THE LAW SOCIETY
OF NEW SOUTH WALES

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29 May 2014

The Hon John Robertson MP
NSW Opposition Leader
State Parliament
Macquarie Street
SYDNEY NSW 2000

By email: leader.opposition@parliament.nsw.gov.au

Dear Mr Robertson,

Law Enforcement (Powers and Responsibilities) Amendment Bill 2014

I write to you on behalf of the Criminal Law and Juvenile Justice Committees of the Law Society of New South Wales ("the Committees") in relation to the Law Enforcement (Powers and Responsibilities) Amendment Bill 2014 ("the Bill").

The Committees note the Bill passed the Legislative Assembly with no opposition from the Labor Party.

The Committees support many of the proposed amendments set out in the Bill. However, the Committees are of the view that some of the proposed amendments may be unworkable, or may have unintended consequences, or may unreasonably interfere with civil liberties. Of particular concern are some of the proposed amendments to Part 9 of the Act, concerning investigations and questioning.

The Committees' main concerns are set out in the attached submission and are summarised as follows:

- Amendments to the definition of "Protected Suspects": this definition should include persons who have not been explicitly told they are free to leave. The Committees are concerned about the potential for injustice in relation to vulnerable people under the proposed definition.

- The Committees oppose the extension of the initial investigation period from four to six hours.

- Amendments to strip searches: these provisions should be clarified to ensure they only apply to searches carried out under s 23 or s 24, on a person under arrest or in lawful police custody.

- Amendments to searches by consent: the proposed provision should include the requirement that police inform the person the search is voluntary, which would help avoid uncertainty about whether the consent is genuine.

The Committees submit that Messrs Tink and Whelan's review (resulting in their Report dated 12 December 2013) was conducted without sufficiently broad consultation. The Committees understand that the persons consulted in the course of that review were almost exclusively from the Police and the Department of Attorney-General and Justice (as it then was). Similarly, the Committees' view is that the Bill was also drafted and introduced without sufficient consultation.

The Committees acknowledge that the review conducted involved a public call for submissions, and Messrs Tink and Whelan had access to the report and submissions from that review. However, the Committees are nevertheless concerned that there has not been sufficient opportunity for all interested stakeholders to have input into the final recommendations or the content of the Bill.

Given the limited opportunity to provide considered comment on this Bill, the Committees request that you consider the issues raised and seek the amendments that would address the identified problems.

Should your office wish to discuss any aspect of this letter, please contact Policy Lawyer Alex Dimos on (02) 9926 0310 or via email alex.dimos@lawsociety.com.au.

Yours sincerely,

Ros Everett
President

The Law Society of New South Wales' submission on Law Enforcement (Powers and Responsibilities) Amendment Bill 2014

29 May 2014

Schedule 1 of the Bill - amendments to Part 9 (investigations and questioning)

1. Amendments in relation to protected suspects

The Committees' view is that the definition of "protected suspect" should be amended to apply to a person who has not been explicitly told that they are free to leave. The Committees submit that it would be unjust for suspects to be deprived of protection under Part 9 simply because a police officer has neglected to tell them that they are free to leave.

The Committees note the Bill abolishes the concept of "deemed arrest" that currently exists in Part 9, and replaces it with the concept of "protected suspect". The Committees support this, as it is likely to alleviate some of the problems associated with the concept of "deemed arrest", which is not always well understood by police.

However, the Committees are concerned about the potential for injustice in the following definition of "protected suspect", which is to be inserted into s 110(1):

> **protected suspect** means a person who is in the company of a police officer for the purpose of participating in an investigative procedure in connection with an offence if:
>
> (a) the person has been informed that he or she is entitled to leave at will, and
>
> (b) the police officer believes that there is sufficient evidence that the person has committed the offence.

The following example illustrates the problem:

> Jai is 18 and has an intellectual disability. He receives a call from police, informing him that his image has been picked out from a photo array in relation to an alleged robbery offence. He is asked to attend the police station for an interview.
>
> At this stage there is no other evidence linking Jai to the alleged offence and, unless Jai makes admissions, there is insufficient evidence to charge him.
>
> Jai attends the police station, unaccompanied, and is escorted straight to an interview room. Jai is not placed under arrest, but nor is he is explicitly told he is free to leave, and he is under the impression that he is no longer at liberty. The police tell Jai that they will put the allegations to him on Electronically Recorded Interview of a Suspected Person (ERISP). Jai is cautioned in the usual terms about his right to silence, but does not understand that he may refuse to participate in an interview.
>
> Jai would not be a "protected suspect" under the proposed definition, firstly because he has not been told that he is free to leave, and secondly because the investigating officer presumably does not believe that there is sufficient evidence to establish that he committed the offence.

The above example is not an isolated one. It is the Committees' experience that similar situations commonly arise, particularly with vulnerable people who may be unable to understand and assert their rights.
In this example, in the Committees' view Jai is clearly in need of the protection afforded by Division 3 of Part 9, including the additional protections (such as a support person) afforded to "vulnerable persons".

The Committees also submit that the phrase "sufficient evidence that the person has committed the offence" also lacks clarity. Does this mean sufficient evidence to arrest the person, to commence criminal proceedings, or to make out a prima facie case?

The concept of "protected suspect" appears to have been drawn from the Commonwealth *Crimes Act 1914;* however the proposed definition bears little resemblance to the definition of "protected suspect" in s 23B of that Act. Consideration could be given to defining "protected suspect" in similar terms to section 23B(2) of the Commonwealth *Crimes Act,* which provides:

(2) A person is a protected suspect if:

(a) the person is in the company of an investigating official for the purpose of being questioned about a Commonwealth offence; and

(b) the person has not been arrested for the offence; and

(c) one or more of the following applies in relation to the person:

(i) the official believes that there is sufficient evidence to establish that the person has committed the offence;

(ii) the official would not allow the person to leave if the person wished to do so;

(iii) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so; and

(d) none of the following applies in relation to the person:

(i) the official is performing functions in relation to persons or goods entering Australia, and the official does not believe that the person has committed a Commonwealth offence;

(ii) the official is performing functions in relation to persons or goods leaving Australia, and the official does not believe that the person has committed a Commonwealth offence;

(iii) the official is exercising a power under a law of the Commonwealth to detain and search the person;

(iv) the official is exercising a power under a law of the Commonwealth to require the person to provide information or to answer questions; and

(e) the person has not ceased to be a suspect under subsection (4).

This is somewhat similar to the definition of a person under "deemed arrest" in the current section 110 of LEPRA[1]:

> (2) A reference in this Part to a person who is under arrest or a person who is arrested includes a reference to a person who is in the company of a police officer for the purpose of participating in an investigative procedure, if:
>
> (a) the police officer believes that there is sufficient evidence to establish that the person has committed an offence that is or is to be the subject of the investigation, or
>
> (b) the police officer would arrest the person if the person attempted to leave, or
>
> (c) the police officer has given the person reasonable grounds for believing that the person would not be allowed to leave if the person wished to do so.

2. Amendments in relation to duration of investigation period

Schedule 1, clause 9 amends s 115 of the Act to extend the maximum duration of the initial investigation period from four hours to six hours.

The Committees strongly oppose this recommendation for the following reasons:

A. A key justification the Tink and Whelan review of 12 December 2013[2] ("the Report") puts forward to support the extension of the initial period is on the basis that:

> Police advised that often the 4 hour limit is not long enough, and applying for an extension warrant is often a time consuming process[3].

The Report proposes people be detained for longer when applying for an extension. The Committees note that on the same page, the Report states that police have indicated that four hours is generally sufficient in most cases.

The Committees submit that if there is an issue in relation to the time it is taking to have applications granted, the process for having applications heard and reviewed should be examined. There is no mention in the Report of any attempts to address this process. The Committees further submit that when one considers the significance of increasing the time period and the impact this will have on individual liberty, it should be incumbent upon the government to either increase resources or review the efficiency of processes relating to the time it is taking to hear and determine extension applications.

B. The Report does not comment on the number of extension applications or the nature of the charges that require extension applications.

As noted at paragraph A above, the Report indicates that the Police consulted were of the view that generally four hours' investigation time is sufficient.

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[1] Law Enforcement (Powers and Responsibilities) Act 2002 ("LEPRA") Review Report

[2] Law Enforcement (Powers and Responsibilities) Act 2002 ("LEPRA") Review Report (Part 2) by Mr Andrew Tink and The Hon. Paul Whelan dated 12 December 2013

[3] Page 9 of Report

The Committees submit that the consequence of this view is that there appears to be no meaningful justification for extending the initial timeframe generally as the proposal would be unnecessary for the majority of cases.

The Committees further submit that if the Report concedes that extensions are only required for a minority of cases, to extend the time generally to all persons detained should require a proper analysis of the number and types of cases requiring extensions to properly assess whether a general extension of time is warranted.
The Committees' view is that while they do not support any extension of the initial period, if the time period is to be extended, it should only be extended for those charges which can be identified as routinely requiring extension applications to be made.

C. It is uncertain how effective the proposed change would be in achieving its aim. The Report refers to the Gibbs report[4] and Western Australian ("WA") experience to presumably support the recommendation to extend the time to six hours. The Committees note that the Gibbs report is now 25 years old (1989) and in relation to the WA position, there is no evidence or comments in relation to the effectiveness of their legislation. The Committees' view is that the Report in general lacks any credible analysis or significant number of case studies to substantiate the police views that more time is required.

D. The impacts upon the liberty of accused persons who may experience longer periods in custody because of the extension of the initial period is of great concern, in particular, vulnerable persons who are detained by police. The Committees note the particular vulnerability of Aboriginal people and those who are mentally ill. The Committees submit that the recommendations of the Royal Commission into Aboriginal Deaths in Custody regarding the impacts of detention of Aboriginal people should be seriously considered.

3. Schedule 2 of the Bill - amendments to Part 15 (safeguards in relation to powers)

The most significant amendment proposed in the Committees' view, is that an officer's failure to provide his or her name or place of duty would not invalidate the exercise of the power or render the conduct of the police officer unlawful (see proposed s 204A and s 204B).

The proposed new Part 8 of Schedule 5 requires the Ombudsman to monitor, over a 12-month period, compliance by police officers with the obligation to provide name and place of duty. The Committees are of the view that monitoring by the Ombudsman is important, to ensure the continued compliance with this obligation. The reasons for requiring police officers to provide their names and place of duty have been cogently set out in the Report.

Part 15 of the Act, and in particular s 201, requires police officers to provide certain information (and in some cases, warnings) when exercising their powers. It is the Committees' view that s 201 is too complex and therefore difficult for police officers to comply with.

One of the amendments aims to achieve greater clarity as to when a police officer is obliged to provide the relevant information. It is the Committees' view that the

[4] Review of Commonwealth Criminal Law Interim Report: Detention Before Charge, AGPS 1989

proposed amendment would simplify this to "as soon as reasonably practicable" in relation to most powers. The Committees do not oppose this amendment.

4. Amendments to search powers (Schedule 3 [1] to [3], [14] to [29])

4.1 Strip searches

Currently, to conduct a strip search under any circumstances, the police officer must hold a reasonable suspicion as to both necessity and urgency. Proposed s 31(a) dispenses with the "urgency" requirement in relation to searches carried out at a police station or other place of detention. The Committees are of the view that this provision may need re-drafting to clarify that it only applies to a search carried out under s 23 or s 24, that is, a search on a person who is under arrest or in lawful police custody (and not a search conducted under the general stop and search power, in relation to a person who happens to be at a police station).

The proposed new s 31 provides that a police officer may carry out a strip search of a person if:

(a) in the case where the search is carried out at a police station or other place of detention – the police officer suspects on reasonable grounds that the strip search is necessary for the purpose of the search, or

(b) in the case where the search is carried out at any other place, the police officer suspects on reasonable ground that the strip search is necessary for the purpose of the search and that the seriousness and urgency of the circumstances make the strip search necessary.

The Committees' view is that as it currently stands, this power is stated too broadly.

4.2 Searches by consent

The Committees support the introduction of proposed s 34A; however, the Committees are of the view that, when seeking a person's consent to a search, the police should be required to inform the person that the search is voluntary. Unless police are required to inform the person that there is no obligation to submit to the search, there will continue to be many cases in which a person's "consent" is not genuine.

The Committees suggest that this would not be an onerous obligation for police. It would be somewhat similar to cautioning a suspect about their right to silence, which police are well accustomed to doing.

The Committees submit that it can be very difficult, especially for a vulnerable or unsophisticated person, to distinguish between a politely-expressed demand and a mere request. Many people may acquiesce to a search after such a request, but would not do so if they knew they had a right to refuse. The Committees submit that acquiescence in such circumstances is not genuine consent.

The Committees further submit that requiring police to tell a person whether or not they are obliged to undergo a search would help avoid uncertainty (and disputes in court) about whether the person's consent is genuine.