THE LAW SOCIETY
OF NEW SOUTH WALES

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Ms Penny Musgrave
Director
Criminal Law Review Division
NSW Department of Justice and Attorney General

Dear Ms Musgrave,

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

The Law Society appreciates the opportunity to make a written submission to the review of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA).

The Law Society's Criminal Law Committee (Committee) has reviewed LEPRA and attaches its submission for consideration by the Attorney General and Minister for Police.

Yours sincerely,

Joseph Catanzariti
President

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Policy objectives

LEPRA was introduced in response to the Wood Royal Commission into the NSW Police Service which recommendation that NSW police powers be consolidated in order to:

- Strike a balance between the need for effective law enforcement and individual rights;
- Assist in ensuring clarity;
- Reduce the possibility of abuse of power through ignorance, and
- Assist in training.

The policy objectives, which are set out in the Long Title of LEPRA, are to consolidate and restate the law relating to police and other law enforcement officers' powers and responsibilities, and to set out the safeguards applicable in respect of persons being investigated for offences.

The amalgamation of powers and safeguards under the one piece of legislation is positive. The legislation is a further move towards achieving a balance and clarity, but further refinement is required.

Aspects of the legislation are not very clear and legislative amendment would improve clarity. The Committee is also of the view that police require better training and further education about LEPRA. The Committee commends the Ombudsman on the comprehensive review of parts of LEPRA. The Committee suggests that future reviews of the policy objectives of LEPRA ought to include the Ombudsman, in order to avoid the perception that the police are reviewing themselves.

In conducting this review, the Committee suggests that the Attorney General and Minister for Police look at the Ombudsman's recommendations, not only in the recent review, but also from past reports, and give further consideration to the recommendations.

General concerns about increasing police powers

When first enacted, LEPRA did not give police any significant extra powers. On the contrary, it introduced some new safeguards such as rules for conducting searches, limits on power to arrest, and s 201 safeguards. Some of these safeguards already existed at common law but it is commendable that they were introduced into LEPRA.

However, since LEPRA's commencement, various new powers have been introduced that have significantly increased police powers e.g.: emergency public disorder powers, powers to move on groups of intoxicated people, gang-related powers and covert search warrants. These new powers appear to disregard the policy objective of striking a balance between the need for effective law enforcement and individual rights.

Review by Ombudsman

Related to the Committee's general concerns about increasing police powers is the fact that many of the Ombudsman's recommendations about police powers have not been adopted into LEPRA.

Various parts of LEPRA were subject to statutory review and were reported on earlier in 2009. This review covered searches of persons in custody and after arrest, notices to produce, and crime scenes.

The Ombudsman also conducted a statutory review of the emergency public disorder powers under Part 6A.

Some predecessor Acts were also reviewed by the Ombudsman e.g. drug-detection dogs, internally concealed drugs, drug premises (including move-on powers) and vehicle powers.

Apart from the internally-concealed drugs provisions (which have been repealed) most recommendations of the Ombudsman have not been adopted into LEPRA. It is concerning that the recommendations that have been adopted are mainly those which make things easier for police e.g. amendments to s 20 and to search and directions powers.

Part 3 – Powers to require identity to be disclosed

Generally, these powers have appropriate safeguards, i.e. in situations where it is an offence to fail to disclose name and address, police must inform/warn.

However, in the converse situation, where there is no power to demand a person's name and address, police are under no obligation to tell the person that giving this information is voluntary. This causes a lot of problems for young people in particular. It is very common for police to approach children and ask not only for their names but for identification. Young people usually comply because they think they have to, and/or they do not want any trouble.

The Committee suggests legislative amendment so that when there is no power to demand a person's name and address police should let the person know that they are under no obligation and that the person is giving this information voluntarily. This obligation on police could be limited to children.

It needs to be made clear to citizens (and police officers) that there is no power in LEPRA to require a person to produce documentary identification. Section 19 provides that police *may* request a person to provide documentary identification. In making such a request police should have to advise the person that they are not obliged to provide documentary identification and that it is not an offence to fail to provide it.

It should also be clarified that police have no express power to search for identification. The Committee is aware of instances where police officers have searched a person's belongings for identification after the person has failed to provide their name and address. Police officers sometimes refer to this in their statements, which indicate that they seem to think there is nothing untoward about this practice. The Committee suggests that rather than a legislative amendment, police require further education so that they are aware that they do no have the power to search for identification.

Part 4 - Search and seizure without warrant

While the new safeguards in Division 4 are encouraging, it appears they are insufficient to ensure that police conduct searches in an appropriate manner. Many of the rules and safeguards apply only if reasonably practicable in the circumstances.

The safeguards in s 201 (which requires police to provide information such as their name and place of duty, and the reason for the search) are also a positive development.

However, LEPRA does not seem to have brought about a significant change in police searching practices.

Strip searches

Section 31 provides that strip searches are to be carried out only if the police officer believes on reasonable grounds that a strip search is necessary for the purpose of the search and is required by "the seriousness and urgency of the circumstances". This is similar to the guidelines to which police were subject before the enactment of LEPRA, contained in the Police Code of Practice for Custody, Rights, Investigation, Management and Evidence (CRIME). However, accounts by the clients of Committee Members indicate that strip searches are often carried out as a matter of routine.

The Committee commends the protections contained in ss 30 and 31 relating to strip searches, however there needs to be more accountability by police. Strip searches may need to be recorded in some way to demonstrate compliance with ss 31 and 33. This would provide an accountability mechanism and would allow for analysis of the patterns of strip searches and the circumstances.

The Ombudsman review on personal searches found that there is scope for improvement of compliance with LEPRA by Police. The Ombudsman recommended that NSW Police Force ensure that all strip searches are properly recorded on COPS and audit those records on a regular basis.

The Committee agrees with the Ombudsman's recommendation, however there are privacy concerns with recording the names of every person who is stripped searched, in circumstances where nothing is found and the police would not otherwise have cause to record the person's name. The Committee suggests that records of strip searches be maintained with the time, location, reason, names of all officers present, description of the person searched and any support persons, but not the name of the person searched.

Searches by consent

Unfortunately there is still no legislative safeguard to protect people who are searched by "consent", for example, those who comply when requested by police to empty their pockets. Such compliance is often not the product of free choice, but arises from a belief that there is no choice. If a person voluntarily consents to a search, police need not demonstrate reasonable suspicion. In *DPP v Leonard* (2001) 53 NSWLR 227, it was held that a person may validly consent to a search even if not aware of the right to refuse (although it was held that such lack of awareness may be relevant to the issue of consent in come cases).

It is unclear whether the safeguards in Part 4 and s 201 apply to searches by consent. It is open to interpretation that a search by consent is not a search under LEPRA, or not even a search at all, and this is unsatisfactory.

As with the right to silence, forensic procedures, etc, police ought to be under an obligation to tell the person whether a search is voluntary or compulsory.

Part 5 – Search and seizure powers with warrant or authority

The Committee has concerns about the questioning of occupants during the execution of a search warrant. This regularly occurs before the occupant is cautioned. Further, once they are arrested and taken to the station where they are then formally cautioned, often the occupant declines to take part in an ERISP and is then returned to the crime scene for the continuation of the search, and is further questioned. Occupants in this situation have reported that where they have declined to be interviewed at the station, they did not know they could decline to say anything back at the premises being searched.

The Committee is strongly of the view that *every* time the police officer wants to ask the occupant a question, the occupant should be cautioned that what they say will be recorded and can be used against them.

Covert search warrants

The Committee agrees with the observations made by the Legislation Review Committee in the Legislation Review Digest No 2 of 2009 in relation to covert search warrants. The Legislation Review Committee commented that authorising an eligible person to covertly enter and search premises using such force as is necessary and to seize, substitute, copy, photograph and record things, and to covertly enter adjoining premises, as provided under s 47A, is clearly a significant trespass on the relevant persons' privacy and property.

Part 6A - Emergency public disorder powers

The Committee is disappointed at the repeal of the sunset clause, as there is no demonstrated need for Part 6A to remain in the legislation.

The Committee's main concern with Part 6A is that anyone in the target area can be searched without reasonable suspicion (s 87K).

The NSW Ombudsman reviewed Part 6A in the 'Review of Emergency Powers to Prevent or Control Disorder'. Recommendation 7 proposed that Parliament should consider amending s 87K to require an appropriate 'reasonable suspicion' test for searches of persons under the Part 6A powers. The Committee is strongly of the view that the Recommendation 7 should be implemented.

The current search powers under Part 6A do not require an officer to reasonably suspect a person of involvement or potential involvement in any wrongdoing. Mere presence in a target area or road is sufficient grounds to stop and search a person, which creates the potential for these powers to be exercised arbitrarily. A 'reasonable suspicion' requirement exists for other powers under Part 6A. For example to exercise the power to obtain disclosure of identity under s 87L a police officer must '*reasonably suspect that the person has been involved or is likely to be involved in a public disorder*'.

As stated in the Ombudsman's report, introducing a 'reasonable suspicion' requirement for personal searches would:

- encourage better targeting of police powers;

- reduce the likelihood that people such as residents and workers who have no involvement or intended involvement in any kind of wrongdoing will be searched;
- introduce a threshold test that police are already familiar with, and
- help address concerns about the potential for police to use the search powers arbitrarily.

The Committee submits that s 87K should be amended to include a "reasonable suspicion" test.

Section 87MA does not provide an exception for peaceful assembly. The Ombudsman recommended that Parliament consider whether further safeguards are required to provide an assurance of the right to peaceful assembly.

Part 7 - Crime scene powers

The Committee is of the view that the crime scene powers are too broad and the provisions require clarification.

Section 91 provides that police may establish a crime scene. There appears to be no provision specifying how the police officer is to notify the public, or when premises cease to be a crime scene.

The crime scene powers in s 95 are draconian and could potentially be used without a warrant in "public places" (such as business premises, common areas of blocks of flats) which are actually privately-owned premises. Legislative amendment is required to clarify the situation where an area is simultaneously public and private. There is no provision for compensation for people whose property is damaged or interfered with in the course of exercising crime scene powers.

Under s 96, a person must not, without reasonable excuse, fail or refuse to comply with a request or direction made by a police officer exercising crime scene powers (maximum penalty 10 penalty units). There appears to be no threshold requirement that the police request or direction must be reasonable in the circumstances. The Committee suggest an amendment so that the request must be "reasonable".

Part 8 - Powers of arrest

Arrest as a last resort – s 99(3)

In regard to arrest powers, the most significant change introduced by LEPRA is s 99(3), which gives statutory basis to the long-held common law principle that arrest is a last resort. The Committee regards this as a very positive development.

However, the experience of our members (and other members of the legal profession) suggests that this provision is still not adequately understood by police or by judicial officers.

Despite s 99(3), many police officers do not appear to understand the need to consider alternatives to arrest, and to arrest *only* if none of those alternatives is appropriate. There is also a widely-held misconception among police officers that they have the power to arrest someone for the purpose of investigation.

The decision of Heilpern LCM in *R v McClean* [2008] NSWLC 11 illustrates some of the confusion that has arisen in relation to the interpretation of s 99. His Honour's judgment

provides some helpful clarification, but the Committee is of the view that some further clarification would be beneficial.

In that case it was argued by the prosecution that, once the police had reasonable grounds to suspect the defendant had committed an offence, they were empowered to arrest her under s 99(2). The prosecutor submitted that the purpose of the arrest was not to commence proceedings but to confirm the defendant's identity, and therefore s 99(3) did not apply.

His Honour rejected this submission. At paras 25-26:

> *"It is my view of s99 of LEPRA that subsection (2) states a general power, and then subsection (3) qualifies that power. 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. Investigation is not one of these preconditions.*
>
> *It is arguable that subsection (3) limits those preconditions to circumstances of arrest by the words "for the purpose of taking proceedings". Thus, the argument goes, police need only have a reasonable suspicion to arrest, and then can detain for the purposes of investigation without concern for s99(3). Sections 109 to 114 of LEPRA do provide powers for detention after arrest for the purposes of investigation, however it was not submitted by the prosecution that these sections were relied upon. It is clear that those sections do not confer any power to detain a person who has not been lawfully arrested – see s 113(1)(a) of LEPRA. Further, such an interpretation would represent such a significant departure from the common law prohibition regarding arrest for investigation that it could not be said to represent a codification of the common law."*

At para 31:

> *"The courts and the parliament have spoken loudly, clearly and repeatedly – it is not enough to arrest a person simply because there is a reasonable suspicion that they have committed an offence. Arrest will be unlawful unless it is necessary to achieve one of the purposes set out in s99(3). It is not one of those purposes that further investigation needs to take place. Arrest is a last resort."*

In his judgment, Heilpern quoted the following very important passage from the judgment of Mason and Brennan JJ *Williams v R* [1987] HCA 36, at para 22:

> *"The jealous protection of personal liberty accorded by the common law of Australia requires police so to conduct their investigation as not to infringe the arrested person's right to seek to regain his personal liberty as soon as practicable. Practicability is not assessed by reference to the exigencies of criminal investigation; the right to personal liberty is not what is left over after the police investigation is finished."*

It is clear that some police officers still do not seem to understand that there is no power to arrest merely for the purposes of investigation. Although the common law is clear on this, and s 113 provides that nothing in Part 9 confers on police any power to arrest, perhaps this could be clarified with an amendment to s 99 or another provision somewhere in Part 8.

The Committee suggests that s 99 be clarified to provide that, if a police officer arrests a person under s 99(1) or (2), such an arrest must be for the purpose of taking

proceedings against the person for an offence, and not for the purpose of investigating whether an offence has been committed.

It should be noted that bail may be granted or refused even if the accused person is not in custody (*Bail Act* s15). Therefore the perceived need to set bail conditions is not, of itself, a reason justifying arrest under s 99(3). It would be of benefit if s 99(3) could be amended to clarify this.

Regardless of whether the legislation is amended, the Committee sees an urgent need for improved police training on arrest powers.

After arrest – s 99(4)

Section 99(4) provides that a police officer who arrests a person must, as soon as reasonably practicable, take the person before an authorised officer to be dealt with according to law.

Although the objectives of s 99(4) are sound (to ensure that police do not detain people for improper purposes or for longer than necessary) it does not reflect current reality. Nor does it sit well with other provisions of the Act, especially Part 9 and s 105 (which gives police the power to discontinue an arrest).

Arrest for breach of peace or breach of bail

Police have the power under s 50 of the *Bail Act 1978* to arrest for breach of bail, and a common law power (preserved by s 4 LEPRA) to arrest for breach of the peace.

The Committee suggests that consideration be given to enacting these powers in Part 8 of LEPRA so that citizens are more aware of situations in which police are empowered to arrest without warrant. The Committee does not suggest that the meaning of "breach of the peace" needs to be codified. The Committee also submits that some statutory limitation should be placed on the powers to arrest for breach of bail or breach of the peace, so that an arrest is made only when no other options are appropriate. These arrest powers should be subject to the s 201 safeguards.

Part 9 - Detention after arrest

No power to arrest for purpose of investigation

As mentioned above, many police officers still do not appear to understand that there is no power to arrest merely for the purposes of investigation. Although the common law is clear, and s113 provides that nothing in Part 9 confers on police any power to arrest, it may be worth clarifying this by legislative amendment to s99 or another provision somewhere in Part 8.

It is common for police officers to assert that it is necessary to arrest a suspect in order to accord them their Part 9 rights. There also appears to be significant confusion about the concept of deemed arrest.

The Committee concedes that as a matter of practical reality, the custody manager, who is responsible for ensuring that Part 9 is complied with, is located in the custody area. It is easier for the custody manager to explain to a suspect his/her Part 9 rights, and to ensure they are complied with, if the suspect is also in the custody area.

However, the Committee does not accept that it is necessary for a person who voluntarily attends the police station for an interview to be placed under arrest and taken out the back to speak to the custody manager. The Committee suggests that provision

be made for a person other than the custody manager to explain the suspect's Part 9 rights, in situations where a suspect is under deemed arrest, but not actual arrest.

People under arrest on warrants or for breach of bail

It is unfortunate that at least some of Part 9 does not apply to people arrested for breach of bail or on bench warrants. Although police will usually allow the arrestee to contact a lawyer or support person in this situation, this is a discretionary matter and not a right.

The Committee is of the view that some of the rights and safeguards under Part 9 (e.g. to contact a friend or relative or a lawyer and to be given reasonable refreshments etc) ought to apply to all people in police custody and under arrest. There is a good argument to extend rights to people who have been arrested but who are not being detained for the purposes of investigation e.g. those arrested on warrants or for breach of bail. This matter needs to be investigated further and could be appropriately built on the model of Part 9.

Shorter investigation period for vulnerable persons

Section 112 provides that the Regulations may provide for a shorter investigation period for certain classes of vulnerable persons. The Committee suggests that serious consideration be given to prescribing a shorter investigation period for vulnerable persons, especially children.

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

Section 133 – Power to take identification particulars

Taking a person's photograph or a finger print should not be a routine procedure, particularly in country towns and rural areas where police know people and do not need to take particulars to identify a person. Further police education is required.

Section 137A – Destruction of fingerprints and palm prints (adults and children)

A person from whom any fingerprints or palm prints are taken under Part 10 Division 1 in relation to an offence may request the Commissioner to destroy the prints if the offence is not proven. "Not proven" includes being found not guilty, acquitted, or having a conviction quashed and an acquittal entered on appeal. It also includes the situation where proceedings have not been commenced, or have been discontinued, 12 months after the prints were taken (but see section 137B). The Commissioner must destroy the prints as soon as reasonably practicable after receiving the application.

This section does not go far enough. The Commissioner should have a discretion to destroy fingerprints etc in other situations. In relation to children, s 38 of the *Children (Criminal Proceedings) Act 1987* gives the Children's Court a discretion to order the destruction of fingerprints etc where the court believes the circumstances justify it. However there is no equivalent provision applying to adults.

The following case study illustrates the need for such a discretion:

> An 18-year-old man was pulled over for a RBT, which was negative. The police officer noticed a non-standard modification to his vehicle and started issuing him a penalty notice. An argument ensued and the young man was arrested, taken to the police station, fingerprinted and photographed. He was charged with

offensive language and resist police, and was ultimately found not guilty of these offences, but pleaded guilty to the "vehicle not comply with standard" offence. Had he been dealt with appropriately at the outset, police would not have his fingerprints and photograph on record. The solicitor wrote to the Commissioner requesting that this material be destroyed, but this request was declined as there was no legislative basis for it.

The Committee is of the view the Commissioner should have the discretion to destroy finger prints etc when the circumstances justify it and the court should have the power to review the Commissioner's position.

An inconsistency remains within s 137A, in that the section does not refer to charge photographs or criminal records, and therefore Police continue to retain these records in accordance with Part 3 of the *State Records Act 1998*.

Section 137A should be amended to include reference to photographs and any other records (other than records of the Court) relating to the alleged offence.

Section 138 – Power to examine person in custody

A medical practitioner acting at the request of a police officer of the rank of Sergeant or above may examine a person in lawful custody for the purpose of obtaining evidence if the person in custody has been charged with the offence, and there are reasonable grounds for believing that an examination of the person may provide evidence as to the commission of the offence.

It is unclear how this provision interacts with the provisions of the *Crimes (Forensic Procedures) Act 2000*. Certainly such an examination would fall within the definition of "forensic procedure" (and in many cases would constitute an intimate forensic procedure) and would be subject to the safeguards provided by that Act. However, it appears that LEPRA authorises such an examination without the safeguards required by the *Crimes (Forensic Procedures) Act 2000.*

The Committee is of the view that Section 138 should be moved to the *Crimes (Forensic Procedures) Act 2000.*

Part 11 - Drug detection powers

Div 1 – drug premises

The provisions are based on the *Police Powers (Drug Premises) Act 2001,* which was reviewed by the NSW Ombudsman.

Div 2 – drug detection dogs

These provisions are based on the *Police Powers (Drug Detection Dogs) Act* 2001, which was also reviewed by the NSW Ombudsman. The Ombudsman expressed significant concerns and made a number of recommendations, most of which have not been incorporated into LEPRA. One of the recommendations was that Parliament give serious consideration to whether the drug detection dogs legislation should be retained at all.

Div 3 – internally concealed drugs

It is pleasing to see that these provisions have been repealed.

Part 12 - Powers relating to vehicles and traffic

Most police powers in relation to traffic (eg accidents, random breath testing, speed measuring devices) remain in the *Road Transport (Safety and Traffic Management) Act* 1999 and the *Road Transport (General) Act 2005*.

The Committee suggests that Part 5 should be removed from LEPRA and moved to the relevant pieces of road transport legislation.

Part 14 - Power to give directions

Most of these powers were transferred over from the *Summary Offences Act*.

The direction-giving power was reviewed by the NSW Ombudsman in 1999 ("Policing Public Safety" report published November 1999). The power to give directions to persons in relation to drug activity was introduced in 2001 by the *Police Powers (Drug Premises) Act*, which was also reviewed by the Ombudsman.

Unfortunately the legislature has done nothing to address most of the problems identified by the Ombudsman, and instead has transferred the problems to LEPRA. The only amendments have made it easier for the police and not correspondingly for the people subject to the powers.

There is still a significant problem with police giving inappropriate directions, especially to young people, indigenous people and drug users. However, the provisions do contain some safeguards and there are a number of elements which the police must prove in order to successfully prosecute a person for failure to comply. Unfortunately most allegations of disobeying police directions are dealt with by infringement notice and are rarely contested. Again this is a further example of where police require further education.

There has also been the relatively recent addition of powers to move on groups of intoxicated persons that contain preconditions for the issue of a direction.

Part 15 - Safeguards relating to powers

The s 201 safeguards apply to the exercise of most powers, whether or not conferred by LEPRA or any other law (including common law), unless specifically excluded. The Committee is highly in favour of s 201.

Section 201(6) (which was inserted on 12 December 2006) makes it clear that the section does not apply to powers exercised under Acts listed in Schedule 1. This would include, for example, an arrest for breach of bail under the *Bail Act 1978*, the detention of a person under the *Mental Health Act 2007*, a direction given under the Road Transport legislation, or the conducting of a forensic procedure under the *Crimes (Forensic Procedures) Act 2000*. This is unsatisfactory. While some of these Acts (e.g. *Crimes (Forensic Procedures) Act 2000*) may contain sufficient safeguards, others do not.

Part 18- Use of Force

Police require training on what constitutes "force as is reasonably necessary".

The Committee also suggests that there be some legislative guidance on what "reasonably necessary" means, and that police should be required to consider factors including the seriousness of the offence for which the arrest is being made, the age, gender and cultural background of the person being arrested, and any physical or mental illness or disability.

Part 19 - Miscellaneous

As discussed above, the Ombudsman should be given a general observation power under s 242. The Ombudsman should be included with the Attorney General and the Minister for Police under s 242 to review the Act to determine whether the police objectives remain valid and whether the terms of the Act remain appropriate for securing those objectives.