***Changes to s 99 of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)***

**By Daniel Stuart Roff[[1]](#footnote-1)**

The *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW) – otherwise known as LEPRA – is described in the long title as:

“An Act to consolidate and restate the law relating to police and other law enforcement officers’ powers and responsibilities; to set out the safeguards applicable in respect of persons being investigated for offences; to repeal certain Acts and to consequentially amend other Acts; and for other purposes.”

When first introduced to parliament, the Attorney-General Bob Debus stated the bill constituted a significant law reform, which was intended to simplify the law in relation to law enforcement powers. He went on to say the bill sets out:

“…in one document the most commonly used criminal law enforcement powers and their safeguards. Previously complex and diverse law enforcement powers and responsibilities once buried in numerous statutes and casebooks have been consolidated into the bill so that the law is now easily accessible to all members of the community.

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

When passed, the Act contained a section – s 99 – that dealt with the power of police to arrest without a warrant. And the focus of this paper will be upon the changes to s 99 that occurred in 16 December 2013 pursuant to the *Law Enforcement (Powers and Responsibilities) Amendment (Arrest Without Warrant) Act 2013*. This relates to arrests without warrant performed after that date. (It ought to be noted that police have other powers of arrest – such as pursuant to a warrant – and that the subject of this paper is the power to arrest without warrant pursuant to s 99.)

The original s 99 was introduced with the following statement from the Attorney-General Bob Debus:

“I turn now to powers relating to arrest. Part 8 of the bill substantially re-enacts arrest provisions of the Crimes Act 1900 and codifies the common law. *The provisions of part 8 reflect that arrest is a measure that is to be exercised only when necessary. An arrest should only be used as a last resort as it is the strongest measure that may be taken to secure an accused person's attendance at court.* *Clause 99, for example, clarifies that a police officer should not make an arrest unless it achieves the specified purposes, such as preventing the continuance of the offence.* Failure to comply with this clause would not, of itself, invalidate the charge. Clauses 107 and 108 make it clear that nothing in the part affects the power of a police officer to exercise the discretion to commence proceedings for an offence other than by arresting the person, for example, by way of caution or summons or another alternative to arrest. Arrest is a measure of last resort. The part clarifies that police have the power to discontinue arrest at any time. The application of the safeguards contained in part 15 of the bill represents the classification of the common law requirement that persons must be told of the real reason for their arrest and a clarification of the additional requirements that officers must provide their name, place of duty and a warning (emphasis added).”

In the Explanatory Note specifically in relation to the original s 99 it was stated:

“**Clause 99** sets out the powers of police officers to arrest without a warrant. A police officer may arrest a person if that person is in the act of committing an offence, has just committed an offence, has committed a serious indictable offence for which the person has not yet been tried or if the police officer suspects on reasonable grounds that the person has committed an offence. A police officer must not arrest a person for the purpose of taking proceedings for an offence against the person unless the officer suspects on reasonable grounds that the arrest is necessary to ensure the person’s attendance at court or for other purposes relating to the protection of evidence or preventing the repetition of an offence or another offence. An arrested person, and any property on the person, must, as soon as is reasonably practicable, be taken before an authorised officer to be dealt with according to law.”

In order to supposedly ‘clarify’ ambiguities regarding police powers to arrest without warrant the then Premier, Barry O’Farrell, introduced proposed reforms in late 2013 to avoid situations where people were escaping convictions because of confusion as to when and under what circumstances an arrest could be made, resulting in findings that certain arrests were unlawful. Also of concern apparently was the fact that in some cases, due to the ambiguities, large payouts were then being made even where arrests were unlawful but otherwise performed in good faith.

The terms of the original s 99 are on the left and the amended terms on the right for ease of reference:

Repealed s 99 Current s 99

|  |  |
| --- | --- |
| (1) A police officer may, without a warrant, arrest a person if:  (a) the person is in the act of committing an offence under any Act or statutory instrument, or  (b) the person has just committed any such offence, or  (c) the person has committed a serious indictable offence for which the person has not been tried.  (2) A police officer may, without a warrant, arrest a person if the police officer suspects on reasonable grounds that the person has committed an offence under any Act or statutory instrument.  (3) A police officer must not arrest a person for the purpose of taking proceedings for an offence against the person unless the police officer suspects on reasonable grounds that it is necessary to arrest the person to achieve one or more of the following purposes:  (a) to ensure the appearance of the person before a court in respect of the offence,  (b) to prevent a repetition or continuation of the offence or the commission of another offence,  (c) to prevent the concealment, loss or destruction of evidence relating to the offence,  (d) to prevent harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence,  (e) to prevent the fabrication of evidence in respect of the offence,  (f) to preserve the safety or welfare of the person.  (4) A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person, and any property found on the person, before an authorised officer to be dealt with according to law. | (1)  A police officer may, without a warrant, arrest a person if:  (a)  the police officer suspects on reasonable grounds that the person is committing or has committed an offence,  and  (b)  the police officer is satisfied that the arrest is reasonably necessary for any one or more of the following reasons:  (i)  to stop the person committing or repeating the offence or committing another offence,  (ii)  to stop the person fleeing from a police officer or from the location of the offence,  (iii)  to enable inquiries to be made to establish the person’s identity if it cannot be readily established or if the police officer suspects on reasonable grounds that identity information provided is false,  (iv)  to ensure that the person appears before a court in relation to the offence,  (v)  to obtain property in the possession of the person that is connected with the offence,  (vi)  to preserve evidence of the offence or prevent the fabrication of evidence,  (vii)  to prevent the harassment of, or interference with, any person who may give evidence in relation to the offence,  (viii)  to protect the safety or welfare of any person (including the person arrested),  (ix)  because of the nature and seriousness of the offence.  (2)  A police officer may also arrest a person without a warrant if directed to do so by another police officer. The other police officer is not to give such a direction unless the other officer may lawfully arrest the person without a warrant.  (3)  A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person before an authorised officer to be dealt with according to law.    **Note.** The police officer may discontinue the arrest at any time and without taking the arrested person before an authorised officer—see section 105.  (4)  A person who has been lawfully arrested under this section may be detained by any police officer under Part 9 for the purpose of investigating whether the person committed the offence for which the person has been arrested and for any other purpose authorised by that Part.  (5)  This section does not authorise a person to be arrested for an offence for which the person has already been tried.  (6)  For the purposes of this section, property is connected with an offence if it is connected with the offence within the meaning of Part 5. |

So, in short, the major differences between the old and the new sections can be stated as:

* It arguably removes the requirement that arrest be for the purposes of commencing proceedings. Whilst that may be implied by way of a person being required to go before an authorised officer as soon as is practicable after arrest, it would seem arrest can be used as ‘first resort’ and a means of what might be seen as deterrence. This is because a police officer can release a person before taking them before an authorised officer if the reason for an arrest, for example, no longer exists or it is determined that a person could be dealt with by an alternative, such as the issuing of a caution, penalty notice or a CAN.
* Under the old s 99 the requirement for a lawful arrest that a police officer “suspect on reasonable grounds” was twofold: first, by s 99(2) the officer must suspect on reasonable grounds that the person has committed an offence; and secondly, by s 99(3), a person must not be arrested unless the officer suspected on reasonable grounds that it was necessary to do so for one or other of the purposes set out in the sub-sections. Under the new s 99, this second “suspect on reasonable grounds” test is omitted; in its place is the test that the police officer is satisfied that the arrest is “reasonably necessary” for one of the purposes in sub-sections (i) to (ix).
* The substituted section extends the reasons for arrest without warrant to include additional reasons. Those additional reasons include: to stop the person fleeing; to make inquiries to establish the identity of the person; to obtain property in the possession of the person connected with the offence; to preserve the safety or welfare of any person; or because of the nature and seriousness of the offence.
* A police officer is also empowered to arrest a person without a warrant if directed to do so by another police officer who may lawfully arrest the person.
* The substituted s 99(4) makes it clear that a person lawfully arrested without a warrant may be detained for the purpose of investigating whether the person committed the offence for which the person has been arrested, as well as for any other offence the police officer reasonably suspects the person may have committed.

***Arrest and the Commencement of Proceedings***

The new section removes the explicit reference contained in the previous s 99(3) that the purpose of arrest is to commence proceedings. Parliament would, however, need to expressly extinguish this common law principle, which it has not done. The new s 99(3) *implies* that there must be an intention to arrest in order to commence proceedings:

(3) A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person before an authorised officer to be dealt with according to law.

However, removing the explicit reference to the purpose of arrest for prosecution, communicates to police that they may arrest in circumstances, particularly minor matters, where they may otherwise not have considered commencing proceedings, but rather would have dealt with them by way of a diversionary measure. The absent wording may lead police to believe that they may use the power to increase arrest rates for the purpose of deterrence, whether ‘prosecution-directed’ deterrence or not. This would be in accordance with former Premier O’Farrell’s stated rationale for the changes to s 99 when introducing the bill. This is because a police officer can release a person before taking them before an authorised officer if the reason for an arrest, for example, no longer exists or it is determined that a person could be dealt with by an alternative, such as the issuing of a caution, penalty notice or a CAN.

***The Test for an Arrest***

Far from making things clearer for police, as was one of the stated intentions, the recently inserted s 99(1) has arguably made the test for exercising the arrest power potentially more ambiguous for police.

There are two stages that an officer needs to consider before effecting an arrest. The first is whether a police officer suspects on reasonable grounds that an offence is being or has been committed. The previous s 99(2) and the new s 99(1)(a) are substantially similar in that they state the general power that a police officer must first have a suspicion on reasonable grounds that the person has committed an offence. An improvement in the new provision is that s 99(1)(a) now brings the suspects on reasonable grounds test into play in relation to committing an offence, where it was not previously spelt out. Furthermore, collapsing the old ss 99(1) and 99(2) could be viewed as a welcome simplification of the first stage of the test. It is the second stage of the arrest power that is of concern — that is, whether or not the arrest is necessary.

The repealed provision required that the police officer must not arrest unless the officer suspected on reasonable grounds that the arrest was necessary to achieve one of the purposes set out in the subsection (s 99(3)). Magistrate Heilpern’s analysis of the language of the old s 99 highlighted the clear boundaries set by Parliament and intended by the inclusion of ‘must not arrest’:

“The words ‘must not arrest’ in subsection (3) are an unambiguous representation of parliamentary intent creating preconditions for a lawful arrest. Indeed, it is hard to imagine a clearer statement of parliamentary intent.” (*R v McClean* [2008] NSWLC 11 at 25)

The new section provides that an officer ‘may arrest’ if satisfied that ‘it is reasonably necessary’ for one or more of the reasons that are then set out in s 99(1)(b).

By replacing ‘must not arrest’ with ‘may arrest’ Parliament has watered down the unambiguous restrictions placed upon police with regards to the circumstances they are entitled to arrest.

This new formulation is, as was stated earlier, arguably more complex than previously existed. It ought to be the case that it is either necessary to arrest or it is not. The meaning of necessary is plain. It is that there is no other means of securing the purpose for the deployment of the arrest. ‘Reasonably necessary’, on the other hand, is arguably less susceptible of certain application when reading the shifts in language as a whole from the old to new provisions. The previous provision called for the officer to apply only one test, that of ‘suspicion on reasonable grounds’, to both establishing whether an offence had been committed and whether under s 99(3) arrest was necessary to achieve one of the purposes set out in that subsection. The section now imports two different tests that the officer must apply at the time of making arrest: the reasonable grounds test (s 99(1)(a)) and a ‘reasonably necessary’ test (s 99(1)(b)).

The principles in *R v Rondo* (2001) 126 A Crim R 562 have provided clear guidance as to how the test ‘suspects on reasonable grounds’ should be applied. To recap, within the context of that particular matter her Honour Simpson J stated:

“53 These propositions emerge:

(a) A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs covered by s.357E. A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.

(b) Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.

(c) What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest at the time he did so. Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole of the surrounding circumstances.

The NSW Parliament imported the new formulation ‘reasonably necessary’ from the Queensland legislation, without providing an explanation as to why this aspect of the test should be changed. It has failed to indicate in any adequate detail the objective nature of the test in the context of the new s 99. Given that the Queensland test appears to ‘require some objective test to be applied’ it would still seem that the test is not a purely subjective one. The courts may well interpret ‘reasonably necessary’ as requiring the officer be satisfied on an objective basis that the arrest was necessary. The courts may grapple with determining Parliament’s intent in departing from the longstanding ‘suspect on reasonable grounds’ test. As outlined, the shift away from mandatory language that made arrest a last resort – from ‘must not arrest’ to ‘may arrest’ – reflects Parliament’s intention that the statute expand police discretion to arrest as a possible first resort. If the courts do interpret ‘reasonably necessary’ as meaning the same as the ‘suspect on reasonable grounds’ test, the legislative intention of Parliament may well be thwarted. In the meantime, frontline police may struggle to give their own meaning to the phrase ‘reasonably necessary’ to arrest.

***The Specific New Grounds for Arrest***

It is not proposed to go into these in any great detail aside from noting briefly certain things that may be of interest.

* The nature and seriousness of the offence
* It would seem this is quite broad and ill defined. It is unclear what would be used as a yardstick to determine seriousness. It is unclear what type of offences may warrant regard to the provision, although a likely example would include domestic violence offences. It is not clear if the seriousness and/or type of the offence is to be determined by individual police officers, station by station, command by command etc.
* To protect the safety and welfare of any person (including the person being arrested)
* The inclusion of the reason to arrest to protect the safety of any person may have the benefit of shielding third parties from harm when police are confronted with a violent offender in a volatile situation. However, allowing for arrest for the protection of the ‘welfare’ of any person is too broad and has the potential to be applied inconsistently given the breadth of the term, which is undefined in the legislation. If ‘welfare’ is interpreted broadly, there is a danger of arrests being effected for reasons falling short of ensuring a person is protected from maintaining their safety or to prevent the repetition of an offence.
* With such a broad power now available, it is desirable that police are well trained to be aware of the range of alternatives to arrest and legislation that assist police to prevent violent harms without arrest. For example, police have the discretion (pursuant to s 206 LEPRA) to detain an intoxicated person found in a public place if they are likely to cause injury to themselves or another person. Further, police have the power to apprehend and take a person to a mental health facility (pursuant to the Mental Health Act 2007 (NSW)) if the person appears to be suffering from a mental illness or disturbance and has committed an offence, or if it is probable that the person will attempt to cause serious harm to themselves or another person.
* To obtain property in possession of a person alleged to be connected to the offence
* Under s 21 LEPRA an officer has the power to seize and detain a thing that the officer suspects on reasonable grounds is stolen or otherwise unlawfully obtained, such as goods stolen in the context of a shoplifting incident, without the need to arrest. Making it lawful to arrest to obtain property effectively authorises arrest for a wide variety of common and relatively minor offences — for example, drug possession offences and property offences such as shoplifting and goods in custody — where a Court Attendance Notice would be the appropriate way of bringing the person to court. Given existing search powers, arresting a person suspected of committing an offence purely to obtain property is unnecessary and may potentially achieve no other purpose than to increase arrest rates.
* To stop a person fleeing and/or to enable inquiries to be made establish the person’s identity
* This would appear unnecessary in light of the provision regarding ensuring the person’s appearance before the court.
* It is well established that where there are issues regarding identity or place of residence, there may be difficulties in issuing a Court Attendance Notice (per Smart AJ in *DPP v Carr* [2002] NSWSC 194 at [6]) and therefore arrest may be made to secure a person’s attendance at court. Fleeing a scene is logically a valid reason for arresting a person, in appropriate circumstances, to ensure their attendance at court, as the ability to issue a Court Attendance Notice (as first option for laying charges) is thwarted by the suspect’s behaviour in trying to escape.
* The inclusion of the identity provision may communicate to police that arrests for the sole purpose of establishing identification or arrest for the sole purpose that someone is fleeing police, are permissible. Critical here is the repeal of the explicit prerequisite that an arrest must be for the purpose of ‘commencing proceedings’. It may communicate to police that they may arrest a fleeing person or to establish identity in relation to minor matters that may have otherwise been dealt with by way of diversionary action.
* The requirement that police must first form a reasonable suspicion that the person has committed or is about to commit a criminal offence before arresting for one of the reasons, does not preclude a practice of arrest for the sole reason of fleeing a crime scene or establishing identity.

***Arrest When Directed By Another Police Officer***

In the second reading speech for the 2013 Bill the Premier explained: “A similar provision exists in the Victorian Crimes Act [s 458(1)(b)]. The reviewers agreed with New South Wales police that this would be a valuable inclusion in the context of large and complex policing operations”.

The troubling aspect of this aspect of the new s 99 is that a police officer acts on the instruction of another. I note that in *O’Hara v Chief Constable of the RUC* [1997] AC 286 the House of Lords refused to accept that an order to make an arrest would be sufficient by itself to provide reasonable grounds for suspicion (see Colvin and McKechnie, *Criminal Law in Queensland and Western Australia*, 6th ed, Lexis Nexis Butterworths 2012, p 695).

The issue would then turn upon the other aspects of the legislation being made out in relation to the police officer giving the order and this police officer is not to give such a direction unless he or she may lawfully arrest the person without a warrant.

***Arrest and Investigation or Questioning***

As noted by reference to *Zaravinos v NSW* (2004) NSWCA 320, in NSW there is no power to arrest a person for the purpose of questioning and investigating them about a suspected offence as such. It is fair to say the inserted s 99(4) does not purport to give police that power; rather, it confirms that where a “lawful arrest” has been made, for the purposes outlined under s 99(3), then questioning can be undertaken subject to the time limits and any other conditions set out under Part 9 of LEPRA.

In effect, s 99(4) merely confirms the current legal position (presumably because the law as it stands has not been entirely clear to serving police officers). The then Premier in the second reading speech in that regard stated: “This amendment is intended to remove uncertainty about whether a person who is otherwise lawfully arrested can be detained for questioning under part 9”.

(The provisions of Part 9 relate to investigating and questioning those who have been arrested. This includes the fact that, once arrested, a person may be subject to investigation and questioning if, under s 114(3) the police officer forms a reasonable suspicion as to the person’s involvement in the commission of any other offence, the police officer may also investigate the person’s involvement in that other offence during the investigation period for the arrest. It is immaterial whether that other offence was committed before or after the commencement of this Part or within or outside the State. This is subject to safeguards contained elsewhere within that Part.)

***Conclusion***

The major changes under the new s 99 of note are:

* It arguably removes the requirement that arrest be for the purposes of commencing proceedings. Whilst that may be implied by way of a person being required to go before an authorised officer as soon as is practicable after arrest, it would seem arrest can be used as ‘first resort’ and a means of what might be seen as deterrence. This is because a police officer can release a person before taking them before an authorised officer if the reason for an arrest, for example, no longer exists or it is determined that a person could be dealt with by an alternative, such as the issuing of a caution, penalty notice or a CAN.
* Under the old s 99 the requirement for a lawful arrest that a police officer “suspect on reasonable grounds” was twofold: first, by s 99(2) the officer must suspect on reasonable grounds that the person has committed an offence; and secondly, by s 99(3), a person must not be arrested unless the officer suspected on reasonable grounds that it was necessary to do so for one or other of the purposes set out in the sub-sections. Under the new s 99, this second “suspect on reasonable grounds” test is omitted; in its place is the test that the police officer is satisfied that the arrest is “reasonably necessary” for one of the purposes in sub-sections (i) to (ix).
* The substituted section extends the reasons for arrest without warrant to include additional reasons. Those additional reasons include: to stop the person fleeing; to make inquiries to establish the identity of the person; to obtain property in the possession of the person connected with the offence; to preserve the safety or welfare of any person; or because of the nature and seriousness of the offence.
* A police officer is also empowered to arrest a person without a warrant if directed to do so by another police officer who may lawfully arrest the person.
* The substituted s 99(4) makes it clear that a person lawfully arrested without a warrant may be detained for the purpose of investigating whether the person committed the offence for which the person has been arrested, as well as for any other offence the police officer reasonably suspects the person may have committed.

(At this stage I was unable to find any cases in New South Wales judicially considering the changes.)

Daniel Stuart Roff

9 October 2014

1. The author wishes to thank Mark Higgins, Evan James and is indebted to the following papers: “Changes to Police Powers of Arrest in New South Wales” by Vicki Sentas and Rebecca McMahon in *Current issues in Criminal Justice* Volume 25(3) and “Law Enforcement (Powers and Responsibilities) Bill (Arrest Without Warrant)” by Gareth Griffith in *Issues Backgrounder* Volume Number 4 of November 2013 provided by the Parliamentary Research Service. [↑](#footnote-ref-1)