5.
1181 Authorised officer survey response 8.
1182 Authorised officer survey response 3.
1183 Authorised officer survey response 5.
1184 Authorised officer survey response 17.
1185 Authorised officer survey response 18.
1186 Focus group with sergeants, LAC F, 29 October 2007.

Another police officer noted that as it is not difficult to obtain a notice to produce under the current system and as there is no need to have a notice to produce issued in the middle of the night, unlike perhaps a crime scene warrant, the argument to devolve the function to a senior officer who is accessible both day and night, is therefore not as compelling.[1187]

A detective sergeant commented that although the idea of devolving authority was attractive, he surmised that it was highly unlikely that Parliament would ever grant police such a power. He went on to comment:

> *Having said that though, the short answer is no. It's not appropriate. Why? Because any situation where a non-judicial officer is approving what is essentially a search warrant (or something that achieves the same result as one) is a great intrusion. A man's home is his castle and this decision is best left to the judiciary.*[1188]

Opposition to devolving authority to senior police officers was expressed in the submissions received in response to our issues paper. The NSW Aboriginal Justice Advisory Council (AJAC) commented that 'senior police should never be allowed to authorise an intrusive measure that requires independent decision-making unless there is an imminent threat of danger or harm.'[1189]

The AJAC also questioned whether the NSW Police Force could act as 'judge, jury and executioner' in an administrative sense when it is clear that data recording difficulties have already arisen in relation to notices to produce.[1190]

Another submission received from a member of the public also expressed a preference for the authority to issue a notice to produce to remain with authorised officers as a matter of accountability.[1191]

The issue of independence in decision-making has been examined in other jurisdictions for similar processes.

In Western Australia, a Royal Commission report concerning questions of police corruption (the Kennedy Report) was published in 2004.[1192] This report examined the issue of the most appropriate officers to issue search warrants (in WA, JPs authorise these processes) and commented:

> *WAPS [Western Australia Police Service] Operational Procedure … provides that members have a responsibility to ensure that complaints for obtaining search warrants meet legal requirements for the valid issue of search warrants, including documenting the grounds for suspicion and grounds for belief. It further requires that, prior to approaching a justice, consultation take place with a commissioned or non-commissioned officer, independent of the inquiry, to review the grounds for the issue of the warrant.*
>
> *Given the evidence received by the Royal Commission, it is clear that there have been frequent instances where this procedure was not followed. Instances have been cited where search warrants have been forged, obtained on false or misleading information, and blank warrants signed by obliging justices of the peace …*
>
> *There is no doubt that almost all justices of the peace are honest and conscientious, but the fact is that they are invariably laypersons with no particular legal skill, and often seem to achieve a state of inappropriate familiarity with police officers with whom they deal regularly.*[1193]

The report went on to praise the New South Wales and Commonwealth legislative frameworks whereby magistrates, court officers or other particular designated persons are responsible for issuing warrants. It noted:

> *The use of magistrates, court officers or particular designated persons, to issue search warrants, as opposed to justices of the peace, would lead to a more thorough and independent review of applications for warrants. It is sometimes suggested that the geography of Western Australia requires a more flexible system. Integrity, however, should not be sacrificed in the interests of expediency. In any event, given modern means of communication, including facsimile and email, the requirement that warrants be issued by a magistrate or particular designated person would not impact on the timeliness of police operations.*[1194]

While this Royal Commission report does not specifically address the issue of police issuing search warrants (or notices to produce) it does illustrate some of the risks that arise when robust systems are not in place in relation to the application and granting of coercive instruments.

1187 Focus group with duty officer, LAC F, 30 October 2007.
1188 Focus group with detective sergeant, LAC G, 20 November, 2007.
1189 NSW Aboriginal Justice Advisory Council submission to LEPRA issues paper, 14 August 2007, p.9.
1190 NSW Aboriginal Justice Advisory Council submission to LEPRA issues paper, 14 August 2007, p.9.
1191 B. Rowe submission to LEPRA issues paper, 7 August 2007, p.11.
1192 The Hon. G. A. Kennedy AO QC, *Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer: Final Report*, January 2004.
1193 The Hon. G. A. Kennedy AO QC, *Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer: Final Report*, January 2004, Chapter 12, pp.308–309.
1194 The Hon. G. A. Kennedy AO QC, *Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer: Final Report*, January 2004, Chapter 12, p.309.

In 2007, the New Zealand Law Reform Commission issued a report on its review of the search and surveillance powers embodied in various pieces of legislation, including an examination of production orders, which are orders requiring persons to produce information.[1195] The Commission examined the various arguments put forward as to why it would be appropriate for a law enforcement officer to have the power to issue production orders rather than a judicial officer. It noted the suggestions of urgency (more efficient and effective to have notices issued by a person responsible for the investigations); the issue of privacy (less intrusive than a search warrant, therefore less compelling need to have the production notice examined by an independent officer); and the positive experience of the Serious Fraud Office (SFO) who strongly endorsed the wider application of the tool. The director of the SFO advised:

> *For many people who see assisting the authorities as their civic duty, a notice provides them with formal backing for their cooperation. For these people, the position of the person issuing the notice is irrelevant; it is rather the authority of the notice that sanctions their assistance.*[1196]

Despite these considerations, the Commission found that the suggestion that an officer of a law enforcement agency should be given the power to issue production notices rather than an independent officer, was not justified. It recognised that whilst the safeguards for issuing a production notice are not necessarily the same as for a search warrant, it found that it was more desirable that an independent person 'undertakes the balancing of the law enforcement interests with the privacy interests of the person to whom the notice is directed'.[1197] The Commission also advised that 'it is expecting a great deal of a person with a responsibility for the investigation to apply the same detached consideration [as an independent officer]'.[1198]

A recent High Court decision reinforced the importance of independent authorisation.[1199] The majority of the High Court held that:

> *An office-holder … is also a judicial officer enjoying independence from the Executive Government and hence from the police. This facility is thus an important protection, intended by Parliament, to safeguard the ordinary rights of the individual.*
>
> *An officer … is not immediately involved in the circumstances of the case and … may thus be able to approach these circumstances with appropriate dispassion and attention to the competing principles at stake.*[1200]

38.2.5. Conclusion

Notices to produce documents allow police to access documents of a personal nature and represent a significant intrusion on a person's private or business life. We are of the view therefore that the decision to grant or deny approval should be subject to independent authorisation. We have considered the arguments put forward throughout the review period as reasons for authority to be devolved to senior police. Specifically, we have looked at:

- the concerns held by police regarding the time burden imposed by having to access an authorised officer to have an application considered
- whether authorised officers are the appropriate persons to consider serious and complex fraud matters
- whether there is a valid comparison with other procedures senior police currently have authority to approve
- the value independence brings to the authorisation process.

After considering all of these issues we are of the view that the independence provided by authorised officers in the notice to produce process ensures an impartiality and scrutiny that protects the rights of all parties. Arguments put forward in favour of the devolvement of authorisation to senior police such as concerns that notices to produce applications are not dealt with in a timely manner by authorised officers are not substantiated from our analysis of the Local Court data. Further, we are not persuaded by the argument that authorised officers are not the most appropriate officers to make determinations of applications due to the complex and specialised subject matter contained in notices to produce applications. Accordingly, we recommend that the authorisation for notices to produce remain with authorised officers.

1195 The New Zealand government is presently drafting legislation in relation to the execution of search and surveillance powers by law enforcement agencies in response to the report.
1196 New Zealand Law Commission, *Search and Surveillance Powers*, Report 97, June 2007, p.301.
1197 New Zealand Law Commission, *Search and Surveillance Powers*, Report 97, June 2007, p.302
1198 New Zealand Law Commission, *Search and Surveillance Powers*, Report 97, June 2007, p.302
1199 This High Court decision related to the independent authorisation of a warrant allowing entry onto private premises, however, this issue is also relevant to discussion about the independent authorisation of notices to produce. For further discussion see section 27.3.3 with regard to crime scenes.
1200 *Kuru v NSW* [2008] HCA 26 at p.44.

38.3. Extending the scope of notices to produce documents

Throughout the review period many police officers expressed the view that it would be of great assistance to their investigative work if they could require the production of documents from bodies and instrumentalities other than ADIs. In its submission to our issues paper, the NSW Police Force supported extending notices to produce to other bodies stating that 'adopting this option would assist police in the conduct of their investigations'.[1201]

Police suggested that notices to produce documents be extended so that a range of records could be accessed from a range of agencies, including medical and student records and records from Centrelink and the Roads and Traffic Authority (RTA).

38.3.1. Centrelink records

Throughout our consultations many officers described their frustration with not being able to access Centrelink[1202] records to obtain information which would assist them in progressing investigations. A group of detectives gave the following example where Centrelink apparently refused to assist them with enquiries in an investigation.

Case Study 50

Matter involving request for information from Centrelink

A woman was found dead at a Westfield shopping centre in circumstances resembling suicide. However, in order to rule out murder or foul play detectives immediately began constructing a time line of the woman's last known movements. There was a reported sighting of the woman leaving the local Centrelink office earlier in the day, however, when police contacted Centrelink, workers refused to confirm or deny whether or not she had attended a meeting at the office that day, claiming privacy reasons. The frustrations of the detectives were twofold, in that they felt that the information they were asking for was not sensitive, and in any case, they believed that privacy considerations were not relevant in this instance as the exemption for law enforcement purposes under Part 2, Division 3 of the *Privacy and Personal Information Protection Act 1998* should have applied.[1203]

Officers have suggested on a number of occasions that in incidents such as this, authority to apply for a notice to produce documents held by Centrelink would greatly assist in the progress of investigations. However, it should be noted that coercive powers of this type under New South Wales legislation are not available against Commonwealth agencies. In our view therefore, the issue of accessing Centrelink records cannot be resolved through extending the scope of notice to produce provisions.

38.3.2. Roads and Traffic Authority

During our consultations with police, we were advised that the RTA currently requires a search warrant to be served before it will release any identification information to police. One senior detective described how officers under his command were continually called upon by officers across the state to personally serve search warrants on the RTA to extract photos from RTA licenses for the purpose of being able to confirm the identity of a person of interest in an investigation. This was of particular concern to inner city police located near the head office of the RTA. At the time of our consultation the RTA would not accept faxed copies of a search warrant.[1204] Senior officers were of the view that the imposition this requirement posed on staff was both unfairly onerous and unnecessary and could be easily rectified by widening the scope of notices to produce documents to organisations other than ADIs.

Other stakeholders supported extending the scope of notices to produce to the RTA. The following example was provided by an authorised officer in response to our survey.

1201 NSW Police Force submission to LEPRA issues paper, 24 August 2007, p.11.

1202 Whilst the majority of the High Court in *Residential Tenancies Tribunal of NSW and Henderson; ex parte Defence Housing Authority* (1997) 190 CLR 410 were of the view that the Commonwealth could be bound by a state law of general application, state legislative power is subject to limitations and restrictions the most relevant of which, for present purposes, is to be found in section 109 of the Commonwealth Constitution. For example, tax and social security records are subject to strict non-disclosure provisions in the *Taxation Administration Act 1953* (Cth) and the *Social Security (Administration) Act 1999* (Cth) respectively and a New South Wales law that purported to set aside these non-disclosure provisions by requiring the relevant Commonwealth agencies to produce tax and social security records would be inconsistent with the non-disclosure provisions and, to that extent, invalid by reason of section 109.

1203 Details obtained from focus group with detectives. LAC C, 18 June 2007.

1204 Focus group with detective sergeant, LAC G, 20 November 2008.

Case Study 51

Refusal to issue notice to produce as Roads and Traffic Authority not an ADI

An authorised officer declined to issue a notice to produce documents as the police officer wished to serve the notice on premises which did not meet the criteria of a deposit-taking institution. The application related to an offender who had been photographed at an automatic teller machine taking money. Police wished to match photographic records held by the RTA to the footage recorded on the bank's security camera for the purpose of gathering evidentiary proof. The authorised officer believed that the RTA held documents that arguably, were connected with an offence, however, as it was not a deposit-taking institution as defined in the legislation the officer did not grant the notice. The authorised officer questioned why the notice to produce can only apply to a 'deposit-taking institution'.[1205]

We have now been advised, however, that the NSW Police Force will now be able to access driver licence photographs held by the RTA.[1206] The decision will apply to the investigation of 'major crime'[1207] only and photographic images will be available via iASK.[1208] No service fee will apply. It appears that this outcome has been negotiated between the NSW Police Force and the RTA and articulated in a Memorandum of Understanding.

38.3.3. Medical records

During consultations many police officers spoke of their frustration in being unable to access medical records of both victims and offenders when conducting investigations and suggested that the situation could be rectified through the use of notices to produce[1209] One particular officer recalled an incident where a man committed a murder, cut his hand whilst doing so and then attended a medical centre straight afterwards to obtain a blood test as he wanted to make sure he had not contracted any diseases from his victim. The offender apparently later made these admissions to police and gave permission for the officers to go and access his medical records from the medical centre, as he could not recall the date of the alleged incident.

According to the police officer, the medical staff refused to provide the information, advising police that access would only be granted on the production of a subpoena. The officer remarked that this approach tends to 'just get your hackles up'[1210] and 'almost in a retaliation' police will issue a subpoena for all hard drive medical records, which would involve an inordinate amount of preparation on the part of the medical staff.

Given the sensitive, and potentially incriminating nature of the information police were wanting to access in the above situation, it does not seem unreasonable on the part of the medical staff to insist on legal justification for the release of the information.

38.3.4. Student records

The issue of police accessing student records was raised in the public domain in the lead up to the Asia Pacific Economic Community (APEC) Summit last year. It was reported in the media that the University of Technology and Sydney University had released confidential student information to police without requiring a 'warrant, subpoena or even an explanation',[1211] for the purposes of 'spying' on student activists. The University of Wollongong on the other hand had refused any such requests due to its strongly held views on privacy.[1212] Police defended their actions saying that there is a 'community expectation' that police would access records of a student if they were a missing person, witness or suspected of committing a crime.[1213] A spokesman at the University of Wollongong, however, commented that:

> *It's private information and the laws say we don't give it out to third parties unless they have a legal right of access or students have given permission.*[1214]

1205 Details obtained from Authorised officer survey 18.
1206 NSW Police Force, *Police Weekly*, Vol. 20 No. 16, 12 May 2008, p.6. Note, only the last captured photo of a driver can be obtained.
1207 Major crime includes the following: homicide, serial child abuse, extortion, kidnapping/abduction, bombings, money laundering, arson, terrorist offences, serial violent crime, drug trafficking, complex fraud, serial armed hold-up.It also includes information for the purposes of missing persons and any other crime deemed to be 'major crime' by the Privacy Commissioner.
1208 iASK is an intranet application used by police for requesting information from other agencies and providers. Information requests are then tracked by the iASK facility and can provide cost estimates for information requests. NSW Police Force intranet. Accessed 2008.
1209 Focus group with Investigation Manager, LAC D, 7 August 2007.
1210 Focus group with Investigation Manager, LAC D, 7 August 2007.
1211 "Police got student data just by asking", *The Sydney Morning Herald*, 13 July 2007.
1212 "Police got student data just by asking", *The Sydney Morning Herald*, 13 July 2007.
1213 "Police got student data just by asking", *The Sydney Morning Herald*, 13 July 2007.
1214 "University sticks to letter of privacy law", *The Sydney Morning Herald*, 24 July 2007.

One police officer in consultations mentioned that he could see the benefit in also being able to execute notices to produce documents upon education institutions such as TAFE NSW, for the purpose of being able to access student records. He mentioned an investigation he was conducting into a group of students who were believed to be planning a certain crime, and that access to course enrolments and class attendance for those particular students would be of great assistance in progressing his investigation.[1215]

38.3.5. Other records

Other types of documents which police have mentioned they would like to be able to access via a notice to produce include telephone call charge records from telecommunications companies, utilities records from gas and electricity companies, Medicare records and Australian Taxation Office records.

The range of institutions other than ADIs for which applications were inappropriately made during the review period also gives some indication of the police desire for access to documents from alternative institutions via a notice to produce.[1216] During the review period police attempted to obtain documents from a municipal library, a telecommunications provider, a television station, the Department of Corrective Services and a hospital. In two of these cases authorised officers appeared to inappropriately grant the applications.

38.3.6. The New Zealand model

In New Zealand, production orders are not currently used for general investigative purposes but as an investigative tool under the *Serious Fraud Office Act 1990* (NZ)[1217] and for offences specifically connected with the *Proceeds of Crime Act 1991* (NZ).[1218] The Serious Fraud Office (SFO) is a government department that detects, investigates and prosecutes cases of serious and complex fraud. The *Serious Fraud Office Act 1990* gives the SFO powers to obtain evidence during the course of its investigations. Specifically, it can require any person to produce documents, supply information, attend and answer questions where it has reasonable grounds to believe that an offence involving serious or complex fraud has been committed.[1219] The New Zealand Parliament is currently considering the Serious Fraud Office (Abolition and Transitional Provisions) bill to de-establish the SFO. The Bill is one of four major legislative initiatives intended to reduce serious and organised crime in New Zealand. The functions and powers of the SFO will apparently be transferred to the wider police infrastructure operating within the newly created Organised and Financial Crime Agency (OFCA) of New Zealand.[1220]

In 2007, the New Zealand Law Reform Commission issued a report[1221] on its review of the search and surveillance powers included in various pieces of legislation which had become cumbersome and outdated due to their piecemeal evolution.[1222]

The Commission proposed a codification of law enforcement powers and recommended a single statute combining all general law relating to search and surveillance.[1223] In this review, the Commission also examined the use of production orders and looked at whether such an instrument could be used as a 'tool' to assist in the investigation of crime generally. It found that the introduction of a regime which enables the wider application of production notices would be desirable for various reasons, such as:

- it is a less intrusive power for obtaining material
- the power has already been successfully used by the Serious Fraud Office of New Zealand for over 15 years
- where the third party is cooperative 'a production power better reflects the nature of the transaction'.[1224]

In coming to this conclusion, the Commission also looked at the operation of other similar schemes internationally and found that restricting the scheme to accessing financial documentation did not seem necessary. The Commission stated:

1215 Focus group with senior constables, LAC G, 29 August 2006.
1216 See section 37.1.4.4 and section 38.1.5 for further discussion of this issue.
1217 Ministry of Justice NZ website. http://justice.org.nz/cpu/organised-crime/cabinet-paper-5.html, accessed 28 May 2008.
1218 *Proceeds of Crime Act 1991*, s.68.
1219 The New Zealand Serious Fraud Office website. http://www.sfo.govt.nz/, accessed 24 June 2008.
1220 NZPD, House of Representatives, 20 May 2008, p.16096. http://www.parliament.nz/en-NZ/PB/Debates/Debates/6/2/f/48HansD_20080520_00001047-Serious-Fraud-Office-Abolition-and-Transitional.html, accessed 3 February 2009.
1221 New Zealand Law Commission, *Search and Surveillance Powers*, Report 97, June 2007.
1222 Note, the New Zealand Government is presently drafting legislation in relation to the execution of search and surveillance powers by law enforcement agencies in response to the report. See "Search and surveillance powers modernised", 19 April 2008. http://www.beehive.govt.nz/release/search+and+surveillance+powers+modernised, accessed 6 May 2008.
1223 New Zealand Law Commission, *Search and Surveillance Powers*, Report 97, June 2007, p.16.
1224 New Zealand Law Commission, *Search and Surveillance Powers*, Report 97, June 2007, p.295.

A production order should afford sufficient authority for the party to whom it is directed to provide the enforcement agency with any business or other records including, for example, utility use of data or telephone records.[1225]

Having established that a production order should be introduced for the purpose of general criminal investigation, the Commission also gave consideration as to whether such a regime should allow the issuing of a production notice by an officer of the enforcement agency conducting the investigation. As discussed in section 38.2.4, its view was that the impartiality afforded by an independent officer provided immeasurable benefits and should remain in place.

38.3.7. Current police practice for obtaining documents from organisations

Although police have informed us that they would appreciate the notice to produce provisions being extended to other agencies, it is unclear what form officers would like such an extended scheme to take, and how this would operate in practice. Before consideration is given to the utility and appropriateness of extending the notice to produce provisions, it would be prudent to consider the investigative options currently available to police. The NSW Police Force currently has a variety of ways in which to obtain records or documents from organisations and individuals which are discussed below.

38.3.7.1. Requests for information

During a police investigation, officers may at any time request information relevant to a suspected offence from victims, witnesses or other relevant parties. In the case of theft or fraud, for example, victims are likely to be willing to assist police with the provision of relevant documents, such as receipts, statements, contracts, cheques or cheque butts, contracts and bank account details, particularly if such documents are likely to assist in the arrest and conviction of a person, or assist the victim to obtain recompense, such as victims' compensation or an insurance payout.

38.3.7.2. iASK facility

The NSW Police Force has a facility called 'iASK' that enables officers to obtain information from certain government departments and external agencies, where the information sought is 'reasonably necessary' for the enforcement of the criminal law, or a law imposing a pecuniary penalty or for the protection of public revenue.[1226] Most iASK requests must be authorised by commissioned officers (police officers the rank of Inspector or above).[1227]

There are a range of agencies, from which the NSW Police Force can request information via the iASK system. Telecommunications companies, for example, may provide information about telephone accounts, account holders, and calls; energy companies are able to provide information relating to gas and electricity usage; and the Australian Electoral Commission may divulge details such as a voter's full name, address, date of birth, and employment status. Some of the other agencies participating in the iASK system are Australia Post, Centrelink, Australian Securities and Investment Commission (ASIC) and the Health Insurance Commission (Medicare).

Generally, police requests for information via the iASK system are sent via memo on a computer system. Responses are provided the same way. The iASK handbook advises police officers that the 'turnaround time for receiving information via iASK varies, from one or two days to two weeks, depending on which agency information is sought from'.[1228]

Generally, police we spoke to agreed that the iASK system is useful for obtaining routine information relevant to investigations. However, two concerns were raised about the system. The first being the time it takes some agencies to respond to requests made via iASK; and second, the fact that the cost of obtaining records from some agencies, inhibits officers from seeking or obtaining approval from senior officers to request information. In relation to the high cost of obtaining telephone records, one officer commented:

Look we've got to make an application through a commissioned officer to find out call charge records … A lot of the times we get them knocked back, they'll say you can't have it it's too expensive and it runs into thousands of dollars, the budget for it is incredible.[1229]

Another officer stated:

See the other thing is like telephone records are just a huge cost to our Command — getting reverse call charge records, call charge records, there's all the different costs associated with them.[1230]

1225 New Zealand Law Commission, *Search and Surveillance Powers*, Report 97, June 2007, p.296.
1226 NSW Police 'iASK User's Handbook', 13 July 2006, p.7. NSW Police Force intranet. Accessed October 2006.
1227 Officers who are relieving in Inspector positions are not authorised officers. Requests relating to Passenger Analysis, Clearance and Evaluation (PACE) Alerts, managed by Customs through the Australian Federal Police, do not require approval by an authorising officer. NSW Police 'iASK User's Handbook', 13 July 2006, pp.7 and 11. NSW Police Force intranet. Accessed 5 October 2006.
1228 NSW Police 'iASK User's Handbook' updated, 13 July 2006, p.9. NSW Police Force intranet. Accessed 5 October 2006.
1229 Focus group with detectives, LAC B, 27 March 2006.
1230 Focus group with detectives, LAC D, 24 May 2006.

Several police we spoke to were of the view that if they had the power to issue notices to produce documents to agencies which currently provide information via the iASK system, the issues of concern relating to timeliness and cost of information provision would most likely be overcome.

38.3.7.3. Confiscation of Proceeds of *Crime Act 1989*

The *Confiscation of Proceeds of Crime Act 1989* provides that a police officer can apply to the Supreme Court for a production order for a person to produce 'property-tracking documents' relating to a serious offence. Property-tracking documents are documents that identify, locate or quantify the property (including tainted property) of a person who has committed a serious offence, or documents necessary for the transfer of such property.[1231] These provisions are designed to enable law enforcement agencies to trace the proceeds of and benefits derived from the commission of certain offences, and therefore deprive persons of the proceeds of crime.[1232]

The *Confiscation of Proceeds of Crime Act 1989* also provides that an authorised officer may apply to the Supreme Court for a monitoring order which 'shall direct a financial institution to give information obtained by the institution about transactions conducted through an account held by a particular person with the institution'.[1233] Monitoring orders can only be issued if the Supreme Court is satisfied that there are reasonable grounds for suspecting that the person in respect of whose account information is sought has been, or may be, involved in a serious drug offence, or has benefited or is likely to benefit from the commission of such an offence.[1234]

38.3.7.4. LEPRA

In addition, section 47(1) of LEPRA provides that a police officer may apply to an authorised officer for a search warrant if the officer believes on reasonable grounds that there is or, within 72 hours will be, in or on any premises a thing connected with a particular offence, or a thing stolen or otherwise unlawfully obtained. A police officer executing a search warrant may seize and detain a thing mentioned in the warrant, and may also seize and detain 'any other thing that the police officer believes on reasonable grounds is connected with any offence'.[1235]

It is important to note that, although police will often use a search warrant as the tool to obtain documents from an organisation, in practice they will often specify to the organisation which documents they would like to obtain and wait for the documents to be provided, rather than searching the premises themselves. In other words, police practice in executing search warrants on an organisation often mirrors police practice in executing a notice to produce documents.

38.3.7.5. Memorandum of understanding

Police also have opportunity to form 'understandings' between other government departments and bodies through the use of a Memorandum of Understanding (MOU). NSW Police already have MOUs in place with various government bodies in relation to the exchange of information surrounding operational or administrative functions.[1236] Whilst MOUs are not legally binding they can provide a useful reference point between large organisations to aid the facilitation of efficient information exchange.

38.3.8. The issue of privacy

Several police officers we spoke to were of the view that some stakeholders in a criminal investigation are reluctant to provide information voluntarily to police on the basis that by doing so they may be breaching privacy laws. This is particularly the case when an organisation is asked to disclose personal information about a third party — usually a suspect in a criminal investigation.

The *Privacy and Personal Information Protection Act 1988* (PPIP Act) deals with how all NSW public sector agencies manage personal information.[1237] Section 4 of the PPIP Act defines personal information as:

> *information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.*

1231 *Confiscation of Proceeds of Crime Act 1989*, s.4.
1232 *Confiscation of Proceeds of Crime Act 1989*, s.3.
1233 *Confiscation of Proceeds of Crime Act 1989*, s.68.
1234 *Confiscation of Proceeds of Crime Act 1989*, s.69(1).
1235 *Law Enforcement (Powers and Responsibilities) Act 2002,* s.49.
1236 NSW Police Force intranet list of Memoranda of Understanding. NSW Police Force intranet. Accessed 28 May 2008.
1237 The public sector agencies that are bound by the *Privacy and Personal Information Protection Act 1988* are state government departments, statutory or declared authorities, NSW Police Force, local councils, and bodies whose accounts are subject to the Auditor-General. See *Privacy and Personal Information Protection Act 1988*, s.3, and Privacy NSW website. www.lawlink.nsw.gov.au/lawlink/privacynsw pages about NSW Privacy laws, accessed 6 December 2006.

Examples of personal information are things such as an individual's fingerprints, retinaprints, body samples, and genetic characteristics.[1238]

The PPIP Act contains 12 Information Protection Principles which create legal obligations on NSW public sector agencies in relation to the collection, storage, use and disclosure of personal information, as well as rights to access and correct information held by the agency.[1239] However, the Act also lists a range of circumstances where agencies are exempt from complying with the Information Protection Principles. The relevant exemptions provide that:

- Agencies are permitted to provide law enforcement agencies, including the NSW Police Force, with personal information they have collected, if the provision of the information is for law enforcement purposes.[1240]
- The NSW Police Force and several other NSW investigative agencies, including the Independent Commission Against Corruption, Police Integrity Commission and NSW Crime Commission, are specifically exempted from complying with the Information Protection Principles, except in relation to their administrative and educative functions.[1241]

The *Health Records and Information Privacy Act 2002* regulates the handling of health information in both the public and private sectors in New South Wales. However, this Act does not apply to the NSW Police Force except in connection with its administrative and educative functions.[1242]

The Commonwealth *Privacy Act 1988* contains:

- 11 Information Privacy Principles which apply to Commonwealth and Australian Capital Territory government agencies[1243]
- 10 National Privacy Principles, which apply to private sector organisations, including not-for-profit organisations, with an annual turnover of more than $3 million; all health service providers regardless of turnover; and some small businesses with an annual turnover of $3 million or less.[1244]

Like the NSW privacy legislation, the National Privacy Principles make provisions for organisations to disclose personal information to law enforcement agencies, or for law enforcement purposes.[1245]

Privacy laws are complex. It is therefore not surprising that some agencies or officers are unsure of their obligations in regard to disclosing personal information about third parties, and are reluctant to provide such information to the police voluntarily.

38.3.9. Conclusion

At present, it is unclear to what extent agencies' refusal to provide information about third parties is hampering effective police investigations. It is also unclear why agencies currently refuse to provide police with information in some circumstances. This could be because of confusion about their obligations in regard to privacy laws. It could also be because they understand their obligations in this regard and consider they have a legitimate reason to refuse to provide the requested information.

There is also the question of whether extending the notice to produce provisions is necessary, given the existing powers of police to use systems such as iASK, and legal instruments such as search warrants, subpoenas and production/monitoring orders. In this regard, there is a concern about what impact extending police powers to issue notices to produce documents would have on the privacy and protection of personal information of members of the public.

1238 *Privacy and Personal Information Protection Act 1988*, s.4(2). The *Privacy and Personal Information Protection Act 1988*, section 3(a)–(k) specifies the information that is not considered personal information for the purposes of the Act. This includes information about an individual who has been dead for more than 30 years, or information about an individual that is contained in a publicly available publication.

1239 *Privacy and Personal Information Protection Act 1988*, ss.8–19. See also Privacy NSW website. www.lawlink.nsw.gov.au/lawlink/privacynsw pages about frequently asked questions (for the public sector), accessed 6 December 2006.

1240 *Privacy and Personal Information Protection Act 1988*, s.23(5).

1241 *Privacy and Personal Information Protection Act 1988*, s.27. For a discussion on the difference between law enforcement duties and administrative and educative functions see *HW v Commissioner of Police, New South Wales Police Service and Anor* [2003] NSWADT 214, P. O'Connor.

1242 *Health Records and Information Privacy Act 2002*, s.17.

1243 *Privacy Act 1988* (Cth), s.14.

1244 *Privacy Act 1988* (Cth), Schedule 3. See also website of the Office of the Privacy Commissioner. www.privacy.gov.au/act/index.html, accessed 8 January 2007.

1245 See for example, National Privacy Principle 2.1, *Privacy Act 1988* (Cth), Schedule 3, s.2.1.

If the notice to produce provisions were extended to a greater range of agencies, but the existing processes and safeguards remained the same, it is unlikely that there would be significant issues of concern for agencies that had a notice to produce documents issued to them, as the notice to produce is a more specific instrument for obtaining information. Police already have the option of applying for a search warrant when particular documents are being sought for a police investigation. Being issued with a notice to produce rather than a search warrant could be beneficial to organisations because:

- it is likely to be more convenient for an organisation to find particular documents and provide them to police, rather than have their entire premises searched by officers
- providing police with specific documents provides greater privacy to an organisation's clients that have nothing to do with the offence being investigated, than having police search through all of the organisation's records.

While many police have informed us that they would benefit from the notice to produce provisions being extended, it is unclear what form officers would like such an extended scheme to take, and how this would operate in practice.[1246] We believe it would be appropriate in the circumstances for the Minister for Police and the Attorney General to consider the issues raised in determining whether a wider application of the notice to produce scheme is feasible, in conducting its review of the policy objectives of the legislation in accordance with section 243 of LEPRA.[1247]

Recommendation

75. That the Attorney General and Minister for Police in conducting their review of the policy objectives of the Act, give consideration to the views expressed by the relevant parties in relation to the broadening of the notice to produce provisions in determining whether a wider application of the notice to produce scheme would be appropriate.

1246 Letter from Mr Les Tree, Director General, Ministry for Police, 9 January 2009.
1247 The Attorney General and the Minister for Police are to conduct a review of the Act to determine whether the policy objectives of the Act remain valid, as soon as possible after the period of 3 years from 1 December 2005.

Chapter 39. Conclusion

During our consultations, a number of police advised that little, if anything, has changed since the introduction of the notice to produce provisions, and that in practice, it makes no difference whether a search warrant or a notice to produce is used to obtain documents from an ADI. Comments from police officers include the following:

> *No, I didn't think there was a big difference … Different name.*[1248]

> *Basically it hasn't really changed.*[1249]

> *In a way I don't really see the point — you can get a notice to produce, you can get a search warrant, what's the difference? … so let me think, will I get a notice to produce or get a search warrant? Throw coins in the air, makes no difference, that's right, so I don't see the point in having [the new provisions].*[1250]

Several other officers were critical that the authority to issue a notice to produce had not been devolved to a senior police officer commenting that the process of going before an authorised officer is cumbersome and time consuming and that the process needs further refinement:

> *That was a sham because a notice to produce from what I read and what I perceived was that it was going to be a more simplified process … It's not. They've just reworded the document and you've still got us to go through the same processes so it has not been an improvement whatsoever and it should be.*[1251]

A number of police and authorised officers however, did see merit in the introduction of the provisions, noting that the prevailing process of obtaining documentation from ADIs by way of search warrant was not entirely appropriate, particularly with regard to the SOPs which recommend the use of independent observers and the videotaping of a search warrant being executed which many advised rarely occurred in reality. As one officer commented:

> *It's silly to go and video all that because it's literally just handing the search warrant across the counter and they've got to get the documents all bundled up to hand to you. You wouldn't do it.*[1252]

There was also recognition from a number of police and authorised officers and other stakeholders that whilst the notice to produce process introduced did not represent a momentous change to the way of doing things it was a more relevant investigative tool and on the whole was seen as being a more palatable process to ADIs.

Interestingly, a number of the police officers who commented that little had changed with the introduction of notices to produce advised that they would like the power expanded so that they are able to require documentation from bodies other than financial institutions. The two ideas are not compatible. If the Division 3 notice to produce powers in LEPRA have not made an impact on the way in which police conduct their business, then it is difficult to see why officers would wish to expand the scope of the notice to produce provisions beyond financial institutions.

On balance, having looked at the information presented by all parties throughout the period of our review, it appears that the notice to produce provisions have been effectively implemented. As the Attorney General asserted in his second reading speech the use of a search warrant for obtaining financial documents from ADIs is indeed a 'blunt instrument'. Our research for the review has revealed that the introduction of the notice to produce process has simplified the process by refining the legislative basis for the practice of obtaining documents held by financial institutions. Notices to produce provide a more appropriate means by which to obtain records from ADIs thereby achieving the primary aim of Part 5, Division 3 of the legislation.

Whilst we have identified a number of legislative issues requiring clarification, and there appears to be room for improvement of the notice to produce provisions with further refinement through legislative amendment, additional guidance through the development of SOPS, strengthening of Memoranda of Understanding, and improved communication between the ADIs and police, the scheme on the whole has been successful. It would therefore seem logical that Parliament give some consideration to extending the scheme to obtaining documents from other types of agencies on a case by case basis having regard to all the issues raised.

Whilst we appreciate the frustrations experienced by police in being able to progress investigations when they are unable to freely gain access to relevant documentation, we are equally mindful of the adequate protection of personal liberties and the need to strike the right balance between both. It is our view that the notice to produce provisions put in place through the introduction of Part 5, Division 3 of LEPRA achieve this aim.

1248 Focus group with detectives, LAC B, 27 March 2006.
1249 Focus group with detectives, LAC C, 1 May 2006.
1250 Interview with acting commander, LAC C, 1 May 2006.
1251 Interview with Education and Development Officer, LAC D, 24 May 2006.
1252 Focus group with crime manager, LAC C, 20 June 2007.

List of tables

List of figures

List of case studies

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Glossary

ACLO	Aboriginal community liaison officer
ADI	Authorised deposit-taking institution authorised by the Australian Prudential Regulation Authority to carry on banking business in Australia
AJAC	Aboriginal Justice Advisory Council
BOCSAR	Bureau of Crime Statistics and Research
CAN	Court attendance notice
CCTV	Closed circuit television
CJC	Crime and Justice Commission (QLD). From 2002 superseded by the Crime and Misconduct Commission (CMC)
CJSN	Criminal Justice Support Network
CNI	Central names index
COPS	Computerised Operational Policing System (NSW Police Force)
CRIME	(NSW Police Force, Code of practice for) Custody, Rights, Investigation, Management and Evidence
CSSB	Crime Scene Services Branch (part of the FSG of NSW Police Force)
DOH	Department of Housing
FSG	Forensic Services Group (NSW Police Force)
IDRS	Intellectual Disability Rights Service
LAC(s)	Local Area Command(s)
LEPRA	*Law Enforcement (Powers and Responsibilities) Act 2002*
MCPE	Mandatory Continuing Police Education
MOU	Memorandum of Understanding
NSWLRC	New South Wales Law Reform Commission
NSWPD	New South Wales Parliamentary Debates (Hansard)
Ombudsman	NSW Ombudsman
PACE	*Police and Criminal Evidence Act 1984* (UK)
PFA	Protected forensic area (WA)
POI	Person of Interest (generally used by police to describe a potential suspect, a suspect, an accused or an offender)
PPRA	*Police Powers and Responsibilities Act 1997* (Qld)
SOCO	Scene of the crime officer
SOPs	Standard operating procedures

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