"A Pack of Fucken Boys in Blue Skirts"

A Lawful Combatant's Guide to Assaulting, Resisting, Hindering, and Escaping Police in New South Wales

"Go fuck yourself, you fucking cunt....
Fuck you, you're a pack of fucken boys in blue skirts.
Fuck you, dog cunts."

Richard Semaan in the presence of
Sergeant Damien Poidevin and a pack of constables
at Queen Street, Auburn on 14 September 2011 at about 3.20pm.
"Police Facts Sheet" - *Police v Richard Semaan* H 47013755
But see more generally *Poidevin v Semaan* [2013] NSWCA 93;
85 NSWLR 313; 231 A Crim R 373

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Raymond Courtney doing what he does best

- see *Courtney v Thomson* [2007] QCA 49; 170 A Crim R 233

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A copy of this paper can be found online at www.CriminalCPD.net.au on the Police Powers page of that site. If you take out a free email subscription to this site you will automatically receive by email any updated edition of this paper.

This paper will deal only with arrest by police without warrant. For arrests by police with warrant see *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)* [hereinafter "LEPRA"] sections 101-104 inclusive. For citizen's arrest see LEPRA s.100.

1. A PRELIMINARY WORD ABOUT LEPRA.

In order to have a complete grasp of what follows in this paper you need to be aware of the legislative history of section 99 of LEPRA as there has been a degree of legislative amendment over the years. You will need to understand which edition of s.99 of LEPRA is being referred to when you are reading a particular piece of case law.

Specifically, you should know that the first edition of section 99 LEPRA came into effect on and from 1 December 2005 and remained on foot up until 16 December 2013. Section 99 of LEPRA was then amended, taking effect on and from 16 December 2013 and remains in effect at the time of writing (July 2020). This more recent edition of s.99 of LEPRA can be found at Appendix 1 of this paper.

The former and now repealed edition of s.99 of LEPRA can be found at Appendix 2 of this paper.

Similarly, the requirements for lawful announcement now found in s.202 of LEPRA have changed over time. The particular section you are reading about will depend on the relevant law at the time of the facts giving rise to the particular case. The current requirement for lawful announcement is found in section 202 of LEPRA (which must be read subject to section 201).

The current form of the legislation (as at July 2020) dates from 1 November 2014 and can be found at Appendix 3 of this paper.

The pre-amendment legislation (section 201) commenced on 1 December 2005 until 1 November 2014 and can be found at Appendix 4 of this paper.

2. WHAT CONSTITUTES A LAWFUL ARREST BY POLICE WITHOUT WARRANT?

There are a number of fundamental requirements for a lawful arrest without warrant as follows:

(i) **Firstly,** the arresting officer must **suspect on reasonable grounds** that the person is committing or has committed an offence. For this first requirement the officer must in fact hold the subjective belief, and it must in addition be held on objectively reasonable grounds – see LEPRA s.99(1)(a).

The objective reasonableness of this first requirement is a matter for the Court to determine at the time of hearing the evidence.

(ii) **Secondly,** the officer must believe that it is **"reasonably necessary"** to effect the arrest in order to achieve one of the matters enumerated in LEPRA s.99(1)(b). The belief to be assessed for this second requirement is the subjective belief of the arresting officer at the time of the arrest, and not the objective assessment of the Court at the time of hearing the evidence.

(iii) **Thirdly,** the arrest must be subject of a lawful announcement pursuant to LEPRA s.202, save for two exceptions as discussed later in this paper.

(iv) **Fourthly,** an arrest must be for the purposes of commencing proceedings. Arrest for the purposes of questioning, for example, is unlawful.

(v) **Fifthly,** arrest must be the measure of last resort.

If an arrest without warrant fails to fulfil all of these requirements, then it is unlawful.

2.1 THE FIRST REQUIREMENT – SUSPICION HELD ON REASONABLE GROUNDS (REASONABLE SUSPCION) THAT THE PERSON IS COMMITTING OR HAS COMMITTED AN OFFENCE.

Section 99(1)(a) of LEPRA authorises police to arrest without warrant a person who the officer ***suspects on reasonable grounds*** that the person is committing or has committed an offence

So given the above, it is obviously important to know what constitutes a reasonable suspicion (or "suspects on reasonable grounds" to use the language of the subsection). The leading authorities are outlined below:

R v Rondo [2001] NSWCCA 540, 126 A Crim R 562

One of the leading authorities in this regard is *R v Rondo* [2001] NSWCCA 540, 126 A Crim R 562 per Smart J (Spigelman CJ and Simpson J concurring) at [53]:

> (*a) A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs covered by s.357E. A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.*
>
> *(b) Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.*
>
> *(c) What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest at the time he did so. Having ascertained that information the question is whether that information afforded*

reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole of the surrounding circumstances.

***Streat v Bauer, Streat v Blanco* NSWSC 16 March 1998 unrep.**

Another useful authority is *Streat v Bauer, Streat v Blanco* NSWSC 16 March 1998 unrep. BC9802155 where Smart J reviewed the authorities and stated:

> In *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, the High Court considered s.95 if the Bankruptcy Act 1924-1960 (Cth) and the words in s.95(4) "had reason to suspect". Kitto J at 303 said:
>
> > *"In the first place, the precise force of the word 'suspect' needs to be noticed. A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to a 'slight opinion, but without sufficient evidence', as Chambers Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence."*
> >
> > *"In George v Rockett (1990) 170 CLR 104 the High Court, in a joint judgment, referred at 115-116 with approval to the judgment of Kitto J just quoted and to the description of Lord Devlin in Hussien v Chong Fook Kam [1970] AC 942 at 948 that suspicion was "In its ordinary meaning is a state of conjecture or surmise where proof is lacking." Reasonable suspicion is not arbitrary. As the High Court said at 115, "The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown." A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value."*
> >
> > *"In R v Armstrong (1989) 53 SASR 25 a car with five men was stopped on the outskirts of Port Augusta without apparent reason. At 27 King CJ recorded that the only reasons given to the appellant, Armstrong, the driver, were that the occupants were not locals, the police did not recognise the car, "the police like to know who's just passing through our town" and it was "just a routine check." King CJ regarded these reasons as inadequate."*

***Hyder v Commonwealth* [2012] NSWCA 336**

A comprehensive discussion of what constitutes reasonable suspicion (or "reasonable belief" as the case may require under other legislation) is set out in *Heyder v Commonwealth* [2012] NSWCA 336 per McColl JA at [15:

> *"The following propositions, adapted by reference to s 3W, can be extracted from decisions considering how a person required to have reasonable grounds*

either to suspect or believe certain matters for the purposes of issuing a search warrant or arresting a person might properly form that state of mind:

(1) When a statute prescribes that there must be "reasonable grounds" for a belief, it requires facts which are sufficient to induce that state of mind in a reasonable person: George v Rockett (at 112);

(2) The state of mind that the reasonable grounds for the relevant suspicion and belief exist must be formed by the person identified in s 3W (the "arresting officer"); the arresting officer may not "discharge the ... duty [of forming the relevant opinion] parrot-like, upon the bald assertion of the informant": George v Rockett (at 112), quoting R v Tillett; Ex parte Newton (1969) 14 FLR 101 (at 106) per Fox J;

(3) The proposition that it must be the arresting officer who has reasonable grounds to suspect (or believe) the alleged suspect to be guilty of an arrestable offence is intended to ensure that "[t]he arresting officer is held accountable ... [and] is the compromise between the values of individual liberty and public order": O'Hara v Chief Constable of Royal Ulster Constabulary (at 291) per Lord Steyn (Lords Goff, Mustill and Hoffmann agreeing);

(4) There must be some factual basis for either the suspicion or the belief: George v Rockett (at 112); the state of mind may be based on hearsay material or materials which may be inadmissible in evidence; the materials must have some probative value: R v Rondo [2001] NSWCCA 540; (2001) 126 A Crim R 562 (at [53](b)) per Smart AJ (Spigelman CJ and Simpson J agreeing); Shaaban Bin Hussien v Chong Fook Kam (at 949); O'Hara v Chief Constable of Royal Ulster Constabulary (at 293) per Lord Steyn;

(5) "The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof": George v Rockett (at 116);

(6) "Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture": George v Rockett (at 116);

(7) What constitutes reasonable grounds for forming a suspicion or a belief must be judged against "what was known or reasonably capable of being known at the relevant time": Ruddock v Taylor [2005] HCA 48; (2005) 222 CLR 612 (at [40]) per Gleeson CJ, Gummow, Hayne and Heydon JJ; whether the relevant person had reasonable grounds for forming a suspicion or a belief must be determined not according to the subjective beliefs of the police at the time but according to an objective criterion: Anderson v Judges of the District Court of New South Wales (1992) 27 NSWLR 701 (at 714) per Kirby P (Meagher and Sheller JJA agreeing); see also O'Hara v Chief Constable of Royal Ulster Constabulary (at 298) per Lord Hope;

(8) The information acted on by the arresting officer need not be based on his own observations; he or she is entitled to form a belief based on what they have been told. The reasonable belief may be based on information which has been given anonymously or on information which turns out to be wrong. The question whether information considered by the arresting officer provided reasonable grounds for the belief depends on the source of the information and its context, seen in the light of the whole of the surrounding circumstances and, having regard to the source of that information, drawing inferences as to what a reasonable person in the position of the independent observer would make of it: O'Hara v Chief Constable of Royal Ulster Constabulary (at 298, 301, 303) per Lord Hope. (O'Hara concerned the formation of a suspicion, but the proposition Lord Hope stated is equally applicable to the formation of a belief); it is "[t]he character of the circumstances [which have] to be decided: were they such as to lead to the specified inference?": Queensland Bacon Pty Ltd v Rees[1966] HCA 21; (1966) 115 CLR 266 (at 303) per Kitto J;

(9) "The identification of a particular source, who is reasonably likely to have knowledge of the relevant fact, will ordinarily be sufficient to permit the Court to assess the weight to be given to the basis of the expressed [state of mind] and, therefore, to determine that reasonable grounds for [it] exist": New South Wales Crime Commission v Vu [2009] NSWCA 349 (at [46]) per Spigelman CJ (Allsop P and Hodgson JA agreeing); see also International Finance Trust Co Ltd v New South Wales Crime Commission [2008] NSWCA 291; (2008) 189 A Crim R 559 (at [134] - [135]), per McClellan CJ at CL. Although McClellan CJ at CL was in dissent, Allsop P (with whom Beazley JA agreed) (at [51]) would have agreed with McClellan CJ at CL's conclusion in this respect subject to qualifications none of which are in issue in the present case. International Finance Trust Co Ltd v New South Wales Crime Commission was overturned in the High Court insofar as it concerned the constitutional validity of s 10 of the Criminal Assets Recovery Act 1990, but not in a manner which affects the statements concerning the reasonable grounds issue: International Finance Trust Co Ltd v New South Wales Crime Commission [2009] HCA 49; (2009) 240 CLR 319;

(10) In Holgate-Mohammed v Duke (at 443), Lord Diplock held that the words "may arrest without warrant" conferred on a public official "an executive discretion" whether or not to arrest and that the lawfulness of the way in which the discretion was exercised in a particular case could not be questioned in any court of law except upon the principles Lord Greene MR enunciated in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223. That aspect of Lord Diplock's reasoning was applied in Zaravinos v State of New South Wales (at [28]) where Bryson JA (Santow JA and Adams J agreeing) held that that the validity of an exercise of the statutory power to arrest, in that case under s 352(2) of the Crimes Act 1900 (which provided that "[a]ny constable or other person may without warrant apprehend"), was "not established conclusively by showing that the circumstances in s 352(2)(a) exist[ed], and that the validity of the decision to arrest and the lawfulness of the arrest also depend on the effective exercise of the discretion alluded to by the word 'may' "; see also Bales v Parmeter (1935) 35 SR (NSW) 182 (at 188) per

Jordan CJ. Holgate-Mohammed v Duke has not been followed in Australia to the extent that Lord Diplock held that an arrest for the purpose of ***asking*** *questions was lawful: see Zaravinos v State of New South Wales (at [31] - [33]); Williams v The Queen (at 299) per Mason and Brennan JJ.*

The Assessment of Reasonable Suspicion Is A Matter For Objective Determination by the Court

State of New South Wales v Randall [2017] NSWCA 88

Basten JA at [13]:

> *." ...Most challenges to the validity of arrests turn on whether or not there were reasonable grounds for the suspicion, the grounds being a matter for assessment by the court."*

2.2 THE SECOND REQUIREMENT – THE ARRESTING OFFICER MUST BELIEVE THAT THE ARREST IS "REASONABLY NECESSARY" TO ACHIEVE ONE OF THE MATTERS ENUMERATED IN LEPRA s.99(1)(b)

The Requirement Re Matters Enumerated in s.99(1)(b) of LEPRA

A-G for the State of NSW v Bar-Mordecai [2009] NSWSC 396

This is the foundational case in NSW on the former s.99(3) [see now s.99(1)(b)]. Mr Bar-Mordecai had previously been declared a vexatious litigant by the Supreme Court. He was subsequently seeking to sue police for unlawful arrest, wrongful imprisonment, assault, negligence, and malicious prosecution and was thus seeking leave to file a Statement of Claim. The A-G for NSW opposed the granting of leave on the basis that the proposed cause of action was an abuse of process. The A-G's submission was rejected. In examining the merits of the cause of action, Smart AJ remarked upon the provisions of s.99(3) of LEPRA [see now s.99(1)(b)] at paragraphs [28]-[30] as follows:

> *"[28] In the second reading speech (Hansard, Legislative Assembly, 17 September 2002), the Attorney General said:*
>
> *"Part 8 of the Bill substantially re-enacts arrest provisions of the Crimes Act 1900 and codifies the common law. The provisions of Pt 8 reflect that arrest is a measure that is to be exercised only when necessary. An arrest should only be used as a last resort as it is the strongest measure that may be taken to secure an accused person's attendance at court. Clause 99, for example, clarifies that a police officer should not make an arrest unless it achieved the specified purposes, such as preventing the continuance of the offence ..."*
>
> *[29] The authors of Criminal Practice and Procedure NSW write at p 626,002:*
>
> > *"Before the enactment of s 99, it was said that the power of arrest for an offence should not be exercised unless it is necessary to ensure the accused's attendance before the court and only where a summons would not be appropriate: Fleet v District Court of NSW [1999] NSWCA 363;*

BC9906539; (1999) 6 Crim LN 82 [1061]; Director of Public Prosecutions v Carr (2002) 127 A Crim R 151; [2002] NSWSC 194; BC200201026; (2002) 9 Crim LN [1401]. See also Wilson v DPP [2002] NSWSC 935; BC200206024. Section 99(3) now confines the use of arrest for the purposes of taking proceedings for an offence to certain defined circumstances."

[30] I respectfully agree with the views expressed. I take the view that s 99(3) restricts the circumstances in which the power under s 99(2) may be exercised."

Williams v DPP (NSW) [2011] NSWSC 1085; 210 A Crim R 554

In this matter police attended a public hall for the purposes of arresting a person who was wanted for shoplifting. Police were aware or believed they were aware of that person's identity. They effected an arrest. Two others physically intervened and were subsequently charged with hinder police in execution of duty. At the Local Court a submission that there was no prima facie case was made as there was no evidence that police effected the arrest for one of the purposes set out in section 99(3) of LEPRA [see now s.99(1)(b)]. The magistrate was rejected the submission. On appeal to the Supreme Court, the magistrate was held to be in error. The decision of A-*G for the State of NSW v Bar-Mordecai [2009] NSWSC 396* was cited with approval at [23].

The relevant "purple passage" can be found at [25]-[26]. Note that these passages refer to the former s.99(3) of LEPRA but see now s.99(2)(b) of LEPRA:

"[25] As discussed the evidence indicates an intention on the part of the police at the time of arrest to take proceedings against Joel Williams in relation to the shoplifting offence, thus triggering the operation of s.99(3) of the LEPR Act . There was no evidence that the police had concerns in relation to any of the matters addressed in those sub paragraphs (a) to (f). In these circumstances, it would seem that the elements of a lawful arrest were not made out and therefore an element of the s 546C offences cannot be established at any subsequent hearing of the charge against the plaintiffs.

[26] Without falling into the error of construing too strictly the unedited extempore remarks of the Magistrate in a busy court (see Acuthan v Coates (1986) 6 NSWLR 472 at 479) the substance of his Honour Magistrate Linden's decision does demonstrate an error in law because his Honour found that the offence of hinder police under s.546C of the Crimes Act was proven against the plaintiffs without finding that the requirements of s.99(3) of the LEPR Act had been met in respect of the arrest of Joel Williams by Sergeant Reid. His Honour erred in law by failing to apply s.99(3)."

New South Wales v Smith [2017] NSWCA 194

McColl JA at [108]:

"The structure of s 99 is that subsections (1) and (2) confer a power of arrest upon a police officer, while subsection (3) operates as a constraint on those powers of arrest, prohibiting a police officer from arresting a person for a

particular purpose, namely, the purpose of taking proceedings against the person for an offence, unless the conditions stated in s 99(3) are satisfied."

Jankovic v DPP [2020] NSWCA 31

Barrett AJA commented on the requirement that the arresting officer must be satisfied that the arrest is reasonably necessary to give effect to one of the purposes enumerated in s.99(1)(b) of LEPRA in the following terms at [[60]-[62]:

"[60].....The section imports a requirement of proportionality into police officers' decision-making. Each of the reasons in s 99(1)(b)(i) to (ix) is expressed in terms of a particular outcome relevant to law enforcement. [18] The reasons are concerned with the risk that lack of constraint upon a person through arrest might frustrate the attainment of one or more of those outcomes and thereby prejudice law enforcement. In Robinson v State of New South Wales [2018] NSWCA 231 at [164], Basten JA said of the s 99(1)(b)(i) to (ix) reasons:

> *Those reasons provide, in effect, that the police functions of law enforcement would not be sufficiently carried out by steps short of arrest, which, with respect to the commencement of proceedings, would commonly mean the issue of a court attendance notice."*

"[61] The reasonably foreseeable consequences of continued freedom (either alone or in conjunction with other available measures) are to be compared with the obvious consequences of arrest. That comparison is to be made by reference to the whole of the circumstances prevailing at the time. The comparison will quantify the extent, if any, to which a continuation of freedom creates a risk that the attainment of any one or more of the stated law enforcement outcomes will be jeopardised. Only if, according to an objectively reasonable assessment, continuing freedom (with or without some other available measure) presents a significant risk to attainment of any of the law enforcement results will immediate arrest be a proportionate response to that risk and therefore substantially preferable and "reasonably necessary". The police officer is required to assess the situation at hand and make an evaluative judgment."

"[62] A vital component in the comparison is the alternatives to arrest at the disposal of the police officer. LEPRA, s 107 says that nothing in Pt 8 (which includes s 99) affects the power of a police officer either to commence proceedings for an offence otherwise than by arresting the person or to issue a warning, a caution or a penalty notice. Ch 4 Pt 2 of the Criminal Procedure Act 1986 (NSW) allows proceedings for numerous offences (including an offence of breaching an apprehended violence order) to be commenced by the issue of a court attendance notice. A range of measures obviously less drastic than arrest is thus identified as material to a police officer's decision to arrest without warrant."

The Arresting Officer Must Be Satisfied That the Arrest is "Reasonably Necessary" for Any One or More of the Bases Enumerated in s.99(1)(b) of LEPRA

It is important to note that the requirement here is the subjective state of mind of the officer at the time of the arrest and not the objective view of the Court at the time of the hearing.

State of NSW v Randall [2017] NSWCA 88

Basten JA:

> *[38]….With respect to the second requirement, the judge was not satisfied that the course of arresting the plaintiff was "reasonably necessary" in relation to that offending. However, the correct question with respect to the second requirement was not what the judge thought, but what the officer thought was reasonably necessary in the circumstances; s 99(1)(b) refers to the officer being "satisfied". The precondition to the exercise of the power is the officer's state of mind."*

The above passage was cited with approval in *DPP(NSW) v SB* [2020] NSWSC 734 at [68].

***Lule v State of New South Wales* [2018] NSWCA 125**

Beazley P at [2]:

> *"[2]….Section 99(1)(b) is concerned with a state of satisfaction that the police officer must have, namely, that the "arrest is reasonably necessary" for one or more of the reasons specified in para (b). The police officer's state of satisfaction is a subjective matter and must exist as a matter of fact at the time of the arrest."*

The above passage was cited with approval in *DPP(NSW) v SB* [2020] NSWSC 734 at [80] and *Jankovic v DPP* [2020] NSWCA 31 at [63].

CASE LAW FROM OTHER JURISDICTIONS WITH SIMILAR LEGISLATION TO SECTION 99 OF LEPRA

Queensland Case Law

Of interest is that many of the bases for arrest as outlined in s.99(1)(b) of LEPRA can also be found in section 365 of the *Police Powers and Responsibilities Act 2000 (Qld)*. The following case law from Queensland may be of assistance to practitioners in NSW.

Courtney v Thomson [2007] QCA 49; 170 A Crim R 233

Raymond Courtney was observed by police to be holding up some signs adjacent a busy road. The signs were said to be offensive to Queensland police, the Queensland Crime and Misconduct Commission, and others. It was held that the actions of Mr Courtney

were designed to attract the attention of motorists, and this caused at least one motorist to swerve. Sergeant Thomson arrested Mr Courtney for public nuisance at a later time, namely when he had packed up his signs and was walking in the direction of his home. Mr Courtney was searched and as a result was charged over the possession of a knife. He was also charged with obstructing police as he allegedly pulled away from police during the course of a pat down search. The power to search Mr Courtney was contingent upon him being "lawfully arrested."

The prosecution failed to call any evidence that the police officer held any relevant reasonable suspicion, nor did they call any evidence to demonstrate that any of the bases for arrest under section 365 [see s.99(1)(b) of LEPRA in NSW] had been satisfied. The Queensland Court of Appeal unanimously quashed Mr Courtney's conviction for obstruct police.

de Jersey CJ stated at [13]:

> *"[13] There was however no direct evidence from Sgt Thomson of his having formed the requisite "reasonable suspicion" in arresting the applicant, or evidence bearing on whether an arrest was "reasonably necessary" in terms of s 365 (then s 198) of the Police Powers and Responsibilities Act. To establish Sgt Thomson's lawful entitlement to carry out the search which led to the obstruction, the prosecution needed to establish the lawfulness of the preceding arrest, and that depended on satisfying the requirements of s 365. That was not done."*

Jerrard JA held at [35]:

> *"[35] The important points are whether Sergeant Thomson reasonably suspected Mr Courtney had committed an offence when he arrested him, and whether, for example, he made the arrest to prevent the offence being continued. If Sergeant Thomson did so reasonably suspect, and make an arrest for that reason, the arrest would not be rendered unlawful because the charge on which Mr Courtney was arrested was later dismissed by a court. The lawfulness of the arrest does not depend on whether Mr Courtney was proven to have committed an offence, but whether Sergeant Thomson reasonably suspected Mr Courtney had. As to that, as described, the prosecution led no evidence."*

Holmes JA held at [43]:

> *[43] However, I would go a little further than the Chief Justice: not only did the prosecution fail to establish those matters, but the evidence of Sergeant Thomson strongly suggested that none of the reasons for arrest in s 365(1) existed. Sergeant Thomson's account was that he and his partner had seen the applicant with his signs, causing some difficulties with the traffic flow at the intersection of Finucane Road and Old Cleveland Road. They did not stop, because they were on their way to a more important job, and Sergeant Thomson knew Mr Courtney and where he could find him to follow the matter up. When they returned about an hour later, they saw the applicant walking along the footpath carrying his signs: he was walking in the direction of his*

residence. According to Sergeant Thomson, having located Mr Courtney, he "advised him he was under arrest for public nuisance".

R v Hardy [2010] QCA 28

Pamela Hardy was required to undergo a breath test by Queensland police. After failing this test she was informed that she was required to accompany police to a police station. She demanded that "a female police officer be present at the scene" but was told that there were no female police officers working that night. Ms Hardy then stated that she would not go to the police station. She was told that she would be arrested if she did not go with police. The male arresting officer took Ms Hardy by the hand. She pulled her hand away. The officer then handcuffed her because (according to his evidence) there was no need for Ms Hardy "to bring [up] that issue about getting a female officer" and it "gave him a clear indication that something is likely to happen" namely she was "going to be in a position where she is going to basically chuck a tantrum."

As a result of events that allegedly followed shortly after the above circumstances, Pamela Hardy was charged with three counts of seriously assaulting a police officer.

The matter went to trial before a jury. The prosecution relied upon the evidence of police that Ms Hardy had been arrested for her own safety and the safety of police [in NSW see LEPRA s.99(1)(b)(viii)]. The trial Judge's summing up was held to be defective in that it failed to specify the basis for arrest as found in the relevant section [equivalent to s.99(1)(b) of LEPRA].

Muir JA held at [34] (Fraser JA, Chesterman JA, concurring):

> *"[34] Having regard to the prosecution and defence cases, the primary judge was required to direct the jury on the findings of fact which, if made, would result in the conclusion that the arrest was lawful, or unlawful, as the case may be. He directed that it was lawful to arrest where there was a reasonable suspicion that "the adult has committed or is committing an offence if it is 'reasonably necessary' for one or more of a number of reasons which includes 'to preserve the safety or welfare of any person including the person arrested'". The direction, given with respect to s 365(1)(g) of the Police Powers and Responsibilities Act 2000 (Qld), left open the possibility of a finding that a lawful arrest had occurred for a reason not relied on by the prosecution, not addressed on by defence counsel, or not referred to in the summing-up. The summing-up failed to mention the basis for the arrest relied on by the prosecution."*

This case is authority for the proposition that the prosecution is required to particularise the specific basis relied upon for arrest. Writing to police seeking such particulars may, at best result in withdrawal of charges. It might also result in police having time to reflect on matters they wish to say in evidence (and highly unlikely included in their statements). It may alert the police prosecutor to a deficiency in the evidence of which operational police remain blissfully unaware.

One way of dealing with these difficulties is waiting until the prosecution has closed their case. You are entitled to seek particulars up until and including the close of the

prosecution case - see *Johnson v Miller* (1937) 59 CLR 467 especially Dixon J at 490 and Evatt J at 497-498. This may help fashion submissions either as to the absence of a prima facie case, or possibly assisting in shaping final submissions.

Victorian Case Law

De Moor v Davies [1999] VSC 416

This case involved a consideration of s.458(1)(a) of the Crimes Act 1958 (Vic). This subsection relevantly outlines a number of bases for arrest namely:

> *(i) to ensure the attendance of the offender before a court of competent jurisdiction;*
> *ii) to preserve public order;*
> *(iii) to prevented continuation or repetition of the offence or the commission of a further offence; or*
> *(iv) for the safety or welfare of members of the public or of the offender;....*

The facts of the case involved a citizen's arrest. The manager of a hotel chased and apprehended a patron who had used an EFTPOS card in committing some dishonesty offences. In considering the legislation in this case Warren J stated at [13]:

> *"In summary, the provision empowers a citizen's arrest at any time of any person so as to deliver that person to the police where the apprehending person finds the other person committing any offence and where the apprehending person believes on reasonable grounds that the apprehension is necessary for the specified reasons. For present purposes those reasons include ensuring the appearance of the offender at court. Hence, s.458(1) requires a two fold test to be satisfied before the liberty of the individual can be infringed by a member of the public."*

The "two-fold test" referred to in the above passage is also relevantly applicable to police. The author's view is that the NSW legislation also requires a two-fold test. This point is effectively in accordance with the decided cases in NSW, though not expressed in those precise terms.

United Kingdom Case Law

The equivalent legislation in the United Kingdom is found in section 24 of the *Police and Criminal Evidence Act 1984*. This legislation is often referred to by its acronym, "PACE". The leading authorities concerning this section are *Regina v Bowden* [2002] EWCA 1279, 2 All ER (D) 427 (May), and *Regina v Self* [1992] 3 All ER 476. However, due to material differences in the legislation, and also material differences in the general case law on arrest, it is the author's view that these authorities are not really of any assistance to practitioners in NSW. However, it may prove worthwhile to monitor the development of UK case law in the event that something of assistance does emerge in the future.

2.3 THE THIRD REQUIREMENT – THE ARREST MUST BE THE SUBJECT OF A LAWFUL ANNOUNCEMENT(SAVE FOR TWO EXCEPTIONS).

The two exceptions for a requirement of lawful announcement are found in the case law. The first exception is if the person arrested must have known the reason for their arrest. The second exception is if the person arrested makes it in practical terms impossible for police to inform them of the reason for the arrest – e.g. by running away. With respect to this second issue, note the words of

Preceding Common Law on Lawful Announcement

The common law that preceded LEPRA provides useful guidance on this issue. The foundational case is *Christie v Leachinsky* [1947] AC 573, 1 All ER 567.

***Christie v Leachinsky* [1947] AC 573, 1 All ER 567**

Viscount Simon at 587-588:

> ***(1)*** *If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words a citizen is entitled to know on what charge or on suspicion of what crime he is seized.*
>
> *(2) If the citizen is not so informed but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment.*
>
> *(3) The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.*
>
> *(4) The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, prima facie, entitled to his freedom and is only required to submit to restraints on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed.*
>
> *(5) The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, eg, by immediate counter-attack or by running away. There may well be other exceptions to the general rule in addition to those I have indicated, and the above propositions are not intended to constitute a formal or complete code, but to indicate the general principles of our law on a very important matter. These principles equally apply to a private person who arrests on suspicion. If a policeman who entertained a reasonable suspicion that X has committed a felony were at liberty*

to arrest him and march him off to a police station without giving any explanation of why he was doing this, the prima facie right of personal liberty would be gravely infringed."

Another worthy passage can be found in the judgment of Lord Simonds at 591:

> *"Is citizen A bound to submit unresistingly to arrest by citizen B in ignorance of the charge made against him? I think, my Lords, that cannot be the law of England. Blind, unquestioning obedience is the law of tyrants and slaves: it does not yet flourish on English soil."*

The above decision has been cited with approval in cases decided in New South Wales including *Adams v Kennedy* [2000] NSWCA 152; 49 NSWLR 78, *State of NSW v Delly* [2007] NSWCA 303; 70 NSWLR 125; 177 A Crim R 538 and *Johnstone v State of New South Wales* [2010] NSWCA 70.

The arrest does not become unlawful because the person is charged with a different offence, or no offence at all - *Wiltshire v Barrett* [1966] 1 QB 312, *Weekes* v *Lahood* NSWSC 31 July 1992 unrep. BC 9201717.

Case Law on Lawful Announcement of Arrest - New South Wales

Poidevin v Semaan [2013] NSWCA 334, 85 NSWLR 313, 231 A Crim R 373

The facts in this matter were that police were called to attend a "domestic" at a block of apartments in Auburn. Upon speaking to the complainant, police were informed that the alleged offender may have gone next door. Police conducted enquires, and in doing so observed a group of men allegedly smoking cannabis in the grounds of the apartment block next door. A locked gate prevented police from entering the premises. Police remained behind the locked gate for a period of about 5 minutes and continued to observe the men before a resident came along and opened it. The men fled - some of them were never apprehended. Richard Semaan walked up to the front of the flats. He was spoken to by a police officer who asked him what he was doing in the block of flats. He was asked for identification, which he produced. Senior Constable Hockey asked Mr Semaan to wait whilst checks were conducted on him. Mr Semaan waited as Senior Constable Hockey walked away to use the police radio.

At this stage Sergeant Poidevin and another officer approached Mr Semaan. The following exchange took place:

Mr Semaan shouted:

> *"What the fuck's happening? I want to go home."*

Sergeant Poidevin responded:

> *"Wait here until we have finished our checks, but it looks like at this stage you will be getting done for trespass."*

Mr Semaan responded:

> *"Oh come on get fucked. We will see about this, you wait and see, you're fucked now."*

Mr Semaan reached for his phone and commenced dialling. Sergeant Poidevin urged Mr Semaan not to use the phone and to give him the phone. Mr Semaan refused. Sergeant Poidevin attempted to grab the phone. Mr Semaan twisted away and raised his forearm. In the result both men went to the ground. Mr Semaan required an ambulance as a result of an injury to his leg. Police did not, at any stage, inform Mr Semaan why he was restrained. He was charged with hinder police.

The Magistrate found that Sergeant Poidevin was not trying to arrest Mr Semaan but was trying to seize the phone due to a reasonable apprehension of an imminent breach of the peace.

Mr Semaan appealed to the Common Law Division of the Supreme Court. The matter was heard by Rothman J - see *Semaan v Poidevin* [2013] NWSWSC 226. His Honour Rothman J found at [94] and [95] that the evidence was not capable of sustaining the finding of fact by the Magistrate that the police officer reasonably apprehended an imminent breach of the peace. His Honour also found at [104] that the prosecution in the Local Court made no attempt to prove that it was not reasonably practicable for the requirements of s.201 to be complied with at or before the time the police officer attempted to seize Mr Semaan's phone. His Honour held at [108] and [109] that the prosecution must provide evidence that it was not reasonably practicable to comply with the requirements of s.201 in order to prove that the officer was acting in the execution of duty.

The decision of Rothman J in the Common Law Division was appealed to the Court of Appeal. The parties agreed that in circumstances where it was not reasonably practicable to comply with the requirements of s.201, acts done by police during the period where it was not reasonably practicable were lawful at that time. The Crown Advocate argued that in the present matter the act of hindrance was completed prior to the point that it was reasonably practicable for Sergeant Poidevin to make the relevant announcement, and thus the offence was complete. The Court of Appeal accepted this argument and the decision of Rothman J was overturned.

The Court of Appeal rejected the argument that the prosecution must lead some evidence as to the police officer turning his or mind to the question of whether it was reasonably practicable to make the relevant announcement under s.201 when relying on an argument to the effect that it was not reasonably practicable.

Leeming JA at [25]:

> *"The time for compliance with s 201(1) depends upon whether or not it is practicable to do so before or at the time of exercising the power, or only at some later time. The explicit premise of the section is that there will be some occasions when a compulsive power referred to in s 201(3) may be exercised without being preceded or accompanied by the provision of information in accordance with s 201(1). In those circumstances, there is a lawful exercise of power or, to use the language of s 546C, the lawful execution by a police officer of his or her duty, notwithstanding the absence at that time of the information required by s 201(1). Counsel for the respondent accepted that in circumstances where it was not practicable to provide the s 201(1) information, the offence was committed at the time of the hindering or resistance."*

Leeming JA stated at [28]:

> *"...Section 201 is an important safeguard to the exercise of coercive power. But if in fact it is not practicable to explain the basis of the officer's authority and the reason for the exercise of power, then there is no sound reason to imply as an additional incident of his or her duty under s 201 (and therefore as an additional element of the offence created by s 546C) that the officer subjectively formed that (uncommunicated) opinion.*

It must be taken from the decision of the NSW Court of Appeal that evidence to the effect that it was not reasonably practicable to comply with the requirements of s.201 at a given point in time is something that can be inferred from the primary facts in evidence pertaining to that point in time.

The NSW Court of Appeal at [34] also rejected Rothman J's reasoning that it was not open to the Magistrate to find that the police officer reasonably apprehended an imminent breach of the peace.

It should be noted that both before Rothman J in the Common Law Division and in the NSW Court of Appeal the Court in each case was not assisted by UK authority concerning similar UK legislation as referred to later in this paper. The parties were at the time unaware of such authority and failed to bring it to the attention of the Court.

The author is now of the view that relevant UK authority may well be of influence in the development of the case law in New South Wales.

State of New South Wales v Randall [2017] NSWCA 88

Basten JA at [10]-12]:

> *"[10]....., s 201 (as then in force) required that a person arrested be informed of the reason for the arrest."*
>
> ….
>
> *"[12] However, the common law requirement contained two qualifications. First, as explained by Viscount Simon in Christie v Leachinsky, the obligation to inform a person arrested of the reason for the arrest "naturally does not exist if circumstances are such that he must know the general nature of the alleged offence for which he is detained." [8] Viscount Simon further stated: [9]*
>
> > *"The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, eg, by immediate counter-attack or by running away."*
>
> *The second qualification, though not the first, applies with respect to an arrest pursuant to s 201(2). Whether the first still operates was not an issue addressed in this case."*

CASE LAW FROM OTHER JURSIDCTIONS WITH SIMILAR LEGISLATION RE LAWFUL ANOUNCEMENT

United Kingdom Case Law

The equivalent provision to section 202 of LEPRA in the United Kingdom is section 28 of the *Police and Criminal Evidence Act* 1984. The section is as follows:

> *(1)Subject to subsection (5) below, where a person is arrested, otherwise than by being informed that he is under arrest, the arrest is not lawful unless the person arrested is informed that he is under arrest as soon as is practicable after his arrest.*
>
> *(2)Where a person is arrested by a constable, subsection (1) above applies regardless of whether the fact of the arrest is obvious.*
>
> *(3)Subject to subsection (5) below, no arrest is lawful unless the person arrested is informed of the ground for the arrest at the time of, or as soon as is practicable after, the arrest.*
>
> *(4)Where a person is arrested by a constable, subsection (3) above applies regardless of whether the ground for the arrest is obvious.*
>
> *(5)Nothing in this section is to be taken to require a person to be informed—*
>
> > *(a)that he is under arrest; or*
> >
> > *(b)of the ground for the arrest,*
>
> *if it was not reasonably practicable for him to be so informed by reason of his having escaped from arrest before the information could be given.*

DPP v Hawkins [1988] 3 All ER 673

This case is the foundational authority in the UK on the statutory equivalent to s.202 of LEPRA in NSW. Hawkins was arrested for common assault, three counts of assault police and the UK equivalent of offensive language. He was not informed as to the reasons for his arrest at the time he was arrested. It was found as a fact that it was not reasonably practicable to do so as he had put up a struggle and assaulted police. It was also found as a fact that it remained impracticable whilst he was being transported to the police station. It was found that when it became practical to inform Hawkins of the reason for his arrest it was held that he was not given the correct reason - either he was given the wrong reason or no reason at all.

It was argued on behalf of Hawkins that police were not acting in the execution of duty with respect to the charges of assault police due to the failure of the police to inform Hawkins of the true reason for his arrest, either at the time of his arrest, or at any time afterwards.

Parker LJ stated at 674-675:

> *"When a police officer makes an arrest which he is lawfully entitled to make but is unable at the time to state the ground because it is impracticable to do so, it*

is plain on the wording of the section that it is his duty to maintain the arrest until it is practicable to inform the arrested person of that ground. If, when it does become practicable, he fails to do so, then the arrest is unlawful, but that does not mean that acts, which were previously done and were, when done, done in the execution of duty, become retrospectively, acts, which were not done in the execution of duty. The 1984 Act certainly does not say so and contentions founded upon other consequences of an arrest being unlawful do not assist."

"In my judgment, the position is clear. It is impossible to contend that an officer who makes an arrest which he could lawfully make but is prevented by immediate violence from stating the ground of the arrest is not under a duty to state the ground of arrest as soon as he can. It is also impossible to contend that he is not under a duty to maintain the arrest until the moment arrives. If, when it does arrive, he then fails to carry out his duty to state the ground I am quite unable to see that such failure can have any effect on what has gone before unless specific provision is made. Here it is not."

Simon Brown J stated at 676 stated:

"Forcefully and attractively as this argument was advanced I unhesitatingly reject it. Its central fallacy seems to me to lie in the unwarranted assumption at the Christie v Leachinsky principle can properly be extended to determine retrospectively the legal character of the conduct in question, i.e. to legalise by reference to subsequent events what at the time was apparently a criminal assault upon a police officer attempting to execute his duty. I say "apparently a criminal assault" because there can be no doubt here but that the police officer was entitled to approach the respondent with a view to arresting him (it was common ground, indeed, that an assault on the officer at that stage would have been unlawful irrespective of what thereafter occurred), then to arrest him, then to restrain him. Indeed his duty required him to take such actions. I recognise of course that by virtue of s.28(3) the arrest ultimately proved to be unlawful. But that is not to say that all the earlier steps taken during the course of events leading to that ultimate position must themselves be regarded as unlawful. Still less so does it follow that conduct on the part of the police officer which at the time was not only permitted but positively required of him in the execution of his duty can become retrospectively invalidated by reference to some later failure (a failure which, I may add could well have been that of some officer other than himself)."

"The answer to the question posed in this appeal is, I have no doubt, this. Section 28(3) plainly dictates the circumstances in which an arrest may be found to have been unlawful and it determines decisively the consequences following the time at which that becomes apparent. In my judgment, however, it says nothing in respect of the intermediate period during which it is not practicable to inform the person arrested of the ground for his arrest. Least of all does it supply the answer to the question, hitherto unconsidered by the authorities, whether a police officer is acting in the execution of his duty during that intermediate period. That is a question which I regard as logically separate and apart from the eventual lawfulness or otherwise of the arrest on which he is engaged. Unless I were driven inexorably by the statute to accept the

respondent's argument I would decline to do so: it would certainly produce the most bizarre and unwelcome results. I fell no such compulsion. In the result I concur with Parker LJ's conclusion that this appeal must be allowed."

Lewis v Chief Constable of the South Wales Constabulary **[1991] 1 All ER 206**

Again, this case deals with the UK equivalent of section 202 of LEPRA.

Miss Lewis and Mrs Evans were arrested due to a reasonable suspicion of burglary. They were not informed as to the reason for their arrest at the point when they were first arrested. They were taken to the police station. One was told the reason for her arrest after she had been detained for 10 minutes, the other after 23 minutes. Both sued seeking damages for unlawful arrest and wrongful imprisonment. Damages were sought for the whole of the period of their detention on the basis that the whole of the period was unlawful due to the delay in being informed of the reason for their arrest. The Judge at first instance only awarded damages for the periods of 10 and 23 minutes respectively. Both appealed, maintaining that the whole of their period of detention was unlawful.

The appeal was dismissed. Balcombe LJ stated at 210-211:

"Simply as a matter of language used, arrest as I have already said, is defined as a continuing act. It starts with the action of taking a person into custody and, undoubtedly, under s.28(3) at that moment the person arrested should be informed of the ground of the arrest, and, if that is not so, that arrest, that taking in to custody, is unlawful. But there is nothing in the section which providers what is the effect of the arrested person subsequently being given the reason for the arrest. Now, clearly, a subsequent giving of the reasons cannot retrospectively make the period between the moment of arrest and the time for giving the reasons lawful, and no one suggest that it did. The question, which this court has to decide, which is precisely the same as the court had to decide in R v Kulynycz [1907] 3 All ER 881, [1971 1 QB 367, is this. What is the effect of telling a person, who was initially arrested without being told of the reasons for his arrest, those reasons at a later time? R v Kulnycz held that thereafter his custody became lawful and, in so far as I have already said that arrest is a continuing act and is the process of being kept in custody or deprived of liberty, it seems to me that there is nothing inconsistent with the wording of s.28(3) to say that from the moment (when reasons are given) the arrest becomes lawful, or the continued deprivation of liberty becomes lawful, or the continued custody becomes lawful. Indeed, the contrary seems to me to be not merely a surprising, but an almost ridiculous, contention, that what the police officer should do in those circumstances is to tell the person concerned, "You are free to go", and, the instant he say that, should place his hands immediately on that person's shoulder and say, "Now you are under arrest and you are arrested for", giving the reasons. It seems to me that Parliament cannot have intended that such a farce had to be gone through, and it is sufficient if the police officer gives the reasons and then from that moment onwards the arrest is lawful."

2.4 THE FOURTH REQUIREMENT – ARREST MUST BE FOR THE PURPOSES OF COMMENCING PROCEEDINGS

Section 99(3) of LEPRA requires that a police officer to take the person so arrested "…as soon as reasonably practicable...before an authorised officer to be dealt with according to law." This in effect means that the person must be charged and a determination made on the question of bail. The leading authority in this regard is *NSW v Robinson* [2019] HCA 46; 374 ALR 687.

***NSW v Robinson* [2019] HCA 46; 374 ALR 687**

Bell, Gaegler, Gordon and Edelman JJ at [62]:

> *"This appeal concerns whether a police officer has the power to arrest a person, without warrant, under s.99 of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) ("LEPRA") when, at the time of the arrest, the officer had not formed the intention to charge the arrested person. The answer is "no"."*

At [93]:

> *"Police officers have, in New South Wales, a power to arrest and detain a person where they suspect on reasonable grounds that an offence has been committed or is being committed, and that the person has committed or is committing the offence, and the arrest is reasonably necessary for any one or more of specified reasons. But that power is exercisable only for the purpose of taking the person before a magistrate (or other authorised officer) to be dealt with according to law to answer a charge for that offence. Arrest cannot be justified where it is merely for the purpose of questioning."*

At [109]:

> *"To comply with the requirement in s 99(3) immediately upon arrest, a police officer must at the time of arrest have an intention to take the person, as soon as is reasonably practicable, before an authorised officer to be dealt with according to law to answer a charge for that offence. If there is no intention to comply with the requirement in s 99(3), the arrest is unlawful. And a requirement for the police officer to have an intention to bring a person before an authorised officer means, as a matter of substance, a requirement to have an intention to charge that person."*

For further reading on this issue see *Foster v The Queen* [1993] HCA 80; 65 A Crim R 112, *R v Dungay* [2001] NSWCCA 443; 126 A Crim R 216, and *Zaravinos v State of New South Wales* [2004] NSWCA 320; 62 NSWLR 58; 151 A Crim R 24.

2.5 THE FIFTH REQUIREMENT - THE COMMON LAW PRINCIPLE OF ARREST AS THE MEASURE OF LAST RESORT

There are numerous statements found in the common law to the effect that arrest is the measure of last resort. Relevant authority to this effect in NSW includes the following two significant decisions often cited in support of this proposition:

Fleet v District Court **[1999] NSWCA 363**

> *"[73] Lawfulness of arrest is one thing, appropriateness is another. Nevertheless, it is difficult to understand how it could have been thought appropriate to exercise any available power of arrest in the present circumstances, where Mr Dymond and the third opponent knew the claimant's name and residential address and where there was nothing to suggest that the claimant was at risk of departing. Deane J pointed out in Donaldson v Broomby [1982] FCA 58; (1982) 60 FLR 124 at 126 that:*
>
> > *Arrest is the deprivation of freedom. The ultimate instrument of arrest is force. The customary companions of arrest are ignominy and fear. A police power of arbitrary arrest is a negation of any true right to personal liberty. A police practice of arbitrary arrest is a hallmark of tyranny. It is plainly of critical importance to the existence and protection of personal liberty under the law that the circumstances in which a police officer may, without judicial warrant, arrest or detain an individual should be strictly confined, plainly stated and readily ascertainable."*
>
> *"[74] There have been many judicial statements about the inappropriateness of resort to the power of arrest (by warrant or otherwise) when the issue and service of a summons would suffice adequately (O'Brien v Brabner (1885) 49 JP 227, R v Thompson [1909] 2 KB 614 at 617, [Dumbrell v Roberts 1944] 1 All ER 326 at 332, Chung v Elder [1991] FCA 369; (1991) 31 FCR 43). Some are in a legal context that differs from the present. (Section 352 of the Crimes Act 1900 is different in some respects from the legal regime in the Australian Capital Territory considered in Donaldson.) Nevertheless, it remains appropriate that those vested with extraordinary powers of arrest should be reminded of the need to consider whether they should be exercised in a particular case. The arrest in this case seems to have an element of the arbitrary about it, which brings to mind the tyranny Deane J warned against. Such cases are harmful to the free society we all want to preserve."*

DPP v Carr **[2002] NSWSC 194; 127 A Crim R 151 per Smart J**

> *"[35] This Court in its appellate and trial divisions has been emphasising for many years that it is inappropriate for powers of arrest to be used for minor offences where the defendant's name and address are known, there is no risk of him departing and there is no reason to believe that a summons will not be effective. Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear. The consequences of the employment of the*

power of arrest unnecessarily and inappropriately and instead of issuing a summons are often anger on the part of the person arrested and an escalation of the situation leading to the person resisting arrest and assaulting the police. The pattern in this case is all too familiar. It is time that the statements of this Court were heeded."

***DPP (NSW) v SB* [2020] NSWSC 734**

Walton J stated at [50]-[55]:

"[50] First, arrest is onerous and is a narrowly considered power. As Donaldson v Broomby (1982) 60 FLR 124 at 126 per Deane J (with whom Kelly J agreed) stated, it is:

> *Arrest is the deprivation of freedom. The ultimate instrument of arrest is force. The customary companions of arrest are ignominy and fear. A police power of arbitrary arrest is a negation of any true right to personal liberty. A police practice of arbitrary arrest is a hallmark of tyranny. It is plainly of critical importance to the existence and protection of personal liberty under the law that the circumstances in which a police officer may, without judicial warrant, arrest or detain an individual should be strictly confined, plainly stated and readily ascertainable. Where the Parliament has legislated so as to define those circumstances, neither legal principle nor considerations of public interest commend or support a search among the shadows of earlier subordinate legislation for the means of evading the constraints upon the interference with the liberty of the subject which the Parliament has imposed."*

"[51] Second, and consistently, arrest is a measure of last resort. Arrest is fundamentally discretionary and the exercise of a conscious discretion is necessary: see Zaravinos v State of New South Wales; State of New South Wales v Zaravinos (2004) 62 NSWLR 58; [2004] NSWCA 320 ("Zaravinos") at [24]; Fleet v District Court of NSW [1999] NSWCA 363 ("Fleet v District Court") at [74]."

":[52] Third, arrest is inappropriate for minor offences where a summons (Court Attendance Notice) would be appropriate: Director of Public Prosecutions v Carr (2002) 127 A Crim R 151; [2002] NSWSC 194 ("DPP v Carr") at [35]."

"[53] Fourth, there is a legal immunity from arrest until the conditions governing its exercise are fulfilled: Webster & Daff v McIntosh (1980) 32 ALR 603 at 607 per Brennan J (Deane and Kelly JJ agreeing)."

"[54] Fifth, arrest is principally to bring a person before a justice: Robinson v NSW per McColl JA at [65]-[66] and Basten JA at [154]."

"[55} Sixth, the principle of legality has application in respect to interpreting powers of arrest: see Northern Australian Aboriginal Justice Agency v Northern Territory (2015) 256 CLR 569; [2015] HCA 41 at [11] (per French CJ, Kiefel and Bell JJ.".

LEPRA Retains the Principle of Arrest as the Measure of Last Resort

The intention of the Parliament to preserve the common law principle of arrest as the measure of last resort is made plain by the Second Reading Speech wherein the Attorney-General stated (Legislative Assembly Hansard 17 September 2002):

> *"Part 8 of the Bill substantially re-enacts arrest provisions of the Crimes Act 1900 and codifies the common law. The provisions of part 8 reflect that it is a measure that is only to be exercised when it is necessary. An arrest should only be used as a last resort as it is the strongest measure that may be taken to secure an accused person's attendance at court. Clause 99, for example, clarifies that a police officer should not make an arrest unless it achieves the specified purpose, such as preventing a continuance of the offence."*

Note that the Attorney-General is wrong about codifying the common law – s.99(1)(b) substantially changes the common law as an arrest in circumstances where the police officer did not form the view that the arrest was reasonably necessary to achieve one of the purposes in s.99(1)(b) is now unlawful.

3. THE ROLE OF *DPP v CARR* [2002] NSWSC 194; 127 A Crim R 151 IN THE WORLD AFTER LEPRA

What is the decision in *DPP v Carr* [2002] NSWSC 194; 127 A Crim R 151?

This case introduced the notion that an arrest, though lawful, may amount to an impropriety for the purposes of s.138 of the Evidence Act if the arresting officer failed to pay heed to the common law principle that arrest is the measure of last resort; and that upon establishing such an impropriety it was open to a magistrate to exclude evidence of subsequent offences such as resist arrest and assault police, on the grounds that the evidence of these subsequent offences was "improperly obtained".

The facts in Carr were that a police officer was patrolling a street, when a rock struck the police vehicle. The officer stopped the vehicle and asked Carr if he could assist as to who threw the rock. (Wrongly) believing himself to be a suspect, Carr commenced to use offensive language towards police. An arrest for offensive language was announced, and Carr was taken by the arm. Carr allegedly pushed the officer, broke free and commenced to run away. The officer ran after Carr for 25 metres, and crash tackled him to the ground. Carr was charged with offensive language, resist arrest and assault police. As a result of certain alleged utterances at the police station, charges of intimidate were added.

Cross-examination on the voir dire showed that Carr's identity and long term residence of the town was known to the police officer, and that Carr's address was known or could be easily ascertained. The officer had not considered a summons. He arrested him as it was "far quicker" than issuing a summons at a later time and attempting to serve it. The officer had not read the NSW Police Service handbook, but was aware that it stated that arrest was a measure of last resort.

The evidence of assault and resist police as well as intimidate police was not admitted by the magistrate pursuant to s.138 of the Evidence Act. The impropriety relied upon

was the failure of the police officer to observe the common law principle that arrest should only be used as the measure of last resort.

The Interaction Between *DPP v Carr* and s.99 of LEPRA – Subsequent Offences Containing an Element of "Execution of Duty".

DPP v Carr was a case determined on the law as it existed prior to the introduction of LEPRA.

s.99(1) of LEPRA states that a police officer *MAY* arrest a person without warrant if they suspect on reasonable grounds that the person is committing or has committed an offence and they are further satisfied that it is reasonably necessary to effect the arrest in order to achieve one of the purposes in s.99(1)(b)(i)-(ix) inclusive. If these pre-conditions are not fulfilled the arrest is UNLAWFUL. In the event of an unlawful arrest, police are not acting in the execution of their duty. Thus an element may be missing in an offence of resisting arrest in execution of duty, hindering police in the execution of their duty, or assault police in execution of duty.

It is clear from the wording of the section that arrest is not mandatory (note "may"). There is still a discretion not to arrest, and the common law remains. In practical terms, there may be instances of an offender continuing to commit a minor offence. In the author's humble opinion it is open to seek to have evidence excluded on the voir dire if the arrest is for a minor matter and it is ill-advised in the circumstances – a common example in the ALS context would be a person continuing to use offensive language (often with only the police seeming to hear and / or taking offence). Other examples of minor matters for which arrest would amount to an impropriety – e.g. a person who continues to leave their car in a no parking zone despite being requested to move it; or a person who continues to ash their cigarette into the gutter despite having been issued with an infringement notice and told to stop.

An interesting and quite useful judicial pronouncement on "continuing public order offences" and the inappropriateness of arrest can be found in *DPP v Carr* at [25] where Smart J states:

> *"[25] Mr Carr discounted the DPP's use of the phrase "continuing public order offence in a public place" and the contention that where this occurred the exercise of the power of arrest was proper. Mr Carr pointed to* ***Lake v Dobson*** *(NSWCA, 19 December 1980, Petty Session Review 2221) and submitted that it revealed conduct capable of falling within the description "continuing public order offence in a public place". The defendants were arrested and charged with offensive behaviour in a public place. They were sunbaking in the nude at Thompson's Bay, a narrow bay with a small beach and recreation reserve to the north of Coogee Beach. Samuels JA, with whom Moffitt P and Hope JA agreed, while appreciating that "this type of offence is capable of constituting, as it were, a continuing offence commented:*
>
> > *"… it can scarcely be regarded as ranking high in the criminal calendar. [Arrest] is a means of setting the criminal process in train which should be reserved for situations where it is clearly necessary, and should not be employed where the issue of a summons will suffice." "*

Note that the *Lake v Dobson* is reported in Petty Sessions Review as referred to above. This is a series of law reports that has long been out of print. However, a set of these law reports is available in the Dubbo ALS office.

The Interaction Between *DPP v Carr* and s.99 of LEPRA – Subsequent Offences NOT Containing an Element of "Execution of Duty".

A subsequent offence may not involve an element of execution of duty. A common example might be a person who uses offensive language towards police as a result of protesting improper police conduct that is nonetheless strictly within s.99(1) – e.g. "This is fucking stupid to arrest me, you dog arse cunts!! You poxy mongrel cunts are fucked!" The charge of offensive language would be defended on the basis of seeking an exclusion of the evidence pursuant to s.138 on the basis that the evidence was improperly obtained in consequence of the arrest. As there is no "execution of duty" element for offensive language, it is necessary to rely upon discretionary exclusion on the voir dire. Another example might be a person found in possession of a small quantity of cannabis after an ill-advised arrest for a minor matter.

***DPP v AM* [2006] NSWSC 348; 161 A Crim R 219**

Since *DPP v Carr* was first handed down, a line of contradictory authorities emerged contemplating exactly what it all might mean. *DPP v AM* is the last substantial case in the line of authorities. Essentially, it puts *Carr* back to where it started (allowing for the fact that *DPP v AM* is also a pre-LEPRA case). It is worth reading this case and the cases cited therein in order to gain a deeper understanding of the debate.

4. ASSULTING OR RESISTING POLICE IN EXECUTION OF THEIR DUTY

Use of Force To Arrest - Any Force Used Must Be Reasonable

LEPRA s. 230 authorises police to use reasonable force in exercising a function under LEPRA.

LEPRA s.231 authorises police to use reasonable force in exercising a power of arrest. This reflects the preceding common law.

Use of Force To Arrest – Not Required As a Matter of Law

It is clear from the decided cases that the use of force is not required as a matter of law, to effect an arrest. The following decisions are instructive:

In ***Alderson v Booth* [1969] 2 QB 216** Lord Parker CJ stated at 220-221:

> *"There are a number of cases, both ancient and modern, as to what constitutes an arrest, and whereas there was a time when it was held that there could be no lawful arrest unless there was an actual seizing or touching, it is quite clear that that is no longer the law. There may be an arrest by mere words, by saying "I arrest you" without any touching, provided, of course, that the defendant submits and goes with the police officer. Equally it is clear, as it seems to me,*

that an arrest is constituted when any form or words is used which in the circumstances of the case were calculated to bring to the defendant's notice, and did bring to the defendant's notice, that he was under compulsion and thereafter he submitted to that compulsion."

In ***R v Inwood*** **[1973] 2 All ER 645** Stephenson LJ stated at 649-650:

"It all depends on the circumstances of any particular case whether in fact it has been shown that a man has been arrested, and the court considers it unwise to say that there should be any particular formula followed. No formula will suit every case and it may well be that different procedures might have to be followed with different persons depending their age, ethnic origin, knowledge of English, intellectual qualities, physical or mental disabilities. There is no magic formula; only the obligation to make it plain to the suspect by what is said and done that he is no longer a free man. However, what we think is clear is that it is a question of fact, not of law, and it must be left to the jury to decide whether a person has been arrested or not, at least where there is a real dispute as to the question whether the defendant understood that he was arrested."

Use of Force To Arrest – Excessive Force is Unlawful (and Therefore Not in Execution of Duty)

There is no grant of power to police under either statute or common law to use force which is more than what is reasonable. Therefore in the event of the use of excessive force - police will not be acting in the execution of their duty.

For a further discussion of the common law on this issue see *Woodley v Boyd* [2001] NSWCA 35 at [37] and *Wiltshire v Barrett* [1966] 1 QB 312 at 326 and 331.

Use of Force to Arrest – Excessive Force May Be Lawfully Resisted

LEPRA ss.230-231 only authorise the use of reasonable force. Therefore the use of excessive force is unlawful. A citizen has the lawful right to use reasonable force to resist an unlawful arrest – see s.418(2)(b) of the *Crimes Act 1900 (NSW)* and also the decision of *Christie v Leachinsky* [1947] AC 573 especially the judgment of Lord Simonds at 591-592:

"Putting first things first, I would say that it is the right of every citizen to be free from arrest unless there is in some other citizen, whether a constable or not, the right to arrest him. And I would say next that it is the corollary of the right is that he should be entitled to resist arrest unless that arrest is lawful."

If police or a citizen uses excessive force in an attempt to effect an arrest, then the person being purportedly arrested has a right of self-defence. This is made plain by the provisions of s.418(2)(b) of *Crimes Act 1900 (NSW).* A useful example in the case law is *R v Thomas* (1992) 65 A Crim R 269. Note that this decision refers to the law of self-defence as it stood prior to the enactment of s.418 of the *Crimes Act 1900 (NSW).* The case is still good for the general proposition that self-defence is available in the face of an arrest using excessive force.

What Does "Resist" Mean?

R v Galvin (No.2) **[1961] VR 740 at 749**

In this case before the Full Court of the Supreme Court of Victoria it was held (O'Bryan, Dean and Hudson JJ):

> *"The word "resist" carries with it the idea of opposing by force some course of action which the person resisted is attempting to pursue."*

This case is often cited as authority for the proposition that in order to make out a charge of resist arrest, the prosecution must prove the use of force by the alleged offender. Running away prior to any physical contact with police, for example, is insufficient to prove resist.

A word of caution about this case – this case also states that in order to assault, resist or hinder police it is necessary for the offender to know that the person so assaulted, resisted or hindered was a police officer. In this regard the decision was subsequently overruled by the High Court of Australia in *R v Reynhoudt* [1962] HCA 23, (1962) 107 CLR 381.

The difficulty, however, with the decision in *Regina v Reynhoudt* as discussed above, is that it was decided prior to the High Court of Australia in *He Kaw Teh v The Queen* [1985] HCA 43; 157 CLR 523. The decision in *He Kaw Teh* is authority for the proposition that there will be a presumption that knowledge or intent will be an element of an offence of a serious nature. An application of this principle to assaulting police or resisting arrest would see the decision in *Reynhoudt* overturned in the author's humble opinion, However, somebody has to cart the issue up to the High Court of Australia in order to achieve this outcome.

Execution of Duty – The General Statutory Duties of Police

The *Police Act 1990 (NSW)* outlines a number of duties of police. The definition of "police service" within the section gives police significant powers of a generic nature. Practitioners should be aware of how this might impact upon issues of "execution of duty" when considering police conduct.

The definition of "police service" within section 6 of the Police Act 1990 (NSW) is set out below

> ***police services*** includes:
>
> *(a) services by way of prevention and detection of crime, and*
> *(b) the protection of persons from injury or death, and property from damage, whether arising from criminal acts or in any other way, and*
> *(c) the provision of essential services in emergencies, and*
> *(d) any other service prescribed by the regulations.*

An example of how this might impact on an assessment of whether or not police are acting in the execution of their duty can be found in the decision of *DPP v Gribble* as discussed below:

***DPP v Gribble* [2004] NSWSC 926; 151 A Crim R 256**

In this case police found a person wearing dark clothes and standing in the middle of a road in the city. He refused to leave the roadway when directed to by police. The person resisted the efforts of police to remove him from the roadway. Once removed, he then assaulted police. In answer to charges of resist and assault police, he argued that police were not acting in the execution of their duty. Barr J held that pursuant to section 6(3)(b) of the *Police Act 1990 (NSW),* police had a duty to provide services for "the protection of persons from injury or death, and property from damage, whether arising from criminal acts or any other way." Barr J considered that this meant that police were acting in the execution of their duty in removing the person from the roadway.

Execution of Duty – What Happens if Police are Not In The Execution of Their Duty?

If the prosecution fails to prove beyond a reasonable doubt that police are "acting in the execution of their duty" with respect to charges of assault police in execution of duty (or resist police in execution of duty or hinder police in execution of duty) then the relevant charge has not been proven beyond a reasonable doubt.

There are a number of ways in which police might not be in the execution of their duty. Possible issues include the following:

- The absence of a reasonable suspicion pursuant to LEPRA s.99(1)(a)
- Failure to arrest for one of the purposes in LEPRA s.99(1)(b)
- Arrest for a purpose other than the commencement of proceedings (e.g. arrest for the purposes of questioning only).
- The failure to lawfully announce the arrest (in breach of LEPRA s.202).
- The use of excessive (and therefore unlawful) force.

Duplicity in Charging Multiple Counts of Resist - *Hull v Nuske* [1974] 8 SASR 587

In *Hull v Nuske* [1974] 8 SASR 587 Walters J in the South Australian Supreme Court held that an act of resistance against two police officers could properly be charged in the one charge, and was not duplicitous. This case is often used as authority for the proposition that police should charge one act of resist and regard the name of each individual officer so allegedly resisted as amounting to a particular. Therefore a single count of resist could particularise one or more names of police. In the event of multiple counts each containing a single name of a police officer, police prosecutors will often be persuaded to withdraw all but one charge, and particularise all officers in the remaining charge. Where police prosecutors refuse to do so, pointing out the difficulty to the magistrate either at the start of the proceedings or at the end of the prosecution case, and submitting that he prosecution should be "required to elect" which count they are proceeding upon will usually bring an appropriate ruling / indication from the bench that will result in the prosecutor particularising all names in one charge (either by choice or as a result of a formal ruling from the bench).

Must The Accused Have Knowledge That the Person Resisted, Hindered or Assaulted is a Police Officer?

The decision in *Regina v Reynhoudt* [1962] HCA 23, (1962) 107 CLR 381 is authority for the proposition that an accused person does NOT have to know that the person being assaulted is a police officer in order to be guilty of the offence of assault police. This case was decided prior to the High Court of Australia in *He Kaw Teh v The Queen* [1985] HCA 43, 157 CLR 523. The decision in He Kaw The is authority for the proposition that there will be a presumption that knowledge or intent will be an element of an offence of a serious nature. An application of this principle to assaulting police or resisting arrest would see the decision in *Reynhoudt* overturned in the author's humble opinion, However, somebody has to cart the issue up to the High Court of Australia in order to achieve this outcome. Note that the HCA bench in *Reynhoudt* was divided 3-2. Long overdue for the issue to be re-visited at HCA level I think.

5. HINDERING POLICE IN THE EXECUTION OF THEIR DUTY

In order to hinder police, an accused must make the performance of the officer's duty *substantially* more difficult. A key "purple passage" follows:

Plunkett v Kroemer [1934] SASR 124

Napier J:

> *"It must be conceded that, for the purposes of this charge, the complainant has to prove an actual hindrance, in the sense of some appreciable obstruction to, or interference with, the performance by the constable of his duty; but "hinder" is not a word of art, or capable of precise definition, and it is a question of fact and of degree whether in the circumstances of the particular case the obstruction or interference was appreciable. If the constable is frustrated in his attempt to perform his duty, or retarded in the execution thereof, then, clearly, he has been "hindered"; but I think that the fair and natural meaning of the word goes further than that. I think that a constable is "hindered" by any obstruction or interference that makes his duty substantially more difficult."*

***Leonard v Morris* [1975] 10 SASR 528**

This case talks about how advising a person of their right to silence, offering to organise for a solicitor etc. does not, of itself, hinder police in the execution of their duty. It states that it is the duty of police to attend to all matters reasonably arising out of their investigation, including attendance to assertions of legal rights, safeguards etc. It is useful for a consideration of the fact that legal representatives properly going about their role are not hindering. It is a case that has been used to defend solicitors charged with Hinder more than once.

6. ESCAPING POLICE CUSTODY

The offence of escaping lawful police custody is a common law misdemeanour.

In the author's view the elements of the offence are:

i. That the accused was lawfully arrested; and

ii. That the arrest was completed to the extent that the accused came to be held in actual custody such that the initial deprivation of liberty was complete.; and

iii. That the accused by an intentional act removed him or herself from that custody.

There is very little written on this topic and the sources of case law are few and far between. However, an examination of such case law as is available is of assistance.

One significant authority is *R v Scott* (1967) VR 276 and in particular the judgment of Smith J. This decision bears out the elements of the offence as outlined above.

Another significant decision is *Williams v The Queen* [1995] HCA 8, 184 CLR 117. This case concerned an allegation of escape from police custody contrary to the *Crimes Act 1914 (Cth).* The appellant had attempted to escape from the police station. The appellant argued that as his custody was unlawful, he could not be convicted of the offence of escape lawful custody. The majority (Brennan, Dean, Toohey and McHugh JJ) in discussing the appellants arguments stated at [11]:

> *"The appellant could not be convicted of escaping lawful custody unless he was in custody and that custody was lawful at the time of his escape. That much is obvious…"*

In light of the above it is important to note a couple of practical examples where an offence of escape police custody could not be made out. Firstly, where a person is commanded to "stop" but simply runs away, an offence of escape cannot be made out. Similarly, if there is a purported arrest, perhaps even including a struggle, but the accused at no time submits to the custody but breaks free and runs away, an offence of escape cannot be made out (though depending on the facts in this latter example, a charge of resist might find the accused with a more substantial headache).

7. THE POWER TO ARREST FOR A REASONABLY APPREHENDED IMMINENT BREACH OF THE PEACE

What is a "Breach of the Peace"?

The following authorities offer guidance:

R v Howell **[1981] 3 All E.R. 383** at 389:

> "…An act done or threatened to be done which either actually harms a person or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done…"
>
> "…Furthermore, we think, the word 'disturbance' when used in isolation cannot constitute a breach of the peace…."

Parkin v Norman **[1982] 2 All E.R. 583** at 590

> "…the justices were in error in thinking that a mere disturbance not involving violence or a threat of violence could amount to a breach of the peace."

State of New South Wales v Bouffler **[2017] NSWCA 185**

The Court (Beazley ACJ, Ward JA, Gleeson JA) held at [163]-[164]:

> *"[163] In State of New South Wales v McMaster (2015) 91 NSWLR 666; [2015] NSWCA 228 at [32](6), this Court expressed the view, by reference to Campbell JA's discussion in State of New South Wales v Tyszyk at [87]-[98], that the statement of the Court in Howell was unlikely to be exhaustive."*
>
> *"[164] Accordingly, we consider that it is open to us to prefer the view expressed by Campbell JA, that a breach of the peace includes "a wide range of actions and threatened actions that interfere with the ordinary operation of civil society". In particular, a threat or a realistic apprehension of self-harm could constitute a breach of the peace. Each case will be fact dependent."*

Readers should note that there is a fundamental flaw in what is accurately quoted from above in that in *McMaster*, no such view was expressed at [32]. Rather [32] involves a summary recitation of the State's arguments on the issue.

Fletcher v State of NSW **[2019] NSWCA 31**

In *Fletcher v State of NSW* [2019] NSWCA 31the above definition (in *Bouffler*) of breach of the peace was further considered. The three Justices each took a different view of the matter as follow:

Baste JA stated at [11]:

> *"[11]….In State of New South Wales v Bouffler this Court held that a breach of the peace includes "a wide range of actions and threatened actions that interfere with the ordinary operation of civil society". [4] There is an element of ambiguity in that description of a breach of the peace: the breach should refer to an action, rather than a threatened action. (Of course, there will be cases where threats will be sufficient themselves to constitute breaches of the peace.)*

Beazley P stated at [2]:

> *"[2]….contrary to the observation of Basten JA, at [11], I do not consider that there is any ambiguity in the statement in Bouffler at [164], which is set out in the observations of Payne JA. As that statement makes clear, it will be a matter*

of evaluation of the factual circumstances in each case whether there has been conduct which entitles a police officer in New South Wales to exercise the powers conferred by the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW).”

Payne JA stated at [32]:

“[32] It may be, as Basten JA suggests, that there is an element of ambiguity in this description of a breach of the peace. In this case, however, it was common ground that Bouffler correctly stated the law. Accordingly, I would reserve to a case where the issue is necessary to determine the question of whether the test for breach of the peace described in Bouffler is ambiguous or requires further explanation.”

Power to Arrest or Restrain For a Reasonably Apprehended Imminent Breach of the Peace

Section 4 of LEPRA specifically preserves the common law powers of police to deal with breaches of the peace. Section 4 of LEPRA specifically preserves the common law powers of police to deal with breaches of the peace. In that regard, the power to arrest a person for an imminent breach of the peace is not limited by the terms of s.99 of LEPRA. The absence of any limitation pursuant to s.99 in this regard is confirmed by the decision of *DPP v Armstrong* [2010] NSWSC 885.

DPP v Armstrong [2010] NSWSC 885

This case noted that a Magistrate was in error in finding that section 99 of LEPRA was the only power available to police to effect an arrest, and noted that police had power to arrest for a breach of the peace. Davies J stated:

"[23] The Magistrate’s undoubted error in relation to the arrest in s 99 was assuming that s 99 was the only source of power for a police officer to arrest a person without a warrant. It is not disputed that the police retain a power outside s 99 to arrest a person for breach of the peace. Section 4(2) of the Act expressly preserves police powers with regard to breaches of the peace."

Note that section 9 of LEPRA empowers police to enter premises if the officer believes 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 to prevent or end the breach of the peace.

What Constitutes a Reasonable Apprehension of an “Imminent” Breach of the Peace

In order to make an arrest, the officer must *reasonably* apprehend an *imminent* breach of the peace.

See *Albert v Lavin* [1981] 2 WLR 1070 and *Piddington v Bates* [1961] 1 WLR 162. The following principles can be distilled from these two cases:

i. It is not enough that the police officer anticipates an imminent breach of the peace.

ii. The police officer must reasonably anticipate it.
iii. There must be a real and not remote possibility of an imminent breach of the peace
iv. The restraining may continue as long as is necessary to prevent the imminent breach of the peace, the citizen must then be released OR arrested
v. The force used to restrain the citizen must only be such as is reasonable

Further, the decision of *Innes v Weate* (1984) 12 A Crim R 45 at 52 shows that even when a citizen is arrested due to a reasonable apprehension of an imminent breach of the peace, such arrest is a measure of last resort for a police officer.

Measures falling short of depriving the citizen of their liberty can be sufficient to prevent an imminent breach of the peace. Examples of cases involving prevention of a breach of the peace involving something less than arrest include:

- *King v Hodges* [1974] Crim LR 424 – taking a person by the arm and moving them on.
- *Minto v Police* [1987] 1 NZLR 374 - temporarily impounding property such as a loudhailer used at a demonstration.
- *Poidevin v Semaan* [2013] NSWCA 334; 85 NSWLR 758; 231 A Crim R 3 – seizing a mobile phone.

Most police will assert that a breach of the peace occurs if the defendant continues to use offensive language, and that this was the "breach of the peace" that they apprehended. This does not amount to a reasonable apprehension of an imminent breach of the peace. Such behaviour, of itself would not satisfy the definition of "imminent breach of the peace". Cases that may be of particular assistance to ALS practitioners in this regard include:

- *Williams v Pinnuck* (1983) 68 FLR 303. This case involved an Aboriginal woman yelling loudly at four other Aboriginal women. Police could not understand what she was saying but the circumstances allegedly pertained to her difficulty in obtaining beer from the other women that she was shouting at. The mere making of noise in a public place does not constitute a breach of the peace. This case cites a number of English authorities that further support the proposition.

- *Beaty v Glenister* (1884) 51 LT (NS) 304. Members of the Salvation Army marching, playing musical instruments, singing hymns, and "shouting loudly Alleluia and other expressions" did not breach the peace.

- *Neave v Ryan* [1958] Tas SR 58. Burbury CJ stated:
  > "Shouting loudly in a public place or addressing a crowd in loud tones cannot possibly of itself amount to conduct creating a disturbance of the public peace…To hold otherwise would endanger free speech…The "public peace" is not "peace and quiet" – it is "public order."

8. ACKNOWLEDGMENT

The author would like to thank Jane Sanders of the Shopfront Youth Legal Centre for her assistance in reviewing this paper in an earlier draft form. All errors and omissions remain the sole responsibility of the author.

I hope the above has been of some help. If you are ***a criminal defence practitioner*** and have any questions, please do not hesitate to get in touch with me on **0408 277 374.** Please respect the "no fly zone" on my phone for the hour prior to the commencement of court – (I am sweating on my matter too) – outside those hours, including out of normal business hours, you are welcome to call. Alternatively, you can drop me an email. My email address remains:

dark.menace@forbeschambers.com.au.

I will almost always respond within 24 hours.

Please note that ***I do not provide answers to university assignments*** – you have to do your own homework :-b

I have endeavoured to state the law of New South Wales as at 1 July 2020.

Mark Dennis SC
Forbes Chambers

July 2020

APPENDIX 1

SECTION 99 OF THE *LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) ACT 2002 (NSW)* FROM 16 DECEMBER 2013

99 Power of police officers to arrest without warrant

(cf *Crimes Act 1900* , s 352, Cth Act, s 3W)

(1) A police officer may, without a warrant, arrest a person if:

(a) the police officer suspects on reasonable grounds that the person is committing or has committed an offence, and

(b) the police officer is satisfied that the arrest is reasonably necessary for **any** one or more of the following reasons:

(i) to stop the person committing or repeating the offence or committing another offence,

(ii) to stop the person fleeing from a police officer or from the location of the offence,

(iii) to enable inquiries to be made to establish the person's identity if it cannot be readily established or if the police officer suspects on reasonable grounds that identity information provided is false,

(iv) to ensure that the person appears before a court in relation to the offence,

(v) to obtain property in the possession of the person that is connected with the offence,

(vi) to preserve evidence of the offence or prevent the fabrication of evidence,

(vii) to prevent the harassment of, or interference with, any person who may give evidence in relation to the offence,

(viii) to protect the safety or welfare of any person (including the person arrested),

(ix) because of the nature and seriousness of the offence.

(2) A police officer may also arrest a person without a warrant if directed to do so by another police officer. The other police officer is not to give such a direction unless the other officer may lawfully arrest the person without a warrant.

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

Note: The police officer may discontinue the arrest at any time and without taking the arrested person before an authorised officer -see section 105.

(4) A person who has been lawfully arrested under this section may be detained by any police officer under Part 9 for the purpose of investigating whether the person committed the offence for which the person has been arrested and for any other purpose authorised by that Part.

(5) This section does not authorise a person to be arrested for an offence for which the person has already been tried.

(6) For the purposes of this section, property is connected with an offence if it is connected with the offence within the meaning of Part 5.

APPENDIX 2

SECTION 99 OF THE *LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) ACT 2002 (NSW)* FROM 1 DECEMBER 2005 UNTIL 16 DECEMBER 2013

99 Power of police officers to arrest without warrant

(cf *Crimes Act 1900* , s 352, Cth Act, s 3W)

(1) A police officer may, without a warrant, arrest a person if:

(a) the person is in the act of committing an offence under any Act or statutory instrument, or

(b) the person has just committed any such offence, or

(c) the person has committed a serious indictable offence for which the person has not been tried.

(2) A police officer may, without a warrant, arrest a person if the police officer suspects on reasonable grounds that the person has committed an offence under any Act or statutory instrument.

(3) A police officer must not arrest a person for the purpose of taking proceedings for an offence against the person unless the police officer suspects on reasonable grounds that it is necessary to arrest the person to achieve one or more of the following purposes:

(a) to ensure the appearance of the person before a court in respect of the offence,

(b) to prevent a repetition or continuation of the offence or the commission of another offence,

(c) to prevent the concealment, loss or destruction of evidence relating to the offence,

(d) to prevent harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence,

(e) to prevent the fabrication of evidence in respect of the offence,

(f) to preserve the safety or welfare of the person.

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

APPENDIX 3

SECTIONS 201 AND 202 OF THE *LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) ACT 2002 (NSW)* FROM 1 NOVEMBER 2014

201 Police powers to which this Part applies

(1) This Part applies to the exercise of the following powers by police officers:
(a) a power to stop, search or arrest a person,
(b) a power to stop or search a vehicle, vessel or aircraft,
(c) a power to enter or search premises,
(d) a power to seize property,
(e) a power to require the disclosure of the identity of a person (including a power to require the removal of a face covering for identification purposes),

(f) a power to give or make a direction, requirement or request that a person is required to comply with by law,

(g) a power to establish a crime scene at premises (not being a public place).

This Part applies (subject to subsection (3)) to the exercise of any such power whether or not the power is conferred by this Act.

Note.

This Part extends to special constables exercising any such police powers—see section 82L of the *Police Act 1990*. This Part also extends to recognised law enforcement officers (with modifications)—see clause 132B of the *Police Regulation 2008*.

(2) This Part does not apply to the exercise of any of the following powers of police officers:

(a) a power to enter or search a public place,

(b) a power conferred by a covert search warrant,

(c) a power to detain an intoxicated person under Part 16.

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

202 Police officers to provide information when exercising powers

(1) A police officer who exercises a power to which this Part applies must provide the following to the person subject to the exercise of the power:

(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 this section:

(a) as soon as it is reasonably practicable to do so, or

(b) in the case of a direction, requirement or request to a single person—before giving or making the direction, requirement or request.

(3) A direction, requirement or request to a group of persons is not required to be repeated to each person in the group.

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

(5) If a person subject to the exercise of a power to which this Part applies asks a 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) A police officer who is exercising more than one power to which this Part applies on a single occasion and in relation to the same person is required to comply with subsection (1) (a) and (b) only once on that occasion.

APPENDIX 4

SECTION 201 OF THE *LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) ACT 2002 (NSW)* FROM 1 DECEMBER 2005 UNTIL 1 NOVEMBER 2014

201 Supplying police officer's details and giving warnings

(cf *Crimes Act 1900*, s 563, *Police Powers (Vehicles) Act 1998*, s 6)

(1) A police officer must, before or at the time of exercising a power referred to in subsection (3) (other than subsection (3) (g), (i) or (j)), or as soon as is reasonably practicable after exercising the power, provide the person subject to the exercise of the power with the following:

(a) evidence that the police officer is a police officer (unless the police officer is in uniform),
(b) the name of the police officer and his or her place of duty,
(c) the reason for the exercise of the power,
(d) a warning that failure or refusal to comply with a request of the police officer, in the exercise of the power, may be an offence.

(2) A police officer must comply with subsection (1) before exercising a power referred to in subsection (3) (g), (i) or (j).

(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 26 to request a person to submit to a frisk search or to produce a dangerous implement or a metallic object.

(4) If 2 or more police officers are exercising a power to search or enter premises or to establish a crime scene, 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.