



NSW Ombudsman

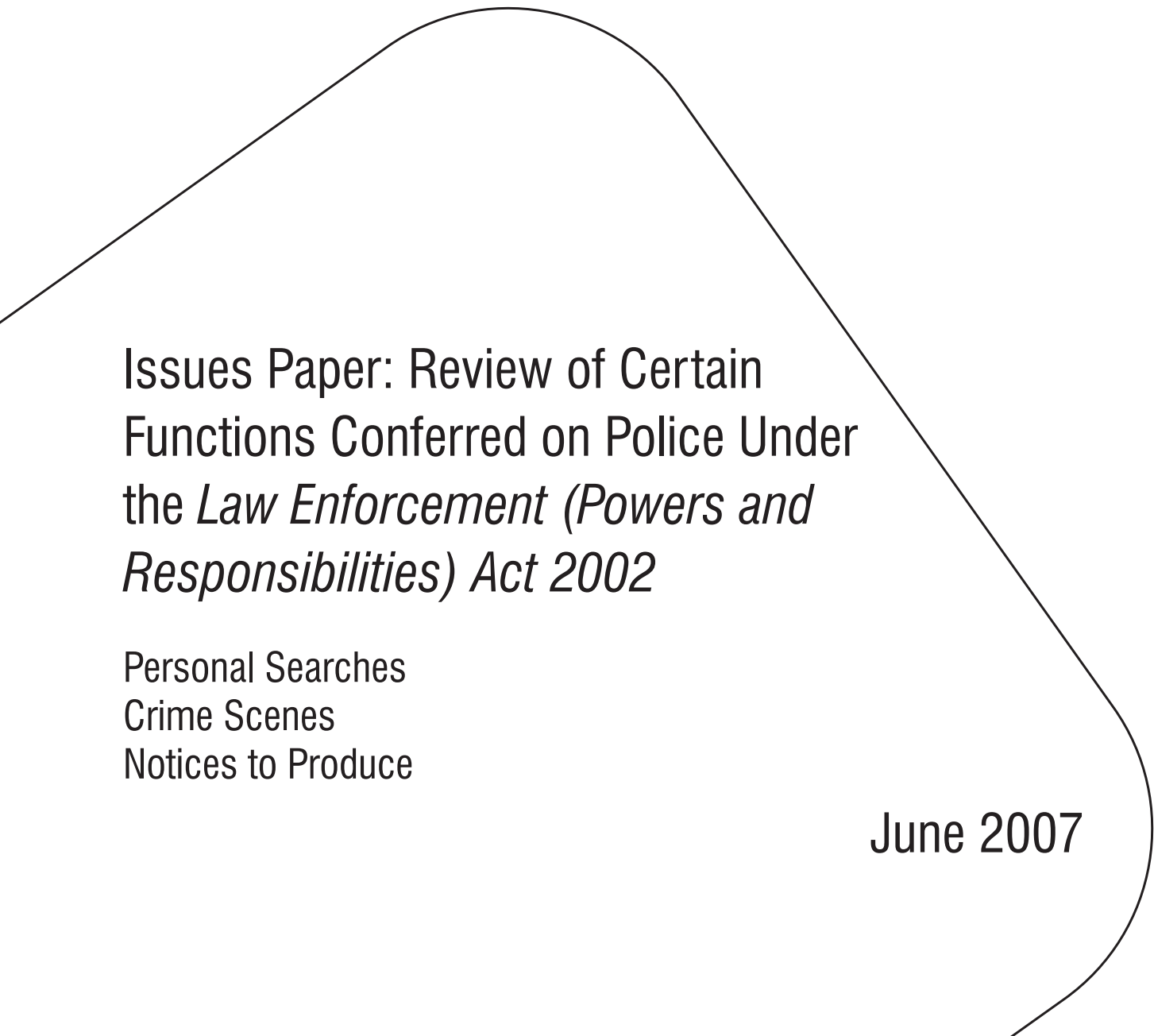
Issues Paper:

Review of Certain Functions Conferred on Police Under the *Law Enforcement (Powers and Responsibilities) Act 2002*

Personal Searches
Crime Scenes
Notices to Produce

June 2007





Issues Paper: Review of Certain
Functions Conferred on Police Under
the *Law Enforcement (Powers and
Responsibilities) Act 2002*

Personal Searches
Crime Scenes
Notices to Produce

June 2007

Any correspondence relating to this review should be sent to:

Issues Paper: Review of Certain
Functions Conferred on Police Under
the *Law Enforcement (Powers and
Responsibilities) Act 2002*
Level 24 580 George Street
Sydney NSW 2000

Phone: (02) 9286 1000
Toll free (outside Sydney Metro Area): 1800 451 524
Facsimile: (02) 9283 2911
Telephone typewriter: (02) 9264 8050
Website: www.ombo.nsw.gov.au
Email: nswombo@ombo.nsw.gov.au

ISBN 978-1-921131-72-1

© Crown Copyright, NSW Ombudsman, June 2007

This work is copyright, however material from this publication may be copied and published by State or Federal Government Agencies without permission of the Ombudsman on the condition that the meaning of the material is not altered and the NSW Ombudsman is acknowledged as the source of the material. Any other persons or bodies wishing to use material must seek permission.

Contents

Chapter 1. Overview	1
1.1. Introduction	3
1.2. Background	4
1.3. Implementation of LEPR	5
1.4. Sources of information.....	6
Chapter 2. The personal search provisions	11
2.1. Introduction	11
2.2. Objectives of the personal search provisions	11
2.3. Overview of the personal search provisions.....	11
2.4. Sources of information.....	16
2.5. Implementation of the personal search provisions by the NSW Police Force	17
2.6. Comparable legislation in other jurisdictions	17
2.7. Data on the use of the personal search provisions.....	18
2.8. Issues relating to the operation of the personal search provisions	21
2.9. The general safeguards	26
2.10. Safeguards to ensure dignity and privacy	28
2.11. Safeguards for strip searches	34
2.12. Additional search powers	44
Chapter 3. The crime scene provisions.....	51
3.1. Introduction.....	51
3.2. Objectives of the crime scene provisions	51
3.3. Overview of the crime scene provisions.....	51
3.4. Sources of information.....	61
3.5. Comparable legislation in other jurisdictions	61
3.6. Implementation of the crime scene provisions by the NSW Police Force	61
3.7. NSW Police Force operational units involved in the establishment and investigation of crime scenes ...	62
3.8. Data on the use of the crime scene provisions	62
3.9. Issues arising during the review period so far	64
Chapter 4. The notice to produce provisions.....	81
4.1. Introduction.....	81
4.2. Objectives of the notice to produce provisions.....	81
4.3. Overview of the notice to produce provisions	81
4.4. Sources of information.....	84
4.5. Comparable legislation in other jurisdictions	84
4.6. Data on the notice to produce provisions	85
4.7. Issues arising during the review period so far	87
Consolidated list of questions for consideration.....	97
Glossary	103
Appendix A.....	105



Chapter 1. Overview

Chapter 1. Overview 1

1.1. Introduction 3

1.2. Background 4

1.3. Implementation of LEPR 5

1.4. Sources of information 6

1.1. Introduction

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 (NSW). However, it does not comprehensively codify all police powers — a number of police powers can still be found in various other pieces of legislation and the common law.¹

Section 242 of LEPRA requires the Ombudsman to keep under scrutiny the exercise of the following functions conferred on police officers:

- personal searches on arrest or while in custody²
- notices to deposit-taking institutions to produce documents,³ and
- the establishment of crime scenes.⁴

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.

It should be noted that LEPRA also 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 those of 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 which are currently being reviewed separately by our office.⁵

LEPRA requires the Ombudsman to monitor the operation of the relevant provisions for a two-year period. The review period began on 1 December 2005. The Ombudsman will report on the outcome of the review as soon as practicable after the completion of the two-year review period.

This issues paper provides some background to LEPRA, an explanation of the legislative provisions that are subject to review, and some initial statistical information about the operation of the legislation during the first 12 months. The paper outlines a number of issues which have been brought to our attention during the review. The purpose of the issues paper is to seek submissions from interested people and organisations for the purposes of our final report.

We have included some specific questions which we invite you to address in your submission. However, you are invited to comment about any aspect of the implementation or operation of LEPRA. Submissions may be in the form of a formal written document or simply a letter or email.

Please note that we generally attribute comments from submissions to the authors of those comments. If you do not want all or some of your comments to be attributed to you or your organisation, please advise us accordingly. We are happy to discuss any concerns you may have about confidentiality.

To make an inquiry or discuss this review, please contact Shelagh Doyle on (02) 9286 1050.

Submissions and correspondence relating to this review should be addressed to:

Mail: LEPRA Review or **Email:** review@ombo.nsw.gov.au
NSW Ombudsman
Level 24, 580 George St
SYDNEY NSW 2000

Due date for submissions: 15 August 2007

1.2. Background

1.2.1. The Wood Royal Commission

As the Attorney General indicated when introducing LEPRA, the Wood Royal Commission into the NSW Police Service,⁶ which delivered its final report in May 1997, was central to the reform of police powers in NSW.⁷ 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, and*
- *assist in the training of police.*⁸

Of the benefits put forward by the Royal Commission, it is the first that has been most frequently raised in promoting LEPRA.

1.2.2. Further influences

In the last 10 years there have been numerous other events, reports and statutory developments which have provided further strength to 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;⁹ and the forensic procedures legislation introduced in 2000.¹⁰ 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)*.¹¹

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'.¹²

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'.¹³ In the same year, the NSW Ombudsman released the *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.¹⁴

LEPRA brings many of these changes under one piece of legislation in an attempt to make police powers more accessible to police officers and ordinary citizens. LEPRA seeks to define the conditions upon 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.

The issue of clarifying and consolidating police powers has also been considered for a number of years in many 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.¹⁵

1.2.3. The development of LEPRA

Following the recommendations of the Wood Royal Commission in 1997, the NSW government established a taskforce in 1998 to examine, clarify and consolidate police powers into one piece of legislation. The taskforce comprised representatives from the Parliamentary Counsel's Office, the Attorney General's Department, the NSW Police Force, the Ministry for Police, and the Cabinet Office.

In June 2001, the taskforce presented the government with an exposure draft Law Enforcement (Powers and Responsibilities) Bill 2001. Four months were set aside for consultation on the exposure bill.

The Law Enforcement (Powers and Responsibilities) Bill was introduced into the NSW Parliament in September 2002 and assented to on 29 November 2002. When introducing the Bill into Parliament, the Attorney General the Hon. Bob Debus 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.¹⁶

LEPRA did not commence until 1 December 2005, some three years after assent.¹⁷ This delay occurred because the NSW Police Force needed to develop and implement adequate systems to ensure the smooth introduction and operation of the legislative changes, and to educate and train police and other staff about these changes.

1.3. Implementation of LEPRA

A comprehensive overview of the steps taken by the relevant authorities to implement the relevant sections of LEPRA under review will be provided in our final report. Below is a brief summary of the implementation activities undertaken so far by the NSW Police Force.

1.3.1. 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 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

together with representatives of various operational police areas, the Ministry for Police, and the Police Association.

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

- operational policing
- education and training
- communications and change management
- information technology, and
- search warrants.¹⁸

1.3.2. Education and training

Training about LEPRA was mandatory for all police.

From July 2005, Education Services 'rolled out' a training package throughout all units and Local Area Commands (LACs). This involved five face-to-face training sessions and on-line units, covering various topics — including the search powers and related safeguards, crime scenes, the WIPE provisions¹⁹ and notices to produce. Other strategies used to educate and train police include:

- the publication in July 2005 of a special edition of the *Policing Issues & Practice Journal* devoted to LEPRA, which was made available to all police²⁰
- the publication of articles about LEPRA in the *Police Weekly* in the period leading up to the commencement of LEPRA in December 2005
- the development of a frequently asked questions guide which was placed on the Police Intranet in October 2005 and recurrently updated
- the publication in November 2005 of a *COPS LEPRA User Guide* which outlined changes to the Computerised Operational Policing System (COPS) and intranet forms required to implement LEPRA
- the publication of a regular column in the *Police Weekly* about LEPRA provisions and developments from July 2006, and

- the development of specific LEPR training materials for police prosecutors and the roll out of training for prosecutors across the state between August and September 2006.

In addition, the Foundational Studies Unit of Educational Services commenced LEPR training of student police in early 2005. Legal Services commenced LEPR training of trainee prosecutors in late 2005.

1.3.3. Development of policies and procedures

The NSW Police Force has advised that any policy documents affected by LEPR, 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. Police have indicated that the process of updating the *Police Handbook* to reflect LEPR is nearing completion.²¹

The *Code of Practice for CRIME* is also updated periodically. Updates made in December 2005 and August 2006 incorporate many of the changes made by LEPR.²²

1.3.4. Systems changes to COPS

The implementation of LEPR required the NSW Police Force to update its technology systems.

Changes to COPS were completed in November 2005, with new screens and action types introduced. The primary change to COPS was in relation to how police record information about searches, crime scenes, and notices to financial institutions to produce documents.²³

1.4. Sources of information

The methods we have employed in our review will be set out in detail in our final report. At this stage we have scrutinised the police use of the powers by:

- reviewing COPS records
- observing police operations
- monitoring complaints and enquiries from members of the public
- conducting interviews and focus groups with police
- consulting community members and organisations, and
- conducting a literature survey.

We also plan to examine data from NSW Local Courts.

Our analysis of this information and the submissions and contributions from individuals and organisations that we receive in response to this issues paper will form the basis of our final report.

Endnotes

¹ Schedule 1 of the *Law Enforcement (Powers and Responsibilities) Act 2002* details the Acts not affected by the legislation, for example, the *Crimes (Forensic Procedures) Act 2000*.

² *Law Enforcement (Powers and Responsibilities) Act 2002*, Part 4, Divisions 2 and 4.

³ *Law Enforcement (Powers and Responsibilities) Act 2002*, Part 5, Divisions 3 and 4.

⁴ *Law Enforcement (Powers and Responsibilities) Act 2002*, Part 7 and Part 5, Division 4.

⁵ These reports can be accessed free of charge through the publications section of the NSW Ombudsman website, www.ombo.nsw.gov.au.

⁶ The 'NSW Police Service' was renamed 'NSW Police' in 2002 and was recently renamed the 'NSW Police Force' in 2006.

⁷ The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p. 4846.

⁸ Royal Commission into NSW Police Service, *Final Report*, May 1997, Vol. II at paragraph 7.20.

⁹ *Crimes Legislation Amendment (Police and Public Safety) Act 1998*.

¹⁰ *Crimes (Forensic Procedures) Act 2000*.

¹¹ The *Code of Practice for Custody, Rights, Investigation, Management and Evidence* is a NSW Police document which outlines non-statutory guidelines to govern police behaviour. It details procedures associated with arrest, detention and investigation to be followed by police.

¹² 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*.

¹³ 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 5.3.

-
- ¹⁴ NSW Ombudsman, *Policing Public Safety*, 1999.
- ¹⁵ 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 5.1-5.3.
- ¹⁶ The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p. 4846.
- ¹⁷ 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.
- ¹⁸ Implementation of proposed amendments to the search warrants legislation was a separate project. We note that the amendments to the search warrants legislation introduced by LEPRA have not commenced.
- ¹⁹ The term 'WIPE' is a reference to section 201(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002*. The acronym WIPE was used by police as a training tool as a reminder to: Warn that it may be an offence not to comply; Inform of the reason for the exercise of the power; Provide name and station; and Evidence the fact that you are a police officer.
- ²⁰ *Policing Issues & Practice Journal*, 'LEPRA: Consolidating Police Powers', Special Edition, July 2005, Vol. 13, No. 3.
- ²¹ NSW Police Force response to consultation draft issues paper, 14 May 2007, p. 2.
- ²² The *Code of Practice for Custody, Rights, Investigation, Management and Evidence* has not yet been updated to incorporate amendments to LEPRA made by the *Police Powers Legislation Amendment Act 2006*, which commenced on 12 December 2006.
- ²³ LEPRA COPS User Guide Prepared by NSW Police, Business and Technology Services, November 2005.

Chapter 2. The personal search provisions

- 2.1. Introduction 11
- 2.2. Objectives of the personal search provisions 11
- 2.3. Overview of the personal search provisions..... 11
- 2.4. Sources of information..... 16
- 2.5. Implementation of the personal search provisions by the NSW Police Force 17
- 2.6. Comparable legislation in other jurisdictions 17
- 2.7. Data on the use of the personal search provisions..... 18
- 2.8. Issues relating to the operation of the personal search provisions 21
- 2.9. The general safeguards 26
- 2.10. Safeguards to ensure dignity and privacy 28
- 2.11. Safeguards for strip searches 34
- 2.12. Additional search powers 44

2.1. Introduction

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

We have structured our discussion of the personal search provisions as follows:

- a brief outline of the objectives behind the personal search powers and safeguards
- a detailed overview of the legislative provisions
- our information sources for this discussion
- a discussion of the implementation of the personal search provisions
- an overview of comparable legislation in other Australian jurisdictions
- an outline of the data relating to personal searches conducted by the NSW Police Force, and
- a discussion of various issues and concerns that have arisen to date about the operation of the legislation.

2.2. Objectives of the personal search provisions

In his second reading speech, the Attorney General, the Hon. Bob Debus, introduced the personal search provisions by 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 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.²⁴

The Attorney General went on to say:

In order to provide greater regulation of police search powers, the bill substantially adopts the three-tiered personal search model contained in the Commonwealth Crimes Act 1914... The bill introduces a regime of frisk, ordinary and strip searches in respect of all personal searches conducted under the bill. The bill details the circumstances in which each of the three levels of search may be warranted and provides safeguards to protect the privacy and dignity of persons being searched.²⁵

In terms of the general safeguards, the Attorney General said:

The application of the safeguards contained in Part 15 of the bill represents the clarification 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.²⁶

2.3. Overview of the personal search provisions

2.3.1. The powers to search in Part 4 of LEPRA

Part 4 of LEPRA provides police with the power to search persons. Division 1 allows police to stop, search and detain persons in relation to particular offences. Division 3 provides police with additional personal search and seizure powers in public places and schools. Neither Division 1 nor Division 3 are the subject of our review.²⁷

Division 2 provides police with the power to search persons on arrest or in custody. 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. Both Division 2 and Division 4 (so far as it applies to searches under Division 2) are the subject of our review. In addition, Part 15, which provides for safeguards relating to police powers including personal searches, is the subject of review.

Part 4 and Part 15 of LEPRA commenced on 1 December 2005. Part 15 was amended by the *Police Powers Legislation Amendment Act 2006* which commenced on 12 December 2006. The reasons for the amendments to Part 15 are discussed below.

2.3.2. The power to search persons on arrest or 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 'lawful custody of the police'.

In his second reading speech, the 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'.²⁸ 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 in custody and is a justifiable law enforcement power'.²⁹

2.3.3. Frisk, ordinary and strip searches

Section 30 of LEPPRA provides police with the power to carry out a 'frisk search' or an 'ordinary search'. Section 30(1) provides:

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.

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.*³⁰

Section 30(2) provides:

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.

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.*³¹

Section 31 of LEPR 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.

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.*

2.3.4. The general safeguards

Part 15 of LEPR provides general safeguards that apply to the exercise of certain powers including the power to search or arrest a person.³² The parts of section 201 that are relevant to searches on arrest or in custody are highlighted in bold below. Section 201 provides:

- (1) **A police officer must 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.**
- (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, 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,**
 - (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.

2.3.5. Safeguards for all personal searches

Section 32 provides a number of safeguards for the preservation of privacy and dignity during searches.³³ 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.*

- (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 reasonable appropriate clothing.*

2.3.6. Safeguards for strip searches

Section 33 provides further safeguards for strip searches.³⁴ Section 33 provides:

- (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.*

'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.*

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

LEPRA contains a 'note' at the end of section 33, which states that 'Procedures for searches of a more invasive nature are dealt with under the *Crimes (Forensic Procedures) Act 2000*'. That Act authorises DNA samples, photographs, swabs of the body, nail scrapings, finger prints, visual examinations of the body, hair samples and dental impressions.³⁵

2.4. Sources of information

In reviewing the operation of the personal search provisions in LEPRA, we have used a variety of research methods.

- We have required the NSW Police Force to provide us with data from the Computerised Operational Policing System (COPS) on the use of the search provisions. That data includes details of the date, time and location of the search, the officer who conducted the search, the person who was searched including their sex and age, the type of search, whether a support person was present, the primary reason for the search, and any legal action taken. The COPS data included in this issues paper covers the first 12 months since LEPRA commenced, from 1 December 2005 to 30 November 2006. During the course of the review, the NSW Police Force has made additional amendments to COPS data extracts at the Ombudsman's request and using NSW Police Force resources.
- We visited seven Local Area Commands (LACs) between March and August 2006 and discussed the implementation and operation of the search provisions with a variety of officers, including probationary constables, constables, sergeants and commanders. The LACs that we visited are identified as LACs 'A' to 'G' for the purpose of this issues paper.
- We have held consultations with the Intellectual Disability Rights Service and the Shopfront Youth Legal Centre.
- We have conducted a review of comparable legislation in other jurisdictions and various articles discussing the personal search provisions.
- We are monitoring any legal proceedings where the personal search provisions are being considered.
- We have conducted observations of searches performed as part of high visibility policing operations and in custody rooms. While we have attempted to focus our observational research on searches following arrest or in custody, some searches observed may have been performed under section 21 of LEPRA which sets out the general police powers to stop, search and detain.³⁶ As we explain later, the precise point of arrest can often be unclear, however, our observations of these searches have informed our general understanding of how police undertake searches of persons and apply the safeguards. In the examples provided in Chapter 2 of this paper, we have not sought to distinguish between the applicable search powers where our observations reflect on the general safeguards that apply to the different types of searches performed by police.

2.5. Implementation of the personal search provisions by the NSW Police Force

Training for the NSW Police Force has included:

- Mandatory training modules undertaken in 2005 prior to the commencement of LEPR. These training modules covered a number of areas relating to personal searches including:
 - the three-tiered personal search regime
 - the general rules for conducting searches
 - confiscating knives or other dangerous implements
 - circumstances when an officer may stop, search and detain without a warrant
 - power to seize dangerous articles used in the commission of an offence, and
 - the safeguards to be applied when conducting personal searches.
- Amendments to the *Code of Practice for Custody, Rights, Investigation, Management and Evidence (The Code of Practice for CRIME)*.
- The publication of a special edition of the *Policing Practice and Issues Journal* dedicated to the operation of LEPR in July 2005.
- The development of a new *Searching Manual* by the Operational Safety Training Unit in August 2006.
- Articles and law notes in the *Police Weekly* on the LEPR search powers.

2.6. Comparable legislation in other jurisdictions

2.6.1. Commonwealth

In introducing LEPR's personal search provisions, the Attorney General indicated that the new legislation:

*substantially adopts the three-tiered personal search model contained in the Commonwealth Crimes Act 1914, which in turn is based on the Model Criminal Code.*³⁷

Under the *Crimes Act* (Cth), Federal police have the power to conduct a 'frisk search' or an 'ordinary search' of an arrested person, and the power to conduct an 'ordinary search' or a 'strip search' of a person in custody at a police station.³⁸ Police must suspect on reasonable grounds that a strip search is necessary in order to recover a seizable item or evidentiary material and must obtain approval from a superintendent or higher.³⁹ The terms 'frisk search', 'ordinary search' and 'strip search' are defined in section 3 and have substantially the same meaning as they do in LEPR.

The rules for the conduct of a strip search in the *Crimes Act* are similar to the rules for strip searches in section 33 of LEPR. However, under the *Crimes Act*, persons incapable of managing their own affairs and children between the ages of 10 and 18 must not be strip searched unless they have been charged or an order has been obtained from a magistrate.⁴⁰ The only rule provided for the conduct of a frisk or an ordinary search is that it must be conducted by a person of the same sex as the person being searched, if practicable.⁴¹

Our review of the rationale behind the three-tiered model of searches in the *Crimes Act* suggests that it was introduced on the recommendations of Sir Harry Gibbs' 1991 *Review of Commonwealth Criminal Law: Fifth Interim Report*.⁴² In his report, Gibbs considered the statutory search regimes in force in Australian jurisdictions and noted that the *Customs Act 1901* (Cth) was the only Australian statute to prescribe how three tiers of frisk, external and internal searches should be conducted.⁴³

NSW is the only state that has followed the Commonwealth model of three-tiered searches.

2.6.2. Queensland

In 2000, the Queensland Parliament passed the *Police Powers and Responsibilities Act 2000*.

Under the *Police Powers and Responsibilities Act*, Queensland police have the power to search a person who is lawfully arrested; in lawful custody for particular purposes; or is otherwise lawfully detained under another Act.⁴⁴ A 'search' is defined as including a frisk search but does not include the use of a drug detection dog. Police have the power to remove clothing for a search,⁴⁵ and 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'.⁴⁶ The terms 'frisk search' and 'search' are defined in the Act.⁴⁷

The general rules for the conduct of searches are expressed in terms of 'causing minimal embarrassment to the person being searched'. They include rules similar to the search safeguards in section 32 of LEPR, but also provide that searches in public should be restricted to outer clothing, unless an immediate and more thorough search is necessary.⁴⁸ The rules for searches involving the removal of clothing that differ from LEPR include providing the person with the opportunity to remain partly clothed during the search, and prohibiting physical contact with the genital and anal areas of the person searched.⁴⁹

2.6.3. Western Australia

In 2006, the Western Australian Parliament passed the *Criminal Investigation Act 2006*. The Act has not yet commenced.⁵⁰

The *Criminal Investigation Act* will provide Western Australian police with the power to conduct a 'basic search', or a 'strip search' on a person in custody for security purposes.⁵¹ The terms 'basic search' and 'strip search' are defined in sections 63 and 64.⁵²

The rules for the conduct of searches are similar to those found in Part 4 and Part 15 of LEPR. However, in order to conduct a strip search, police are only required to reasonably suspect that it is necessary in the circumstances, rather than considering necessity, seriousness and urgency as required under LEPR.⁵³ Police operating under the *Criminal Investigation Act* are required to request the person's consent prior to conducting a search to the extent that it is reasonably practicable, and inform the person that it is an offence to obstruct the search if the person does not consent to the search or withdraws his or her consent.⁵⁴

2.7. Data on the use of the personal search provisions

2.7.1. Recording of personal searches in COPS

The distinction in LEPR between search 'on arrest' and search 'in custody' is not used in the COPS recording system, which classifies searches according to their occurrence 'in the field' or 'in custody'. Consequently, it has not been possible to determine how many searches 'in the field' or 'in custody' involved a search on arrest, or how many searches 'in custody' involved a search of a person 'in lawful custody' (as opposed a search of a person who is merely in a custody location). However, this data still provides useful information on the application of the personal search safeguards, because the safeguards apply to 'any search of a person'.⁵⁵

2.7.1.1. Searches in the field

Police are required to record the details of personal searches in the COPS system. Searches in the field are recorded as 'Power — Person Search' incidents within the 'events' recording system. In the 'Power — Person Search' screen, officers must complete the 'search details' screen. The mandatory fields in the 'search details' screen are:

- the type of search
- the date and time of the search
- the searching officer
- the location of the search, and
- the primary reason for the search.

Additional reasons can be entered as free text. Multiple search entries can be made for the one event.⁵⁶

2.7.1.2. Searches in custody

If any property is found during a search in custody, police are required to record the search details in the 'property' screen within the 'custody' recording system. When a new 'property record' is created, the 'person search details' screen is displayed — the mandatory fields in this screen are the same as those listed above for a search in the field, with the exception of the 'primary reason' field which defaults to 'custody property search'. There is also a yes/no field for 'support person present'; however, this does not appear to be a mandatory field.⁵⁷

For searches in custody where no property is found, police are also instructed to create personal search details, but in a separate part (the 'person details') of the custody event. Again, the mandatory fields are the same as those listed above for a search in the field; however, a 'custody property search' cannot be nominated as the 'primary reason' and a yes/no field is provided to record whether a support person was present.⁵⁸

2.7.2. The type of searches being used

The COPS data indicates that in the first 12 months of the review period, 12,347 searches were conducted in the field, and 127,806 searches were conducted in custody. The majority of these searches were ordinary searches as shown in Figures 1 and 2:⁵⁹

- Frisk searches accounted for 3,261 (27%) searches in the field and 25,348 (20%) searches in custody.
- Ordinary searches accounted for 8,809 (71%) searches in the field and 95,617 (75%) searches in custody.
- Strip searches accounted for 277 (2%) searches in the field and 6,841 (5%) searches in custody.⁶⁰

2.7.3. Same sex searches

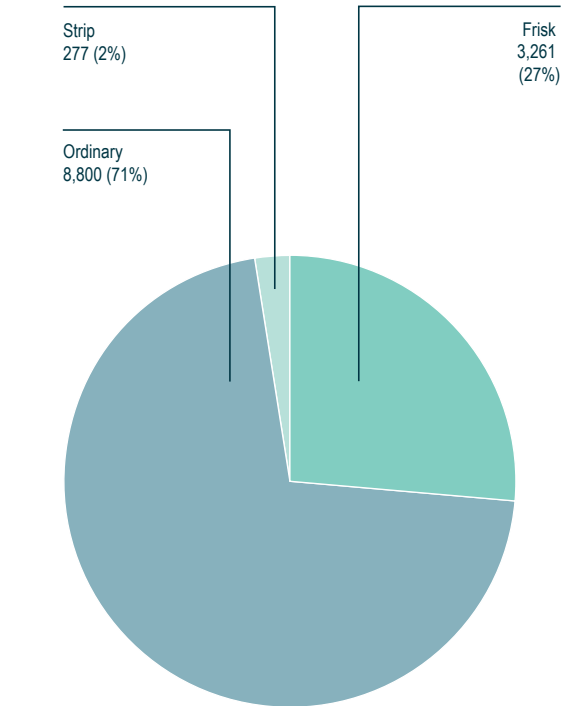
The data provided indicates that 9,966 (81%) searches in the field were performed by an officer of the same sex as the person being searched in the first 12 months since LEPR commenced.⁶¹ 2,252 (18%) searches were performed by an officer of the opposite sex, and for 116 (1%) searches, the sex of the person searched was unknown. These figures are based on the sex of the person as recorded in the 'person details' screen in COPS and the sex of the officer who conducted the search as recorded in the Police personnel system.⁶²

However, the number of same sex searches may actually be higher than the data suggests. We have found instances where the details recorded in the 'searching officer' field indicate that this officer was not the same sex as the person searched, but additional information in the COPS entry indicates that the search was in fact conducted by an officer of the same sex as the person searched.⁶³

As shown in figure 3, over the page, the data where the sex of the person searched is known indicates that 9,535 (78%) searches in the field involved a male being searched by a male officer, and 431 (4%) searches in the field involved a female being searched by a female officer. It also shows that only a third of the women searched were searched by a female officer.

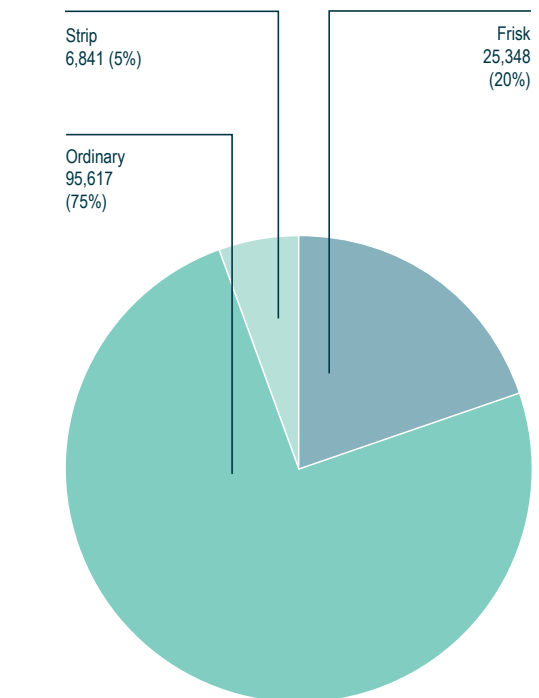
For searches in custody, the data indicates that 103,542 (81%) searches were performed by an officer of the same sex as the person being searched.⁶⁴ 23,321 (18%) searches were performed by an officer of the opposite sex and for 940 (1%) searches the sex of the person searched was unknown. We have not audited custody searches in the same way as field searches to determine whether there were more same sex searches than the data suggests because there is no narrative in a custody record. As shown below, the data where the sex of the person searched is known indicates that 94,422 (74%) searches in custody involved a male being searched by a male officer, and 9,120 (7%) searches in custody involved a female being searched by a female officer. It also shows less than half the women searched were searched by a female officer (see Figure 4, over page).

Figure 1. Searches in the field



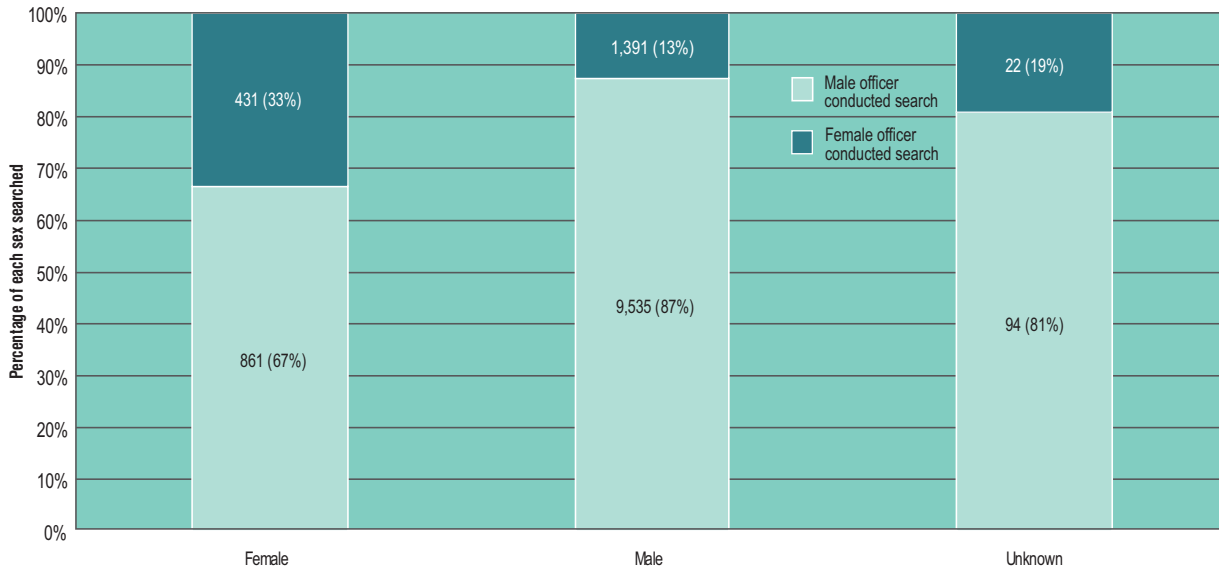
n = 12,347
Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2006

Figure 2. Searches in custody



n = 127,806
Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2006

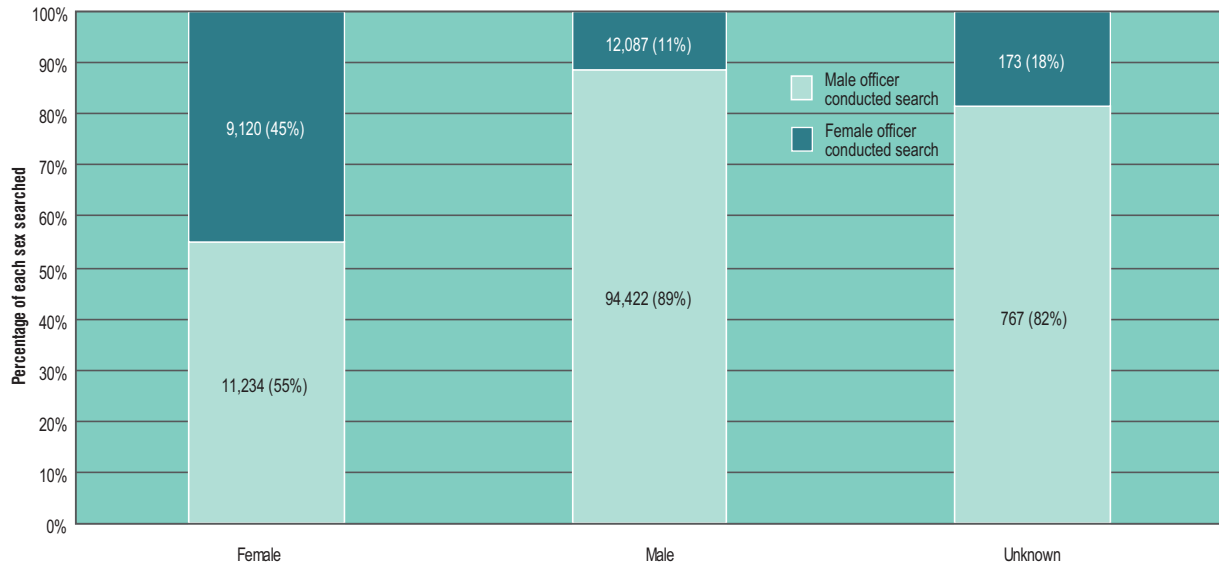
Figure 3. Searches in the field according to sex



n=12,334

Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2006

Figure 4. Searches in custody according to sex



n=127,803

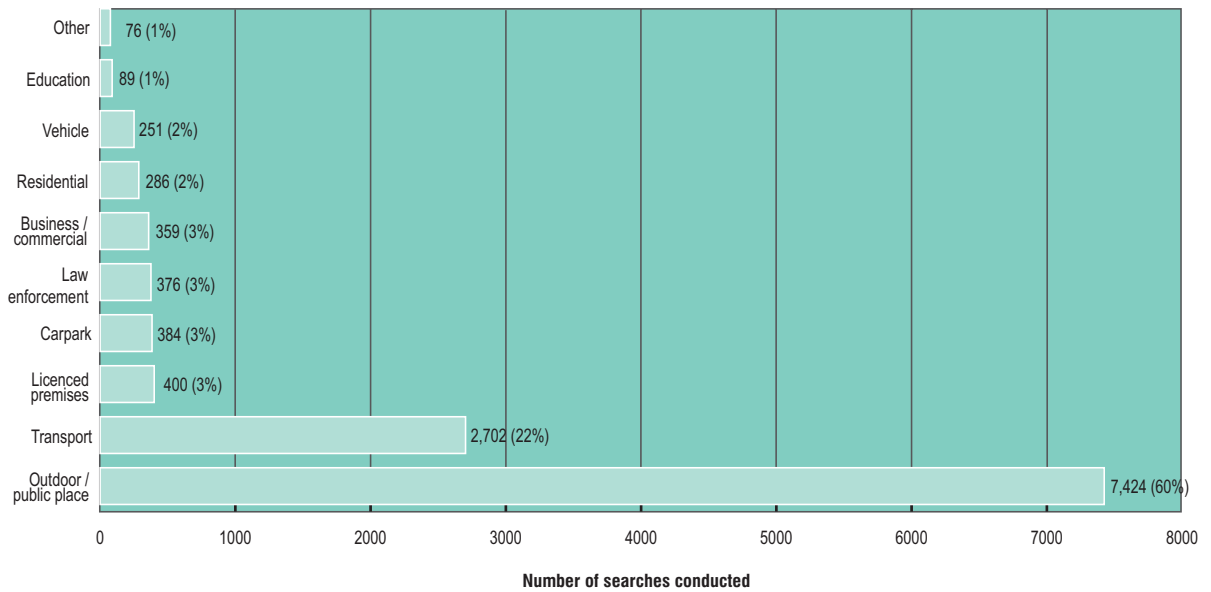
Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2006

2.7.4. Location of searches

The COPS data indicates that in the first 12 months since LEPR commenced, the majority of searches in the field were conducted in an outdoor or public place (60%) or on transport (22%) (see Figure 5, over page).⁶⁵

The majority of searches in custody appear to have been conducted in a police station. The COPS data shows that in the first 12 months since LEPR commenced, 62% of searches in custody occurred in the charge room, while the next largest proportion (18%) occurred in the dock (see Figure 6, over page).⁶⁶

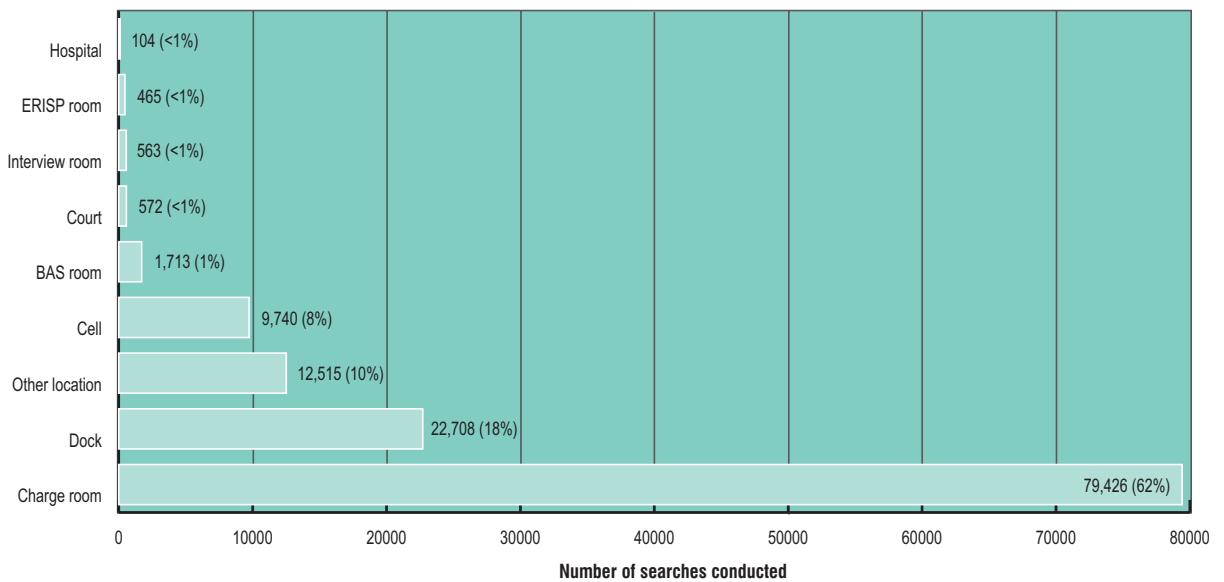
Figure 5. Location of searches in the field



n=12,347

Source: NSW Police Force COPS data, 1 December 2005 – 30 November 2006. The category 'other' includes adult entertainment, health, industrial, marine transport, religious, recreation, utilities and unknown, each of which recorded < 0.25% of searches for the period.

Figure 6. Location of searches in custody



n=127,806

Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2006. BAS stands for Breath Analysis Section and ERISP stands for Electronically Recorded Interview of Suspected Person.

2.8. Issues relating to the operation of the personal search provisions

Below we discuss a range of issues and concerns in relation to the implementation of the personal search provisions. In addition we are very interested in hearing personal experiences about the way the personal search powers and safeguards operate in practice.

Questions for consideration

1. **Have you been the subject of a personal search on arrest or in custody since 1 December 2005? If so, please provide an account of your experience and any issues or concerns that arose.**
2. **Are you aware of any instances where persons or clients were searched on arrest or in custody after 1 December 2005? If so, please provide details of any issues or concerns that arose from the search.**

2.8.1. Scope of the powers to search on arrest and in custody

Part 4 of LEPRA provides five separate search powers:

1. Section 21 in Division 1 allows an officer, without a warrant, to stop, search and detain a person if the officer suspects on reasonable grounds that the person has in their possession stolen goods; or anything (including a dangerous article) used or intended to be used in the commission of a relevant offence (for example, an indictable offence); or a prohibited drug or plant. For these searches, police have ancillary powers to request a person to open their mouth or shake their hair and failure to comply with such a request is an offence.
2. Section 23(1) in Division 2 provides for an officer who arrests a person for an offence or under a warrant to search a person, if the officer suspects on reasonable grounds that it is prudent to do so in order to ascertain whether the person is carrying anything: that would present a danger to a person; that could be used to assist in the escape from lawful custody; that is a thing with respect to, or will provide evidence of, or was used or is intended to be used in, the commission of an offence.
3. Section 23(2) in Division 2 provides for an officer who arrests a person for the purpose of taking the person into lawful custody to search a person, if the officer suspects on reasonable grounds that it is prudent to do so in order to ascertain whether the person is carrying anything that would present a danger to a person or could be used to assist in the escape from lawful custody.
4. Section 24 in Division 2 also allows an officer to search a person who is in lawful custody — no belief or suspicion is required to justify such a search.
5. Section 26 in Division 3 allows an officer to frisk search a person in a public place or school if the officer suspects on reasonable grounds that the person has a dangerous implement (for example a knife). Section 27 provides that a failure to produce anything detected or to comply with a request made by an officer exercising section 26 powers is an offence.

This brief description of the various search powers highlights a number of issues.

Depending upon the status of a person (detained/arrested/in custody), police powers will vary. For example:

- In custody, police may exercise ordinary and frisk searches without any threshold test.
- Additional search powers — such as the power to request a person to open their mouth or shake their hair — are conferred on officers conducting searches on detention.
- The consequences of a failure to comply with a police request may vary depending on the power exercised.

In practice, it is not always clear as to the precise status of a person at any point in time. This issue is discussed further below. This impacts not only on the capacity of police officers to undertake their search functions in a lawful manner, but also on the understanding of the public of their rights and obligations when being searched by police officers.

2.8.1.1. When an arrest occurs

For an arrest to take place, there must be a power to arrest and an arrest in fact. The latter requires a police officer to plainly convey by words or actions that the suspect is no longer a free person.⁶⁷ There is no set formula for what must be said or done to make an arrest lawful. Rather, what must be done is what is reasonable in the circumstances — words may be sufficient but are not always necessary.

It is important to consider when an arrest occurs in order to know what search power is being exercised and what police can search for in those circumstances. In his second reading speech, the Attorney General indicated that the search powers in section 23 are powers that may be exercised at or after the time of arrest.⁶⁸ Section 110(2) of LEPRA extends the definition of arrest for the purpose of Part 9 to include:

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.

Section 110(3) goes on to provide:

A person is not taken to be under arrest because of subsection (2) merely because the police officer is exercising a power under a law to detain and search the person or to require the person to provide information or to answer questions.

Case study

High visibility policing of a youth event

In January 2007 we observed searches performed by police as the result of drug dog indications at a youth event. When a drug dog made an indication, the dog handler would introduce themselves to the person, explain that the drug dog had made an indication, caution the person that they did not have to do or say anything that may incriminate them, then introduce the person to two other officers who would take the person into a tent where a search would be conducted.

In these circumstances police are ostensibly exercising stop, search and detain powers. However, if a prohibited substance is found, the person may then be placed or deemed under arrest. In this circumstance, the powers to be exercised by police, and consequences for not complying with requests, may differ.

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

In order to carry out a search on arrest, police must 'suspect on reasonable grounds that it is prudent to do so'. This test differs from the tests in sections 21 and 26, in that police are only required to suspect on reasonable grounds that it is 'prudent' to conduct a search once a person is arrested rather than suspecting that specified circumstances exist⁶⁹ or that the person has a dangerous implement in their custody.⁷⁰

The *Searching Manual* and the *Code of Practice for CRIME* do not elaborate on the test for 'suspicion on reasonable grounds that it is prudent to do so'. However, both provide police with guidance on what constitutes 'reasonable suspicion' with regard to search powers. The *Searching Manual* refers to Justice Smart's findings in *Streat v Bauer*: *Streat v Blanco* (1998) where he said:

*In part it is a subjective test, because he must have formed a genuine suspicion in his own mind... In part, it is also an objective one, because there must also be reasonable grounds for the suspicion, which he had formed... The point does not depend on whether the arresting officer himself thought at the time that the suspicion was reasonable. The question is whether a reasonable man would be of that opinion having regard to the information which was in the mind of the arresting officer.*⁷¹

The *Searching Manual* goes on to note the NSW Ombudsman's 1998 Report, *Policing Public Safety*, and advises officers that:

*You should be prepared to explain why and how you developed your suspicion that the 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.*⁷²

The *Code of Practice for CRIME* includes a dictionary of terms which defines 'reasonable grounds to suspect' as follows:

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, the question for a court is whether that information afforded reasonable grounds for the suspicion which the police officer formed.*⁷³

Given that having a lawful basis for a search may affect the admissibility of any evidence found, giving clear guidance to officers as to the relevant factors which are or are not relevant to consider may be a useful exercise.

2.8.2. Searches in custody

Section 24 provides police with the power to search a person 'in lawful custody (whether at a police station or at any other place), and seize anything found in that search'. Exactly what is meant by 'lawful custody' is open to a number of interpretations.⁷⁴ 'Lawful custody' is defined in section 3 as meaning 'lawful custody of the police'. In his second reading speech, the Attorney General stated that section 24:

*sets out the search powers that may be exercised by a police officer after the person has been arrested and taken into custody.*⁷⁵

The reference to a 'police station' or 'other place' in section 24 suggests that 'custody' could be characterised according to location. As discussed above at 2.7.1, the police recording system COPS requires officers to classify searches according to their occurrence 'in the field' or 'in custody', and as shown in Figure 6, the majority of searches classified as 'custody' searches occur in a police station location.

Other definitions of 'custody' include the elements of location, restraint and belief, to varying degrees, suggesting that the term is a complex mix of a number of factors. For example, the *Butterworths Australian Legal Dictionary* defines 'custody' as:

*Confinement; imprisonment; being in the keeping or charge of officers of the law. Custody includes the elements of dominance and control of the liberty of a person, and the state of being guarded and watched to prevent escape. A person shut up by a police officer as if in prison, or held in restraint by a police officer, is held in 'police custody'.*⁷⁶

In the textbook *Crime*, Ross cites the cases of *Smith v The Queen* (1957) and *R v Amad* (1962) in defining 'custody'. In *Smith v The Queen*, Justice Williams said:

*The term 'in custody' in the Judges' Rules is not a term of art. It is not confined to a person who has been arrested after a charge has been preferred against him. Any person who is taken to a police station under such circumstances that he believes that he must stay there is in the custody of the police. He may go only in response to an invitation from the police that he should do so and the police may have no power to detain him. But if the police act so as to make him think that they can detain him he is in their custody.*⁷⁷

In *R v Amad*, Justice Smith said:

*A person is to be regarded as in custody not only after formal arrest, but also where he is in, say, a police vehicle, or on police premises, and the police by their words and conduct have given him reasonable grounds for believing, and caused him to believe, that he would not be allowed to go should he try to do so.*⁷⁸

In deciding whether the Royal Commission into Aboriginal Deaths in Custody had jurisdiction to investigate the death of Mr Gundy who was shot when police raided his home in the course of looking for someone else, Justices Morling and Gummow found that:

*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... be regarded as being 'in custody' within the meaning of the Letters Patent.*⁷⁹

Their Honours went on to say that:

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.

In *Uniform Evidence Law*, Odgers notes that while the term 'police custody' is not defined, the NSW Court of Criminal Appeal in *R v McKellar* (2000) has given the term the 'normal meaning' of 'under physical restraint'.⁸⁰

If the definition of 'custody' does not turn on location, it is arguable that section 24 is worded in a way that could cover any search following an arrest performed by police under Part 4 of LEPPRA, since a person may be considered to be in lawful custody once arrested. However, a counter argument may be that the order of the provisions and the intention of parliament as expressed by the Attorney General in his second reading speech suggest that section 24 would only cover those circumstances not already covered by section 23 or, alternatively, be specifically aimed at custody in a police station or other place, and generally not in the field.

2.8.3. The power to search a person on arrest for the purpose of taking the person into lawful custody

A particular example of how police powers may differ depending upon the purpose of the exercise of a power is the power in section 23(2) to search a person who has been arrested for the purpose of being taken into lawful custody. This search power is limited to circumstances where an officer suspects on reasonable grounds that it is prudent to ascertain whether the person is carrying anything that would present a danger to a person or assist the person to escape from lawful custody.⁸¹ The *Code of Practice for CRIME* advises officers that the limited search power (in section 23(2)) applies to searches on arrest 'other than for an offence'.⁸² A number of circumstances could fall within the ambit of this search power including searches on arrest for breach of bail,⁸³ and searches on arrest for the purpose of conducting a breath analysis.⁸⁴

It has not been possible to analyse how many searches were performed using 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.

What is important in respect of this power however, is that there is no power to search for evidence of an offence unless there is a separate reasonable suspicion that specified circumstances exist⁸⁵ or that the person has a dangerous implement in their custody.⁸⁶

In order to gain a better understanding of the possible practical applications of section 23(2), we have searched the data for references to 'breach of bail'. The following case study is one instance of a search on arrest for breach of bail recorded in COPS, where the circumstances in the COPS event do not appear to disclose consideration by police of the appropriate threshold test to conduct the search.

Case study

Search on arrest for breach of bail

In December 2005, plain-clothes officers conducted a 'bail compliance assessment' in relation to a 15 year old male. The conditions of the young person's bail required that he only leave home to attend work related activities or in the company of his mother. Around 1.30pm that day, police saw the young person leave his home on his own, walk down the street and get into a car which stopped at a bottle shop before proceeding to another residence. The COPS event states 'Believing the young person was in contradiction of his bail conditions, police pursued the young person into the premises. The young person was then removed from the premises and searched in the front yard'. We note that the narrative provides no additional reason, other than the breach of bail, as the basis for the police search. The narrative notes that \$535 in cash was found. The young person was subsequently charged with possession of goods in personal custody suspected of being stolen.

Questions for consideration

3. **What are your views as to the threshold tests for the police exercise of search powers on arrest or in custody?**
 - a. **Is the present scheme — five separate search powers over a continuum from detention to custody, with separate thresholds, powers and penalties — excessively complex? If so, what other test or tests may be appropriate, or how should the scheme be simplified?**
 - b. **Should there be a specific definition of custody in Part 4 beyond that provided in section 3 of LEPR? If so, what should that definition include?**
 - c. **Should the powers of police officers who initially detain a person for searching be simplified so that any search or continuation of a search on arrest or in custody includes all search powers in Divisions 1 and 2 of Part 4?**
 - d. **What, if any, additional guidance should be provided to police officers as to the factors that should be considered when determining whether there are reasonable grounds to suspect that it is prudent to conduct a search on arrest?**

2.8.4. The application of the search definitions

We have set out the definitions for frisk and ordinary searches above in section 2.3.3. The main distinctions include that while outer clothes can only be removed 'voluntarily' as part of a frisk search, their removal may be 'required' as part of an ordinary search. And while a frisk search only extends to the removal of outer clothing, an ordinary search may additionally require the removal of gloves, hats, socks and shoes.⁸⁷ In comparison, the personal search powers and safeguards in Queensland and Western Australia only make a distinction between searches that involve the removal of clothing and those that do not.⁸⁸

As shown in Figures 1 and 2 above, the data provided by police indicates that ordinary searches are the most common search performed by police, comprising 71% of all searches in the field and 75% of all searches in custody.⁸⁹

Our consultations with police suggest that, in practice, the distinction between frisk and ordinary searches is sometimes blurred. The officers we consulted suggested that their normal practice of conducting a 'pat down' search could fall into either a frisk or an ordinary search. One officer said:

*I personally don't know the difference between a frisk search and an ordinary search. It seems exactly the same to me. So when I do my COPS events I alternate between one or the other depending on how I'm feeling.*⁹⁰

A number of officers indicated that the creation of the three tiers of searches has not had any impact on their search practices. A number of officers indicated that they use their common sense and do what is necessary and appropriate at the time, regardless of the definitions. As one officer told us:

*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 searching them for, you're going to do it as thoroughly as you can without being intrusive and then the next category of search would be if you're being more intrusive. But when I'm out there I don't think of whether I'm doing a frisk or ordinary search.*⁹¹

Some officers told us that they think the definitions are too prescriptive. As one officer said:

*I just think they've broken it down a little bit too much and over complicated it. Considering that most of the legislation is based around it being reasonable and what's necessary given the situation, it would be much easier just to have the level of search required based on what's reasonable and necessary in a situation.*⁹²

Questions for consideration

4. What are your views on the separation in the legislation of frisk and ordinary searches?
 - a. Is it a useful distinction, and what, if any are its advantages and disadvantages?
 - b. What are your views on a two-tiered search regime of ordinary and strip searches?

2.9. The general safeguards

The original requirements of section 201(1) were identified by police as the 'WIPE' provisions for training purposes. In our consultations, this terminology was often used by police. '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; and Evidence that you're a police officer.⁹³

2.9.1. Providing evidence that the person is a police officer (if not in uniform)

Police are required to provide evidence that they are police officers unless they are in uniform.⁹⁴ In consultations, police indicated that it has always been their practice to provide evidence that they are a police officer when arresting and searching a person if they are not in uniform.⁹⁵ In May 2006, we observed an underage drinking operation conducted by plain-clothes police officers. During that operation the officers we observed all provided evidence that they were members of the NSW Police Force during their interactions with the public. We are not currently aware of any concerns having been raised in relation to the requirement that officers provide evidence that they are a police officer.

2.9.2. Providing the officer's name and place of duty

Police are required to provide their name and place of duty to the person before or as soon as practicable after the person is searched.⁹⁶ Police are only required to identify themselves once if more than one power is being exercised.⁹⁷

In consultations, a number of police have indicated that this is generally not a contentious issue where searches on arrest or in custody are concerned. A number of officers also indicated that was the practice of police prior to the introduction of LEPR.

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.⁹⁸ A number of officers pointed out that the requirements in section 201(1)(b) conflict with the badge policy, which allows police to identify themselves using a number rather than their name. As one officer 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.⁹⁹

Some officers from regional areas also expressed concern for their personal safety when required to provide their name and place of duty. For instance, one officer said 'We've got family here and it's sometimes been the case where an officer has had his garage sprayed and items stolen from his house'.¹⁰⁰

Some officers indicated that they did not consider it was necessary to provide their name and place of duty in general circumstances. For instance, some officers told us:

It's not about me, it's about our job and what we do not 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.¹⁰¹

Some officers also suggested that they should not be required to provide their name and details to those people they deal with frequently, if the person already knows the officer.¹⁰²

The view of the Shopfront Youth Legal Centre was that police should have to provide this information 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.¹⁰³

The Shopfront also commented 'We used to get a lot of complaints before LEPR about police refusing to give their name and things. We haven't had so many complaints since [LEPR commenced]'.¹⁰⁴

2.9.3. Providing the reason for the exercise of the power

Police are required to tell the person why a search power is being exercised.¹⁰⁵ All of the officers we spoke to suggested that they always tell the person they are searching why the search is being conducted. One officer said, 'Commonsense is, if you're going to speak to someone, you're going to tell them why you're speaking to them'.¹⁰⁶ However, in consultations, The Shopfront Youth Legal Centre commented:

I do get a lot of clients who report that the police don't tell them why they're searching them, they [just say] 'Oh, we're searching you'.¹⁰⁷

2.9.4. Warning that failure to comply may be an offence

In December 2006, section 201(1)(d) was repealed and replaced with section 201(2C) by the *Police Powers Amendment Act 2006*. The new provision provides for a two step warning that is only required if a person is not already complying with a direction or a request made by police in the course of exercising a relevant power.

It is arguable that section 201(2C) only applies to those powers that specify a power to request or direct. However, it could also be argued that 'a power that involves the making of a request or a direction' may apply to the exercise of the personal search powers which inherently involve a number of requests or directions such as 'can you stand over here', 'take your jacket off', 'hold your arms out for me', 'open your bag', or 'take off your shoes'.

2.9.4.1. Warning and cautioning

When a person is arrested in the field, police must caution the person that they do not have to say or do anything, but that anything the person does say or do may be used in evidence.¹⁰⁸ Police also provide this caution when a person is taken into custody at a police station or other place of detention.¹⁰⁹ The giving of a caution in custody does not affect a lawful requirement by a police officer that a person answer questions or do things.¹¹⁰

In consultations with police, a number of officers expressed concern that it may be confusing to warn a person that failure to comply with a police request or direction may be an offence, where the person is also told that they do not have to say or do anything. One officer said:

The main thing is it's confusing. You arrest someone, you caution them, then explain their rights to them [that they do not have to say or do anything], and next minute you're saying you have to do what I tell you.¹¹¹

However, there are officers who believe that there is no confusion between warning and cautioning. For instance, one officer indicated that his practice when arresting a person is to tell the person:

You have the right not to answer my questions ... but there will be times when you are obliged to do what I tell you and I will let you know when you have the right to remain silent or when you are obliged to do something'.¹¹²

In response to police concerns about warning and cautioning, police published an article in August 2006 in the *Police Weekly* that advised officers on measures that could be taken to fulfil the warning and cautioning requirements in an effective way that would not compromise any of the evidence.¹¹³ The article, entitled 'How can I ensure that a person understands the official caution after I have complied with the safeguards in section 201?', explained the application of the safeguards and how they can be used to assist police in their work, saying:

The rationale for the safeguards is that if people know who you are, know the reason you're exercising the power and that not complying with your requests may be an offence, it is believed that less people are likely to resist you.¹¹⁴

In November 2006 the *Police Powers Legislation Amendment Act 2006* amended section 201 by inserting subsection (2C) which now clarifies that police only have to warn the person that failure to comply is an offence if the person is not complying with the police requests or directions.

Questions for consideration

5. What are your views as to the general safeguard provisions in Part 15 of LEPR as they apply to searches?

- a. Are each of the safeguards desirable or useful? If not, should some other safeguards be in place? Please provide reasons for your views.
- b. Should police officers be required to provide their name when exercising search powers, or is other identifying information (for example a number and location) sufficient?
- c. Are any additional steps required to clarify and communicate the separate purposes of cautioning and warnings for persons being searched on arrest or in custody?

2.10. Safeguards to ensure dignity and privacy

The section 32 safeguards 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 a search'.¹¹⁵ These safeguards apply to all personal searches to the extent that it is reasonably practicable in the circumstances.

2.10.1. Telling the person if and why they will be required to remove any clothing

Under section 32(2), police must inform the person to be searched whether they will be required to remove clothing during the search, and if so, why it is necessary, if it is reasonably practicable to do so in the circumstances.¹¹⁶

In our consultations, we asked police officers whether they tell the person if they will be required to remove clothing and why. A number of officers indicated that it was common sense to tell the person that they will be required to remove their clothes and the reason why. One officer said:

If you're going to [require] someone to remove their clothes to strip search or something like that in the field, which is really rare, well then obviously you're going to tell them because they're going to get offended. If you say 'I believe you've got some gear in your pants... Let's come around the corner here and just do a quick strip search', the majority of the time, most people are compliant and we have no worries.¹¹⁷

Our observations to date suggest police do not always tell the person being searched whether they will be required to remove clothing or the reason why they will need to remove their clothing, as indicated in the following case study.

Case study

High visibility policing of a dance party drug dog operation

We attended a high visibility policing operation conducted at a dance party in Sydney, which involved drug detection dogs. We observed a number of ordinary searches where police asked the person to remove outer clothing such as jackets, shoes and socks. Police generally advised the person that they would be searched as the result of a drug dog detection. In circumstances where police determined that a strip search would be required, the person was often told that police intended to conduct a strip search.¹¹⁸

2.10.2. Asking the person to co-operate

Under section 32(3), police must ask for the person's cooperation, as far as is reasonably practicable in the circumstances.¹¹⁹

Many of the officers that we spoke to indicated that asking for cooperation assists their work. For instance, when we asked officers whether they ask for the person's cooperation, one officer commented:

*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.*¹²⁰

Another officer said:

*You seek [their cooperation] wherever you can, especially in this area because you've got so many people who have always used drugs but more recently use 'ice', they can snap in an instant, so the more cooperation you can get with them the better.*¹²¹

Others have indicated that they only ask for a person's cooperation if the person starts to get violent or begins to be uncooperative. One officer said, 'Unless they begin to not co-operate, I don't think you need to ask'.¹²²

2.10.3. Providing reasonable privacy for the person searched and conducting the search as quickly as is reasonably practicable

Under section 32(4), police must conduct a search in a way that provides reasonable privacy for the person searched, and must conduct the search as quickly as is reasonably practicable in the circumstances.¹²³

In our consultations, a number of officers indicated that, in practice, reasonable privacy varied depending on the type of search being conducted. As one officer said:

*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.*¹²⁴

Our observations of searches suggest that the application of the requirement for reasonable privacy can vary depending on the circumstances and the officers involved, as indicated in the two case studies below.

Case study

High visibility policing of licensed premises

We observed an ordinary search of a man who had been indicated by a drug detection dog on licensed premises. The man was playing a poker machine in the gaming area located at the back of the premises when an indication was made. Police explained to the man that the dog had made an indication, cautioned him, and said they would like to take him to a more private area to conduct the search. The man was then taken to a corridor where the search could be observed by patrons located in the bistro and the gaming area.¹²⁵

Case study

High visibility policing of a youth event

We observed frisk and ordinary searches performed on people 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 took the person to a tent to perform the search. 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.

2.10.4. Carrying out the least invasive kind of search practicable in the circumstances

Under section 32(5), police must conduct the least invasive kind of search practicable in the circumstances.¹²⁶

The *Code of Practice for CRIME* reminds officers of this requirement three times: once in the chapter on custody, and twice in the annexure concerning the rules for the conduct of personal searches.¹²⁷

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, ordinary search, is the most common type of search performed by police.¹²⁸

When we asked police about the circumstances in which they conduct searches, a number of officers indicated that their work generally requires an ordinary search at 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 ever recorded a frisk.*¹²⁹

2.10.4.1. Religious clothing

While a scarf may generally be considered outer clothing, and therefore acceptable to remove as part of a frisk search if removed voluntarily, or an ordinary search if removal is required by police, a Muslim woman might consider a requirement to remove her headscarf or hijab to be unreasonable if her practice is to wear the hijab when in public.

In some instances particular provisions have been included in legislation to make provision for religious practices. For example, section 11C(2)(vii) of the *Summary Offences Act 1988* states that 'genuine religious purposes' are a reasonable excuse for having custody of a knife, thereby making provision for initiated male Sikhs who are required to carry a ceremonial blade known as the kirpan. This issue was discussed in the October 2006 issue of the *Policing Issues and Practice Journal*.¹³⁰

2.10.5. The general prohibition on searching genitals or breasts

Under section 32(6), police must not search the genital area of a person, or the breasts of a female, or the breasts of a transgender person who identifies as a female, unless the officer suspects on reasonable grounds that it is necessary to do so for the purpose of the search.¹³¹

Officers are reminded of this requirement three times in the *Code of Practice for CRIME*.¹³²

2.10.5.1. Genitals

In our consultations, some of the circumstances that officers identified as warranting a strip search which might involve a search of a person's genitals included the secretion of drugs and dangerous objects. For example, when we asked officers what situations they think generally warrant a strip search, 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. The instant they see police they'll put their hand there and it'll disappear inside. 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.*¹³³

2.10.5.2. Transgender persons

The *Code of Practice for CRIME* contains a brief discussion on transgender and transvestite people. The Code advises custody managers to consider transgender people in custody as people at risk and states that 'where circumstances suggest someone in custody might be transgender, discreetly inquire whether that is the case. If so, deal with them accordingly, if possible'.¹³⁴

In our consultations with police in an inner city area, officers have suggested that people often tell them that they identify as a member of the opposite sex. For example, one officer told us, 'Yeah well they'll tell you, you know if I'm going to be searched. I want to be searched by a male or female whatever the case is'.¹³⁵

2.10.6. Same sex searches

Under section 32(7), a search must be conducted by a person of the same sex as the person being searched as far as reasonably practicable in the circumstances.¹³⁶

In consultations, we asked officers what they think of this requirement and whether it is difficult finding an officer of the same sex to conduct a search. The officers we spoke to indicated that same sex searches are a long-standing police practice. Some of the comments made by officers included:

You always had to have a same sex officer searching them so that hasn't really changed. That stuff was all in CRIME before anyway.¹³⁷

Even before it was sort of policy, it just happened anyway. You wouldn't want to leave yourself open anyway because there's enough complaints kicking around without that sort of thing.¹³⁸

One officer in an urban area pointed out that it is relatively easier to ensure that an officer of the appropriate sex is available to perform a search in the city than in rural areas, saying:

Being in the city there's plenty of police, male or female... I understand in other places there is difficulty getting somebody of the same sex especially female to come and do it but in the city you don't have a problem.¹³⁹

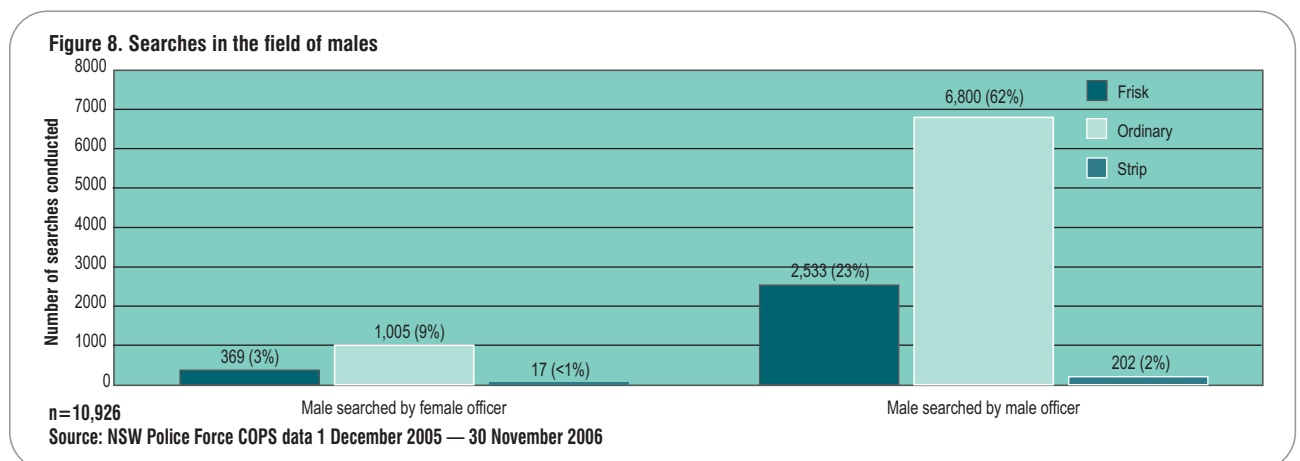
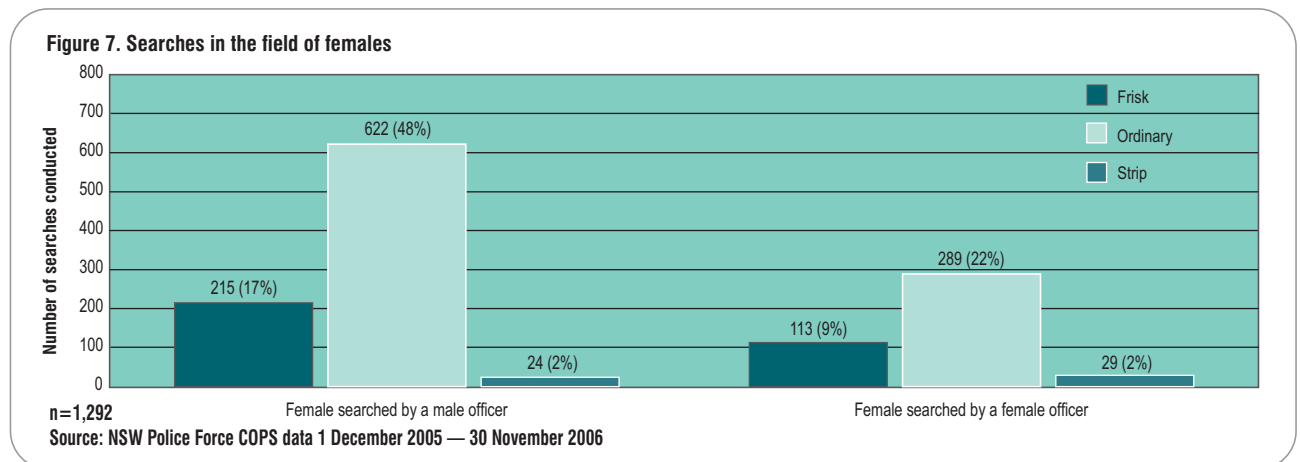
An officer in a rural area explained that, while there are not as many female police officers, police can comply with this safeguard with the assistance of female corrective services officers, saying:

The majority are males around the place but I think that most teams have got a female or two in each team to cover [searches]. It could occur [that no female officer is available to search a female], especially on late shifts that would happen, but that wouldn't be very often and we have Corrective Services here as well, they help us out, as we do them.¹⁴⁰

According to the NSW Police Annual Report 2005-06, at 30 June 2006 there were 14,634 sworn officers in the NSW Police Force,¹⁴¹ including 3,739 female police officers, constituting 25% of police.¹⁴²

2.10.6.1. In the field

As discussed above, the majority of searches were conducted by an officer of the same sex.¹⁴³ However, when searches of men and women are considered separately, the statistics show that in the first 12 months since LEPR commenced, 861 (67%) women searched in the field were searched by a male officer. By comparison, 1,391 (13%) men searched in the field during the same period were searched by a female officer. In real numbers, more men than women were searched by an officer of the opposite sex.



We have observed a number of searches where officers have waited for a female officer to conduct the search of a female. However, we have also identified instances in which a search was conducted by an officer of the opposite sex as indicated in the case study over the page.

Case study

Complaint involving the execution of a search warrant

In February 2006 we 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*. The video showed a male being searched by a female 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 the large number of police officers involved in the execution of the search warrant.

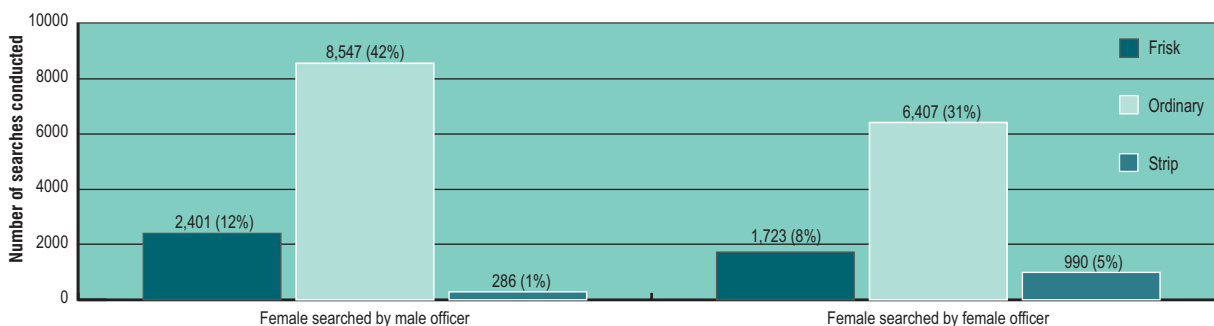
2.10.6.2. In custody

The *Code of Practice for CRIME* states that for searches in custody 'if a search is conducted by someone of the opposite sex [police should] record this fact along with the reason/s [for the search]'.¹⁴⁴

When searches in custody of men and women are considered separately, the data indicates that in the 12 months since LEPRA commenced, 11,234 (55%) females searched in custody were searched by an officer of the opposite sex. In comparison, 12,087 (11%) of males searched in custody were searched by an officer of the opposite sex during the same period.

There could be a number of factors to explain the proportion of females searched by an officer of the opposite sex including the number of female officers in the NSW Police Force and the proportion of males and females searched by police.

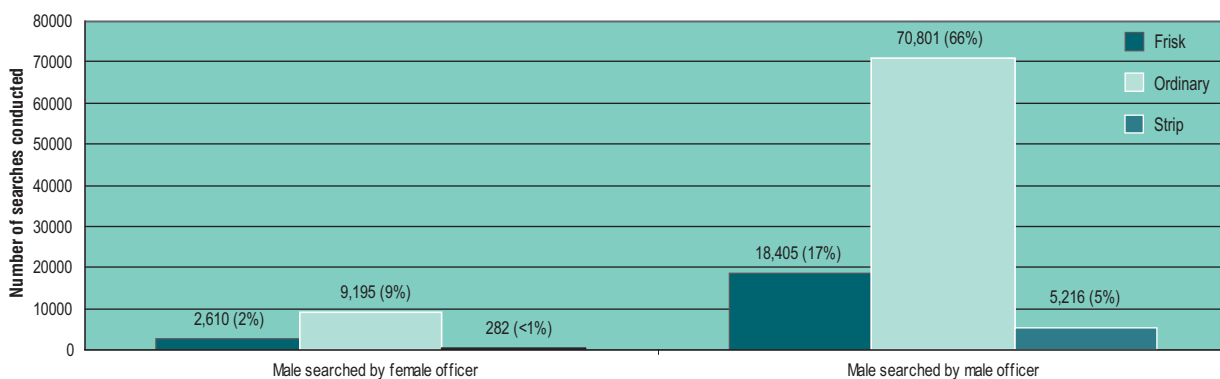
Figure 9. Searches in custody of females



n=20,354

Source: NSW Police Force COPS data 1 December 2005 — 30 November 2006. Percentages add up to 99% because of rounding.

Figure 10. Searches in custody of males



n=106,509

Source: NSW Police Force COPS data 1 December 2005 — 30 November 2006.

2.10.7. No questioning during the search

Under section 32(8), a person must not be questioned while being searched, as far as this is reasonably practicable.¹⁴⁵

In our consultations, a number of the officers we spoke to suggested that they would generally complete their search before asking questions for safety reasons. For instance, one officer said:

*I'd probably wait until it's all out because you want to make sure they've got no weapons on them. If you're finding stuff on them, you'd empty their pockets straight out but that depends on the person.*¹⁴⁶

However, some officers suggested that in circumstances where it was necessary to ask questions, they would suspend the search and question the person about items found. For instance, one officer told us:

*It depends what it is. If it was just drugs, I would personally stop searching and ask a question. If it's a knife or something related to a dangerous weapon, then I'd continue searching and make sure all of it's off first.*¹⁴⁷

One officer suggested that questioning might occur during a search where there are a number of officers available to take part in the search, saying:

*If you've got three or four officers there and someone's standing there, taking all the goods as the searchers are handing it to you, well then you might question them about it, say 'Alright mate, what's the story with this, is this yours?'*¹⁴⁸

2.10.8. Allowing the person to dress as soon as possible after the search

Under section 32(9), a person must be allowed to dress as soon as a search is finished, as far as is reasonably practicable.¹⁴⁹

It has not been possible to analyse the application of this particular provision. However, we are aware of a number of case studies which shed some light on this issue.

Case study

Complaint

In February 2006, our office received a letter of complaint from two young persons 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 persons had been strip searched in order to find an implement they were using to write on the cell walls. Police advised 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 complainants could have occurred in a more expeditious manner and that, if this was not possible, the complainants should have been offered a blanket after they had taken off their clothing.¹⁵⁰

Case study

High visibility policing of a dance party drug dog operation

We observed a number of ordinary searches at a high visibility drug dog operation for a dance party in Sydney on a cold, wet and windy night.¹⁵¹ The majority of the ordinary searches were performed under a shelter that was nevertheless subject to wind and occasional rain. In one search we observed, police noted that the concrete was cold and told the person to put his shoes and socks back on before proceeding with the remainder of the search. In another search police told the person he could put his jacket back on before taking his shoes and socks off.

2.10.9. Ensuring that the person is left with appropriate clothing if clothes are seized

Under section 32(10), if clothing is seized because of the search, police must ensure the person searched is left with or given reasonably appropriate clothing to the extent that it is reasonably practicable.¹⁵²

In our consultations, police have suggested that they always ensure that the person searched is left with appropriate clothing. However, one officer has told us that in circumstances where he thought the person might use whatever they could to harm themselves, he would take everything away from them:

*I've had [somebody] try and nick themselves in the back of the truck when I've been driving and that scared the hell out of me, I'll take everything off them. I'll put them in there nude if I have to.*¹⁵³

To date, we have not observed any searches where a person's clothing was seized. Nor has a statistical analysis of the practical application of this provision been possible.

Questions for consideration

- 6. What are your views as to the safeguards in respect of dignity and privacy for all searches provided for in section 32 of LEPPRA? Do they strike a reasonable balance between operational requirements of police and the dignity and privacy of individuals? If not, in what respect should they be changed?**
- 7. What are your views as to the following issues concerning the dignity and privacy provisions raised to date in our review?**
 - a. The requirement that searches be conducted by a person of the same sex, including your views as to the circumstances which may render this not reasonably practicable?**
 - b. The requirement that a person must not be questioned while being searched, as far as this is reasonably practicable?**
- 8. Are there any other safeguards relating to dignity and privacy which should be included in section 32, or alternatively, are any of the current safeguards unnecessary?**

2.11. Safeguards for strip searches

2.11.1. Necessity, and the seriousness and urgency of the circumstances

Section 31 provides:

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.

In comparison, the test for a strip search under the Commonwealth *Crimes Act 1914* only requires that police suspect on reasonable grounds that a strip search is *necessary* in order to recover a seizable item or evidentiary material,¹⁵⁴ while the test under the Western Australian *Criminal Investigation Act 2006* only requires that police reasonably suspect that a strip search is *necessary* in the circumstances.¹⁵⁵

The *Code of Practice for CRIME* states 'You may not strip search as a matter of policy. You must be able to justify your decision in each case',¹⁵⁶ and advises officers that 'any search that involves the removal of more than outer clothing should be treated as a 'strip search'.¹⁵⁷ The Code also reminds officers that 'it is always open to you to consult a senior officer (supervisor, duty officer, custody manager) before undertaking a strip search'.¹⁵⁸

The COPS data provided by police indicates that strip searches are the least common type of search conducted by police, comprising 2% of searches in the field and 5% of searches in custody.¹⁵⁹

In our consultations, we asked police officers what circumstances they thought would warrant a strip search. Factors such as the offence for which the person was being arrested, any warnings recorded on the COPS system, and officer and suspect safety were frequently mentioned. Some of the comments made by police included:

*If you believe that they've got something on them that they could use to hurt themselves with whilst they're in custody and they've secreted it on their person somewhere. Whilst they're in your custody they're your responsibility, so if you've got that information you're going to strip search them.*¹⁶⁰

*It depends on if the person's under arrest, what offence they've committed and if they're remaining in custody and a drug user that might have history for secreting drugs in a certain place.*¹⁶¹

*When I'm going to search someone before I put them in the back of the truck, it's as thorough as I can possibly make it for my own safety and colleagues.*¹⁶²

These comments, coupled with our observations, suggest that police regularly consider necessity and the seriousness of the situation. However, urgency may be more difficult to measure and demonstrate.

Case study

High visibility policing of a dance party drug dog operation

As part of our research we observed a high visibility drug dog operation at a dance party in Sydney.¹⁶³ Four drug dogs were used to identify people who may have been in contact with prohibited substances and approximately 30 police officers were available to conduct searches at the venue. Police set up a tent prior to commencement of the operation and explained to us that the tent would be used to provide greater privacy when conducting strip searches.

During the operation, people who were indicated by the drug dogs were asked to move to a designated open area next to the tent where frisk and ordinary searches were performed. In the event that a strip search was required, police generally informed the person that this would be done in the tent.

Initially, only one person at a time could be searched in the tent. Consequently, there were times when queues of up to four people waited to be strip searched.

The Shopfront Youth Legal Centre commented in relation to strip searches that 'anecdotally, we still [hear] about strip searches all the time, done really quite routinely, not in exceptional circumstances'.¹⁶⁴ Shopfront also highlighted the fact that there is a tension between searching as an investigative procedure and searching as an occupational health and safety measure for the police, the person who has been arrested and other people who may be in custody.¹⁶⁵

2.11.2. Same sex strip searches

While section 32(7) applies to all searches, it is relevant to consider strip searches conducted by officers of the opposite sex separately, given the higher level of intrusiveness involved in such a search.

The *Searching Manual* says that 'unless exceptional circumstances exist, a strip search is to be conducted by officers of the same sex as the person being searched'.¹⁶⁶

2.11.2.1. In the field

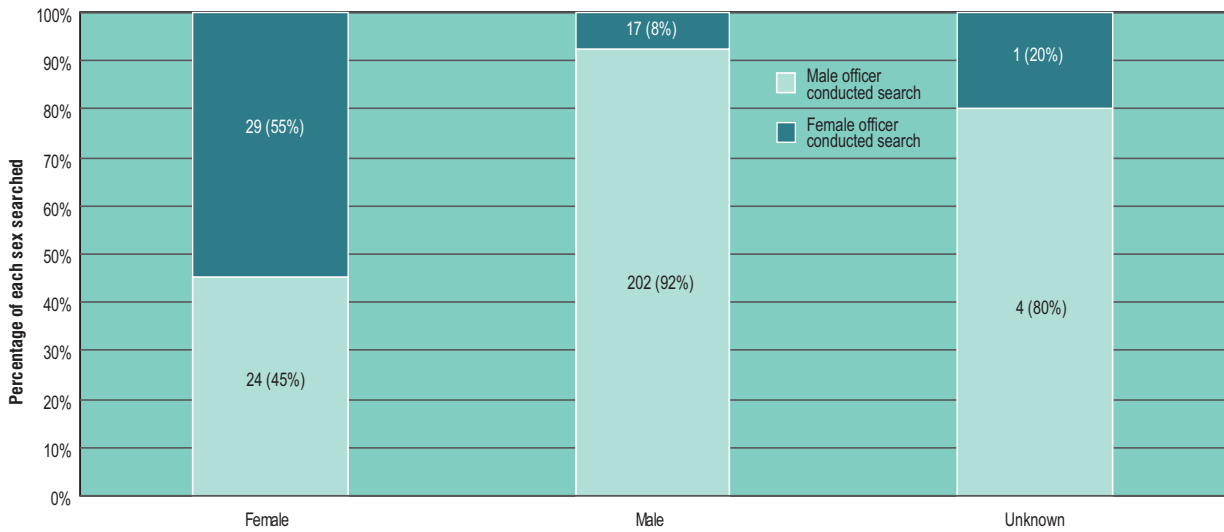
In the 12 months since the commencement of LEPR, the COPS data indicates that 83% of strip searches in the field were performed by an officer of the same sex as the person being searched, as illustrated below.¹⁶⁷

We randomly audited 24 strip searches in the field that were recorded as being conducted by an officer of the opposite sex and found that more searches were performed by an officer of the same sex than the data suggests.¹⁶⁸ The audit shows that:

- For eight of the fourteen records which statistically recorded a female being searched by a male, the narrative explained that a female police officer, customs officer or correctional officer in fact performed the search.
- For one of the ten records which statistically recorded a male being searched by a female, the narrative explained that a male officer in fact conducted the search.

This sample audit suggests that more searches may have been performed by an officer of the same sex as the person searched than the data suggests.

Figure 11. Strip searches in the field according to sex



n=277
 Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2006

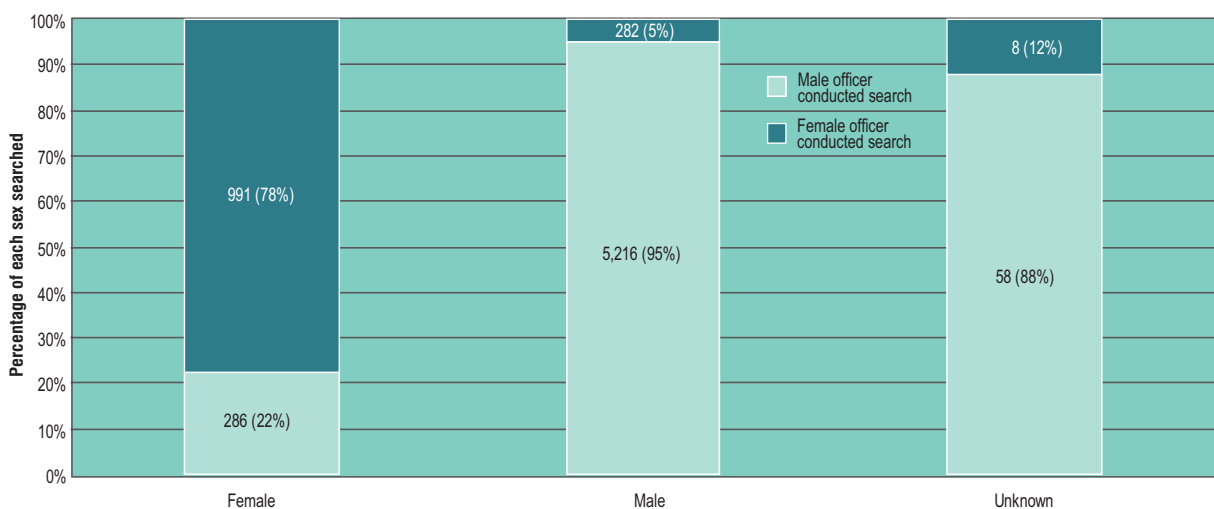
2.11.2.2. In custody

It was more common for searches in custody to be performed by an officer of the same sex. In the first 12 months since LEPRA commenced, the COPS data indicates that 91% of strip searches in custody were performed by an officer of the same sex as the person being searched, as shown below.¹⁶⁹

The relatively lower number of strip searches performed by an officer of the opposite sex in custody may suggest that police are more aware of the need to ensure that an officer of the same sex conducts a strip search as opposed to a frisk or an ordinary search.

However, this also means that 8% of strip searches in custody are recorded as being conducted by an officer of the opposite sex, despite the more controlled conditions of the custody room. In real terms the data indicates that 286 women and 282 men were recorded as being strip searched by an officer of the opposite sex in custody.

Figure 12. Strip searches in custody according to sex



n=6,841
 Source: NSW Police Force COPS data, 1 December 2005 — 30 November 2006

2.11.3. Conducting a strip search in a private area

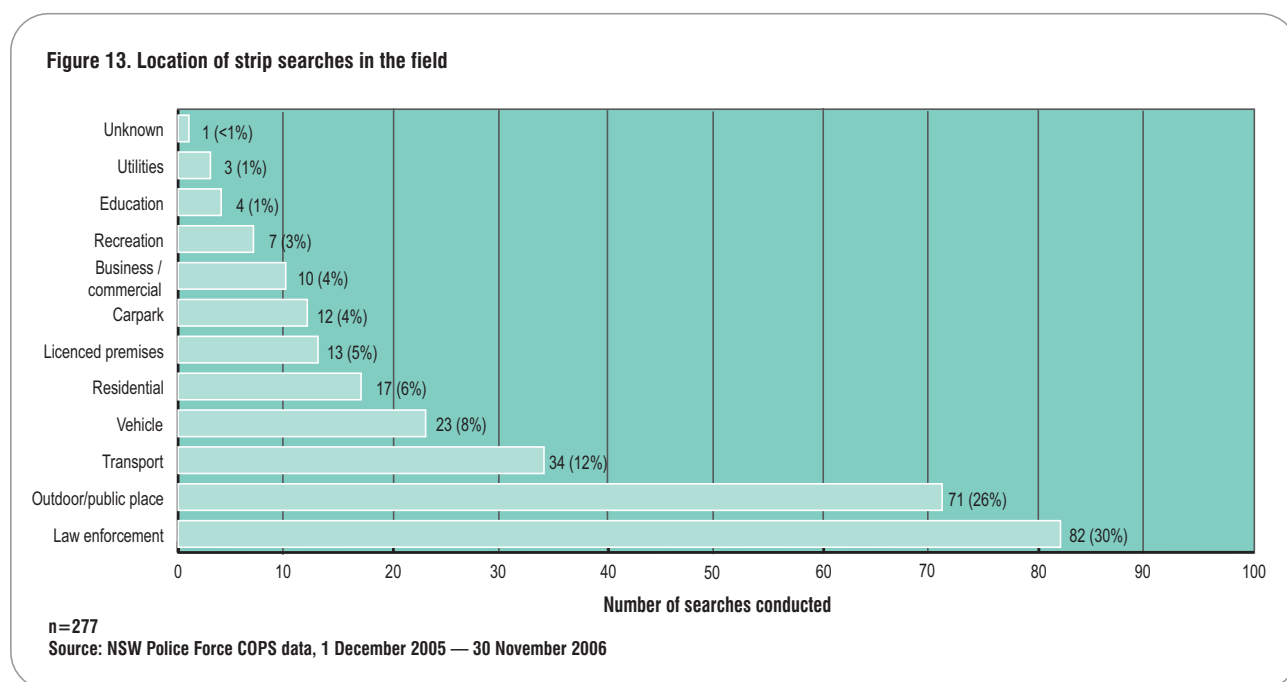
Under section 33(1), a strip search must be conducted in a private area that is not in the presence or view of persons of the opposite sex or persons who are not necessary to the search.¹⁷⁰

The *Searching Manual* says that ‘when a strip search is to be conducted, it should be out of public view, ideally at the nearest police station’.¹⁷¹

In comparison, the Queensland *Police Powers and Responsibilities Act 2000* restricts searches in public to outer clothing, unless an immediate and more thorough search is necessary, and goes on to say that if a more thorough search is required it should be conducted out of public view where possible. The provision goes on to say that suspecting that a person may have a concealed firearm, knife or bomb may be an example of circumstances in which a more thorough search is immediately necessary, and a shop or police station could be examples of an appropriate place to conduct a search out of public view.¹⁷²

2.11.3.1. Strip searches in the field

As indicated above, the three location types most frequently used by police to perform strip searches are ‘law enforcement places’, ‘outdoor and public places’, and ‘transport’.



We asked police officers about their experience of conducting strip searches in the field. Police generally indicated that they ensure searches are conducted in a reasonably private place and that this was common practice before LEPPRA commenced.¹⁷³ However, what constitutes a ‘private area’ in the field can vary from officer to officer, as indicated by some of the quotes below:

*You can hide behind the back or side of the truck, if you’re in the middle of the main street, and worst comes to worst you can get two coppers to stand either side in the alcove of the truck doors.*¹⁷⁴

*If we want to do a full strip search, if we have to go that far, you can just take them to an alcove and do it. Most of them will just do it on the street. I’ve seen shirts and trousers removed at the most.*¹⁷⁵

*It’s very situational. If it’s okay and they’re under control then obviously we’ll wait for a truck.*¹⁷⁶

*Very rarely would you ever do a full strip search in the street or in a public place. You wouldn’t, I’ve never seen it done.*¹⁷⁷

In consultations, the Shopfront Youth Legal Centre suggested that some people might choose to be strip searched in public for reasons of swiftness and safety:

There's always going to be that tension because a person doesn't really want to be dragged down to the station or into public toilets and things. Sometimes people might almost prefer to be searched in public because at least then there's other people who can potentially look on, you know so that the police can't get in a few swift kicks and punches.¹⁷⁸

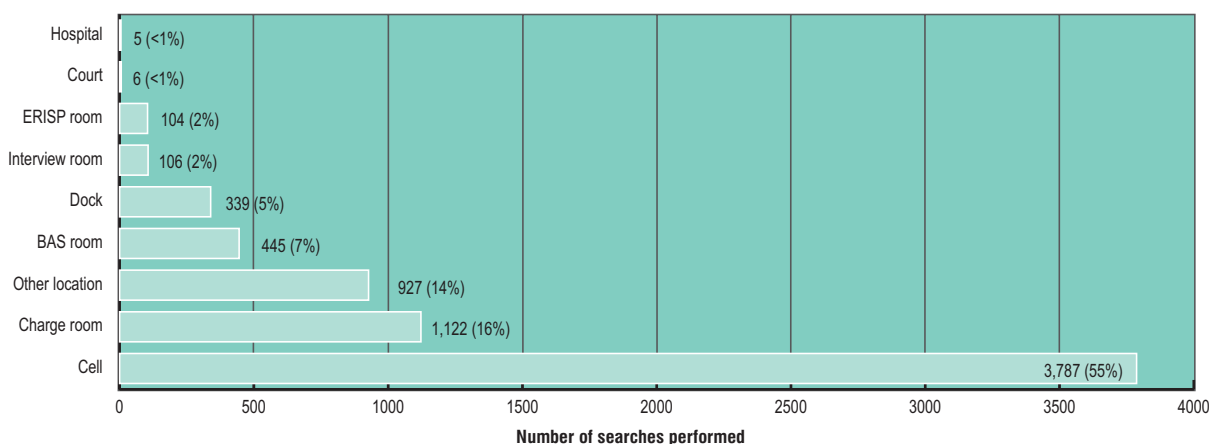
Section 33(1)(b) requires that the strip search not be conducted in the presence or view of a person who is of the opposite sex to the person being searched. It has not been possible to conduct a statistical analysis of strip searches conducted in the presence or view of the opposite sex or people who are not necessary for the purpose of the search because this information is not captured in the COPS data provided by police. One female officer pointed out that there may be circumstances where:

If I've got a violent female and [a male officer] and I are on the truck together, if she was going nuts I would prefer to have [another officer] there. He might not be watching but I'd still want him within arms reach.¹⁷⁹

2.11.3.2. Strip searches in custody

The *Standard Operating Procedures for CCTV Surveillance in Police Charge Rooms and Other Locations in Police Stations* (the CCTV SOPS) state that a camera will generally cover the search area of the charge room.¹⁸⁰ They state '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'. The CCTV SOPS then go on to make an exception 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*'.¹⁸¹

Figure 14. Location of strip searches in custody



n=6,841

Source: NSW Police Force COPS data, 1 December 2005 – 30 November 2006. Percentages add up to 101% because of rounding. BAS stands for Breath Analysis Section and ERISP stands for Electronically Recorded Interview of Suspected Person.

The COPS data indicates that 6,841 strip searches were conducted in custody in the first 12 months since LEPR commenced. This included 3,787 (55%) strip searches in the cells, 1,122 (16%) in the charge room, and 927 (14%) in another location.

Our interviews with police show evidence of their appreciation of the issue of privacy when it comes to strip searches in custody. For instance, one custody officer we spoke to confirmed that strip searches are conducted in cells that are not covered by closed circuit television.¹⁸² Another officer told us 'Even in a dock you don't strip search them in front of other prisoners'.¹⁸³

2.11.4. The presence of a parent, guardian or personal representative

Under section 33(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.¹⁸⁴

The term 'personal representative' is not defined in LEPR.¹⁸⁵ It is not clear whether this means a person can ask that a friend be present, or whether the term is confined to a legally appointed personal representative.

The provision in the *Crimes Act 1914* (Cth) on which section 33(2) was modelled provides for the presence of a parent, guardian or support person as an exception to the prohibition against conducting strip searches in the presence or view of a person who is of the opposite sex.¹⁸⁶

In consultations, we asked officers about the application of this provision. One officer commented:

*Not when you're doing a search, no, probably never. We mainly worry about that for interviews. I've never had anyone really complain about it too much. If they've committed an offence or if we need to strip search them, we generally have a very good reason to do it and quite often it's something that can't wait for officers' safety type reasons.*¹⁸⁷

The issues of 'officer safety' referred to in the quote above might include concerns that the person has an object on them which they could use to harm police.

In consultation, the Shopfront Youth Legal Centre indicated that clients have told them:

*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.*¹⁸⁸

While section 33(2) allows for the presence of a support person, it does not specify whether police are required to inform a person that they can have a support person present.

2.11.5. Strip searching a child or person who has impaired intellectual functioning

Under section 33(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.¹⁸⁹

In his second reading speech, the Attorney General said:

*This provision has been included to protect the interests of those who may not be able to protect their own interests, and may also assist police in the conduct of the strip search.*¹⁹⁰

While there was little discussion in the Legislative Assembly, there was some debate in the Legislative Council on the issue of safeguards for young people and people with impaired intellectual functioning who are strip searched. The Hon. Richard Jones argued that compliance should be required 'unless there is no other alternative' rather than 'as far as reasonably practicable', in order to 'strengthen the existing provision without making it unworkable'. He also indicated that the provision should not be mandatory as it may work against the person being searched.¹⁹¹ 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, as required under the *Crimes Act 1914* (Cth).¹⁹²

2.11.5.1. Comparison with the *Crimes Act 1914* (Cth)

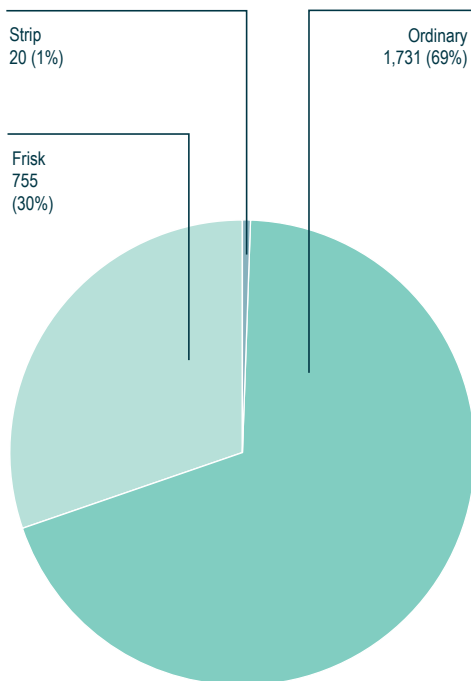
There is no separate threshold test in LEPR for determining when a strip search might be conducted on a child or person with impaired intellectual functioning. In comparison, section 3ZI(1)(f)(i) of the Commonwealth *Crimes Act 1914* states that a strip search of a child between the ages of 10 and 18 or a person incapable of managing his or her own affairs 'may only be conducted if the person or person has been arrested and charged or if a magistrate orders that it be conducted'. Section 3ZI(2) provides that the magistrate must have regard to the seriousness of the offence, the age or any disability of the person and such other matters as the magistrate thinks fit in making an order under section 3ZI(1)(f)(i).

2.11.5.2. Children between 10 and 17 years old

The COPS data indicates that 2,506 children between the age of 10 and 17 were searched in the field in the first 12 months of operation under LEPR (see Figure 15, following page). Of those searches, 20 (1%) involved a strip search. We have not been able to analyse how many of these strip searches were attended by a support person because COPS does not record this information for searches in the field.

The COPS data also indicates that 17,902 searches in custody were conducted on children between the age of 10 and 17 in the first 12 months since LEPR commenced (see Figure 16, following page). Of those searches, 351 (2%) involved a strip search. The data also indicates that 22 (6%) of those children had a support person present. It is mandatory for police to record whether a support person was present for all strip searches in custody.

Figure 15. Searches in the field of 10 to 17 year olds



n=2,506
Source: NSW Police Force COPS data, 1 December 2005 – 30 November 2006

In our consultations, some police said that it can be difficult to get a support person for the young person and that they go ahead with searches if a parent or other representative is unable to attend. For example, one officer in a non-metropolitan area told us:

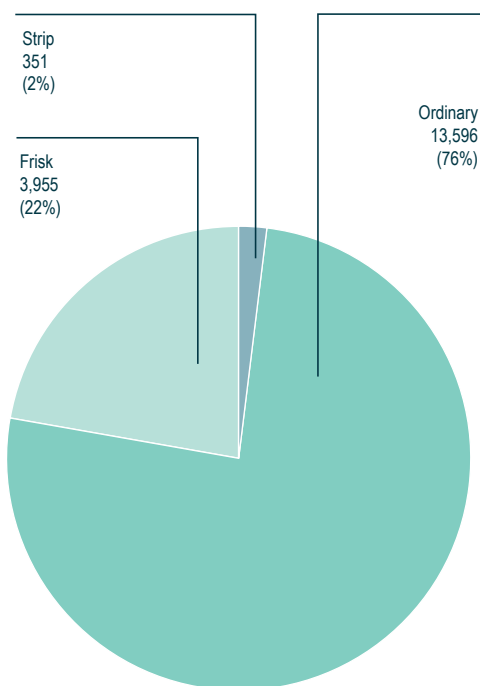
*In custody we wait plenty of times for support people [up to] two or three hours but the fact is, around this area that most times you can't get a support person. You ring up the kid's parents and they refuse to come in so you have great difficulties and no-one will come in for them.*¹⁹³

However, other officers in the same LAC suggested that a support person would be obtained for the search, given that a support person would be required in order to conduct an interview:

*Generally they'll be back in the charge room anyway because they are juveniles, so once you get to the charge room you need a support person anyway for the other processes, to interview them and so they'll have a person there.*¹⁹⁴

In other commands, officers have indicated that they rely on different groups for support persons in circumstances where the young person's family are unable or unwilling to attend. For instance, some officers have said that they contact the Department of Community Services, while others indicated that they have a custody support list which includes organisations such as the Salvation Army.¹⁹⁵

Figure 16. Searches in custody of 10 to 17 year olds



n=17,902
Source: NSW Police Force COPS data, 1 December 2005 – 30 November 2006

2.11.5.3. People of 'impaired intellectual functioning'

The Code of Practice for CRIME says:

In considering whether someone is intellectually impaired the following indicators are to be considered. Whether the person appears to:

- Have difficulty understanding questions and instructions
- Respond inappropriately or inconsistently to questions
- Have a short attention span
- Receive a disability support pension
- Reside at a group home or institution, or be employed at a sheltered workshop
- Be undertaking education, or to have been educated at a special school or in special education classes at a mainstream school
- Have an inability to understand the caution

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.¹⁹⁶

We have not been able to analyse how often police have arranged for people to have a support person present because the COPS data only notes when a support person was in fact present. Nor have we observed any searches where a support person was present.

In consultations, we asked police how often they interact with people who have an intellectual impairment and how they identify people with impaired intellectual functioning. Responses were quite varied. Some officers indicated that they often deal with such people, while others indicated that they very rarely do so.¹⁹⁷ In terms of identifying people who have an intellectual impairment, different officers said that their cumulative experience as a police officer,¹⁹⁸ their conversations with the person¹⁹⁹ and their knowledge of the individual²⁰⁰ all assist them to identify if the person has an intellectual impairment.

A number of officers indicated that they find it useful to have a support person present. One officer told us it assisted to have a support person present because 'they [have] a better rapport with the person'.²⁰¹ Some officers said that they would only arrange for a support person if the person being searched requested it.²⁰² Others indicated that it is impractical to arrange for a support person to attend, particularly in the field.²⁰³ One officer commented:

*If you're out on the street and there's some bloke there who's supposedly knocked something off and you're going to search him, [even] if he's someone working in the sheltered workshop, you're still going to go over and search him.*²⁰⁴

In order to canvas some of the issues concerning people with impaired intellectual functioning, we consulted with the Intellectual Disability Rights Service (IDRS) and the Criminal Justice Support Network (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.²⁰⁵ 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'.*²⁰⁶

The IDRS suggested that practical tools police might use to help them identify whether a person has impaired intellectual functioning might include showing the person some text to see if they have difficulty reading and writing, and asking them if they go to a special school or whether they are on a disability pension.²⁰⁷ The IDRS also 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'.*²⁰⁸

The IDRS explained that many of their clients experience high levels of anxiety when interacting with police and indicated that having a support person can help to reduce the level of anxiety experienced by the person, which may make it easier and quicker for police to conduct the search. 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'.*²⁰⁹

2.11.6. The prohibition on the search of body cavities and searching by touch

Under section 33(4), a strip search must not involve a search of a person's body cavities or an examination of the body by touch.²¹⁰ The term 'body cavities' is not defined in LEPR.

The *Code of Practice for CRIME* reminds officers that they cannot search body cavities as part of a strip search in the section on custody and the annexure containing rules relating to personal searches, but does not provide further guidance on what a body cavity is.²¹¹

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*)'.²¹²

In consultations, many officers indicated that they do not search a person's body cavities. However, when asked specifically if they ever ask to look inside a person's mouth, a number of officers indicated that they do, suggesting that some officers do not consider the mouth to be a body cavity. One officer told us:

*They carry balloons in their mouth all the time and they swallow them when police approach them so you might ask them to open their mouth.*²¹³

Another officer said:

*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.*²¹⁴

One officer suggested that in certain circumstances it would be appropriate for police to physically extract objects from a person's mouth:

*No we don't... though when I was doing street drug stuff, a couple of times in genuine fear for someone's safety when you see someone get a capful, get a handful of heroin and throw it in their mouth, we've tried to get that out because if one of those pops or cracks inside they're probably going to die and I'd have no problems justifying that to a Court, why I was trying to rip something out of someone's mouth.*²¹⁵

Recent amendments provide police with the power to require a person to open their mouth when exercising stop, search and detain powers under section 21.²¹⁶ However, police appear to have interpreted this provision as having a broader application. In February 2007, police published an article, advising officers that:

*If you are exercising a power to search a person, you can require the person to open his or her mouth or shake their hair if you have reasonable suspicion that the person is concealing something in those places.*²¹⁷

If searches of the mouth are limited to searches performed under section 21, this may have created an anomalous situation whereby a police officer can require a person to open their mouth before arresting them, but cannot do so once they move to an arrest.²¹⁸ Police have advised that they will consider amending the *Searching Manual* to include a more comprehensive description of the section 21A amendment.²¹⁹

2.11.7. The prohibition on removing more clothes than reasonably necessary

Under section 33(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.²²⁰

In comparison, the Queensland, *Police Powers and Responsibilities Act 2000* provides that 'the person must be given the opportunity to remain partly clothed during the search, for example, by allowing the person to dress his or her upper body before being required to remove items of clothing from the lower part of the body'.²²¹

So far, we have not identified any concerns in relation to the application of section 33(5).

2.11.8. The prohibition on undertaking any more visual search than is necessary

Under section 33(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.²²²

There may be an issue of whether police are provided with the appropriate powers to make reasonable directions for the purpose of conducting a visual search. For instance, in Queensland, the *Police Powers and Responsibilities Act 2000* provides police with the power to require the 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.²²³

So far, we have not identified any concerns in relation to the application of this provision.

2.11.9. Presence of a medical practitioner

Under section 33(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.²²⁴

This provision makes allowance for a person of the opposite sex to be present during a strip search if the person is a medical practitioner. The equivalent provision in the *Crimes Act 1914* (Cth), on which the search provisions in LEPR are based, expresses this safeguard as an exception to the rule that says strip searches must not be conducted in the presence or view of a person who is of the opposite sex to the person being searched.²²⁵

In consultations, police have said that they have not performed any strip searches where a medical practitioner has been present. We also asked officers when this provision might be useful. In response, a number of officers suggested that no doctor would be willing to attend for the purpose of a strip search. One officer asked, 'How would that work? Who would pay for that?'²²⁶ Another officer said, 'Where would you get a doctor from? You've got no chance of getting a doctor to come here'.²²⁷ Other provisions in LEPR provide for a medical practitioner to conduct a search of a person in custody in order to obtain evidence.²²⁸

2.11.10. Prohibition against searching children under 10 years old

Section 34 provides that children under 10 years of age must not be strip searched.

The COPS data indicates no children under the age of 10 have been strip searched by police since LEPR commenced. Indeed, police who have been interviewed as part of our consultations have indicated that it is extremely rare for a child under 10 years of age to come to police attention in a way that requires a strip search.²²⁹

Questions for consideration

9. What is your view as to the threshold test for strip searches, which requires consideration of necessity, and the seriousness and urgency of the circumstances?
 - a. Would a simpler test such as the Western Australian test of necessity in the circumstances be preferable as a threshold for strip searching?
10. What are your views on the rules for strip searches of persons provided for in section 33 of LEPR?
 - a. Do they strike a reasonable balance between the operational requirements of police and the dignity and privacy of individuals? If not, in what respect should they be altered?
 - b. Should a strip search require approval from a senior officer before being conducted?
 - c. Should any additional restrictions apply to strip searches in public places?
 - d. Should a person be offered the opportunity to remain partly clothed during a strip search?
 - e. In what circumstances might it not be reasonably practicable for a person of the same sex to perform a strip search?
 - f. Should police be specifically permitted to give directions during a strip search such as a direction for the person to raise their arms and move their legs apart?
 - g. What, if any, steps should police take to have a parent, guardian or personal representative present for a strip search?
 - h. Should the term 'body cavity' be defined in the Act?
11. In relation to strip searches of children and people with impaired intellectual functioning:
 - a. Should any additional threshold requirements apply for conducting a strip search such as a requirement that the person be charged or that the search be authorised by a magistrate?
 - b. Are the present requirements for the presence of a support person appropriate? Should police be required to note what steps they have taken to secure an appropriate support person?
 - c. Are police provided with sufficient guidance and other tools to identify persons who have impaired intellectual functioning?

d. What can be done to improve police access to appropriate support persons in all areas of the state?

12. Are you aware of any circumstances where a child under 10 years of age has been strip searched? If so, please provide full details.

2.12. Additional search powers

We have outlined above two additional provisions that apply to personal searches on detention (before arrest or custody):

- A provision entitling police to require a person to open their mouth or shake their hair²³⁰
- A penalty provision for failure to comply with police instructions where such a request is made, or to comply with a request of an officer exercising knife search powers.

The *Crimes Act 1900* already provides an offence for hindering police. Section 546C states:

Any person who resists or hinders or incites any person to assault, resist or hinder a police officer in the execution of his or her duty shall be liable on conviction before a Local Court to imprisonment for 12 months or to a fine of 10 penalty units, or both.

Hence it is unclear if any additional and separate penalty provision is appropriate. In addition, our observational research demonstrates almost universal compliance with police requests by persons being searched. However, views are sought in respect of these or any additional powers which may be considered appropriate.

Questions for consideration

13. What, if any, additional powers or provisions should be provided for in respect of police searches on arrest or in custody?

Endnotes

- ²⁴ The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p. 4846.
- ²⁵ The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p. 4847.
- ²⁶ The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p. 4849.
- ²⁷ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 242.
- ²⁸ The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p. 4846.
- ²⁹ The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p. 4847.
- ³⁰ The original definition of a frisk search did not make any specific reference to the use of metal detection devices, *Law Enforcement (Powers and Responsibilities) Bill*, s. 115.
- ³¹ Socks were added to the definition of a frisk search on 12 December 2006 by the *Police Powers Legislation Amendment Act 2006*, s. 3, Schedule 1, Clause [2].
- ³² *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 201(3)(a).
- ³³ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 29 provides that this provision 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'.
- ³⁴ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 29 provides that this provision 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'.
- ³⁵ *Crimes (Forensic Procedures) Act 2000*, s. 3.
- ³⁶ Under section 242, Parliament has limited our review of personal searches to searches conducted on arrest or in custody.
- ³⁷ The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p. 4847.
- ³⁸ *Crimes Act 1914* (Cth), ss. 3ZE, 3ZF and 3ZH.
- ³⁹ *Crimes Act 1914* (Cth), s. 3ZH(2).
- ⁴⁰ *Crimes Act 1914* (Cth), s. 3ZI.
- ⁴¹ *Crimes Act 1914* (Cth), s. 3ZR.
- ⁴² The Hon. Duncan Kerr MP, Crimes (Search Warrants and Powers of Arrest) Amendment Bill 1993 (Cth), second reading speech, Commonwealth Legislative Assembly Hansard, 17 November 1993, p. 3030.
- ⁴³ Review of Commonwealth Criminal Law: Gibbs, *Fifth Interim Report*, June 1991, p. 42, referring to the *Customs Act 1901* (Cth), as amended by the *Customs (Detention and Search) Act 1990* (Cth).
- ⁴⁴ *Police Powers and Responsibilities Act 2000* (Qld), Chapter 16.
- ⁴⁵ *Police Powers and Responsibilities Act 2000* (Qld), s. 629.
- ⁴⁶ *Police Powers and Responsibilities Act 2000* (Qld), s. 630(4).
- ⁴⁷ *Police Powers and Responsibilities Act 2000* (Qld), Schedule 6. A frisk search is defined as '(a) a search of a person conducted by quickly running the hands over the person's outer garments; and (b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person'. The dictionary also states that a search, '(a) includes frisk search a person; but (b) does not include the use of a drug detection dog to carry out drug detection under Chapter 2, Part 3, even if the drug detection dog physically intrudes onto a person or the clothing of a person'.
- ⁴⁸ *Police Powers and Responsibilities Act 2000* (Qld), Division 1 in Part 3 of Chapter 20.
- ⁴⁹ *Police Powers and Responsibilities Act 2000* (Qld), Division 2 in Part 3 of Chapter 20.
- ⁵⁰ *Criminal Investigation Act 2006* (WA), Division 2 of Part 8 provides police with the power to search a person in relation to an offence or for security reasons. Division 3 of Part 8 outlines the safeguards that apply to personal searches.
- ⁵¹ *Criminal Investigation Act 2006* (WA), Division 3 of Part 12.
- ⁵² Section 63 provides that a basic search may involve scanning the person with an electronic or mechanical device, whether hand held or not, to detect anything; removing the person's headwear, gloves, footwear or outer clothing (such as a coat or jacket) but not his or her inner clothing or underwear, in order to facilitate a frisk search and searching any article removed; a frisk search. Section 64 provides that a strip search may involve removing any article the person is wearing including any article covering his or her private parts and searching any article removed; searching the person's external parts including his or her private parts; searching the persons mouth but not any other orifice.
- ⁵³ *Criminal Investigation Act 2006* (WA), s. 72(2).
- ⁵⁴ *Criminal Investigation Act 2006* (WA), s. 70(2)(c) and (d).
- ⁵⁵ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 29.
- ⁵⁶ *COPS LEpra User Guide*, pp. 19 to 22.
- ⁵⁷ *COPS LEpra User Guide*, p. 24.
- ⁵⁸ *COPS LEpra User Guide*, pp. 25 to 26.
- ⁵⁹ This figure is based on an analysis of the 'type of search' which is a mandatory field in COPS. The options available in this COPS field are 'frisk', 'ordinary' and 'strip'.
- ⁶⁰ For the period from 1 December 2005 to 12 December 2006, the removal of socks fell within the definition of a strip search., However, it is not possible for us to comment on the number of strip searches that only involved the removal of socks because these details are not always provided by police in COPS records.
- ⁶¹ The 'sex' of a person of interest is a mandatory field in COPS. The options are 'male', 'female' and 'unknown'. 13 records did not indicate the sex of the officer and have not been demonstrated graphically.
- ⁶² Police extracted the sex of the officer from their personnel system for the purpose of this review.
- ⁶³ The full details of this random audit are provided below in section 2.11.2.1.
- ⁶⁴ The 'sex' of a person of interest is a mandatory field in COPS. The options are 'male', 'female' and 'unknown'. 3 records did not indicate the sex of the officer and have not been demonstrated graphically.
- ⁶⁵ This figure is based on an analysis of the location chosen by officers in the 'location of search' field which is a mandatory field in COPS. The available options for a search in the field are those shown in Figure 5.
- ⁶⁶ This figure is based on an analysis of the location chosen by officers in the 'location of search' field which is a mandatory field in COPS. The available options for a search in custody are those shown in Figure 6.
- ⁶⁷ *R v O'Donoghue*, NSW CCA 1988, 34 *A Crim R*, per Hunt J at 401.
- ⁶⁸ The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p. 4847.

- ⁶⁹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 21.
- ⁷⁰ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 26.
- ⁷¹ NSW Police Continuing Education, *Searching Manual*, October 2006, p. 16 citing Smart J. in *Streat v Bauer: Streat v Blanco*, NSWSC Common Law Division (Unreported), 16 March 1998.
- ⁷² NSW Police Continuing Education, *Searching Manual*, October 2006, p. 16.
- ⁷³ NSW Police Force Legal Services, *The Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated October 2006, p. 107.
- ⁷⁴ 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, pp. 54-57.
- ⁷⁵ The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p. 4847.
- ⁷⁶ *Butterworths Australian Legal Dictionary*, Reed International Books, 1997.
- ⁷⁷ David Ross QC, *Crime*, 2nd edition, 2004, p. 315, citing *Smith v The Queen* (1957) 97 CLR 100, at p. 129.
- ⁷⁸ David Ross QC, *Crime*, 2nd edition, 2004, pp. 315-316, citing *R v Amad* [1962] VR 545, at pp. 546-547.
- ⁷⁹ Garth Nettheim, *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. <http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/AboriginalLB/1990/25.html?query=eatts%20v%20dawson>. Accessed 5 April 2007.
- ⁸⁰ Stephen Odgers, *Uniform Evidence Act*, 7th edition, 2006, p. 491, citing *R v McKellar* [2000] NSWCCA 523 at paragraph 43.
- ⁸¹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 23(2).
- ⁸² NSW Police Force Legal Services, *The Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated October 2006, p. 11. At present the Code goes on to say that examples of this include 'to undergo a breath analysis, or pursuant to any sort of warrant', however, the NSW Police Force response to the consultation draft issues paper of 14 May 2007 advised that this section will be corrected as soon as practicable.
- ⁸³ There is no offence associated with section 50 of the *Bail Act 1978*. However, a failure to appear before a court in accordance with bail undertakings is an offence which carries a maximum penalty of up to 3 years imprisonment or 30 penalty units.
- ⁸⁴ There is no offence associated with section 13 of the *Road Transport (Safety and Traffic Management) Act 1999*, which provides police with the power to arrest a person without a warrant for the purpose of conducting a breath analysis in certain circumstances.
- ⁸⁵ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 21.
- ⁸⁶ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 26.
- ⁸⁷ The full definition of 'frisk' searches and 'ordinary' searches are set out in section 2.3.3.
- ⁸⁸ Refer to section 2.6 for further detail.
- ⁸⁹ Under section 32(5) police are required to perform the least invasive search practicable in the circumstances which is discussed further in section 2.10.4.
- ⁹⁰ Focus group with general duties, LAC C, 8 May 2006.
- ⁹¹ Focus group with general duties, LAC C, 8 May 2006.
- ⁹² Focus group with general duties, LAC B, 27 March 2006.
- ⁹³ The term WIPE is used throughout the *Policing Issues & Practice Journal*, 'LEPRA: Consolidating Police Powers', Special Edition, July 2005, Vol. 13, No. 3.
- ⁹⁴ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 201(1)(a).
- ⁹⁵ Focus group with detectives, LAC B, 29 March 2006; Focus group with general duties, LAC D, 24 May 2006; Interview with sergeant, LAC F, 26 July 2006; Focus group with senior constables, LAC G, 29 August 2006.
- ⁹⁶ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 201(1)(b).
- ⁹⁷ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 201(3A).
- ⁹⁸ *Police Weekly*, Vol. 18, No. 5, 27 February 2006, p. 10. This policy was approved by the Commissioner's Executive Team on 21 October 2005.
- ⁹⁹ Focus group with senior constables, LAC G, 29 August 2006.
- ¹⁰⁰ Focus group with highway patrol, LAC F, 26 July 2006.
- ¹⁰¹ Focus group with highway patrol, LAC F, 26 July 2006.
- ¹⁰² Focus group with sergeants, LAC D, 24 May 2006.
- ¹⁰³ Interview with Jane Sanders, Shopfront Youth Legal Centre, 7 November 2006, p. 28.
- ¹⁰⁴ Interview with Jane Sanders, Shopfront Youth Legal Centre, 7 November 2006, p. 26.
- ¹⁰⁵ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 201(c).
- ¹⁰⁶ Focus group with sergeants, LAC D, 24 May 2006.
- ¹⁰⁷ Interview with Jane Sanders, Shopfront Youth Legal Centre, 7 November 2006, p. 27.
- ¹⁰⁸ *Evidence Act 1995*, s. 139.
- ¹⁰⁹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 122(1).
- ¹¹⁰ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 122(2).
- ¹¹¹ Focus group with detectives, LAC C, 8 May 2006.
- ¹¹² Focus group with detectives, LAC C, 8 May 2006.
- ¹¹³ *Police Weekly*, Vol. 18, No. 26, 7 August 2006, pp. 6-7.
- ¹¹⁴ *Police Weekly*, Vol. 18, No. 26, 7 August 2006, p. 6.
- ¹¹⁵ The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p. 4847.
- ¹¹⁶ *Law Enforcement (Powers and Responsibilities) Act 2002*, ss. 32(1) and 32(2).
- ¹¹⁷ Focus group with sergeants, LAC D, 24 May 2006.
- ¹¹⁸ High visibility policing operation observation, September 2006.
- ¹¹⁹ *Law Enforcement (Powers and Responsibilities) Act 2002*, ss. 32(1) and 32(3).
- ¹²⁰ Focus group with sergeants, LAC D, 24 May 2006.
- ¹²¹ Focus group with sergeants, LAC G, 29 August 2006.
- ¹²² Focus group with detective constables, LAC F, 26 July 2006.
- ¹²³ *Law Enforcement (Powers and Responsibilities) Act 2002*, ss. 32(1) and 32(4).
- ¹²⁴ Focus group with beat officers, LAC A, 2 March 2006.

- ¹²⁵ High visibility policing operation observation, October 2006.
- ¹²⁶ *Law Enforcement (Powers and Responsibilities) Act 2002*, ss. 32(1) and 32(5).
- ¹²⁷ NSW Police Force Legal Services, *The Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated October 2006, pp. 29, 109 and 111.
- ¹²⁸ As indicated in Figures 1 and 2 in section 2.7.2, 71% of searches in the field and 75% of searches in custody were recorded as ordinary searches.
- ¹²⁹ Focus group with constables, LAC G, 29 August 2006.
- ¹³⁰ *Policing Issues & Practice Journal*, 'The Sikh Faith, Kirpans and Policing', October 2006, Vol. 14, No. 4, pp. 48-50 at p. 49.
- ¹³¹ *Law Enforcement (Powers and Responsibilities) Act 2002*, ss. 32(1) and 32(6). 'Transgender person' is defined in s. 32(11). Note that police may conduct a visual examination of a person's private parts under the *Crimes (Forensic Procedures) Act 2000*. Police must obtain a court order to do this, if the person does not consent.
- ¹³² NSW Police Force Legal Services, *The Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated October 2006, pp. 31, 109 and 111. Officers are reminded once in the section on searching in custody and twice in Annexure A which provides rules for conducting personal searches.
- ¹³³ Focus group with sergeants, LAC G, 29 August 2006.
- ¹³⁴ NSW Police Force Legal Services, *The Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated October 2006, p. 35.
- ¹³⁵ Interview with custody manager, LAC G, 30 August 2006.
- ¹³⁶ *Law Enforcement (Powers and Responsibilities) Act 2002*, ss. 32(1) and 32(7).
- ¹³⁷ Focus group with general duties, LAC C, 8 May 2006.
- ¹³⁸ Focus group with sergeants, LAC D, 24 May 2006.
- ¹³⁹ Focus group with senior constables, LAC G, 29 August 2006.
- ¹⁴⁰ Focus group with sergeants, LAC F, 26 July 2006.
- ¹⁴¹ *The NSW Police Annual Report 2005-06*, p. 107.
- ¹⁴² *The NSW Police Annual Report 2005-06*, p. 19. The Australian Institute of Criminology, *Australian crime: Facts and figures 2005*, Canberra, 2006, at p. 100 reported that a national survey conducted in 2004 indicated that on average 21% of sworn police officers are female.
- ¹⁴³ Refer to section 2.7.3. The COPS data shows that 81% of searches were performed by an officer of the same sex as the person being searched. The records of searches in the field may include searches exercised under stop, search and detain powers as well as searches on arrest.
- ¹⁴⁴ NSW Police Force Legal Services, *The Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated October 2006, p. 31.
- ¹⁴⁵ *Law Enforcement (Powers and Responsibilities) Act 2002*, ss. 32(1) and 32(8).
- ¹⁴⁶ Interview with duty officer, LAC E, 3 July 2006.
- ¹⁴⁷ Focus group with constables, LAC G, 29 August 2006.
- ¹⁴⁸ Focus group with sergeants, LAC D, 24 May 2006.
- ¹⁴⁹ *Law Enforcement (Powers and Responsibilities) Act 2002*, ss. 32(1) and 32(9).
- ¹⁵⁰ One complainant was aged 16 at the time. The age of the other complainant is not known.
- ¹⁵¹ High visibility policing operation observation, September 2006.
- ¹⁵² *Law Enforcement (Powers and Responsibilities) Act 2002*, ss. 32(1) and 32(10).
- ¹⁵³ Focus group with general duties, LAC D, 24 May 2006.
- ¹⁵⁴ While 'necessity' is the applicable test, police must also obtain the approval of a superintendent or higher and the person must be in custody at a police station in order to perform a strip search. Refer to section 2.6.1. and the *Crimes Act 1914* (Cth), s. 3ZH(2)(b).
- ¹⁵⁵ *Criminal Investigation Act 2006* (WA), s. 72(2).
- ¹⁵⁶ NSW Police Force Legal Services, *The Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated October 2006, p. 110.
- ¹⁵⁷ NSW Police Force Legal Services, *The Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated October 2006, p. 30. This reminder is located in the section that deals with searches in custody.
- ¹⁵⁸ NSW Police Force Legal Services, *The Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated October 2006, p. 112.
- ¹⁵⁹ Refer to Figures 1 and 2 in section 2.7.2.
- ¹⁶⁰ Focus group with sergeants, LAC D, 24 May 2006.
- ¹⁶¹ Interview with duty officer, LAC E, 3 July 2006.
- ¹⁶² Focus group with senior constables, LAC G, 29 August 2006.
- ¹⁶³ High visibility policing operation observation, September 2006.
- ¹⁶⁴ Interview with Jane Sanders, Shopfront Youth Legal Centre, 7 November 2006, p. 4.
- ¹⁶⁵ Interview with Jane Sanders, Shopfront Youth Legal Centre, 7 November 2006, p. 15.
- ¹⁶⁶ NSW Police Continuing Education, *Searching Manual*, October 2006, p. 14.
- ¹⁶⁷ This information was sourced from the NSW Police Force COPS data, 1 December 2005 – 30 November 2006.
- ¹⁶⁸ This sample size of 24 records is based on two strip searches per month. The random sample we accessed included 14 searches of females and 10 searches of males between 1 December 2005 and 30 November 2006. We have not been able to access narratives for searches in custody due to the way the searches are recorded.
- ¹⁷⁰ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 33(1).
- ¹⁷¹ NSW Police Continuing Education, *Searching Manual*, October 2006, p. 32.
- ¹⁷² *Police Powers and Responsibilities Act 2000* (Qld), s. 624(1).
- ¹⁷³ For example, Focus Group with beat officers, LAC A, 2 March 2006, when asked whether they strip search in a private area said 'That's not changed. We don't do anything out in public'.
- ¹⁷⁴ Focus group with general duties, LAC D, 24 May 2006.
- ¹⁷⁵ Interview with duty officer, LAC E, 3 July 2006.
- ¹⁷⁶ Focus group with constables, LAC G, 29 August 2006.
- ¹⁷⁷ Focus group with detectives, LAC D, 24 May 2006.
- ¹⁷⁸ Interview with Jane Sanders, Shopfront Youth Legal Centre, 7 November 2006, p. 15.

- ¹⁷⁹ Focus group with general duties, LAC D, 24 May 2006.
- ¹⁸⁰ NSW Police, *Standard Operating Procedures for Video Surveillance in Police Charge Rooms and Other Locations in Police Stations*, January 2005, p. 5.
- ¹⁸¹ NSW Police, *Standard Operating Procedures for Video Surveillance in Police Charge Rooms and Other Locations in Police Stations*, January 2005, p. 4.
- ¹⁸² Interview with custody manager, LAC G, 30 August 2006.
- ¹⁸³ Focus group with general duties, LAC B, 27 March 2006.
- ¹⁸⁴ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 33(2).
- ¹⁸⁵ Nor are the terms 'parent' or 'guardian' defined, however these terms are arguably clearer. 'Personal representative' is not defined in the *Crimes Act 1914* (Cth).
- ¹⁸⁶ *Crimes Act 1914* (Cth), s. 3ZI(4).
- ¹⁸⁷ Interview with duty officer, LAC E, 3 July 2006.
- ¹⁸⁸ Interview with Jane Sanders, Shopfront Youth Legal Centre, 7 November 2006, p. 22.
- ¹⁸⁹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 33(3).
- ¹⁹⁰ The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p. 4847.
- ¹⁹¹ The Hon. Richard Jones MLC, NSWPD, Legislative Council, 21 November 2002, p. 7266.
- ¹⁹² Ms Lee Rhiannon NSWPD, Legislative Council, 21 November 2002, p. 7271.
- ¹⁹³ Focus group with senior constables, LAC G, 29 August 2006.
- ¹⁹³ Focus group with constables, LAC G, 29 August 2006.
- ¹⁹⁵ Focus group with detective constables, LAC F, 24 July 2006 and interview with custody manager, LAC G, 30 August 2006.
- ¹⁹⁶ NSW Police Force Legal Services, *The Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated October 2006, pp. 105-106.
- ¹⁹⁷ Focus group with detectives, LAC D, 24 May 2006.
- ¹⁹⁸ Interview with duty officer, LAC E, 3 July 2006.
- ¹⁹⁹ Focus group with general duties, LAC C, 8 May 2006.
- ²⁰⁰ Interview with duty officer, LAC E, 3 July 2006.
- ²⁰¹ Focus group with sergeants, LAC G, 29 August 2006.
- ²⁰² Focus group with sergeants, LAC D, 24 May 2006.
- ²⁰³ Focus group with general duties, LAC D, 24 May 2006.
- ²⁰⁴ Focus group with sergeants, LAC D, 24 May 2006.
- ²⁰⁵ Interview with Intellectual Disability Rights Service, 18 October 2006, p. 38.
- ²⁰⁶ Interview with Intellectual Disability Rights Service, 18 October 2006, p. 1.
- ²⁰⁷ Interview with Intellectual Disability Rights Service, 18 October 2006, p. 29.
- ²⁰⁸ Interview with Intellectual Disability Rights Service, 18 October 2006, p. 10.
- ²⁰⁹ Interview with Intellectual Disability Rights Service, 18 October 2006, p. 31.
- ²¹⁰ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 33(4).
- ²¹¹ NSW Police Force Legal Services, *The Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated October 2006, pp. 30, 110 and 111.
- ²¹² NSW Police Continuing Education, *Searching Manual*, October 2006, p. 33.
- ²¹³ Interview with duty officer, LAC E, 3 July 2006.
- ²¹⁴ Interview with sergeant, LAC F, 26 July 2006.
- ²¹⁵ Focus group with senior constables, LAC G, 29 August 2006.
- ²¹⁶ *Police Powers Legislation Amendment Act 2006*, s. 3, Schedule 1, Clause [3].
- ²¹⁷ *Policing Issues & Practice Journal*, 'LEPRA Update - Improving Police Powers', February 2007, Vol. 15, No. 1, p. 12.
- ²¹⁸ The *Crimes (Forensic Procedures) Act 2000*, s. 3(1) states that a forensic procedure 'does not include any intrusion into a person's body cavities except the mouth'. This exemption of the mouth from the general prohibition against intrusions into body cavities for the purpose of forensic procedures suggests that the mouth is a body cavity.
- ²¹⁹ NSW Police Force response to consultation draft issues paper, 14 May 2007, p. 7.
- ²²⁰ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 33(5).
- ²²¹ *Police Powers and Responsibilities Act 2000* (Qld), s. 630(1)(b).
- ²²² *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 33(6).
- ²²³ *Police Powers and Responsibilities Act 2000* (Qld), s. 630(4).
- ²²⁴ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 33(7).
- ²²⁵ *Crimes Act 1914* (Cth), s. 3ZH(4).
- ²²⁶ Focus group with detective constables, LAC G, 29 August 2006.
- ²²⁷ Focus group with general duties, LAC D, 24 May 2006.
- ²²⁸ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 138.
- ²²⁹ For example, focus group with detectives, LAC D, 24 May 2006, focus group with senior constables, LAC G, 29 August 2006, interview with sergeant, LAC F, 26 July 2006.
- ²³⁰ Refer to section 2.8.1.

Chapter 3. The crime scene provisions

- 3.1. Introduction51
- 3.2. Objectives of the crime scene provisions51
- 3.3. Overview of the crime scene provisions51
- 3.4. Sources of information.....61
- 3.5. Comparable legislation in other jurisdictions61
- 3.6. Implementation of the crime scene provisions by the NSW Police Force61
- 3.7. NSW Police Force operational units involved in the establishment and investigation of crime scenes62
- 3.8. Data on the use of the crime scene provisions62
- 3.9. Issues arising during the review period so far64

3.1. 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.

We have structured our discussion of the crime scene provisions of Part 7 as follows:

- a brief outline of the objectives of Part 7
- a detailed overview of the legislative provisions — including a discussion of amendments made to Part 7 during the review period
- flow charts presenting a brief summary of the police powers under Part 7
- the sources of information we have used for reviewing the operation of the provisions
- an overview of legislation comparable to Part 7 in other Australian jurisdictions
- a discussion of the education and training given to police and other NSW Police Force employees about when and how to apply the crime scene provisions
- a description of the roles of Local Area Commands (LACs), the Crime Scenes Services Branch (the CSSB) of the Forensic Services Group (FSG), Scene of Crime Officers (SOCOs), and the NSW Police Force State Crime Command (SCC) in relation to the investigation of crime scenes
- a discussion of the statistical data obtained from the NSW Police Force, and
- a discussion of various issues and concerns that have arisen to date about the operation of the legislation.

3.2. 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. He said:

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.²³¹

In his second reading speech on the Law Enforcement (Powers and Responsibilities) Bill, the 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.

The 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.

The Attorney General also pointed out:

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.

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 and specified powers available to use at a crime scene.²³²

3.3. Overview of the crime scene provisions

Part 7 of LEPRA came into operation on 1 December 2005.²³³

It should be noted that Part 7 was amended by the *Police Powers Legislation Amendment Act 2006*, which came into operation on 12 December 2006. The nature of, and reasons for, the amendments are discussed in the following outline of the legislative provisions.

3.3.1. 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.

As to the types of 'premises' on which police may establish crime scenes, LEPRA defines 'premises' very broadly to include 'any building, structure, vehicle, vessel or aircraft and any place whether built on or not'.²³⁴

Section 89(1) 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.

The question of when a police officer is 'lawfully' on public or private premises is discussed in further detail below at section 3.3.6.4.

3.3.2. 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,²³⁵ 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,²³⁶ or
- there may be in or on the premises evidence of the commission of a serious indictable offence that may have been committed elsewhere²³⁷ (this includes situations where the offence occurred outside NSW, and the matter would amount to a serious indictable offence if it had occurred in NSW²³⁸).

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.²³⁹

Alternatively, a crime scene may be established pursuant to the authority conferred by a crime scene warrant.²⁴⁰

3.3.3. 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.²⁴¹ 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.²⁴²

3.3.4. 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.

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.²⁴³ Police may:

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

Section 95(1)(p) also entitles police to exercise any other function 'reasonably necessary or incidental to' the exercise of the preservation powers.

The powers listed in section 95(1)(g)-(o) can conveniently be described as 'the investigation powers'. Police may:

- g. perform any necessary investigation, including, for example, search the crime scene and inspect anything in it to obtain evidence of the commission of an offence

-
- h. conduct any examination or process for the purpose of performing any necessary investigation
 - i. open anything at the crime scene that is locked
 - j. take electricity, gas or any other utility for use at the crime scene
 - k. direct the occupier of the premises or a person apparently involved in the management or control of the premises to maintain a continuous supply of electricity at the premises
 - l. photograph or otherwise record the crime scene and anything in it
 - m. seize and detain all or part of a thing that might provide evidence of the commission of an offence
 - n. dig up anything at the crime scene, and
 - o. remove walls or ceiling linings or floors of a building, or the panels of a vehicle.

Again, section 95(1)(p) entitles police to exercise any other function 'reasonably necessary or incidental to' the exercise of these 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 without a crime scene warrant where police:

- have established a crime scene,
- apply for a crime scene warrant, and
- suspect on reasonable grounds that it is necessary to exercise their investigation powers immediately, to preserve evidence of the commission of an offence.²⁴⁴

In his second reading speech, the 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.*²⁴⁵

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'.²⁴⁶

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'.²⁴⁷
- 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 any of the investigation powers — with the exception of the power under section 95(1)(k) to direct a person to maintain a continuous supply of electricity — with the authority of the police officer who established the crime scene or who is responsible for the crime scene at the time.²⁴⁸

It appears that the reference to members of the NSW Police Force 'responsible for examining and maintaining a crime scene' was designed to refer to SOCOs, who include civilian employees of the NSW Police Force. The role of SOCOs is discussed in detail below at section 3.7.1.3.

3.3.5. Safeguards relating to the exercise of the crime scene powers

The general safeguards under Part 15 of LEPR apply generally to the exercise of the crime scene powers.²⁴⁹

3.3.6. 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 LEPR, 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, and
- a road or road-related area.

However, the term 'public place' does not include a school.²⁵⁰

Examples of public places are shopping centres, parks, cinemas and licensed premises.

3.3.6.1. Establishing a crime scene in a public place

As noted above, section 88 of LEPR provides that a police officer who is 'lawfully' on premises may establish a crime scene.

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 and Practice Journal* published in April 2006 explained, in providing guidance to police on the use of the crime scene provisions:

*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.*²⁵¹

3.3.6.2. Exercising crime scene powers at a crime scene in a public place

Section 89(2) of LEPR provides that a police officer may exercise crime scene powers at a crime scene in a public place without obtaining a crime scene warrant.

3.3.6.3. Vehicles in public places

The LEPR Issues Working Group responsible for examining the operation of LEPR identified two issues of concern about the use of the crime scene powers in relation to offences involving vehicles in public places.

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 LEPR. 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:

- 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
- 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.²⁵² According to the NSW Police

Force, a vehicle within a crime scene is more likely to be 'seized' for as long as is reasonably necessary rather than 'detained'.²⁵³

3.3.6.4. Establishing a crime scene on private premises

A police officer must be 'lawfully' on private premises to establish a crime scene.²⁵⁴

Under the common law, police are lawfully on private premises where:

- they have the consent of the lawful occupier to be there, or
- they have some other lawful authority to be on the premises.²⁵⁵

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 LEPPRA 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 to 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 and Practice Journal*,²⁵⁶ as well as noting the entitlement of police to be lawfully on premises under sections 9 and 10 of LEPPRA, also discusses 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 LEPPRA, [police] may enter premises and be on premises lawfully by executing a search warrant.

However, the Journal goes on to explain the difficulties in establishing a crime scene on private premises where police entry on to the premises was by virtue of a search warrant:

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.

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.

The *Police Powers Legislation Amendment Act 2006* inserted a new provision into Part 7 of LEPR, 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'.²⁵⁷

3.3.6.5. 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 premises.²⁵⁸

This means that police can exercise their preservation and investigation powers if the occupier of the premises consents to them doing so. In these situations, police are not establishing a crime scene or exercising crime scene powers under LEPR.

3.3.6.6. 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.²⁵⁹ Police can also exercise their crime scene investigation powers for up to three hours if:

- they apply for a crime scene warrant, and
- 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.²⁶⁰

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.

3.3.7. Establishment of more than one crime scene on premises in a 24 hour period

Section 92(4) of LEPR provides:

A crime scene may not be established in the same premises more than once in a 24 hour period (whether by the same or another police officer) unless a crime scene warrant is obtained in respect of the second and any subsequent occasion.

It appears that section 92(4) 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 the exercise of crime scene investigation powers for the purpose of preserving evidence.

3.3.8. 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. LEPR 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.²⁶¹

3.3.9. Applications 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 Clerk 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 LEPR.²⁶²

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.²⁶³ However, a crime scene warrant can be applied for by telephone (including radio, facsimile and any other communication device)²⁶⁴ if facilities are readily available for that purpose.²⁶⁵

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.²⁶⁶ 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 are to fill in 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.'²⁶⁷ A copy of the form is annexed to this issues paper.

3.3.10. 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, and
- any other information required by the regulations.²⁶⁸

An authorised officer may issue a crime scene warrant if he or she is satisfied that there are reasonable grounds for doing so.²⁶⁹

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.²⁷⁰

Police must provide such further information 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.²⁷¹

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.²⁷²

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'.²⁷³ The *Law Enforcement (Powers and Responsibilities) Regulation 2005* contains a form on which an authorised officer must record such information. Completed forms are to be returned, with a copy of the crime scene warrant²⁷⁴ and a copy of the occupier's notice,²⁷⁵ to the local court named in the occupier's notice.²⁷⁶ Copies of these forms are annexed to this issues paper.

3.3.11. 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. 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.²⁷⁷

3.3.12. 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.²⁷⁸ 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.²⁷⁹ If the warrant fails to specify a time of expiry, the warrant expires 72 hours after its issue.²⁸⁰

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.²⁸¹ The time for expiry of a warrant can be extended only once²⁸² and must not extend the period of the warrant beyond 144 hours after its issue.²⁸³ Any application for an extension of a warrant must be made before the expiry of the warrant.²⁸⁴

When an authorised officer issues a telephone warrant, the warrant expires 24 hours after the time of its issue.²⁸⁵ A telephone warrant may be extended for up to 60 hours at a time.²⁸⁶ The time for expiry of a telephone warrant may be extended twice.²⁸⁷ Any extensions of a telephone warrant must not extend the period for the warrant beyond 144 hours after its issue.²⁸⁸ Again, any application for the extension of a telephone warrant must be made before the expiry of the warrant.²⁸⁹

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.²⁹⁰

3.3.13. 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 7.²⁹¹

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.

3.3.14. 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 relevant authorised officer 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 notice 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 any other particulars prescribed by the *Law Enforcement (Powers and Responsibilities) Regulation*.²⁹²

The *Law Enforcement (Powers and Responsibilities) Regulation 2005* 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.²⁹³ A copy of this form is annexed to this issues paper.

3.3.15. 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.²⁹⁴

3.3.16. Offences

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.

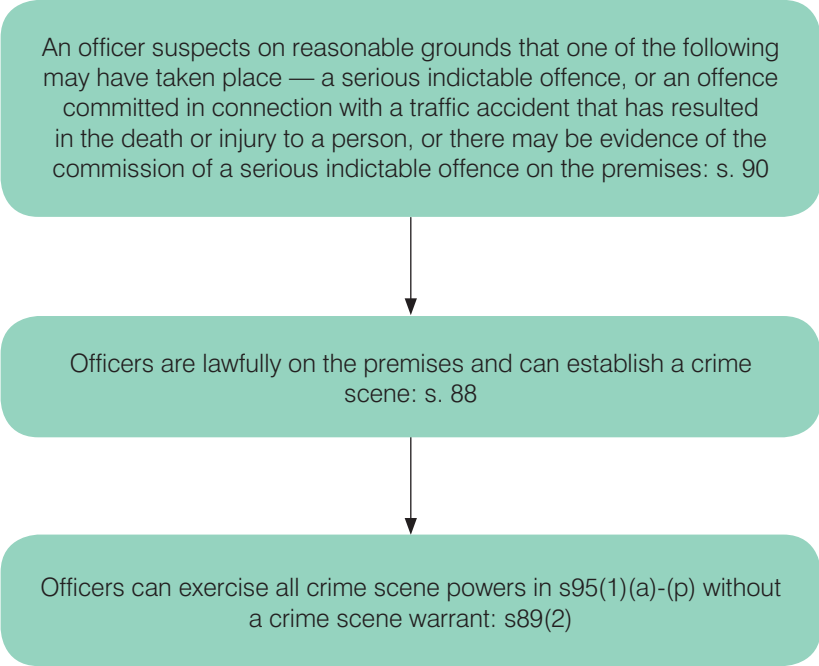
Section 96(2) provides:

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.

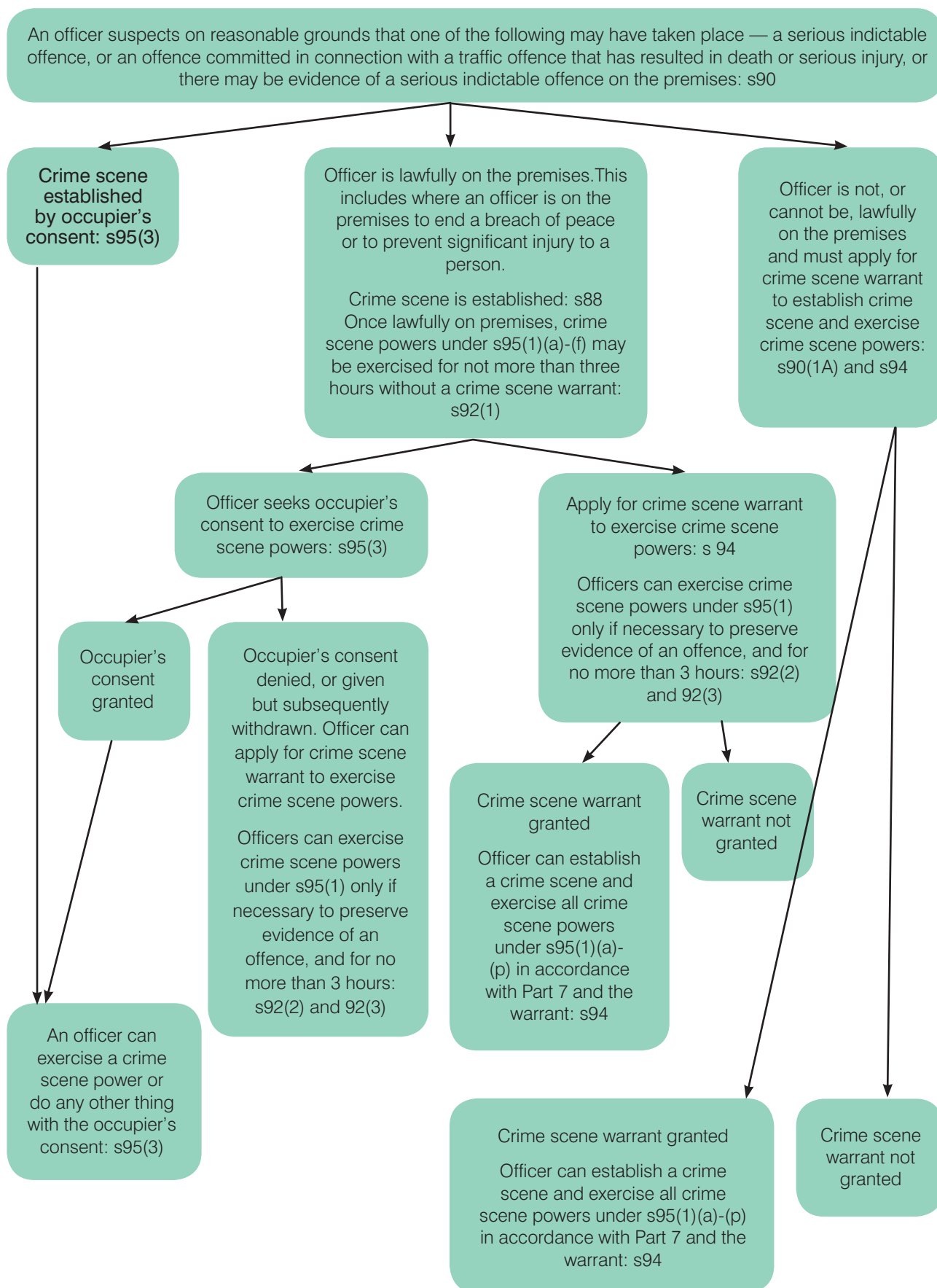
Maximum penalty: 10 penalty units.

3.3.17. Flow charts — exercise of crime scene powers in public places and on private premises

Public Place



Private Premises



3.4. Sources of information

In order to review the operation of the crime scene provisions, we have used a variety of research methods:

- We have required the NSW Police Force to provide us with information from the Computerised Operational Policing System (COPS) on the use of the crime scene provisions. The information from COPS that we have obtained to date covers the period from 1 December 2005, when the legislation commenced, to 30 November 2006.
- We visited seven LACs — identified for the purposes of this issues paper as LACs 'A' to 'G' — to discuss the implementation of the crime scene provisions with commanders, crime managers, detectives, education development officers, SOCOs, and other members of the NSW Police Force. These visits commenced three months after the introduction of the crime scene provisions under Part 7 and were conducted between March and August 2006. We also held discussions with senior officers from the Forensic Services Group in June 2006.
- We have held consultations with various legal centres, and with other agencies and organisations including the Legal Aid Commission, the Department of Housing, the Homicide Victims Support Group, and the NSW Council for Civil Liberties.
- We have conducted a review of various articles discussing the crime scene provisions.
- We have monitored whether there have been any legal proceedings where the crime scene provisions have been considered. To date we are not aware of any such proceedings. This may be because the provisions have only been in operation since December 2005 and any proceedings involving a challenge to the exercise of the crime scene powers have not yet been heard.

3.5. Comparable legislation in other jurisdictions

We have examined comparable legislation in other Australian jurisdictions.

In 2000, the Queensland Parliament passed the *Police Powers and Responsibilities Act 2000* which included provisions about 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'.²⁹⁵ It should be noted that the crime scene provisions in Part 7 of LEPPRA were modelled on the provisions in the Queensland legislation.²⁹⁶

In Western Australia, the *Criminal Investigation Act 2006* contains provisions permitting the establishment of a 'protected forensic area' (PFA).²⁹⁷ 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.²⁹⁸ A serious offence is an offence carrying a maximum penalty of at least five years imprisonment.²⁹⁹ An officer executing a search warrant can also establish a PFA.³⁰⁰ Once a PFA is established, the officer can preserve the area.³⁰¹ 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.

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 NSW.

3.6. Implementation of the crime scene provisions by the NSW Police Force

In section 1.3 above, we outlined the activities undertaken by the NSW Police Force and the Attorney General's Department to implement LEPPRA. The following discussion details the activities undertaken by the NSW Police Force to implement the crime scene provisions:

- In July 2005, Education Services published a special edition of the *Policing Issues and Practice Journal* about the operation of LEPPRA in preparation for the introduction of the legislation. This journal had a chapter covering the operation of the crime scene provisions.³⁰²
- The NSW Police Force *Code of Practice for Custody, Rights, Investigation, Management and Evidence* (the *Code of Practice for CRIME*) was updated to include a section on the crime scene provisions.
- In April 2006, Education Services published a *Policing Issues and Practice Journal* that included an article on crime scenes.³⁰³
- On 11 December 2006, the *Police Weekly* included an article on the recent amendments to LEPPRA, which included an explanation of the nature of the amendments to the crime scene provisions of Part 7.³⁰⁴

Where appropriate, we have included relevant extracts from the *Policing Issues and Practice Journal* and editions of the *Police Weekly* in the discussion below about particular issues and concerns arising from the operation of the crime scene provisions.

We note that, while the *Policing Issues and Practice Journal* and the *Code of Practice for CRIME* have provided guidance for police about the application of the crime scene provisions, there have to date been no Standard Operating Procedures (SOPS) governing how police should implement the provisions. However, the LEPPRA Issues Working Group noted that it would be desirable to finalise appropriate SOPS on the crime scene provisions when the 2006 amendments to the provisions came into operation.³⁰⁵ According to the NSW Police Force, the need for these SOPS has not been raised as an issue since and 'the comprehensive initial education campaign followed by additional educative material and, of course, a 'settling down period' has made the need for SOPS redundant'.³⁰⁶

3.7. NSW Police Force operational units involved in the establishment and investigation of crime scenes

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 FSG in their area. LACs investigating major crimes are required to notify the Forensic Services Group (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.

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. However, 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.³⁰⁷

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'.³⁰⁸ The SCC is divided into various specialist squads, which have 'a key role on focussing LAC and Region response to their particular crime types through state-wide monitoring'.³⁰⁹

3.8. Data on the use of the crime scene provisions

As noted above in section 3.4, our review has involved requiring the NSW Police Force to provide us with information from COPS about the use of the crime scene provisions.

The NSW Police Force introduced two new 'action type' screens entitled 'Crime Scene established for less than 3 hours Action' and 'Crime Scene Warrant Action' which could be filled in when entering events on COPS. However, it was not mandatory for police to fill in these screens.

The NSW Police Force extracted data from COPS about the use of the crime scene provisions by searching for events where police had filled in the new crime scene 'action type' screens as part of the 'actions' for an event.

3.8.1. Limitations in data provision

3.8.1.1. Limited data on crime scenes established for less than 3 hours

The NSW Police Force has provided us with COPS records that indicate that there were 39 events where the 'Crime Scene established for less than 3 hours Action' screen had been completed for the first year of the review period (1 December 2005 to 30 November 2006). We have requested further documentation relating to these events.

We had expected significantly more crime scenes established for less than three hours would have been recorded on COPS and raised concerns with the NSW Police Force about the possible under reporting by officers when crime scenes were established for less than three hours. The NSW Police Force agreed that the number of COPS records relating to crime scenes established for less than three hours was low and advised that the reason for this may be police uncertainty as to whether they should be recording the establishment of a crime scene for less than three hours.³¹⁰ In order to determine more accurately the number of times crime scenes were established for less than three hours during the review period, the Business and Technology section of the NSW Police Force conducted a search in the 'free text' section of COPS for 'crime scene'. In the period 1 December 2005 to 28 September 2006, approximately 12,000 COPS records referred to 'crime scene'. We intend to analyse this data to determine how many of these records refer to a crime scene established under LEPPRA, as opposed to a reference to a place where an offence

appears to have been permitted. In particular, we are interested in situations where a crime scene was established under LEPRa for less than three hours.

3.8.1.2. Limited data on crime scene warrants

According to the COPS data provided by the NSW Police Force, there were 52 events where the 'Crime Scene Warrant Action' screen had been completed for the period from 1 December 2005 to 30 November 2006. Again, we had expected significantly more crime scene warrants would have been recorded on COPS and raised concerns with the NSW Police Force about the possible under reporting by officers when crime scene warrant applications were made.

The NSW Police Force agreed that the number of COPS records relating to crime scene warrants was low and advised that the reason for this may be due to the failure of police to use the appropriate screens in COPS. We have been advised that the NSW Police Force is developing a reminder to police on recording these actions in accordance with the COPS LEPRa Users Guide.³¹¹

We are also currently working with the NSW Police Force and the Attorney General's Department to obtain more accurate information about:

- the number of applications for crime scene warrants during the review period
- the methods used to apply for a crime scene warrant (that is, in person, by phone or by fax)
- whether or not these applications were granted and the reasons for such decisions, and
- whether applications comply with legislative requirements.³¹²

In addition, we have contacted the NSW Police Force to obtain further documentation relating to 21 of the events where the action type 'Crime Scene Warrant' was completed. For each of these events we have sought copies of the application to an authorised officer for the crime scene warrant, any material supporting the application for the warrant, the warrant issued by the authorised officer, and the report to the authorised officer about the execution of the warrant. At the time of writing we have received information in relation to five of these events.

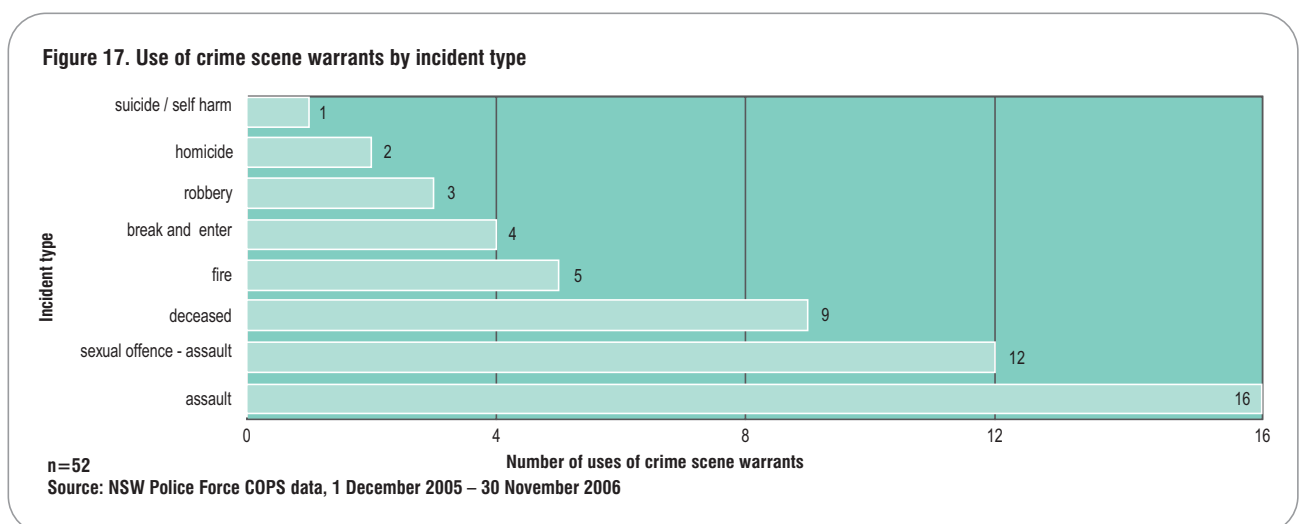
3.8.1.3. Overall comments on data

Given that we have only been able to examine a fraction of the documentation concerning the crime scenes established during the review period so far, it is not possible for us to make comprehensive comments about the operation and effectiveness of these police powers. However, we are able in the following discussion to:

- provide information about the events which were recorded properly or fully in the action section of COPS, and
- highlight a number of issues that have arisen from an examination of available data, and that have been raised by stakeholders during consultations.

3.8.2. Types of incidents where applications for crime scene warrants were made

Crime scene warrants were exercised following a range of incident types. Figure 17 shows the types of incidents for which crime scene warrants were recorded to have been used.³¹³



Of the 52 reported crime scene warrants executed in the period 1 December 2005 to 30 November 2006, 31% of crime scene warrants related to suspected assaults, 23% to suspected sexual assaults, 17% to attending premises where deceased bodies were located and 10% to fire related incidents.³¹⁴

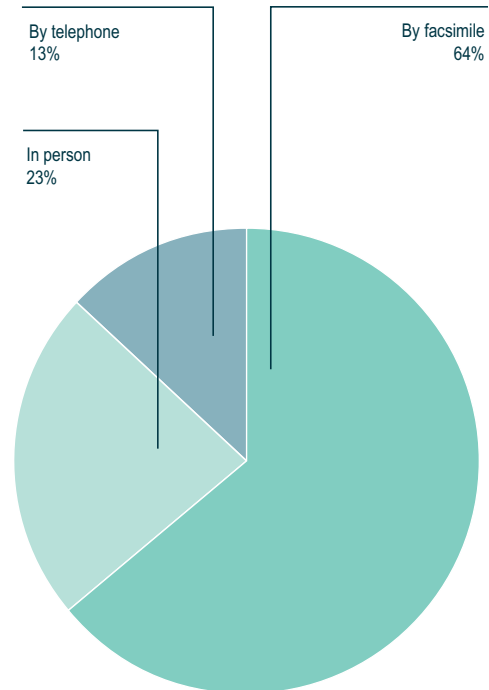
3.8.3. Methods used to apply for crime scene warrants

Figure 18 shows the number and proportion 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 45 out of 52 cases (87%) between 1 December 2005 and 30 November 2006.

3.8.4. Decisions by authorised officers on applications for crime scene warrants

According to the COPS data for the period from 1 December 2005 to 30 November 2006, all police applications to authorised officers for the issue of crime scene warrants were granted. However, we note that, during our consultations with police, we were advised that, on some occasions, authorised officers had refused to grant an application for a crime scene warrant. It appears that applications which were not granted were not recorded in COPS.

Figure 18. Methods used to obtain search warrants



Source: NSW Police Force COPS data, 1 December 2005 – 30 November 2006

3.9. Issues arising during the review period so far

Below we discuss a range of issues and concerns in relation to the implementation of the crime scene provisions. We are also interested in hearing personal experiences about the way the crime scene provisions operate in practice, and any views on whether the legislation achieves its objectives.

Questions for consideration

14. Has a crime scene or scenes been established on your premises since December 2005? Have you ever been affected by a crime scene established in a public place or on private premises? If so, please provide an account of your experience, and any issues or concerns that arose.
15. Are you aware of any instances where a crime scene has been established and crime scene powers have been exercised on persons you know or your clients? If so, provide details of any issues or concerns that arose in the exercise of crime scene powers.

3.9.1. Comments by police on the codification of the crime scene powers

Our consultations with police have revealed general support for the codification of the crime scene powers. Comments from the police whom we have interviewed included:

*We've had really no power to do what we do in and around places so we needed to legislate it.*³¹⁵

*We were acting on good faith in the past. Now we've got legislation to support it.*³¹⁶

*It's making us question our legal right as an individual to be there, which is probably a good thing.*³¹⁷

*It cuts out any anomalies and misconceptions.*³¹⁸

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'.³¹⁹

3.9.2. When to obtain a crime scene warrant

3.9.2.1. Where police are not lawfully on the premises

Section 88 of LEPR provides that police must be lawfully on premises to establish a crime scene. If police are not entitled to enter private premises (for example, because the occupier does not consent), they must apply for a crime scene warrant authorising them to enter the premises, establish a crime scene, and exercise crime scene powers.

We note that the Queensland *Police Powers and Responsibilities Act 2000* provides police with the power to enter premises if they reasonably suspect it is a crime scene or to reach another place that they suspect is a crime scene.³²⁰ We also note that Western Australia's *Criminal Investigation Act 2006* provides police with the power to enter premises if they reasonably suspect that a serious offence is being or has been committed in a place, or there is in a place a thing relevant to a serious offence.³²¹

3.9.2.2. Where police are lawfully on the premises

Even if police are lawfully on the premises and have established a crime scene, the *Code of Practice for CRIME the Policing Issues and Practice Journal* advise police about the circumstances in which they should apply for a crime scene warrant.

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.³²²

The *Policing Issues and 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.

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.³²³

The journal also contains the following:

If and when that consent is withdrawn by the owner, you would then formally exercise your LEPR 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.³²⁴

Both the Code and 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 and the 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 appears to emphasise that it is appropriate for police to rely upon the consent of the occupier to exercise crime scene powers. On the other hand, the journal appears to emphasise that the most efficient option is to apply for a crime scene warrant.

During consultations, police have advised us that they use their discretion when deciding whether to rely on the consent of the occupier to exercise their crime scene powers or alternatively to apply for a crime scene warrant. One senior constable said:

*If it's a bona fide victim's premises and... they wished for police assistance, I'd have no problem with consent... I don't think it's fair to them to make them wait an extra hour and a half [for a crime scene warrant].*³²⁵

A 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, saying 'You obtained this [evidence] under duress, so it's not going to be admissible'.*³²⁶

A senior constable said that he would apply for a crime scene warrant rather than seeking consent to enter the premises to establish a crime scene if he thought that he was likely to obtain evidence of other unrelated offences.³²⁷ Police advised us that a refusal by an occupier to give consent to enter the premises for the purpose of establishing a crime scene usually occurs when the occupier is involved in illegal activities not necessarily related to the suspected offence being investigated.³²⁸ For example, police may wish to establish a crime scene in relation to an alleged assault on premises where the occupier is in possession of or manufacturing drugs.

The following case studies provide examples of where police applied for a crime scene warrant to establish a crime scene on private premises.

Case study

Following the alleged assault of a woman, police applied for a crime scene warrant in relation to the suspect's house because it may have been the location of the alleged assault. The application for the warrant was made on the grounds that police sought to locate some of the missing clothing and jewellery belonging to the woman, the clothing worn by the suspect on the night of the alleged assault, the bed sheets on the suspect's bed, and any stupefying drugs.

Case study

Police attended a unit after neighbours reported a foul odour emanating from the premises. The owner's son answered the door and police found the body of the owner in the main bedroom. Police applied for a crime scene warrant, stating that 'based on the differing version of events given by the son, his failure to report his mother's death to authorities and his injuries police believe the death of [the deceased] is highly suspicious and that [the son] is a suspect in relation to that death'. The application also stated that the deceased was the owner/occupier of the unit and that the son had told police that he did not reside at the premises.

3.9.3. Identifying the 'occupier' of private premises

It has become apparent during our consultations and observations that there are sometimes difficulties for officers in relation to the identification of the relevant 'occupier' of the premises from whom they should seek consent. In particular, these difficulties have arisen when the crime scene needed to be established in premises that were located within larger public premises — for example, a caravan within a caravan park, or a room within a hotel.

An officer of the FSG described the confusion that arose when he was required to investigate an alleged sexual assault that had occurred in a cell at a correctional centre occupied by two inmates. Following the incident, the alleged victim was taken to a nearby hospital and the alleged offender was placed in another cell. The FSG was called to the prison and the cell was established as a crime scene. However, according to the officer, a question had arisen as to whether the Department of Corrective Services or one or both of the inmates was the 'occupier' of the cell where the offence took place.³²⁹

3.9.4. Coronial investigation scenes

In order to establish a crime scene or to apply for a crime scene warrant, a police officer must 'suspect on reasonable grounds' the commission of a serious indictable offence.³³⁰

The LEPRA Issues Working Group identified that:

This requirement [of reasonable suspicion] raises problems where there are no grounds to reasonably suspect the commission of a serious indictable offence until crime scene powers [have been exercised]. In these situations a crime scene warrant cannot be applied for or issued.

For example:

- *Deceased persons who are sole occupants where there is no obvious indication that the death is as a result of a serious indictable offence*
- *Suspected suicides — suicide is not an offence*
- *Fire scenes.*³³¹

With a view to overcoming the problems involved, Parliament amended the *Coroners Act 1980* by introducing a new provision, section 23D, which came into operation on 29 November 2006. This section provides that the coroner may consider that an investigation should be carried out at a particular place for the purposes of an inquest into a death³³² or an inquiry into a fire or explosion.³³³ 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 LEPR. 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'³³⁴ — that is, they may be exercised on private premises.

A *Police Weekly* article of 18 December 2006, published shortly after the introduction of the coronial investigation scene provisions, provided guidance for police on whether to use the crime scene provisions of Part 7 of LEPR or apply to the coroner for an order to establish a coronial investigation scene under the *Coroners Act 1980*:

*There may often be a fine line between a crime scene and a coronial scene, but you should establish a crime scene under Part 7 of LEPR or apply for a crime scene warrant whenever you are able to (that is you have a reasonable suspicion set out respectively in section 90 or 94). When you are dealing with a death, fire or explosion and cannot satisfy those requirements, you may revert to the Coroners Act and obtain an order for a coronial investigation scene, if one is necessary in the circumstances (that is, you have been denied access to a place).*³³⁵

We note that, the introduction of section 23D of the *Coroners Act 1980* has overcome the problem of investigating a death on private premises where police do not have a reasonable suspicion that the death resulted from a serious indictable offence.

However, police have told us that there remains a problem 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. In these circumstances, police are not in a position to seek the consent of the occupier to exercise investigative powers, nor can they apply for a crime scene warrant because there is not the requisite reasonable suspicion of the commission of a relevant offence. Furthermore, they cannot apply for a coronial investigation scene order because there has been no death. Our present view is that the power under section 9 of LEPR to enter in emergencies should allow police to enter premises in these circumstances, in particular, the power to enter premises if police believe on reasonable grounds 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'.³³⁶

3.9.5. Establishment of more than one crime scene on premises in a 24 hour period

As noted above, section 92(4) provides:

A crime scene may not be established in the same premises more than once in a 24 hour period (whether by the same or another police officer) unless a crime scene warrant is obtained in respect of the second and any subsequent occasion.

As previously discussed, it appears that 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 powers and the exercise of crime scene investigation powers for the purpose of preserving evidence.

An unintended consequence of this provision may be that police are unable to return to the same premises to establish a subsequent unrelated crime scene. As an example, this may be an issue where police are investigating a fight on school premises and a second, unrelated incident occurs within a 24 hour period.

Questions for consideration

- 16. What are your views as to the present requirements in respect of police powers of entry to exercise crime scene warrants and the exercise of crime scene powers with consent?**
- Should police have expanded powers of entry if they reasonably suspect the premises are a crime scene, or there is evidence on the premises of a serious indictable offence? If so, what powers should police be permitted to exercise on entry?**
 - Should the exercise of any crime scene powers be only on the basis of a warrant, regardless of occupier's consent? In particular where the exercise of powers may result in damage, should a warrant be required? If so, what, if any, exceptions to the requirement for a warrant may be necessary?**
 - What, if any, clarification is required of the current 'occupier's consent' provision in section 95(3)?**
 - In what circumstances, if any, should police be permitted to establish a crime scene without a warrant within a 24 hour period of an earlier crime scene on the same premises?**

3.9.6. The exercise of crime scene powers to preserve evidence

3.9.6.1. 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.³³⁷ Police can also exercise their crime scene investigation powers for up to three hours if:

- they apply for a crime scene warrant, and
- they reasonably suspect that it is necessary to exercise the crime scene investigation powers immediately, to preserve evidence of the commission of an offence.

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.

One interpretation of the legislation is that police have to apply for a crime scene warrant prior to exercising crime scene powers without a warrant. However, the NSW Police Force have advised that if Parliament had intended that a police officer may only exercise the crime scene powers (such as collecting fragile evidence in danger of being destroyed or contaminated) once police have applied for a crime scene warrant, the provision would be phrased as such, rather than stating as it does that this action may be taken if the officer or another officer applies for a crime scene warrant. The NSW Police Force states its views are supported by the mixed use of past and present tense in section 92.

There is a clear requirement that police must have established a crime scene before exercising the 'emergency crime scene powers': section 92(a) states that the officer can only exercise these powers if 'a crime scene has been established by the police officer or another police officer'. Similarly, the police officer must have the requisite state of mind: section 92(c) requires that the powers only be exercised if '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'. If there were a need to have made an application before exercising these powers, section 92(2)(b) would state 'the police officer or another police officer has applied for a crime scene warrant in respect of the crime scene'.

The construction of this provision is entirely consistent with the objective of the section. That is, acquisition of fragile evidence in exigent circumstances, where any delay could result in the loss of evidence, provided that the application for the crime scene warrant is made at some time reasonably proximate to the exercise of the power.³³⁸

To use the example cited by the Attorney General in his Second Reading Speech... if a crime scene is being flooded, and a police officer had to apply for, or organise for another officer to apply for, a crime scene warrant before exercising his or her emergency crime scene powers, this provision would be rendered ineffective or of very little value.

Police Legal Services has received numerous complaints from police and crime scene examiners who have said that having to apply for a crime scene warrant within three hours of establishing a crime scene is a problem because after three hours the preservation powers cannot be further exercised until a crime scene warrant is obtained. Problems have been said to arise due to the demand on authorised officers and the operational workload of police officers.

One suggestion raised during our consultations with police was that the time that police spent in preparing, applying for and obtaining a crime scene warrant should be excluded from the three-hour limit on exercising crime scene powers without a warrant. A senior constable said:

*Any time-outs where I could go and sort something out and not lose my investigation time I'm generally in favour of... Three hours is not long when you're trying to do fifty things at once.*³³⁹

We note that under the Queensland *Police Powers and Responsibilities Act 2000* there are no specific time limits 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'.³⁴⁰ 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'.³⁴¹

We also note that 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 under a search warrant and the occupier has refused or given but subsequently withdrawn consent, to police entering and searching the place and establishing a PFA.³⁴² 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.³⁴³

Questions for consideration

17. What are your views about the present three hour time limit on the exercise of crime scene powers without a warrant?

a. Is it a sufficient timeframe? If not, what additional time or other arrangements are needed to ensure an efficient exercise of crime scene powers?

18. Are the current powers given to police during this three hour period appropriate? If not, in what respect should they be amended and for what reasons?

3.9.6.2. Directing people to leave, or not to enter, a crime scene

Section 95 of LEPR 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 them from doing so.³⁴⁴

In our consultations, police have advised us that it was useful having these 'preservation powers' articulated in the legislation.³⁴⁵ 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.

Police also indicated that the power to prevent people coming back into their house, when it is a crime scene, may also assist police investigations. An officer of the FSG said:

*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 e.g. firearms, cash, pot.*³⁴⁶

Police also said that they often used the powers to prevent the media from entering a crime scene. An officer of the FSG 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.*³⁴⁷

A senior officer from the FSG described the difficulties police can encounter when removing a victim's family and/or friends from a crime scene:

*We can have family members that won't leave [the body]... which can be a bit distressing.*³⁴⁸

The Executive Director of the Homicide Victims Support Group, Ms Martha Jabour, also noted:

*Family turn up at a crime scene, which is very often the family home and they want to go in... and there's always quite a struggle, like a physical struggle, to keep people away.*³⁴⁹

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.³⁵⁰

Ms Jabour also described how the conduct of crime scene investigations can prevent a family from having access to their dead relative. Following a homicide, the body is usually kept undisturbed 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 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.

The Homicide Victims Support Group has been having informal discussions with police about allowing families access to the body at a crime scene once the police investigation is completed and before the body is taken to the mortuary.

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.³⁵¹

3.9.6.3 The removal of animals from a crime scene

We have compared the crime scene provisions in LEPR with those contained in the Queensland *Police Powers and Responsibilities Act 2000*. We note that the Queensland legislation specifically provides police with a power to remove animals from a crime scene,³⁵² but that there is no such power conferred on police by Part 7 of LEPR. Our research to date has not found the lack of such a power has raised any difficulties in practice.

Questions for consideration

19. What are your views as to the preservation powers conferred on police officers under Part 7 of LEPR?

- a. What matters beyond the preservation of evidence, if any, should police be required to consider when directing persons to leave or not to enter a crime scene or to prevent persons from entering a crime scene?
- b. Should police be required to consider the needs of family members where the crime scene is established because of a suspicious death of a family member?
- c. Should police be required to consider any particular religious or cultural sensitivities in exercising the preservation powers?
- d. Do police require any additional preservation powers, such as a specific power to remove animals from a crime scene?

3.9.7. Issues concerning the use of crime scene warrants

3.9.7.1. Police resources

During our consultations with police, we were repeatedly told that the need for police to apply for a crime scene warrant before they could exercise their investigative powers meant that a considerable number of officers had to wait at a crime scene until a warrant was granted before being able to exercise these powers. For example, an officer from the FSG described his experience of attending a crime scene where a person had been shot. He said that the FSG had had to wait at the scene for three and a half hours until a crime scene warrant had been obtained before they could begin their investigations.³⁵³

We were told that some sections of the FSG were declining to attend a crime scene until a crime scene warrant had been obtained. A member of the FSG said:

*We just basically say 'We're on standby, let us know when you do have the warrant' because what's the point in twiddling our thumbs outside the house for three hours.*³⁵⁴

However, another officer from the FSG described decisions by the FSG not to attend a crime scene until a warrant had been obtained as impractical in situations where the FSG needed to be exercising crime scene investigation powers as soon as possible to avoid evidence being destroyed or contaminated.³⁵⁵

3.9.7.2. Applications for multiple crime scene warrants

One officer believed that the process of applying for a crime scene warrant was particularly and unduly complicated when there was a series of connected offences and more than one crime scene warrant was required. This officer gave 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 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.*³⁵⁶

We note that other officers did not consider that there was a problem in applying for multiple crime scene warrants in relation to a series of connected offences.

3.9.7.3. The availability of authorised officers

As discussed above in section 3.3.9, an application by police for a crime scene warrant must be made to an authorised officer, that is, a magistrate, Local Court clerk or authorised employee of the Attorney General's Department.³⁵⁷

During consultations, many police indicated that they would find it easier if senior police officers in NSW could issue crime scene warrants.

Concerns about the current system include difficulties in obtaining access to authorised officers after hours because these officers were dealing with numerous telephone applications for apprehended violence orders, which took priority over considering applications for crime scene warrants.

Police suggested that, because of the possibility of undue delay in accessing an authorised officer, they should be able to seek appropriate authorisation for the exercise of crime scene powers from a senior police officer. Police frequently identified duty officers as being 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.*³⁵⁸

A commander commented:

*I think that if you have someone such as either a duty officer or... a commander who can be rung and told 'This is the situation', they should be able to sign off on it and say 'There you go, there's your authority'... It's exactly what we've been doing for the last 200 years, so why not just formalise that process and say that this police officer can take responsibility for that?*³⁵⁹

However, other officers thought that there might be a concern about a lack of independence on the part of duty officers in determining whether to authorise the use of crime scene powers. In response to this concern, it was said that the scrutiny by courts of decisions by senior police to authorise the use of crime scene powers would prevent improper or inappropriate decisions. In this respect, a detective observed:

*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 [carefully].*³⁶⁰

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.³⁶¹ 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 laypersons with no legal skills and often achieve a state of inappropriate familiarity with police officers. The report praised the legislative frameworks in NSW and the

Commonwealth whereby magistrates, court officers or other particular designated persons are responsible for issuing warrants, concluding that it led to a more thorough and independent review of applications for warrants.³⁶²

3.9.7.4. The consideration by authorised officers of applications for crime scene warrants

We note that in our consultations, police discussed a number of decisions by authorised officers on applications for crime scene warrants. These issues, which we have not generally examined in detail here, concern whether authorised officers applied the correct test or had regard to the correct considerations in determining warrant applications.

However, one particular issue, is the test to be applied by an authorised officer when considering an application.

Section 94(2) of LEPR provides for an authorised officer to issue a crime scene warrant 'if satisfied that there are reasonable grounds for doing so'. While this test is otherwise unqualified, section 94(1) provides for a police officer to apply for a crime scene warrant if the officer 'suspects on reasonable grounds that it is necessary for [police] to exercise crime scene powers at specified premises for the purpose of preserving, or searching for and gathering, evidence of the commission of a serious indictable offence or an offence committed in connection with a traffic incident that has resulted in the death of or serious injury to a person.'

Division 4 of Part 5 of LEPR, which includes provisions relating generally to warrants, governs crime scene warrants. Relevantly, it provides at section 62(1)(d) that an authorised officer must not issue a warrant unless the application includes specified material including that 'if the warrant is required to search for a particular thing — a full description of that thing and, if known, its location'. Section 62(2) also requires that an authorised officer is to consider (but is not limited to considering), when determining whether there are reasonable grounds to issue a warrant:

- the reliability of the information on which the information is based, and
- if the warrant is required to search for a thing in relation to an alleged offence — whether there is sufficient connection between the thing sought and the offence.

There is some anecdotal evidence that authorised officers have, on occasion, required police to be specific about what is being searched for before issuing a crime scene warrant. However, police may not know, without exercising the crime scene warrant, precisely what evidence at a crime scene is relevant to the offence being investigated.

Consistent with the purpose of Part 7, an assessment by the authorised officer of only the matters set out in section 94(1), and the reliability of the information on which the application is based, appear to be what is required of an authorised officer.

3.9.7.5. Impact of new requirements on police officers

Other than the issues noted above, police officers have not raised with us concerns about any 'red tape' resulting from either the application or reporting requirements. However, as both of these are new requirements for police, we are interested in any views as to the impact of them on police officers.

Questions for consideration

20. What are your views as to the process for obtaining warrants for crime scenes on private premises?

- a. What are your views as to the information requirements for an application for crime scene warrants and for the report to be provided following execution?**
- b. Is the test that authorised officers are required to apply sufficiently clear? If not, what amendments or other changes are required?**
- c. What arrangements, if any, should be available to police in circumstances where, within the three hour period, a crime scene warrant has been applied for but not determined by an authorised officer?**
- d. What are your views as to the suggestion by some police officers that senior police, not authorised officers, should be responsible for authorising a crime scene warrant?**
- e. Should a crime scene warrant be able to specify a number of places which in crime scene powers can be exercised?**

3.9.8. The consequences of establishing a crime scene

As noted above, section 91 of LEPPRA provides that a police officer may establish a crime scene 'in any way that is reasonably appropriate in the circumstances'.³⁶³ Furthermore, a police officer who establishes a crime scene must give the public notice that the premises are a crime scene if it is 'reasonably appropriate' to do so.³⁶⁴

The July 2005 edition of the *Policing Issues and Practice Journal* outlined the general principles that police should follow when setting up a crime scene:

- *create a larger rather than a smaller perimeter (easier to decrease size of a crime scene later, harder to increase)*
- *endeavour to ensure crime scene has minimal impact*
- *avoid contamination of evidence*
- *use tape, vehicles, personnel or similar to define the boundaries of the crime scene.*³⁶⁵

The Journal also gave police the following advice about giving the public notice of a crime scene:

*There are no changes to existing processes. It may mean using tape and using signs, or at the other extreme using a media release.*³⁶⁶

3.9.8.1. 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. This has raised the following issues.

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.³⁶⁷

The Homicide Victims Support Group provides a partial solution to this problem. The group runs the Ebony House Recovery Centre, which provides alternative accommodation for families who are unable to stay in their home during the investigation of a homicide. The centre provides its clients with clothing, food, toiletries and toys for children for as long as necessary. Ms Jabour 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 to the families of homicide victims is not available to the 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.*³⁶⁸

We note that the Queensland *Police Powers and Responsibilities Act 2000* 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 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.³⁶⁹

Western Australia's *Criminal Investigation Act 2006* contains no provisions for alternative accommodation.

3.9.8.2. 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 said:

*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.*³⁷⁰

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.³⁷¹

This proposed amendment was not supported. 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'.³⁷²

We have not been able to identify any provisions in LEPR that provide specific safeguards in relation to directing unaccompanied children to leave, or not to enter, crime scenes and arranging alternative accommodation for them. Nor have we been able to identify any NSW Police Force guidelines in relation to these issues.

3.9.8.3. Damage to premises and property

Part 7 of LEPR contains no provisions providing for how premises or property should be restored following the exercise of crime scene powers, nor any provisions concerning the issue of compensation for damage to premises or property as a result of the exercise of crime scene powers.

However, the July 2005 *Policing Issues and 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.*³⁷³

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'.³⁷⁴ This requirement applies 'whether or not a magistrate has issued a crime scene warrant for the place'.³⁷⁵

In our consultations with police, a SOCO commented that, where damage had been caused to premises as a result of the exercise of the crime scene investigation powers, police are inclined to restore the premises of 'honest' victims. By way of example, he said that if a square of carpet had been cut out during investigations, the NSW Police Force would probably recarpet the entire room.³⁷⁶

On the other hand, the Homicide Victims Support Group has advised 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.

The Homicide Victims Support Group also 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.

The *Victims Support and Rehabilitation Act 1996* allows for compensation for certain prescribed expenses incurred by a primary victim following an act of violence.³⁷⁷ These expenses are set out in the *Victims Support and Rehabilitation Regulation*. The expenses must total at least \$200 and cannot exceed \$1,500.³⁷⁸ One of the prescribed expenses is cleaning property other than clothing or wearable items.

3.9.8.4. Discontinuing a crime scene in a public place

There are no provisions in Part 7 of LEPR specifically limiting the time during which crime scene powers may be exercised in a public place. However, since section 88 only entitles police to stay on the premises for the purpose of exercising any 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.³⁷⁹

During our consultations, the issue of whether the establishment of a crime scene in a public place, particularly for a prolonged period, can prevent or unduly restrict access to residential or business premises has been raised.³⁸⁰

3.9.8.5. Time limit for crime scene warrants

As previously set out, crime scene warrants — whether applied for by telephone or in person — have a maximum timeframe of 144 hours or 6 days. We have not been made aware of any occasion where this was not sufficient. It is a lengthy period for police to have control over private premises. However, there is no provision, even if it were necessary, for a further extension to be made.

Questions for consideration

21. What are your views about the impact on members of the public as a result of the execution of crime scene warrants or exercise of crime scene powers?
- Should the legislation be specific in requiring police to complete the exercise of a crime scene warrant or exercise crime scene powers as quickly as reasonably practicable?
 - Should the legislation specifically provide that, in the exercise of crime scene powers, police officers only cause such damage to property as is reasonably necessary in exercising crime scene powers?
 - Should police (or some other government agency) be required to take steps to assist persons affected by crime scene powers, including:
 - providing alternative accommodation where a person cannot live in private premises as a result of the exercise of crime scene powers?
 - taking reasonable steps to ensure the safe care of children affected by crime scene powers?
 - taking reasonable 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?
 - Should the legislation specifically require police to disestablish a crime scene following the execution of a warrant or exercise of crime scene powers?
22. Would it be appropriate for police in NSW to be subject to a requirement such as that contained in the Queensland legislation to make a specific application for a crime scene warrant to the Supreme Court in circumstances where they intend to cause structural damage to public places or private premises during the exercise of crime scene powers?

3.9.9. The possible exclusion of evidence obtained through the exercise of the crime scene powers

During consultations, police expressed concern that a defect in a crime scene warrant could provide grounds to exclude evidence in a criminal prosecution.

We note that section 76 of LEPR provides:

A warrant is not invalidated by any defect, other than a defect that affects the substance of the warrant in a material particular.

We are not aware of any legal proceedings in which the establishment of a crime scene or the exercise of crime scene powers has been challenged on the basis that the warrant authorising these measures was defective.

Furthermore, a detective said that LEPR:

Just creates paranoia with all of us because then we think if we don't do the right thing it's going to get thrown out.³⁸¹

We note that section 138 of the *Evidence Act 1995* contains provisions governing the exercise of the discretion of courts to admit evidence that has been illegally or improperly obtained.

We are not aware of any legal proceedings in which there has been a challenge to the admissibility of evidence obtained at a crime scene on the basis that police illegally or improperly breached the crime scene provisions. Police have advised that the LEPR Issues Working Group has not received reports of such proceedings, nor have the regular police Failed Prosecutions Reports identified any such issue.³⁸²

Questions for consideration

23. What, if any, further provision is appropriate to permit the admission of evidence collected at a crime scene, including in circumstances where there may be some defect in the exercise of these powers?

3.9.10. Effectiveness of crime scene powers

We have discussed above specific issues relating to the Part 7 crime scene powers. However, given the entire statutory scheme is new, we are also interested in views or comments about the overall effectiveness of the crime scene provisions, any powers not presently specified which should be considered, and whether any other offences should be included as justifying the exercise of the crime scene powers.

Questions for consideration

24. What are your views as to whether Part 7 has unequivocally clarified police powers to establish crime scenes and exercise crime scene powers?

25. What, if any, additional offences should be considered as justifying the establishment of a crime scene and the exercise of crime scene powers?

26. What, if any, additional crime scene powers are necessary in Part 7?

Endnotes

- ²³¹ The Hon. Paul Whelan MP, NSWPD, Legislative Council, 6 June 2001, p. 14517.
- ²³² The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p. 4848.
- ²³³ The *Law Enforcement (Powers and Responsibilities) Act 2002* was assented to in 2002 and amended, in substance, by the *Crimes and Courts Legislation Amendment Act 2005* before it commenced operation on 1 December 2005.
- ²³⁴ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 3.
- ²³⁵ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 90(1A).
- ²³⁶ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 90(1)(b).
- ²³⁷ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 90(1)(c).
- ²³⁸ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 90(2).
- ²³⁹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 90(1)(a)-(c).
- ²⁴⁰ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 90(1A).
- ²⁴¹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 91(1).
- ²⁴² *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 91(2).
- ²⁴³ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 92(1).
- ²⁴⁴ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 92(2).
- ²⁴⁵ The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2002, p. 4848.
- ²⁴⁶ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 92(5) in its original form.
- ²⁴⁷ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 92(6), inserted by the *Police Powers Legislation Amendment Act 2006*.
- ²⁴⁸ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 92(5), inserted by the *Police Powers Legislation Amendment Act 2006*.
- ²⁴⁹ For further discussion on LEPRA safeguards see Part 2 of this issues paper, section 2.9.
- ²⁵⁰ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 3.
- ²⁵¹ *Policing Issues & Practice Journal*, 'Crime Scenes', April 2006, Vol. 14, No. 2, p. 18.
- ²⁵² *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 204.
- ²⁵³ NSW Police Force response to consultation draft issues paper, 14 May 2007, p. 4.
- ²⁵⁴ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 88.
- ²⁵⁵ *Plenty v Dillon* (1991) 171 CLR 635 at 647.
- ²⁵⁶ *Policing Issues & Practice Journal*, 'Crime Scenes', April 2006, Vol. 14, No. 2, pp. 19-20.
- ²⁵⁷ Police Powers Legislation Amendment Bill 2006, explanatory notes.
- ²⁵⁸ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 3.
- ²⁵⁹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 92(3).
- ²⁶⁰ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 92(2).
- ²⁶¹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 3(1).
- ²⁶² *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 3.
- ²⁶³ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 60(2).
- ²⁶⁴ The definition of 'telephone' in s. 3(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides that telephone 'includes radio, facsimile and any other communication device'.
- ²⁶⁵ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 61(3).
- ²⁶⁶ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 61.
- ²⁶⁷ *Law Enforcement (Powers and Responsibilities) Regulation 2005*, Schedule 1, Form 4 – Application for crime scene warrant/record of application, Part 1 – Application.
- ²⁶⁸ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 62(1).
- ²⁶⁹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 94(2).
- ²⁷⁰ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 62(2)(a)-(b).
- ²⁷¹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 62(4).
- ²⁷² *Law Enforcement (Powers and Responsibilities) Regulation 2005*, cl. 5(d).

- ²⁷³ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 65(1).
- ²⁷⁴ *Law Enforcement (Powers and Responsibilities) Regulation 2005*, Schedule 1, Form 12 – Crime scene warrant.
- ²⁷⁵ *Law Enforcement (Powers and Responsibilities) Regulation 2005*, Schedule 1, Form 19 – Occupier’s notice for crime scene warrant.
- ²⁷⁶ *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.
- ²⁷⁷ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 64.
- ²⁷⁸ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73(2).
- ²⁷⁹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73(3) and (4).
- ²⁸⁰ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73(5).
- ²⁸¹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73A(1)(b).
- ²⁸² *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73A(4).
- ²⁸³ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73A(6)(a).
- ²⁸⁴ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73A(6)(d).
- ²⁸⁵ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73(1)(d).
- ²⁸⁶ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73A(2).
- ²⁸⁷ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73A(5).
- ²⁸⁸ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73A(6)(a).
- ²⁸⁹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73A(6)(d).
- ²⁹⁰ The *Police Powers Legislation Amendment Act 2006*, Schedule 1, Clause [10] amended the *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 75.
- ²⁹¹ 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 a magistrate 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 was designed to overcome the difficulty that, if a crime scene had not already been established, it was not sufficient for the crime scene warrant to simply authorise police entry onto premises. *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 94(2).
- ²⁹² *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 74.
- ²⁹³ *Law Enforcement (Powers and Responsibilities) Regulation 2005*, Schedule 1, Form 20 — Report to authorised officer about execution of warrant.
- ²⁹⁴ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 97.
- ²⁹⁵ *Police Powers and Responsibilities Act 2000* (Qld), s. 164(1) and Schedule 6.
- ²⁹⁶ 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.
- ²⁹⁷ *Criminal Investigation Act 2006* (WA), s. 46. This Act is yet to commence.
- ²⁹⁸ *Criminal Investigation Act 2006* (WA), s. 40.
- ²⁹⁹ *Criminal Investigation Act 2006* (WA), s. 40(2).
- ³⁰⁰ *Criminal Investigation Act 2006* (WA), s. 44(2)(f).
- ³⁰¹ *Criminal Investigation Act 2006* (WA), s. 47(2).
- ³⁰² *Policing Issues & Practice Journal*, ‘LEPRA: Consolidating Police Powers’, Special Edition, July 2005, Vol. 13, No. 3.
- ³⁰³ *Policing Issues & Practice Journal*, ‘Crime Scenes’, April 2006, Vol. 14, No. 2, pp. 17-22.
- ³⁰⁴ *Police Weekly*, ‘Understanding LEPRA 06/09’, Vol.18, No. 46, 11 December 2006, pp. 12-13.
- ³⁰⁵ The amendments to the *Law Enforcement (Powers and Responsibilities) Act 2002* contained in the *Police Powers Legislation Amendment Act 2006* commenced on 12 December 2006.
- ³⁰⁶ Letter from R. Smith, Superintendent, NSW Police Force to S. Cohen, Assistant Ombudsman (Police), 30 March 2007.
- ³⁰⁷ NSW Police Force Forensic Services Group, Standard Operating Procedures, *Scene of Crime Officers*, effective 1 January 2006.
- ³⁰⁸ ‘State Crime Command: Business Rules’ (Version 10, December 2004), sourced from the NSW Police Force Intranet, February 2007.
- ³⁰⁹ ‘State Crime Command: Business Rules’ (Version 10, December 2004), sourced from the NSW Police Force Intranet, February 2007.
- ³¹⁰ Discussions with NSW Police Force, Business and Technology Services, 6 October 2006. We are currently working with the NSW Police Force to resolve this data issue and provide further education on the COPS Users Guide.
- ³¹¹ Letter from R. Mahoney, Assistant Commissioner, NSW Police Force to S. Cohen, Assistant Ombudsman (Police), 21 December 2006.
- ³¹² The *Police Powers Legislation Amendment Act 2006* amended the *Law Enforcement (Powers and Responsibilities) Act 2002* to allow the Ombudsman to require information from a public authority in connection with the exercise of functions under the *Law Enforcement (Powers and Responsibilities) Act 2002*.
- ³¹³ Figure 17 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. One incident was recorded as an execution of a search warrant, however, it was in relation to a homicide and therefore included in incident type ‘homicide’.
- ³¹⁴ Fire related incidents include fires believed to be accidental and deliberately lit.
- ³¹⁵ Interview with Acting Commander, LAC C, 8 May 2006.
- ³¹⁶ Focus group with detectives, LAC D, 24 May 2006.
- ³¹⁷ Focus group with senior officers, Forensic Services Group, 7 June 2006.
- ³¹⁸ Interview with crime manager, LAC G, 29 August 2006.
- ³¹⁹ Focus group with senior officers, Forensic Services Group, 7 June 2006.
- ³²⁰ *Police Powers and Responsibilities Act 2000* (Qld), s. 164(1).
- ³²¹ *Criminal Investigation Act 2006* (WA), s. 40(2). This Act is yet to commence. Note, the *Criminal Investigation Act 2006* (WA), s. 40(1) defines a serious offence as an offence the statutory penalty for which is or includes imprisonment for 5 years or more or life.
- ³²² NSW Police Force Legal Services, *The Code of Practice for Custody, Rights, Investigation, Management and Evidence*, February 1998, updated October 2006, p. 102.
- ³²³ *Policing Issues & Practice Journal*, ‘LEPRA: Consolidating Police Powers’, Special Edition, July 2005, Vol. 13, No. 3, p. 22.
- ³²⁴ *Policing Issues & Practice Journal*, ‘LEPRA: Consolidating Police Powers’, Special Edition, July 2005, Vol. 13, No. 3, p. 28.
- ³²⁵ Focus group with senior constables, LAC G, 29 August 2006.
- ³²⁶ Focus group with senior officers, Forensic Services Group, 7 June 2006.

- ³²⁷ Focus group with senior constables, LAC G, 29 August 2006.
- ³²⁸ Focus group with detectives, LAC C, 8 May 2006.
- ³²⁹ Focus group with officers, Forensic Services Group, 19 October 2006.
- ³³⁰ *Law Enforcement (Powers and Responsibilities) Act 2002*, ss. 90(1) and 94(1)(a).
- ³³¹ LEPPRA Issues Working Group, *Operational Policing Issues as at 10 April 2006*, p. 10.
- ³³² Section 4 of the *Coroners Act 1980* defines an 'inquest' to mean an 'inquest' concerning the death or suspected death of a person.
- ³³³ Section 4 of the *Coroners Act 1980* defines an 'inquiry' to mean an 'inquiry' concerning a fire or explosion.
- ³³⁴ *Coroners Act 1980*, s. 23D(3).
- ³³⁵ 'Coronial investigation scenes', *Police Weekly*, Vol. 18, No. 47, December 2006, p. 21.
- ³³⁶ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 9(1)(b).
- ³³⁷ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 92(3).
- ³³⁸ NSW Police Force response to consultation draft issues paper, 14 May 2007, p. 3.
- ³³⁹ Focus group with senior constables, LAC G, 29 August 2006.
- ³⁴⁰ *Police Powers and Responsibilities Act 2000* (Qld), s. 166(1).
- ³⁴¹ *Police Powers and Responsibilities Act 2000* (Qld), s. 168(1).
- ³⁴² *Criminal Investigation Act 2006* (WA), s. 48(4) and (5). This Act is yet to commence.
- ³⁴³ *Criminal Investigation Act 2006* (WA), s. 47(3). This Act is yet to commence.
- ³⁴⁴ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 95(1)(a)-(f).
- ³⁴⁵ Focus group with officers, Forensic Services Group, 19 October 2006.
- ³⁴⁶ Focus group with senior officers, Forensic Services Group, 7 June 2006.
- ³⁴⁷ Focus group with senior officers, Forensic Services Group, 7 June 2006.
- ³⁴⁸ Focus group with senior officers, Forensic Services Group, 7 June 2006.
- ³⁴⁹ Interview with Ms Martha Jabour, Executive Director, Homicide Victims Support Group, 7 November 2006.
- ³⁵⁰ Interview with Ms Martha Jabour, Executive Director, Homicide Victims Support Group, 7 November 2006.
- ³⁵¹ Interview with crime scene officer, LAC F, 26 July 2006.
- ³⁵² *Police Powers and Responsibilities Act 2000* (Qld), s. 177(b)(ii).
- ³⁵³ Interview with officer, Forensic Services Group, 4 October 2006.
- ³⁵⁴ Focus group with officers, Forensic Services Group, 19 October 2006.
- ³⁵⁵ Focus group with officers, Forensic Services Group, 19 October 2006.
- ³⁵⁶ Focus group with senior constables, LAC G, 29 August 2006.
- ³⁵⁷ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 94(1).
- ³⁵⁸ Focus group with sergeants, LAC D, 24 May 2006.
- ³⁵⁹ Interview with commander, LAC C, 8 May 2006.
- ³⁶⁰ Focus group with detectives, LAC D, 24 May 2006.
- ³⁶¹ 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.
- ³⁶² For further discussion on the Kennedy Report see Part 4 of this issues paper, section 4.7.3.1.
- ³⁶³ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 91(1).
- ³⁶⁴ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 91(2).
- ³⁶⁵ *Policing Issues & Practice Journal*, 'LEPPRA: Consolidating Police Powers', Special Edition, July 2005, Vol. 13, No. 3, p. 24. We note that the *Police Powers and Responsibilities Act 2000* (Qld) includes a provision that the responsible officer must identify the crime scene, decide the boundaries and mark the limits of the crime scene in a way that sufficiently identifies it to the public.
- ³⁶⁶ *Policing Issues & Practice Journal*, 'LEPPRA: Consolidating Police Powers', Special Edition, July 2005, Vol. 13, No. 3, p. 29.
- ³⁶⁷ Interview with crime scene officer, LAC D, 24 May 2006.
- ³⁶⁸ Interview with Ms Martha Jabour, Executive Director, Homicide Victims Support Group, 7 November 2006.
- ³⁶⁹ *Police Powers and Responsibilities Act 2000* (Qld), s. 179.
- ³⁷⁰ Ms Lee Rhiannon MLC, NSWPD, Legislative Council, 21 November 2002, p. 7260.
- ³⁷¹ The Hon. Ian Cohen MLC, NSWPD, Legislative Council, 21 November 2002, p. 7260.
- ³⁷² The Hon. Ian MacDonald MLC, NSWPD, Legislative Council, 21 November 2002, p. 7260.
- ³⁷³ *Policing Issues & Practice Journal*, 'LEPPRA: Consolidating Police Powers', Special Edition, July 2005, Vol. 13, No. 3, p. 29.
- ³⁷⁴ *Police Powers and Responsibilities Act 2000* (Qld), s. 166(4).
- ³⁷⁵ *Police Powers and Responsibilities Act 2000* (Qld), s. 166(5).
- ³⁷⁶ Interview with crime scene officer, LAC F, 26 July 2006.
- ³⁷⁷ 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).
- ³⁷⁸ *Victims Support and Rehabilitation Act 1996*, s. 14A.
- ³⁷⁹ *Criminal Investigation Act 2006* (WA), s. 46(6). This Act is yet to commence.
- ³⁸⁰ Interview with Jane Sanders, Shopfront Youth Legal Centre, 7 November 2006.
- ³⁸¹ Focus group with detectives, LAC B, 29 March 2006.
- ³⁸² Letter from R. Smith, Superintendent, NSW Police Force to S. Cohen, Assistant Ombudsman (Police), 30 March 2007.

Chapter 4. The notice to produce provisions

- 4.1. Introduction81
- 4.2. Objectives of the notice to produce provisions81
- 4.3. Overview of the notice to produce provisions81
- 4.4. Sources of information.....84
- 4.5. Comparable legislation in other jurisdictions84
- 4.6. Data on the notice to produce provisions85
- 4.7. Issues arising during the review period so far87

4.1. Introduction

Division 3 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) introduces a new power which allows police to apply for a 'notice to produce documents' from banks and other financial institutions — referred to as authorised deposit-taking institutions (ADIs) in LEPRA, when it is believed, on reasonable grounds, that the institution holds documents that may be connected with an offence committed by someone else.³⁸³

We have structured our discussion of the notice to produce provisions as follows:

- a brief outline of the objectives of notices to produce
- a detailed overview of the legislative provisions
- the sources of information we have used to review the operation of the provisions
- an examination of comparable legislation in other jurisdictions
- a summary of the data about notices to produce applied for by the NSW Police Force, and issues arising from this data provision, and
- a discussion of various issues and concerns that have arisen to date about the operation of the legislation.

4.2. Objectives of the notice to produce provisions

Prior to the introduction of LEPRA, if police wished to obtain documents from a bank or other financial institution 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*.³⁸⁴

In his second reading speech introducing LEPRA, the 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.*³⁸⁵

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.*³⁸⁶

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'.³⁸⁷

This concept is codified 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.'

4.3. Overview of the notice to produce provisions

4.3.1. Applications for a notice to produce

Police may apply to an authorised officer for a notice to produce documents 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.³⁸⁸

An ADI is a body corporate which has been granted authority by the Australian Prudential Regulation Authority to carry on banking business in Australia.³⁸⁹ 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
- authorised non-operating holding companies, and
- organisations which are run by industry bodies and provide services to member building societies and credit unions.³⁹⁰

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 Clerk 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 LEPR.³⁹¹

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.³⁹² However, a notice to produce can be applied for by telephone (including radio, facsimile and any other communication device)³⁹³ if facilities are readily available for that purpose.³⁹⁴

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.³⁹⁵ 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.³⁹⁶

4.3.2. 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.³⁹⁷ 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 LEPR, and
- any other information required by the regulations.³⁹⁸

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.³⁹⁹

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.⁴⁰⁰

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'.⁴⁰¹ 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.⁴⁰²

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).⁴⁰³

4.3.3. 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, a 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.⁴⁰⁴

4.3.4. 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 adduced, 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.⁴⁰⁵ 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.⁴⁰⁶

4.3.5. Duration and extension of notices to produce

An authorised officer who issues a notice to produce other than by telephone must specify when the notice is to expire.⁴⁰⁷ 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.⁴⁰⁸ If the notice to produce fails to specify a time of expiry, it expires 72 hours after its issue.⁴⁰⁹

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.⁴¹⁰ The time for expiry of a notice to produce can be extended only once⁴¹¹ and must not extend the period of the notice beyond 144 hours after its issue.⁴¹² Any application for an extension must be made before the notice expires.⁴¹³

When an authorised officer issues a notice to produce by telephone, it expires 24 hours after the time of issue.⁴¹⁴ Notices to produce issued by telephone may not be extended.⁴¹⁵

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.⁴¹⁶

4.3.6. Execution of notices to produce

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 issued⁴¹⁷
- must produce the notice for inspection by an occupier of the premises if requested to do so by the occupier⁴¹⁸
- may use such force as is reasonably necessary for the purpose of entering the premises⁴¹⁹
- may execute the notice with the aid of such assistants as considered necessary,⁴²⁰ and
- 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.⁴²¹

4.3.7. Requirements following execution of a notice to produce

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.⁴²² The *Law Enforcement (Powers and Responsibilities) Regulation 2005* 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.⁴²³

4.3.8. 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.⁴²⁴

4.3.9. 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.⁴²⁵

4.4. Sources of information

In order to review the notice to produce provisions, we have required the NSW Police Force to provide us with information from its Computerised Operational Policing System (COPS) on the use of notices to produce. The information from COPS that we have obtained to date covers the first year of the review period — from 1 December 2005 to 30 November 2006.

We have also visited seven police Local Area Commands to discuss the implementation of provisions with police officers of various rank, and written 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.

4.5. Comparable legislation in other jurisdictions

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.

4.5.1. Queensland

Queensland legislation 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 production notice to a police officer.⁴²⁶

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.⁴²⁷ Allowing Queensland police officers to obtain production notices in relation to a broader range of agencies than is the case in NSW appears to indicate that the Queensland laws are aimed at facilitating evidence gathering against any persons or institutions who may be involved in money laundering activities generally.⁴²⁸

4.5.2. Western Australia

The *Criminal Investigation Act 2006* (WA), which is yet to come into force, provides that a police officer or public officer⁴²⁹ may apply to a justice of the peace for an order to produce a business record. A business, in this context, refers to 'any business, including a business of a governmental body or instrumentality or of a local government, or any occupation, trade or calling'.⁴³⁰ Such an order must not be issued to a person in relation to an offence that the person is suspected of having committed.⁴³¹ 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.⁴³²

4.5.3. The Commonwealth

The Commonwealth *Anti-Terrorism Act (No. 2) 2005* introduced broad new powers for officers of the Australian Federal Police relating to obtaining documents. The Commonwealth legislation provides that an authorised officer

of the Australian Federal Police may apply to a magistrate for a notice to produce documents relating to serious terrorism and non-terrorism offences if the officer considers on reasonable grounds that the person has documents that are relevant to, and will assist in the investigation of, such an offence.⁴³³ A document to be produced under such a notice must relate to one of a range of matters, including:

- whether an account is held by a particular person, or a person is a signatory to an account, and any details relating to the account or related accounts
- whether a transaction has been conducted by a specified financial institution on behalf of a specified person, and details relating to the transaction
- whether a person travelled or will travel between specified dates or locations, and details relating to the travel
- details of who holds a telephone account, and information relating to the account, including details of calls made and received from the relevant telephone number, and
- who resides at a specific place.⁴³⁴

4.6. Data on the notice to produce provisions

When police officers apply for a notice to produce documents, there is a specific section within COPS where relevant information about the application should be recorded.⁴³⁵ In order to determine how often, and in what circumstances, police officers are applying for notices to produce, and whether relevant legislative provisions are being complied with, we requested the NSW Police Force to provide us with all relevant COPS records.

4.6.1. Limitations in data provision

The NSW Police Force has provided us with COPS records that indicate that 80 notices to produce were applied for in the first year of the review period (1 December 2005 to 30 November 2006). Requests for further documentation relating to some of these events have been made to the NSW Police Force.

We had expected that significantly more notices to produce would have been recorded on COPS and raised concerns with the NSW Police Force about the possible under reporting by officers, of notices to produce.

The NSW Police Force agreed that the number of COPS records recording applications for notices to produce was low and acknowledged that officers do not appear to be using the correct COPS 'action types' to record information about notices to produce. We were advised that the reasons for this may be:

- lack of knowledge by police of the appropriate COPS procedures to follow in relation to recording notices to produce, and/or
- that police are aware of the correct COPS procedures but do not have the time to record the matters, or consider it unnecessary.⁴³⁶

In order to determine more accurately the number of notices to produce that were applied for and granted, the Business and Technology Services section of the NSW Police Force conducted a search of the 'free text' section of COPS records for references to notices to produce. It was found that, in the period December 2005 to September 2006, approximately 400 COPS records referred to notices to produce.⁴³⁷ This appears to confirm that police are sometimes applying for notices to produce and not entering this information in the appropriate section of COPS. We have been advised that the NSW Police Force is developing a reminder to police on recording these actions in accordance with the COPS LEPRAs Users Guide.⁴³⁸

We are currently working with the NSW Police Force and the Attorney General's Department to obtain more accurate information about:

- the number of applications for notices to produce during the review period
- whether or not these applications are granted, and the reasons for such decisions, and
- whether applications and notices comply with relevant legislative requirements.

Given that we have only been able to examine a fraction of the documentation concerning the notices to produce applied for (and granted or denied) during the review period so far, it is not possible for us to make comprehensive comments about the operation and effectiveness of the LEPRAs notice to produce provisions. However, we are able in the following discussion to:

- provide information about the 80 events which were recorded in the correct section of COPS, and
- highlight a number of issues that have arisen from an examination of the available data, and that have been raised by stakeholders during consultations.

4.6.2. Types of incidents where applications for notices to produce were made

Table 1 illustrates the types of incidents where police applied for a notice to produce documents from an ADI.

Table 1. Types of incidents for which notices to produce were recorded by police: 1 December 2005 – 30 November 2006

Type of incident	Number of incidents	Percentage of incidents
Break and enter	1	1%
Child sexual abuse	1	1%
Drug detection	2	3%
Fire	3	4%
Fraud	62	78%
Major traffic crash	2	3%
Sexual offence — assault	3	4%
Stealing	3	4%
Child abuse — non sexual	1	1%
Judicial offences	1	1%
Pornography	1	1%
Total	80	100%

Source: NSW Police Force COPS data, 1 December 2005 – 30 November 2006. Percentages add up to 101% because of rounding.

These incidents include the following events:

- 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.⁴³⁹
- 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 it was alleged 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.⁴⁴⁰
- 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.⁴⁴¹
- 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.⁴⁴²
- 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.⁴⁴³
- 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 accused's version of events and confirm the dates when the alleged assaults took place.⁴⁴⁴
- 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 occupier.⁴⁴⁵

4.6.3. Locations where notices to produce applications were made

Table 2 below summarises the NSW Police Force regions where notices to produce were applied for.

Table 2. Regions where notices to produce were recorded by police: 1 December 2005 – 30 November 2006

Region	Number of notices to produce applications	Percentage of notices to produce applied for
Specialist commands*	7	9%
Central Metropolitan	15	19%
North West Metropolitan	8	10%
Northern	21	26%
South West Metropolitan	13	16%
Southern	10	13%
Western	6	8%
Total	80	100%

* Specialist commands are not region specific. The Counter Terrorism Coordination Command applied for two notices to produce; the State Crime Command applied for five notices to produce - with two applications made by the Fraud Squad, and one each by the Drug Squad, Middle Eastern Organised Crime Squad, and the Robbery and Serious Crime Squad. Percentages add up to 101% because of rounding.

Source: NSW Police Force COPS data, 1 December 2005 – 30 November 2006

4.6.4. Methods used to apply for notices to produce

Of the 80 notices to produce, 73 (91%) were applied for in person and six (8%) were applied for by fax.⁴⁴⁶ We have been advised by the Attorney General's Department that it is not common for notices to produce to be issued by telephone — the approach taken if documents are required urgently and the court is not open. This is because financial institutions are generally closed outside business hours, and employees would therefore usually be unavailable to locate and produce the required documents.⁴⁴⁷

In addition, police may wish to obtain a search warrant outside court hours so that they can urgently conduct a search of a crime scene or a suspect's house to minimise the risk of evidence being lost, damaged or tampered with. In cases where a notice to produce documents is sought, the likelihood of the relevant documents being subject to such risks is much smaller, particularly as the relevant financial institution itself is not a party to the offence being investigated.

These issues mean that the requirements for an authorised officer to issue a notice to produce by telephone — satisfaction that the notice is required urgently and that it is not practicable for the application to be made in person⁴⁴⁸ — are not often likely to be present when a notice to produce documents is sought.

4.7. Issues arising during the review period so far

Below we discuss a range of issues and concerns in relation to the implementation of the notice to produce provisions. We are also interested in hearing personal experiences about the way the notice to produce provisions operate in practice.

Questions for consideration

27. Has a notice to produce been issued to you or your organisation? If so, please provide an account or accounts of their use, and any issues or concerns that arose.

28. Are you aware of any instances where a notice to produce has been issued to organisations you are familiar with, or to your clients? If so, please provide details about any issues or concerns that arose during or following the issue or execution of the notice.

4.7.1. Procedural issues concerning notices to produce

In our consultations to date, we have not been advised of any concerns in relation to the procedures that must be followed in relation to the application and granting of notices to produce documents or their execution. However, we are interested in determining whether stakeholders have experienced, or are aware of, any issues or problems in this area.

4.7.2. Benefits of notices to produce compared to search warrants

Since the repeal of the *Search Warrants Act 1985*, search warrants are regulated by LEPRA and its associated regulation. Under LEPRA, many provisions relating to search warrants also apply to notices to produce documents. For example:

- applications for both search warrants and notices to produce must be in writing in the form prescribed by the regulations and must be made by the applicant in person⁴⁴⁹
- applications for both search warrants and notices to produce may be made by telephone (or radio, facsimile or other communication device) if they are required urgently and it is not practicable for the application to be made in person⁴⁵⁰
- an authorised officer must not issue a warrant or notice to produce unless the application includes certain specified information, including the grounds on which the warrant or notice is being sought, and the details of any previous refusal of the application,⁴⁵¹ and
- the maximum penalty for giving false or misleading information to an authorised officer, in relation to an application for a warrant or a notice to produce, is the same (a fine of 100 penalty units — currently \$11,000, or imprisonment for two years, or both).⁴⁵²

As mentioned above, in section 4.2 although police now have the option of applying for a notice to produce documents from an ADI, they are still able to apply for a warrant to search an ADI's premises if this approach is deemed more appropriate.

In our interviews with police, we have been advised that the introduction of the notice to produce provisions has been positive because they reflect more accurately than search warrants the existing police practice of obtaining documents from financial institutions.

Even prior to the introduction of LEPRA, when a search warrant was used to obtain documents from financial institutions, it was usual practice to specify to the institution which documents were required, and to wait for them to be provided, rather than execute the search warrant in the usual way, by police entering premises and searching for items themselves.

However, many police have 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 officers include the following:

*The definition for a notice to produce fits technically better at what you're actually doing but there is no benefit whatsoever and you've still got to complete an application which is on a template, it's got only the title change from search warrant to notice to produce and you're dealing with a Chamber Magistrate under the same conditions as a search warrant... The difference between a search warrant and notice to produce in practical terms is zero — there's nothing.*⁴⁵³

*No, I didn't think there was a big difference... Different name.*⁴⁵⁴

*Basically it hasn't really changed.*⁴⁵⁵

*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].*⁴⁵⁶

*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.*⁴⁵⁷

These comments appear to indicate a belief by some police that the new legislative provisions regarding notices to produce have not provided any substantive benefit for officers.

In his second reading speech about LEPRA the Attorney General stated that the new notice to produce provisions were intended to 'clarify and provide a legislative basis for the practice of obtaining documents held by financial institutions.'⁴⁵⁸

There is no reference to the provisions streamlining or expediting the process by which police obtain such documents. However, this appears to have been the expectation of many police officers.

4.7.3. Devolving the authority to grant notices to produce

The notice to produce provisions do not appear to have expedited the process for obtaining documents from ADIs because the actual process that police must follow in order to obtain a notice to produce is the same process that must be followed to obtain a search warrant. To obtain either a notice or a search warrant, an officer must apply to an authorised officer, in practice, usually a registrar at a local court.

Several police officers we spoke to suggested that the process of obtaining a notice to produce would be simpler for officers if they could apply to a senior member of the NSW Police Force, rather than an authorised officer, for such a notice. Officers noted that in South Australia the Commissioner of Police has the authority to issue search warrants, and may delegate this function to other officers.⁴⁵⁹

Some of the comments made to us by police officers are as follows:

*Why couldn't this sort of stuff be done by the Duty Officer or the Local Area Commander to give permission to go in? Why do we have to pay someone \$140,000 a year to run a police station and they can't make a decision covering certain criteria to give that warrant... You know... we tell this man that he's in charge of a police station and whatever million dollars a year to budget and he can't be trusted.*⁴⁶⁰

*If you actually look at what is actually a good scenario, we can trust probationary constables in the job one day to take a subpoena out against somebody to get them to court, and yet we can't trust an Inspector to issue a notice to produce against a financial institution.*⁴⁶¹

*I think the investigator should be able to get a notice to produce, same as a subpoena, subpoenaing a witness to court we do now ourselves rather than taking that to the court.*⁴⁶²

However, not all police we spoke to considered that the power to issue notices to produce should be devolved to the NSW Police Force. One officer felt that the scrutiny of an independent person is important when making a decision whether to issue such notices as some police officers 'would just be lazy and... sign off on anything.'⁴⁶³ Another commented that stakeholders other than police would be likely to prefer a magistrate acting as an 'umpire' rather than police themselves determining whether it is appropriate for another organisation to be required to produce documents.⁴⁶⁴ A third officer noted that, if the power to grant notices to produce was given to police, such a move would need to be accompanied by appropriate training and accountability measures for officers, including requirements for accurate and comprehensive recording of information.⁴⁶⁵

4.7.3.1. The case of Western Australia — a comparison

In Western Australia, a Royal Commission report concerning questions of police corruption (the Kennedy Report) was published in 2004.⁴⁶⁶ This report examined the issue of the most appropriate officers to issue search warrants. At the time the report was published, search warrants were issued in Western Australia by justices of the peace.⁴⁶⁷ This approach is set to continue with the passing of the *Criminal Investigation Act 2006* (WA), which is yet to commence. The *Criminal Investigation Act 2006* (WA) also authorises justices of the peace to issue orders to produce which are similar in some respects to NSW notices to produce documents.

The Kennedy Report stated:

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 lay persons with no particular legal skill, and often seem to achieve a state of inappropriate familiarity with police officers with whom they deal regularly.*⁴⁶⁸

The report went on to praise the NSW 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 e-mail, the requirement that warrants be issued by a Magistrate or particular designated person would not impact on the timeliness of police operations.*⁴⁶⁹

While this Royal Commission Report does not specifically address the issue of police issuing 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 such instruments.

4.7.3.2. The situation in NSW

While several police we have spoken to have indicated that they would find it easier if police in NSW could issue notices to produce, it is not clear whether concerns about the current system revolve around:

- a refusal by authorised officers to grant notices to produce documents, when applications are submitted
- the length of time taken for authorised officers to grant notices to produce after applications are received, or
- the time it takes for ADIs to provide documents after a notice to produce has been issued.

Issuing of notices to produce by authorised officers

It appears from the sample of records relating to notices to produce that we have examined so far, that authorised officers usually issue notices to produce to police officers when applications are received. Of the 80 COPS records we examined where notices to produce were applied for, 79 were issued, and one was awaiting approval at the time we received the information.

We note, however, that police may not be recording instances on COPS where they apply for a notice to produce documents, and the application is not granted. Therefore it is possible that some police are experiencing difficulties in having applications approved by authorised officers.

At this stage, we have not received information to suggest that it is common for there to be significant delays by magistrates granting notices to produce. The paperwork relating to the nine events for which we have received documentation from police indicates that most notices to produce are issued on the day on which the application is made.⁴⁷⁰ This is illustrated in Table 3.

Compliance with notices to produce by authorised deposit-taking institutions

At this stage we have not received information to suggest that ADIs are failing to produce the information specified in notices to produce, or that there are significant delays with financial institutions providing the required documents. We note, however, that it has been difficult for us to comprehensively examine this issue. This is because we have only been able to examine the paperwork relating to nine events where applications for notices to produce documents were made.

In addition, LEPR does not require police to keep records about exactly when documents are provided by an ADI in response to a notice to produce. Instead, within 10 days of executing a notice to produce (or of it expiring), police are required to submit a report to the authorised officer outlining, amongst other things, which documents have been produced in response to the notice.⁴⁷¹

Examination of paperwork provided to us by police indicates that in most of the nine events we have scrutinised, police submitted a report to the authorised officer on the same day, or within a few days, of the notice to produce being issued, with reports noting that the required documents had been produced by the relevant ADI. However, in some of the events we examined, we were not provided with a copy of the report to the authorised officer, and it was thus not clear when, if at all, documents were produced.⁴⁷²

Table 3 provides further details about the nine events we have examined, particularly the timeframes relating to when notices to produce were applied for, issued, and reported on.

Table 3. Timeframes between notices to produce being applied for by the NSW Police Force and documents being produced by authorised deposit-taking institutions

Event number	Number of notices to produce applied for	Date of application for notice(s) to produce	Date notice(s) to produce was(were) issued by authorised officer	Date when police advised authorised officer that documents had been provided by financial institution
NP5	9	3 July 2006	3 July 2006	Unclear from records provided
NP9	1	5 July 2006	6 July 2006	9 July 2006
NP10	1	9 February 2006	9 February 2006	9 February 2006
NP17	3	1 December 2005	1 December 2005	1 December 2005
		24 January 2006	24 January 2006	24 January 2006
		24 January 2006	24 January 2006	24 January 2006
NP18	1	10 May 2006	10 May 2006	10 May 2006
NP20	1	5 June 2006	5 June 2006	5 June 2006
NP21	1	2 February 2006	Unclear from records provided	13 March 2006
NP2	2	Unclear from records provided	1 February 2006	Unclear from records provided
		Unclear from records provided	30 June 2006	Unclear from records provided
NP16	2	Unclear from records provided	5 June 2006	7 June 2006
		7 June 2006	7 June 2006	7 July 2006

Source: NSW Police Force COPS data, 1 December 2005 – 31 July 2006. Paperwork relevant to these COPS events was provided by the NSW Police Force in response to an email from NSW Ombudsman, 8 November 2006.

Questions for consideration

29. What are your views as to the processes for obtaining notices to produce documents? In particular:

- a. What are your views as to the information requirements imposed on police when applying for a notice to produce and producing a report following service of the notice?
- b. Are the issues that an authorised officer is required to consider when determining whether or not to grant a notice to produce appropriate (for example, are the legislative requirements inadequate or alternatively overly onerous)?

30. What benefits, if any, have the notice to produce provisions provided for police, authorised deposit-taking institutions or others?

31. What are your views as to the suggestion by some police officers that senior police, not authorised officers, should be responsible for authorising the issue of notices to produce documents?

4.7.4. Extending the scope of notices to produce

When we spoke to police about the notice to produce provisions, several officers criticised the fact that these provisions apply only in relation to obtaining documents from ADIs. Many officers felt that it would expedite investigations if notices to produce documents could be issued in relation to a variety of document types and a range of organisations. For example, officers suggested that notices to produce may be a useful tool in obtaining the following records in a timely manner: telephone records from telecommunications companies; identification photos

from the Roads and Traffic Authority; and information about individuals from agencies such as Medicare, hospitals and Centrelink.⁴⁷³

One officer suggested that suitable agencies to which notices to produce could be issued might be:

*Any agency... that may have information that will assist us in locating someone who's wanted for an offence... like Centrelink, Department of Housing, the Tax Office, maybe Telcos.*⁴⁷⁴

Others suggested that notices to produce may be useful in obtaining closed circuit television footage from private organisations, for example, if there had been an assault at the location. As one officer put it:

*You've got an assault, you don't want to examine [the crime scene], you just want to walk in, take the tape, thank you very much. You don't want any other powers.*⁴⁷⁵

Some police suggested that notices to produce could be a useful tool in obtaining records from businesses, when an offence was suspected to have occurred. One officer commented:

*A notice to produce would be very handy for all business records. So just expanding from deposit taking, just expanding it briefly. It doesn't have to go into the realm of the private citizen whatsoever but just expanding it to other recognised institutions or government institutions.*⁴⁷⁶

Other comments from police we consulted include the following:

*I think [section 53 is] narrow because it restricts us to financial documents. That could include a host of other areas where we're just after documents.*⁴⁷⁷

*TAFE would be great — if I'm investigating certain students that are coming together for the purpose of maybe planning a certain crime, if there's evidence towards that, I would want to substantiate that those people were attending that institution and so I'd be looking for records on who was in the class as an example.*⁴⁷⁸

*If I've got sufficient evidence for a search warrant to obtain medical records, then I would have sufficient information for a notice... It's exacerbated the process by excluding it because now all I do is just go and get a warrant, like I have always, if I need medical records from a local surgery and I don't have the consent of the person who they pertain to, I go and get a warrant.*⁴⁷⁹

4.7.4.1. Current police practice for obtaining documents from organisations

The NSW Police Force currently has a variety of ways in which to obtain records or documents from organisations and individuals. For example:

- 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 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.
- 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.⁴⁸⁰
- 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.⁴⁸¹ 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.⁴⁸²
- 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.'⁴⁸³ 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.⁴⁸⁴

- If police wish to obtain documents relating to an offence after the alleged offender has been charged, and criminal proceedings are underway, the officer may request that a subpoena be issued by a registrar of a court.⁴⁸⁵ Subpoenas can be issued requiring a person to attend proceedings and give evidence and/or produce a document or thing.⁴⁸⁶

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.’⁴⁸⁷

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.

4.7.4.2. 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 1998* (PIIP Act) deals with how all NSW public sector agencies manage personal information.⁴⁸⁸ Section 4 of the PIIP 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.

Examples of personal information are things such as an individual’s fingerprints, retina prints, body samples, and genetic characteristics.⁴⁸⁹

The PIIP 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.⁴⁹⁰ 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.⁴⁹¹
- 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.⁴⁹²

The *Health Records and Information Privacy Act 2002* regulates the handling of health information in both the public and private sectors in NSW. However, this Act does not apply to the NSW Police Force except in connection with its administrative and educative functions.⁴⁹³

The Commonwealth *Privacy Act 1988* contains:

- 11 Information Privacy Principles which apply to Commonwealth and Australian Capital Territory government agencies,⁴⁹⁴ and
- 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.⁴⁹⁵

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.⁴⁹⁶

4.7.4.3. Issues for consideration

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.

Giving police the power to obtain a notice to produce documents from a range of organisations would in many instances assist police in obtaining information relevant to the investigation of criminal offences, where the 'owners' of the information refuse to provide it. However, at present, it is unclear to what extent any refusal by agencies 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.

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. This is because 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, and
- providing police with specific documents provides greater privacy to an organisation's clients who have nothing to do with the offence being investigated, than having police search through all of the organisation's records.

However, it is likely that concerns would be raised if the notice to produce provisions were extended in such a way as to enable police to require documents from an organisation that they can currently only obtain with the organisation's consent.

While many police have informed us that they would appreciate 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.

Questions for consideration

32. What are the advantages and disadvantages of extending the power of police to issue notices to produce documents to institutions other than authorised deposit-taking institutions?

33. If notices to produce documents could be issued to organisations other than authorised deposit-taking institutions, what additional safeguards, if any, may be required to ensure appropriate use of such notices?

Endnotes

³⁸³ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 53.

³⁸⁴ 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.

³⁸⁵ The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2006, p. 7260.

³⁸⁶ The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2006, p. 7260.

³⁸⁷ The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2006, p. 7260.

³⁸⁸ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 53.

³⁸⁹ *Banking Act 1959* (Cth), ss. 5 and 9. See also *Interpretation Act 1987*, s. 21.

³⁹⁰ Australian Prudential Regulation Authority — <http://www.apra.gov.au/ADI/ADIList.cfm>. Accessed 11 September 2006.

³⁹¹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 3.

³⁹² *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 60(2).

³⁹³ The definition of 'telephone' in s. 3(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides that telephone 'includes radio, facsimile and any other communication device'.

³⁹⁴ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 61(3).

³⁹⁵ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 61.

³⁹⁶ *Law Enforcement (Powers and Responsibilities) Regulation 2005*, Schedule 1, Form 6 — Application for notice to produce documents/record of application, Part 1— Application.

- ³⁹⁷ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 54(1).³⁹⁸*Law Enforcement (Powers and Responsibilities) Act 2002*, s. 62(1).
- ³⁹⁹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 62(2)(a)-(b).
- ⁴⁰⁰ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 62(4).
- ⁴⁰¹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 65(1).
- ⁴⁰² *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.
- ⁴⁰³ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 54(2).
- ⁴⁰⁴ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 64.
- ⁴⁰⁵ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 56(1).
- ⁴⁰⁶ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 56(2).
- ⁴⁰⁷ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73(2).
- ⁴⁰⁸ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73(3) and (4).
- ⁴⁰⁹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73(5).
- ⁴¹⁰ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73A(1)(b).
- ⁴¹¹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73A(4).
- ⁴¹² *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73A(6)(a).
- ⁴¹³ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73A(6)(d).
- ⁴¹⁴ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73(1)(d).
- ⁴¹⁵ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 73A(3).
- ⁴¹⁶ The *Police Powers Legislation Amendment Act 2006*, Schedule 1, Clause [10] amended the *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 75.
- ⁴¹⁷ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 54(3).
- ⁴¹⁸ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 69.
- ⁴¹⁹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 70(1).
- ⁴²⁰ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 71.
- ⁴²¹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 72.
- ⁴²² *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 74.
- ⁴²³ *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.
- ⁴²⁴ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 57(2).
- ⁴²⁵ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 57(1).
- ⁴²⁶ *Police Powers and Responsibilities Act 2000* (Qld), s. 180.
- ⁴²⁷ *Financial Transaction Reports Act 1988* (Cth), s. 3.
- ⁴²⁸ 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 5.10.
- ⁴²⁹ 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).
- ⁴³⁰ *Criminal Investigation Act 2006* (WA), s. 50.
- ⁴³¹ *Criminal Investigation Act 2006* (WA), s. 51(1).
- ⁴³² *Criminal Investigation Act 2006* (WA), s. 51(2).
- ⁴³³ *Crimes Act 1914* (Cth), ss. 3ZQN and 3ZQO.
- ⁴³⁴ *Crimes Act 1914* (Cth), s. 3ZQP.
- ⁴³⁵ Notices to produce are to be recorded as actions attached to a case.
- ⁴³⁶ Discussion with NSW Police, Business and Technology Services, 6 October 2006 and NSW Police, Commissioner’s Inspectorate and Business and Technology Services, 28 March 2007.
- ⁴³⁷ Discussion with NSW Police, Business and Technology Services, 6 October 2006.
- ⁴³⁸ Letter from R. Mahoney, Assistant Commissioner, NSW Police Force to S. Cohen, Assistant Ombudsman (Police), 21 December 2006.
- ⁴⁴⁰ NP1.
- ⁴⁴¹ NP7.
- ⁴⁴² NP8.
- ⁴⁴³ NP23.
- ⁴⁴³ NP20.
- ⁴⁴⁴ NP21.
- ⁴⁴⁵ NP2.
- ⁴⁴⁶ It is unclear how one notice to produce was applied for.
- ⁴⁴⁷ Email from Attorney General’s Department, 6 December 2006.
- ⁴⁴⁸ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 61(2).
- ⁴⁴⁹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 60(1).
- ⁴⁵⁰ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 61.
- ⁴⁵¹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 62.
- ⁴⁵² *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 63.
- ⁴⁵³ Focus group with senior constables, LAC G, 28 August 2006.
- ⁴⁵⁴ Focus group with detectives, LAC B, 27 March 2006.
- ⁴⁵⁵ Focus group with detectives, LAC C, 1 May 2006.
- ⁴⁵⁶ Interview with Acting Commander, LAC C, 8 May 2006.
- ⁴⁵⁷ Interview with Education and Development Officer, LAC D, 24 May 2006.
- ⁴⁵⁸ The Hon. Bob Debus MP, NSWPD, Legislative Assembly, 17 September 2006, p. 7260.

- ⁴⁵⁹ See *Summary Offences Act 1953* (SA), s. 67 and *Police Act 1998* (SA), s. 19. As far as we are aware, police in South Australia do not have the power to apply for, or issue, notices to produce documents.
- ⁴⁶⁰ Focus group with detectives, LAC B, 29 March 2006.
- ⁴⁶¹ Focus group with detectives, LAC B, 29 March 2006.
- ⁴⁶² Focus group with detectives, LAC B, 29 March 2006.
- ⁴⁶³ Focus group with detective constables, LAC F, 26 July 2006.
- ⁴⁶⁴ Interview with Acting Commander, LAC B, 27 March 2006.
- ⁴⁶⁵ Interview with Acting Commander, LAC D, 24 May 2006.
- ⁴⁶⁶ 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.
- ⁴⁶⁷ *The Criminal Code* (WA), s. 711.
- ⁴⁶⁸ 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.
- ⁴⁶⁹ 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.
- ⁴⁷⁰ For information about the records we have examined, see section 4.6.1.
- ⁴⁷¹ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 74, and *Law Enforcement (Powers and Responsibilities) Regulation 2005*, Schedule 1, Form 21.
- ⁴⁷² In one of the nine events we examined, the police officer who applied for the notice to produce submitted a report about the execution of the notice to the authorised officer over a month after the notice was granted.
- ⁴⁷³ Focus group with detectives, LAC D, 24 May 2006.
- ⁴⁷⁴ Interview with detective sergeant, LAC F, 26 July 2006.
- ⁴⁷⁵ Focus group with senior constables, LAC G, 29 August 2006.
- ⁴⁷⁶ Focus group with senior constables, LAC G, 29 August 2006.
- ⁴⁷⁷ Focus group with detectives, LAC C, 8 May 2006.
- ⁴⁷⁸ Focus group with senior constables, LAC G, 29 August 2006.
- ⁴⁷⁹ Focus group with detectives, LAC C, 8 May 2006.
- ⁴⁸⁰ NSW Police 'iASK User's Handbook', 13 July 2006, p. 7. Accessed NSW Police intranet 5 October 2006.
- ⁴⁸¹ *Confiscation of Proceeds of Crime Act 1989*, s. 4.
- ⁴⁸² *Confiscation of Proceeds of Crime Act 1989*, s. 3.
- ⁴⁸³ *Confiscation of Proceeds of Crime Act 1989*, s. 68.
- ⁴⁸⁴ *Confiscation of Proceeds of Crime Act 1989*, s. 69(1).
- ⁴⁸⁵ If a police officer is the prosecutor for proceedings, the officer may, subject to and in accordance with the rules, issue any such subpoena. *Criminal Procedure Act 1986*, s. 222(2).
- ⁴⁸⁶ *Criminal Procedure Act 1986*, s. 221.
- ⁴⁸⁷ *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 49.
- ⁴⁸⁸ 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, 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.
- ⁴⁸⁹ *Privacy and Personal Information Protection Act 1988*, s. 4(2). Sections 3(a)-(k) of the *Privacy and Personal Information Protection Act 1988* specify 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.
- ⁴⁹⁰ *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.
- ⁴⁹¹ *Privacy and Personal Information Protection Act 1988*, s. 23(5).
- ⁴⁹² *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 Anot* [2003] NSWADT 214, P. O'Connor.
- ⁴⁹³ *Health Records and Information Privacy Act 2002*, s.17.
- ⁴⁹⁴ *Privacy Act 1988* (Cth), s. 14.
- ⁴⁹⁵ *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.
- ⁴⁹⁶ See for example, National Privacy Principle 2.1, *Privacy Act 1988* (Cth), Schedule 3, s. 2.1.

Consolidated list of questions for consideration

	Questions	Reference
	Personal searches	
1.	Have you been the subject of a personal search on arrest or in custody since 1 December 2005? If so, please provide an account of your experience and any issues or concerns that arose.	2.8.
2.	Are you aware of any instances where persons or clients were searched on arrest or in custody after 1 December 2005? If so, please provide details of any issues or concerns that arose from the search.	2.8.
3.	<p>What are your views as to the threshold tests for the police exercise of search powers on arrest or in custody?</p> <p>a. Is the present scheme — five separate search powers over a continuum from detention to custody, with separate thresholds, powers and penalties — excessively complex? If so, what other test or tests may be appropriate, or how should the scheme be simplified?</p> <p>b. Should there be a specific definition of custody in Part 4 beyond that provided in section 3 of LEPPRA? If so, what should that definition include?</p> <p>c. Should the powers of police officers who initially detain a person for searching be simplified so that any search or continuation of a search on arrest or in custody includes all search powers in Divisions 1 and 2 of Part 4?</p> <p>d. What, if any, additional guidance should be provided to police officers as to the factors that should be considered when determining whether there are reasonable grounds to suspect that it is prudent to conduct a search on arrest?</p>	2.8.3.
4.	<p>What are your views on the separation in the legislation of frisk and ordinary searches?</p> <p>a. Is it a useful distinction, and what, if any are its advantages and disadvantages?</p> <p>b. What are your views on a two-tiered search regime of ordinary and strip searches?</p>	2.8.4.
5.	<p>What are your views as to the general safeguard provisions in Part 15 of LEPPRA as they apply to searches?</p> <p>a. Are each of the safeguards desirable or useful? If not, should some other safeguards be in place? Please provide reasons for your views.</p> <p>b. Should police officers be required to provide their name when exercising search powers, or is other identifying information (for example a number and location) sufficient?</p> <p>c. Are any additional steps required to clarify and communicate the separate purposes of cautioning and warnings for persons being searched on arrest or in custody?</p>	2.9.4.1.
6.	What are your views as to the safeguards in respect of dignity and privacy for all searches provided for in section 32 of LEPPRA? Do they strike a reasonable balance between operational requirements of police and the dignity and privacy of individuals? If not, in what respect should they be changed?	2.10.9.

	Questions	Reference
7.	<p>What are your views as to the following issues concerning the dignity and privacy provisions raised to date in our review?</p> <p>a. The requirement that searches be conducted by a person of the same sex, including your views as to the circumstances which may render this not reasonably practicable?</p> <p>b. The requirement that a person must not be questioned while being searched, as far as this is reasonably practicable?</p>	2.10.9.
8.	<p>Are there any other safeguards relating to dignity and privacy which should be included in section 32, or alternatively, are any of the current safeguards unnecessary?</p>	2.10.9.
9.	<p>What is your view as to the threshold test for strip searches, which requires consideration of necessity, and the seriousness and urgency of the circumstances?</p> <p>a. Would a simpler test such as the Western Australian test of necessity in the circumstances be preferable as a threshold for strip searching?</p>	2.11.10.
10.	<p>What are your views on the rules for strip searches of persons provided for in section 33 of LEPR?</p> <p>a. Do they strike a reasonable balance between the operational requirements of police and the dignity and privacy of individuals? If not, in what respect should they be altered?</p> <p>b. Should a strip search require approval from a senior officer before being conducted?</p> <p>c. Should any additional restrictions apply to strip searches in public places?</p> <p>d. Should a person be offered the opportunity to remain partly clothed during a strip search?</p> <p>e. In what circumstances might it not be reasonably practicable for a person of the same sex to perform a strip search?</p> <p>f. Should police be specifically permitted to give directions during a strip search such as a direction for the person to raise their arms and move their legs apart?</p> <p>g. What, if any, steps should police take to have a parent, guardian or personal representative present for a strip search?</p> <p>h. Should the term 'body cavity' be defined in the Act?</p>	2.11.10.
11.	<p>In relation to strip searches of children and people with impaired intellectual functioning:</p> <p>a. Should any additional threshold requirements apply for conducting a strip search such as a requirement that the person be charged or that the search be authorised by a magistrate?</p> <p>b. Are the present requirements for the presence of a support person appropriate? Should police be required to note what steps they have taken to secure an appropriate support person?</p> <p>c. Are police provided with sufficient guidance and other tools to identify persons who have impaired intellectual functioning?</p> <p>d. What can be done to improve police access to appropriate support persons in all areas of the state?</p>	2.11.10.

	Questions	Reference
12.	Are you aware of any circumstances where a child under 10 years of age has been strip searched? If so, please provide full details.	2.11.10.
13.	What, if any, additional powers or provisions should be provided for in respect of police searches on arrest or in custody?	2.12.
Crime scenes		
14.	Has a crime scene or scenes been established on your premises since December 2005? Have you ever been affected by a crime scene established in a public place or on private premises? If so, please provide an account of your experience, and any issues or concerns that arose.	3.9.
15.	Are you aware of any instances where a crime scene has been established and crime scene powers have been exercised on persons you know or your clients? If so, provide details of any issues or concerns that arose in the exercise of crime scene powers.	3.9.
16.	<p>What are your views as to the present requirements in respect of police powers of entry to exercise crime scene warrants and the exercise of crime scene powers with consent?</p> <p>a. Should police have expanded powers of entry if they reasonably suspect the premises are a crime scene, or there is evidence on the premises of a serious indictable offence? If so, what powers should police be permitted to exercise on entry?</p> <p>b. Should the exercise of any crime scene powers be only on the basis of a warrant, regardless of occupier's consent? In particular where the exercise of powers may result in damage, should a warrant be required? If so, what, if any, exceptions to the requirement for a warrant may be necessary?</p> <p>c. What, if any, clarification is required of the current 'occupier's consent' provision in section 95(3)?</p> <p>d. In what circumstances, if any, should police be permitted to establish a crime scene without a warrant within a 24 hour period of an earlier crime scene on the same premises?</p>	3.9.5.
17.	<p>What are your views about the present three hour time limit on the exercise of crime scene powers without a warrant?</p> <p>a. Is it a sufficient timeframe? If not, what additional time or other arrangements are needed to ensure an efficient exercise of crime scene powers?</p>	3.9.6.1.
18.	Are the current powers given to police during this three hour period appropriate? If not, in what respect should they be amended and for what reasons?	3.9.6.1
19.	<p>What are your views as to the preservation powers conferred on police officers under Part 7 of LEPR?</p> <p>a. What matters beyond the preservation of evidence, if any, should police be required to consider when directing persons to leave or not to enter a crime scene or to prevent persons from entering a crime scene?</p> <p>b. Should police be required to consider the needs of family members where the crime scene is established because of a suspicious death of a family member?</p> <p>c. Should police be required to consider any particular religious or cultural sensitivities in exercising the preservation powers?</p> <p>d. Do police require any additional preservation powers, such as a specific power to remove animals from a crime scene?</p>	3.9.6.3

	Questions	Reference
20.	<p>What are your views as to the process for obtaining warrants for crime scenes on private premises?</p> <p>a. What are your views as to the information requirements for an application for crime scene warrants and for the report to be provided following execution?</p> <p>b. Is the test that authorised officers are required to apply sufficiently clear? If not, what amendments or other changes are required?</p> <p>c. What arrangements, if any, should be available to police in circumstances where, within the three hour period, a crime scene warrant has been applied for but not determined by an authorised officer?</p> <p>d. What are your views as to the suggestion by some police officers that senior police, not authorised officers, should be responsible for authorising a crime scene warrant?</p> <p>e. Should a crime scene warrant be able to specify a number of places which in crime scene powers can be exercised?</p>	3.9.7.5.
21.	<p>What are your views about the impact on members of the public as a result of the execution of crime scene warrants or exercise of crime scene powers?</p> <p>a. Should the legislation be specific in requiring police to complete the exercise of a crime scene warrant or exercise crime scene powers as quickly as reasonably practicable?</p> <p>b. Should the legislation specifically provide that, in the exercise of crime scene powers, police officers only cause such damage to property as is reasonably necessary in exercising crime scene powers?</p> <p>c. Should police (or some other government agency) be required to take steps to assist persons affected by crime scene powers, including:</p> <p>i. providing alternative accommodation where a person cannot live in private premises as a result of the exercise of crime scene powers?</p> <p>ii. taking reasonable steps to ensure the safe care of children affected by crime scene powers?</p> <p>iii. taking reasonable 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?</p> <p>d. Should the legislation specifically require police to disestablish a crime scene following the execution of a warrant or exercise of crime scene powers?</p>	3.9.8.5.
22.	<p>Would it be appropriate for police in NSW to be subject to a requirement such as that contained in the Queensland legislation to make a specific application for a crime scene warrant to the Supreme Court in circumstances where they intend to cause structural damage to public places or private premises during the exercise of crime scene powers?</p>	3.9.8.5.
23.	<p>What, if any, further provision is appropriate to permit the admission of evidence collected at a crime scene, including in circumstances where there may be some defect in the exercise of these powers?</p>	3.9.9.
24.	<p>What are your views as to whether Part 7 has unequivocally clarified police powers to establish crime scenes and exercise crime scene powers?</p>	3.9.10.
25.	<p>What, if any, additional offences should be considered as justifying the establishment of a crime scene and the exercise of crime scene powers?</p>	3.9.10.
26.	<p>What, if any, additional crime scene powers are necessary in Part 7?</p>	3.9.10.

	Questions	Reference
	Notices to produce	
27.	Has a notice to produce been issued to you or your organisation? If so, please provide an account or accounts of their use, and any issues or concerns that arose.	4.7.
28.	Are you aware of any instances where a notice to produce has been issued to organisations you are familiar with, or to your clients? If so, please provide details about any issues or concerns that arose during or following the issue or execution of the notice.	3.9.9.
29.	What are your views as to the processes for obtaining notices to produce documents? In particular: <ul style="list-style-type: none"> a. What are your views as to the information requirements imposed on police when applying for a notice to produce and producing a report following service of the notice? b. Are the issues that an authorised officer is required to consider when determining whether or not to grant a notice to produce appropriate (for example, are the legislative requirements inadequate or alternatively overly onerous)? 	4.7.3.2.
30.	What benefits, if any, have the notice to produce provisions provided for police, authorised deposit-taking institutions or others?	4.7.3.2.
31.	What are your views as to the suggestion by some police officers that senior police, not authorised officers, should be responsible for authorising the issue of notices to produce documents?	4.7.3.2.
32.	What are the advantages and disadvantages of extending the power of police to issue notices to produce documents to institutions other than authorised deposit-taking institutions?	4.7.4.3.
33.	If notices to produce documents could be issued to organisations other than authorised deposit-taking institutions, what additional safeguards, if any, may be required to ensure appropriate use of such notices?	4.7.4.3.

Glossary

ADI	Authorised Deposit-Taking Institution
COPS	Computerised Operational Policing System. A centralised database maintained and operated by the NSW Police Force, used to record incidents and events involving police.
CSSB	Crime Scene Services Branch (NSW Police Force).
FSG	Forensic Services Group (NSW Police Force)
HVP	High Visibility Policing
IDRS	Intellectual Disability Rights Service
LAC	Local Area Command (NSW Police Force)
LEPRA	Law Enforcement (Powers and Responsibilities) Act 2002
MP	Member of Parliament
NSWPD	New South Wales Parliamentary Debate (Hansard)
PFA	Protected Forensic Area
PIIP Act	Privacy and Personal Information Protection Act 1998
SCC	State Crime Command (NSW Police Force)
SOCO	Scene of Crime Officer (NSW Police Force)
SOPS	Standard Operating Procedures
The CCTV SOPS	The Standard Operating Procedures for CCTV Surveillance in Police Charge Rooms and Other Locations in Police Stations
The Code of Practice for CRIME	The Code of Practice for Custody, Rights, Investigation, Management and Evidence (NSW Police Force)

Appendix A

Form 4

(Clauses 4 (1)(d) and 5 (d))

Application for crime scene warrant/record of application (Law Enforcement (Powers and Responsibilities) Act 2002)

Part 1 Application

On ,
(date)

I,
(name)

of ,
(rank) (place of work)

apply for a crime scene warrant to enter the premises known as

(address)

in the State of New South Wales, being a

(description of premises, e.g. dwelling house)

and to exercise all reasonably necessary crime scene powers at, or in relation to, ⁽¹⁾

I swear/solemnly, sincerely and truly declare and affirm* that:

1 I have reasonable grounds for suspecting that it is necessary to exercise crime scene powers at the crime scene for the purpose of preserving, or searching for and gathering, evidence of the commission of:

(a)* the offence of ⁽²⁾

which is a serious indictable offence.

(b)* the offence of ⁽²⁾

that is being/was/may have been* committed in connection with a traffic accident that has resulted in the death of/serious injury* to a person.

2 I rely on the following grounds in support of this application: ⁽³⁾

(1) Specify crime scene.

(2) Delete if inapplicable.

(3) Specify offence.

(4) Insert the reasonable grounds on which the application for the crime scene warrant is based. If space is insufficient, continue overleaf or attach a separate sheet.

[3 and 4 are to be completed if a previous application for the warrant has been made and refused. Attach a copy of previous application to this Form.]

3 The following are details of the refusal of the previous application:

4 The additional information that I consider justifies the making of this further application is: ⁽⁴⁾

Sworn/declared and affirmed* before me on

(Date)

at

(Place)

in the State of New South Wales.

Applicant.

(Print name and insert signature)

Justice of the Peace⁽⁵⁾

(Print name and insert signature)

⁽⁴⁾ Need not be completed if the previous application was made to an authorised officer who was not a Magistrate and this application is made to a Magistrate.

⁽⁵⁾ This application may be sworn before the authorised officer to whom the application is made for the issue of the warrant. Any alterations, deletions or annexure should be initialled or signed by the applicant and witnessed by the justice of the peace.

Warning

IT IS AN OFFENCE UNDER SECTION 63 OF THE LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) ACT 2002 TO GIVE INFORMATION IN THIS APPLICATION KNOWING IT IS FALSE OR MISLEADING IN A MATERIAL PARTICULAR. THE MAXIMUM PENALTY IS A FINE OF \$11,000 OR 2 YEARS IMPRISONMENT (OR BOTH).

Note: In the case of an application by telephone (but not by facsimile), this Form of application should be completed by the authorised officer for record purposes as if it were made in person by the applicant but not on oath.

Part 2 Authorised officer's record of application for a crime scene warrant

On at a.m / p.m
(date) *(time)*

I, the undersigned authorised officer, received this application for a crime scene warrant.

1 *(To be completed if the application was not made in person.)*

The application was made by⁽⁶⁾

and I was/was not* satisfied that the warrant was required urgently and it was/was not* practicable for the application to be made in person.

2* *(To be completed if the authorised officer required the applicant to provide further information concerning the grounds on which the warrant was sought.)*

*Further information provided by the applicant, as required by me, is attached.

*Particulars of further information orally provided by the applicant, as required by me, are as follows:⁽⁷⁾

3 On considering the application I found/did not find* that there were reasonable grounds for issuing the warrant.

(If warrant is issued – continue.)

4 The relevant particulars of the grounds on which I relied to justify the issue of the warrant are as follows⁽⁸⁾:

5 *(To be completed if the warrant may be executed by night.)*

The grounds on which I relied to justify the execution of the warrant by night are as follows:

- (a)* execution of the warrant by day is unlikely to be successful,
- (b)* there is likely to be less risk to the safety of any person if it is executed by night,
- (c)* an occupier is likely to be on the premises only at night to allow entry without the use of force,
- (d)* *Other grounds*

6 The crime scene warrant was issued at a.m. / p.m. on
(date)

Authorised Officer

.....
(Print name and insert signature)

Date

.....

⁽⁶⁾ Specify how the application was made (eg facsimile, telephone).

⁽⁷⁾ Delete if inapplicable.

⁽⁷⁾ Specify particulars.

⁽⁸⁾ Either identify or specify the relevant particulars of the grounds in the application that are relied on. If space is insufficient, continue overleaf or attach a separate sheet.

Notes.

1. Return this Form, together with a copy of the warrant and a copy of the occupier's notice, to the Local Court named in the occupier's notice.

Crime scene warrant
(Law Enforcement (Powers and Responsibilities) Act 2002)

This warrant expires at a.m. / p.m*. on
(time) *(date)*

and must not be used after that time.

On
(date)

(name of authorised officer)

an authorised officer empowered to issue crime scene warrants under Part 7 of the Law Enforcement (Powers and Responsibilities) Act 2002, granted this warrant authorising

(name)

of
(rank) *(place of work)*

(the applicant) a police officer and all other police officers.

1 to enter the premises known as
(address)

being a and
(description of premises, e.g. dwelling house)

2 to exercise all reasonably necessary crime scene powers, as listed in paragraphs (d) - (s) below, at, or in relation to⁽¹⁾

The police officer has reasonable grounds for suspecting that it is necessary to exercise crime scene powers for the purpose of preserving, or searching for and gathering, evidence of the commission of:

(a)* The offence of ⁽²⁾ ,
which is a serious indictable offence.

(b)* The offence of ⁽²⁾
that is being/was/may have been* committed in connection with a traffic accident that has resulted in the death of/serious injury* to a person.

This warrant may be executed:

- (a)* only by day (ie between 6.00 am and 9.00 pm).
- (b)* by day (ie between 6.00 am and 9.00 pm) or night (ie between 9.00 pm and 6.00 am).

(1) Specify crime scene.
(2) Specify offence.
(* Delete if inapplicable.

In executing this warrant the applicant may exercise the powers provided by the Law Enforcement (Powers and Responsibilities) Act 2002. These include the following powers:

- (a) to enter the named premises, using such force as is reasonably necessary for that purpose,
- (b) to use any persons necessary to assist in the execution of this warrant,
- (c) to exercise any lawful power to arrest a person,
- (d) to direct a person to leave the crime scene or remove a vehicle, vessel or aircraft from the crime scene,
- (e) to remove from the crime scene a person who fails to comply with a direction to leave the crime scene or a vehicle, vessel or aircraft a person fails to remove from the crime scene,
- (f) to direct a person not to enter the crime scene,
- (g) to prevent a person from entering the crime scene,
- (h) to 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,
- (i) to remove or cause to be removed an obstruction from the crime scene,
- (j) to perform any necessary investigation, including, for example, search the crime scene and inspect anything in it to obtain evidence of the commission of an offence,
- (k) to conduct any examination, or process, for the purpose of performing any necessary investigation,
- (l) to open anything at the crime scene that is locked,
- (m) to take electricity, gas or any other utility, for use at the crime scene,
- (n) to 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,
- (o) to photograph or otherwise record the crime scene and anything in it,
- (p) to seize, detain, remove from the crime scene or guard all or part of a thing that might provide evidence of the commission of an offence,
- (q) to dig up anything at the crime scene,
- (r) to remove wall or ceiling linings or floors of a building, or panels of a vehicle,
- (s) to exercise any other power reasonably necessary or incidental to a power conferred by paragraphs (d) – (r),
- (t) to stay on premises for the purpose of exercising the powers set out in paragraphs (d) – (s).

Signed

.....
(Print name and insert signature)⁽⁹⁾

Date

.....

⁽⁹⁾ If the application is made in person or by facsimile transmission, the authorised officer should sign and date the warrant and initial any corrections. In the case of a telephone search warrant, in circumstances where facsimile facilities are not available, the authorised officer should use this Form as a copy of the terms of the warrant and the applicant should complete the warrant in the terms dictated by the authorised officer and then sign and date the warrant.

Occupier's notice for crime scene warrant

(Law Enforcement (Powers and Responsibilities) Act 2002)

A crime scene warrant has been issued by an authorised officer. It gives the authority and power to

(name)

of

(rank)

(Place of work)

to enter the premises at

(address)

being a

(description of premises, e.g. dwelling house)

and exercise all reasonably necessary crime scene powers in relation to ⁽¹⁾

Expiry

This crime scene warrant will expire at

(time)

a.m. / p.m on

(date)

Warning

YOU HAVE THE RIGHT TO INSPECT THE WARRANT BUT YOU MUST NOT HINDER OR OBSTRUCT THE POLICE OFFICER AUTHORISED TO ENTER THE PREMISES UNDER THE WARRANT, AS TO DO SO MAY BE A CRIMINAL OFFENCE. UNDER SECTION 96 (1) OF THE *LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) ACT 2002*, THE MAXIMUM PENALTY FOR OBSTRUCTING OR HINDERING, WITHOUT REASONABLE EXCUSE, A PERSON ACTING UNDER A WARRANT IS A FINE OF \$11,000 OR 2 YEARS IMPRISONMENT (OR BOTH).

FURTHER, YOU MUST NOT FAIL OR REFUSE TO COMPLY WITH A REQUEST MADE OR DIRECTION GIVEN BY A POLICE OFFICER EXERCISING CRIME SCENE POWERS AT THE CRIME SCENE AS TO DO SO MAY ALSO BE A CRIMINAL OFFENCE. UNDER SECTION 96 (2) OF THE *LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) ACT 2002*, THE MAXIMUM PENALTY FOR FAILING OR REFUSING, WITHOUT REASONABLE EXECUSE, TO COMPLY WITH A REQUEST MADE OR DIRECTION GIVEN BY A POLICE OFFICER EXERCISING SUCH POWERS UNDER THIS WARRANT IS A FINE OF \$1,100.

The powers given by the warrant

The police officer executing the warrant has the following powers:

- (a) to enter the named premises, using such force as is reasonably necessary for that purpose,
- (b) to use any persons necessary to assist in the execution of this warrant,
- (c) to exercise any lawful power to arrest a person,
- (d) to direct a person to leave the crime scene or remove a vehicle, vessel or aircraft from the crime scene,

⁽¹⁾ Specify crime scene. _____

- (e) to remove from the crime scene a person who fails to comply with a direction to leave the crime scene or a vehicle, vessel or aircraft a person fails to remove from the crime scene,
- (f) to direct a person not to enter the crime scene,
- (g) to prevent a person from entering the crime scene,
- (h) to 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,
- (i) to remove or cause to be removed an obstruction from the crime scene,
- (j) to perform any necessary investigation, including, for example, search the crime scene and inspect anything in it to obtain evidence of the commission of an offence,
- (k) for the purpose of performing any necessary investigation, to conduct any examination or process,
- (l) to open anything at the crime scene that is locked,
- (m) to take electricity, gas or any other utility, for use at the crime scene,
- (n) to 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,
- (o) to photograph or otherwise record the crime scene and anything in it,
- (p) to seize and detain, remove from the crime scene or guard, all or part of a thing that might provide evidence of the commission of an offence,
- (q) to dig up anything at the crime scene,
- (r) to remove wall ceiling linings or floors of a building, or panels of a vehicle,
- (s) to exercise any other power reasonably necessary or incidental to a power listed in paragraphs (e) – (s),
- (t) to stay on premises for the purpose of exercising the powers set out in paragraphs (d) – (s).

Issue Details

The warrant was granted by

an authorised officer, under the *Law Enforcement (Powers and Responsibilities) Act 2002*

on

(date)

at

(time)

a.m / p.m

The warrant was issued on the application of

(name of police officer)

(rank)

of

(place of work)

Basis for the issue of the warrant

The warrant was granted on the basis that the authorised officer found that there were reasonable grounds for the issue of the warrant and, in particular, that the applicant police officer had reasonable grounds to suspect that it was necessary 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)* the offence of ⁽²⁾

which is a serious indictable offence,

(b)* the offence of ⁽²⁾

that is being/was/may have been* committed in connection with a traffic accident that has resulted in the death of/serious injury* to a person.

(*) Delete if inapplicable.

(²) Specify offence.

Challenging the issue or execution of the warrant

If you are dissatisfied with the issue or the execution of the warrant, you should seek legal advice. This advice may assist you to decide whether your rights have been infringed and what action you can take. If your rights have been infringed you may be entitled to a legal remedy.

You should keep this notice as it will assist you if you seek advice.

Limitations on the powers conferred

The following limitations apply to the warrant:

- (a) the warrant must be executed before the date and time of the expiry given above,
- (b) any force used to enter the premises must be reasonably necessary,
- (c) the warrant must be executed between 6.00 am and 9.00 pm unless the warrant states that it may be executed by day or night,
- (d) the warrant must be shown to you if you ask to see it,
- (e) the powers listed in paragraphs (d) – (s) under the heading “**Powers given by the warrant**” may be exercised if it is reasonably necessary to do so.

Inspection

The application for the warrant, written reasons for the issue of the warrant and other associated

documents are to be held at⁽³⁾

You may seek to inspect those documents by arrangement with that Court. You should produce this notice at the court when seeking to inspect the application.

Signed

.....

(Authorised Officer/Applicant Officer)⁽⁴⁾

Date

.....

⁽³⁾ Insert the Local Court to which the issuing authorised officer is attached or to which it is intended to forward the documentation.

⁽⁴⁾ In the case of telephone warrants, in circumstances where facsimile facilities are not available, the notice must be signed by the applicant officer. In other case, the authorised officer must sign the notice.

Form 20

(Clause 9 (1))

Report to authorised officer about execution of warrant

(Law Enforcement (Powers and Responsibilities) Act 2002)

Note. This report must be made within 10 days after the execution of the warrant or the expiry of the warrant, whichever first occurs.

This report is made to the authorised officer who issued the attached warrant. ⁽¹⁾

1* The warrant was not executed for the following reasons:

2* The warrant was executed on
(date)

3* *(To be completed unless 4 applies)*
The warrant was executed at ⁽²⁾ a.m./p.m.

4* *(To be completed if the warrant authorised the use of a dog for general drug detection)*
The warrant was executed during the period/periods* of ³

5* The result of the execution of the warrant (including a description of the things seized) is briefly as follows: ⁽⁴⁾

6* The things seized are now in the custody of ⁽⁵⁾

7* The occupier's notice was not served/served on⁽⁶⁾

Signed
(Print name and insert signature)

Date

Rank or Designation

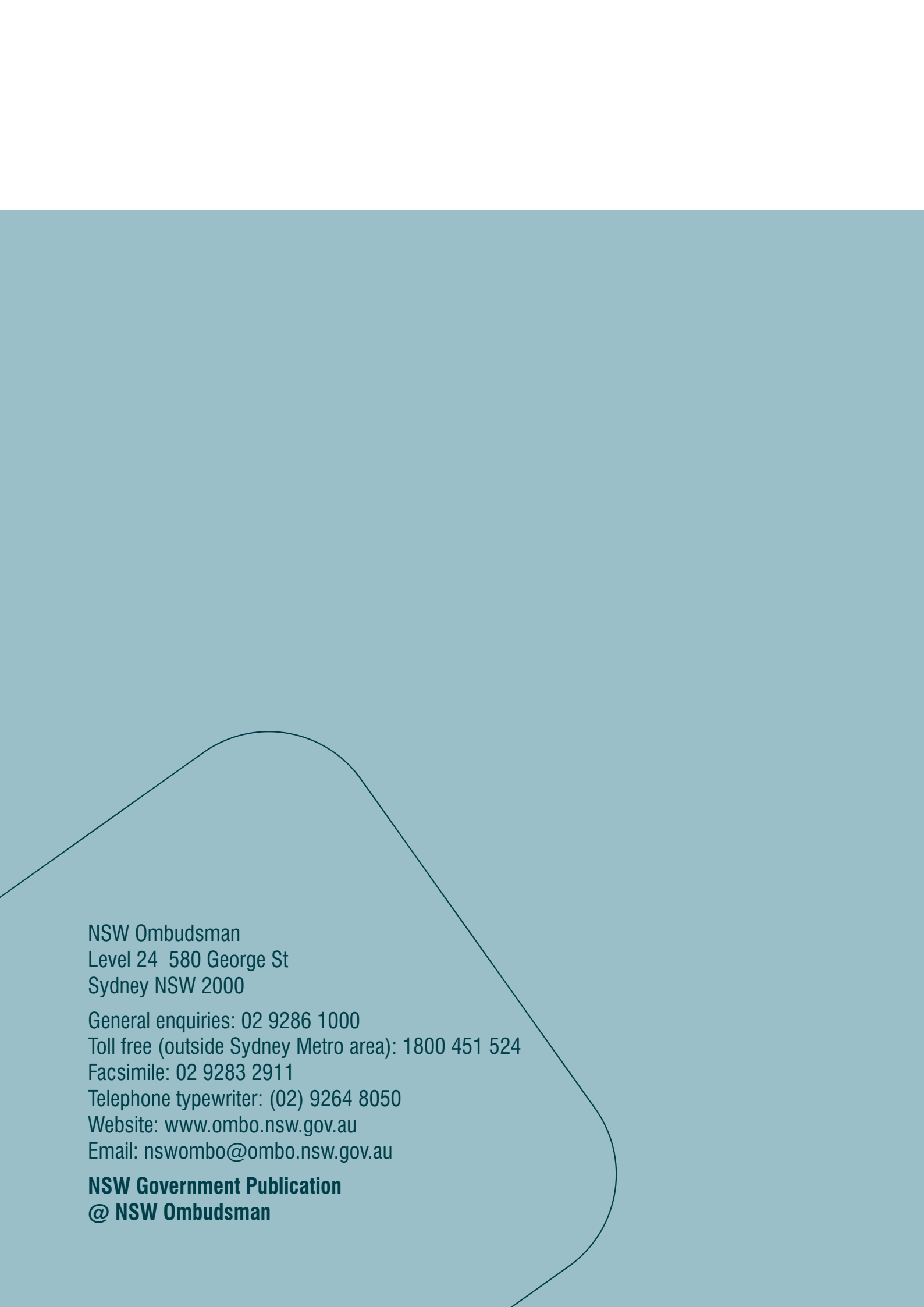
Place of Work

Date of Receipt of Report by Authorised Officer

Authorised Officer
(Print name and insert signature)

⁽¹⁾ Unless completed on the back of the warrant, attach the original warrant issued by the authorised officer or telephone warrant completed by the applicant.
^(*) Delete if inapplicable.
⁽²⁾ Specify time at which execution of warrant was completed.
⁽³⁾ Specify period/periods.
⁽⁴⁾ If a receipt is given for anything seized, attach copy.
⁽⁵⁾ Specify the person who has responsibility for the safekeeping of the things seized. Specify the place where the things are held unless specifying the place where they are held would adversely affect the security of the things seized.
⁽⁶⁾ Specify manner of service and on whom notice was served.

Note. On completion of the Report, forward the Report and attachments to the Local Court named in the Occupier's Notice.



NSW Ombudsman
Level 24 580 George St
Sydney NSW 2000

General enquiries: 02 9286 1000
Toll free (outside Sydney Metro area): 1800 451 524
Facsimile: 02 9283 2911
Telephone typewriter: (02) 9264 8050
Website: www.ombo.nsw.gov.au
Email: nswombo@ombo.nsw.gov.au

NSW Government Publication
@ NSW Ombudsman