[Act 2006 No 128]

New South Wales

Police Powers Legislation Amendment Bill 2006

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.*

Overview of Bill

The objects of this Bill are as follows:

(a) to amend the *Law Enforcement (Powers and Responsibilities) Act 2002*:

- (i) to provide more extensive search powers to police, and
- (ii) to make further provision with respect to the establishment of crime scenes and the exercise of police powers at such crime scenes, and
- (iii) to make further provision with respect to safeguards that apply to the exercise of police powers, including by changing the form of police warning that must be given in respect of requests by police officers, and
- (iv) to provide for the destruction of finger-prints and palm-prints taken from persons in custody when offences are not proven and to make further provision for the taking and destruction of finger-prints and palm-prints from persons issued with penalty notices, and
- (v) to extend the period at the end of which a review of the Act must be carried out,

* Amended in committee—see table at end of volume.

(b) to amend the *Police Powers (Drug Detection in Border Areas Trial) Act 2003*:

(i) to revive and extend the trial under that Act, and

(ii) to extend the trial so as to permit drug detection operations in all areas outside the metropolitan areas of Newcastle, Sydney and the Illawarra, and

(iii) to change the method by which police officers are authorised to exercise powers conferred by that Act, and

(iv) to make other minor modifications to the trial, and

(v) to provide for the monitoring of the extension of the trial by the Ombudsman,

(c) to amend the *Terrorism (Police Powers) Act 2002*:

(i) to make further provision with respect to the grant of an authorisation, and

(ii) to authorise police officers executing a covert search warrant to take action for the purpose of concealing the search from the occupier of the premises, and

(iii) to extend the period for a review under that Act, and

(iv) to make other changes for the purposes of consistency with police powers under the *Law Enforcement (Powers and Responsibilities) Act 2002*,

(d) to amend the *Criminal Procedure Act 1986*:

(i) to allow penalty notices to be served by post (as well as personally as is currently the case) and to make further provision for the withdrawal of penalty notices, and

(ii) to require the Ombudsman to report on certain matters relating to the issue of penalty notices,

(e) to amend the *Criminal Procedure Regulation 2005* so that penalty notices cannot be issued for common assault offences,

(f) to make other minor changes to the above Acts and regulation, including by providing for savings and transitional matters,

(g) to make consequential amendments to other Acts.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act.

Clause 3 is a formal provision that gives effect to the amendments to the *Law Enforcement (Powers and Responsibilities) Act 2002* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the *Police Powers (Drug Detection in Border Areas Trial) Act 2003* set out in Schedule 2.

Clause 5 is a formal provision that gives effect to the amendments to the *Terrorism (Police Powers) Act 2002* set out in Schedule 3.

Clause 6 is a formal provision that gives effect to the amendments to the *Crimes Act 1900*, *Crimes (Forensic Procedures) Act 2000*, *Criminal Procedure Act 1986* and *Criminal Procedure Regulation 2005* set in Schedule 4.

Clause 7 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of Law Enforcement (Powers and Responsibilities) Act 2002

Extension of police powers of search

Schedule 1 [2] ensures that a police officer may, in conducting an ordinary search of a person, require the person to remove his or her socks (in addition to his or her shoes).

Schedule 1 [3] allows a police officer, when conducting a search of a person, to request the person to open his or her mouth or to shake or move his or her hair in connection with ascertaining whether something is concealed in the person's mouth or hair. Failure to comply with such a request will be an offence. **Schedule 1 [39]** ensures that the safeguards relating to the exercise of police powers (such as the requirement to give a warning that compliance with the request is required by law) apply in respect of the new powers.

Schedule 1 [4] allows a police officer who is conducting a search of a student at a school to request the student to submit to a search of any bag or other personal effect that is on or with the student. Failure to comply with such a request will be an offence.

Schedule 1 [6] clarifies that a police officer may, in a public place or school, take possession of and confiscate a dangerous implement that is in a person's custody without first requesting the person to produce the dangerous implement to the police officer.

Crime scenes

Part 7 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (***the LEPR Act***) provides for the establishment of crime scenes by police officers and allows police officers to exercise certain powers at a crime scene for up to 3 hours before a crime scene warrant is obtained.

However, it is not necessarily the case that all crime scenes are established without warrant. Section 88 of the LEPR Act provides that a police officer may establish a crime scene on premises only if the police officer is lawfully on the premises, pursuant to a crime scene warrant or for any other lawful reason. **Schedule 1 [18], [21] and [22]** make it clear that a crime scene warrant may authorise the

establishment of a crime scene on premises. **Schedule 1 [20]** is a consequential amendment.

Schedule 1 [19] allows all powers that are exercised at a crime scene without warrant to be exercised by a police officer with the aid of assistants.

Schedule 1 [19] also allows some crime scene powers (limited to powers relating to forensic investigation) to be exercised at a crime scene by any member of NSW Police responsible for examining or maintaining a crime scene, but only with the authority of the police officer who established the crime scene or is responsible for the crime scene at the time. A similar amendment (**Schedule 1 [23]**) allows the same crime scene powers to be exercised by members of NSW Police responsible for maintaining or examining a crime scene but only with the authority of a police officer who is responsible for executing the warrant.

Schedule 1 [17] makes it clear that a crime scene may be established in a public place that includes any vehicle, vessel or aircraft in the public place. At present, crime scene powers may be exercised in a public place without obtaining a warrant. However, the amendment prevents a police officer from exercising any crime scene power that involves seizing, detaining or searching a vehicle, vessel or aircraft in a public place unless the police officer suspects on reasonable grounds that it is necessary to do so to preserve, or search for and gather, evidence of the commission of the offence in connection with which the crime scene was established or the police officer is authorised to do so by a crime scene warrant or other lawful authority.

Safeguards in relation to exercise of police powers (including warnings)

At present, section 201 of the LEPR Act provides for certain safeguards in relation to the exercise of police powers under that Act, including by requiring police officers who make certain requests to warn the person to whom the request is made that a failure to comply with the request may be an offence. **Schedule 1 [36] and [38]** change this requirement, so that no warning is required if the person has already complied with the request or is in the process of complying with the request. If the person does fail to comply, the police officer is required to warn the person that compliance with the request is required by law. In addition, if the person fails to comply after having been given that warning, and the police officer believes the person is committing an offence, the police officer is required to warn the person that failure to comply with the request is an offence. This removes any necessity for a police officer to warn a person that non-compliance may be an offence in circumstances where the police officer does not believe an offence has been committed (for example, if the person has a reasonable excuse for not complying).

The amendments also extend these requirements to police directions, so as to ensure that the warning requirements apply in respect of such directions as those given under section 198 of the LEPR Act.

Schedule 1 [5], [15], [16] and [35] modify various provisions of the LEPR Act that allow the police to make requests or give directions to clarify the interaction of those provisions with section 201 of that Act and remove provisions that are made redundant by the new warning requirements.

Schedule 1 [37] and [38] modify the requirement that a police officer state his or her name and place of duty before exercising a power to give a direction to a person, so that, if the direction is given to a group, the police officer may comply with the requirement after the direction is given.

Schedule 1 [40] provides that the requirement that a police officer provide evidence that he or she is a police officer (if not in uniform), and state his or her name and place of duty, when exercising powers under the LEPR Act applies once only if several powers are exercised in relation to one person on a single occasion.

Schedule 1 [41] provides that if 2 or more police officers are exercising any power under the LEPR Act it is sufficient that only one of them complies with the safeguard requirements.

Taking and destruction of finger-prints and palm-prints

Schedule 1 [28] allows any person from whom any finger-prints or palm-prints have been taken to request the Commissioner of Police to destroy them if the offence in connection with which they were taken is not proven. The Commissioner of Police is required to destroy them as soon as practicable after receiving such a request. **Schedule 1 [47]** extends these arrangements to finger-prints and palm-prints taken before the relevant amendment commences.

Section 353AC of the *Crimes Act 1900* currently provides that a police officer who serves a penalty notice on a person under the *Criminal Procedure Act 1986* may require the person to submit to the taking of finger-prints and palm-prints and that such prints are to be destroyed on payment of the penalty under the penalty notice. That section, and related sections 353AD and 353AE, are transferred from the *Crimes Act 1900* to the *Law Enforcement (Powers and Responsibilities) Act 2002* by Schedule 4.1 [1] as sections 138A, 138B and 138C, respectively.

Schedule 1 [30] amends transferred section 138A to make it clear that a requirement to submit to the taking of prints may be requested before or after the penalty notice has been served.

Schedule 1 [31] provides that the prints are to also be destroyed if a court deals with the penalty notice offence and dismisses the relevant charge or arrives at a finding of not guilty for the charge.

Schedule 1 [26], [27], [29] and [32] are consequential amendments.

Review period

Schedule 1 [45] extends the period at the end of which a review of the LEPR Act is required to be carried out. The amendment requires the principal provisions of the Act to have been in operation for 3 years before the review is required.

Minor amendments

Schedule 1 [1] updates a reference to the position of clerk of a Local Court (now the registrar).

Schedule 1 [8] and [9] make it clear that the requirements relating to the preparation and provision of an occupier's notice apply to crime scene warrants when they are obtained by telephone. **Schedule 1 [7]** is a consequential amendment.

Schedule 1 [10] allows an authorised officer to extend a warrant where the authorised officer who initially issued the warrant has died, has ceased to be an authorised officer or is absent.

Schedule 1 [11] makes it clear that the power conferred on a police officer to enter and remain on premises where the apparent victim of a domestic violence offence has issued an invitation to do so applies only if the victim apparently resides on those premises.

Schedule 1 [12] allows a police officer of or above the rank of Superintendent to revoke an authorisation, made in connection with a public disorder, that prohibits the sale of liquor from licensed premises. Currently the police officer must be of or above the rank of Inspector.

Schedule 1 [13] and [14] allow a police officer who finds a person drinking in an alcohol-free zone established in connection with a public disorder to direct the person to remove the alcohol from the zone (rather than to remove the alcohol from the zone or put it away) and to require the person to obey that direction immediately. The police officer may seize the liquor if the direction is not obeyed.

Schedule 1 [24] amends a provision transferred from the *Crimes Act 1900* to the LEPR Act relating to arrests by a commander of an aircraft. The amendment is consequential on the transfer of the provision.

Schedule 1 [25] extends the provisions that allow a "time-out" for the calculation of time spent in lawful custody so that time spent in obtaining a crime scene warrant is disregarded (similar to the treatment of other types of warrants).

Schedule 1 [33] requires a search warrant in respect of suspected drug premises to be applied for by the police officer who is in charge of an investigation into the suspected use of the premises as drug premises (rather than any police officer of or above the rank of sergeant).

Schedule 1 [34] makes a minor law revision amendment.

Schedule 1 [42] clarifies that the provisions relating to the exercise of police powers do not apply to police powers exercised under another Act that is excluded from the operation of the LEPR Act by section 5 (1) of that Act.

Schedule 1 [43] removes a requirement that a person make a record of certain matters when another person has already made a record of those matters.

Schedule 1 [44] allows the Ombudsman to require information from a public authority in connection with the exercise of functions under the LEPR Act.

Schedule 1 [46] provides for the making of savings and transitional regulations as a consequence of the proposed amendments.

Schedule 2 Amendment of Police Powers (Drug Detection in Border Areas Trial) Act 2003

Schedule 2 revives, with modifications, the drug detection scheme that operated under the *Police Powers (Drug Detection in Border Areas Trial) Act 2003* (***the Drug Detection Trial Act***). The drug detection scheme that operated under that Act allowed police, under authority of a drug detection warrant issued by a Judge, to exercise certain powers in border areas for the purpose of drug detection operations. These included powers to establish check points in a search area, to stop vehicles at the check points and to use dogs to carry out general drug detection in relation to vehicles.

The principal change to the scheme, as revived by the amendments, is that it will operate under an authorisation issued by the Commissioner of Police or another designated officer (as defined by **Schedule 2 [5]**), rather than under a warrant-based system. This will make it more consistent with the schemes provided for by the *Terrorism (Police Powers) Act 2002* and the *Law Enforcement (Controlled Operations) Act 1997*.

Schedule 2 [7] sets out the new procedure for applying for, and granting, an authorisation to exercise powers conferred by the scheme. A police officer will be able to apply to a designated officer for an authorisation to exercise the powers conferred by the Act when the police officer suspects on reasonable grounds that an area is being, or is to be, used on a regular basis for or in connection with the supply of indictable quantities of prohibited drugs or prohibited plants. This is consistent with existing requirements. In addition to the matters that are currently required to be included in an application, the amendments will require the application to include details of past applications in relation to the area and of past operations in relation to the area. The designated officer will be able to issue an authorisation to exercise the powers conferred by the Drug Detection Trial Act on the same sort of grounds as a Judge was permitted to issue a drug detection warrant under the previous scheme. The designated officer will also be required to be satisfied that the nature and extent of the proposed drug detection operation is appropriate to the suspected criminal activity concerned.

Once issued, an authorisation will remain in force for up to 14 days, unless sooner revoked. Under the previous scheme, drug detection warrants had effect for only 72 hours. See **Schedule 2 [15]**.

Other amendments to the scheme are made to reflect the change from the search warrant-based scheme to an authorisation-based scheme. The amendments incorporate in the Drug Detection Trial Act similar requirements to the requirements that previously applied (under section 15 of the Drug Detection Trial Act) to the issue of a search warrant under that Act. See **Schedule 2 [15] and [19]**.

Another key change to the scheme is that it will extend to all parts of the State that are outside the metropolitan areas of Sydney, Newcastle and the Illawarra. Accordingly, it will be possible to obtain an authorisation to exercise the powers conferred by the Act in respect of a search area in any such non-metropolitan area (not merely in border areas). See the definition of ***outer metropolitan area*** in **Schedule 2 [2]** and the provisions relating to search areas in **Schedule 2 [7]**. **Schedule 2 [1] and [24]** amend the name of the Act, and the long title, consequentially. **Schedule 2 [6]** is a consequential amendment.

In addition, a search area may be comprised of an area of up to 5 square kilometres, rather than a maximum of one square kilometre under the previous scheme (see the provisions relating to search areas in **Schedule 2 [7]**).

Other modifications to the scheme include provisions that make it clear that police may establish more than one check point in a search area and may move check points at any time. The requirement that police ensure that signs are erected to indicate the presence of a check point in a search area is removed. Instead, it will be sufficient that police ensure that adequate measures are in place to ensure the safety of vehicles and persons approaching the check point. See **Schedule 2 [9] and [13]**.

The provisions of the Act that require police to issue a warning to persons who fail to comply with requests made by police in the exercise of powers under the Act are revised in a similar manner to the changes made to section 201 of the LEPR Act by Schedule 1. See **Schedule 2 [11] and [12]**.

The scheme is revived from the commencement of the relevant amendments and will have effect for 18 months. See **Schedule 2 [23]**.

The Ombudsman will be required to undertake another review of the scheme, as modified, at the end of the period of 12 months after the commencement of the relevant provisions. For that purpose, the powers of the Ombudsman are extended so as to allow the Ombudsman to inspect the records of NSW Police at any time. See **Schedule 2 [20], [21] and [22]**.

Schedule 2 [2]–[4], [8], [10], [14], [16] and [17] contain amendments that are consequential on the changes outlined above.

Schedule 2 [18] makes a minor amendment to update a cross-reference to another Act.

Schedule 3 Amendment of Terrorism (Police Powers) Act 2002

The *Terrorism (Police Powers) Act 2002* (***the TPP Act***) confers special powers on police to deal with terrorist acts or suspected terrorist acts. Those powers may be exercised only under the authority of the Commissioner of Police or a Deputy Commissioner of Police, or under the authority of another senior police officer in an emergency.

Schedule 3 [1] requires the Commissioner of Police, when giving an authorisation, (or any other officer who gives an authorisation) to be satisfied that the nature and extent of the powers to be conferred by the authorisation are appropriate to the threatened or suspected terrorist act.

Schedule 3 [2] makes it clear that the special powers conferred by the TPP Act may be exercised by a police officer whether or not the police officer has been provided with a copy of the authorisation or notified of all the terms of the authorisation.

Schedule 3 [3] and [4] revise police powers relating to the detention of persons and vehicles so as to clarify that police officers must not detain persons or vehicles for longer than reasonably necessary. This makes the provisions more consistent with the LEPR Act.

Schedule 3 [5] makes it mandatory for a police officer to provide evidence that he or she is a police officer (if not in uniform) and to provide his or her name and place of duty, and other information, to a person when he or she exercises powers under the TPP Act (whether or not the police officer is requested to do so). This is also consistent with requirements imposed on police officers by the LEPR Act.

Schedule 3 [6] revises the form of warning that a police officer must give to a person if the police officer makes a request of the person that the person is required to comply with by law. The changes are similar to the changes made to section 201 of the LEPR Act by Schedule 1. The changes make it unnecessary for a police officer to give any warning to a person who has already complied with a request or is in the process of complying. Consistent with the changes to the LEPR Act in Schedule 1, the amendments also:

(a) provide that the requirement that a police officer supply evidence that he or she is a police officer (if not in uniform), and state his or her name and place of duty, when exercising powers under the TPP Act applies once only if several powers are exercised in relation to one person on a single occasion, and

(b) provide that if 2 or more police officers are exercising any power under the TPP Act, it is sufficient that only one of the officers present complies with the requirements relating to the exercise of that power (such as the requirement to supply evidence that he or she is a police officer and state his or her name and place of duty).

Schedule 3 [7] makes it clear that when police execute a covert search warrant they are entitled to do anything that is reasonable for the purpose of concealing the execution of the warrant from the occupier of the premises.

Schedule 3 [8] requires a review of the TPP Act to be carried out by the Minister every 2 years (rather than every 12 months as is presently the case).

Schedule 4 Amendment of other Acts and regulation

Amendment of Crimes Act 1900

Schedule 4.1 [1] amends the *Crimes Act 1900* to:

(a) transfer sections of that Act dealing with the taking of finger-prints and palm-prints from persons issued with penalty notices for certain offences under the *Criminal Procedure Act 1986* to the *Law Enforcement (Powers and Responsibilities) Act 2002*, and

(b) renumber a section of that Act dealing with an apprehended person carrying a razor, razor blade or other cutting weapon, and

(c) transfer a section of that Act dealing with the arrest of persons on an aircraft by the aircraft's commander to the *Law Enforcement (Powers and Responsibilities) Act 2002*.

Schedule 4.1 [2] is a consequential amendment.

Amendment of Crimes (Forensic Procedures) Act 2000

Schedule 4.2 amends the *Crimes (Forensic Procedures) Act 2000* consequentially on the amendments made by Schedule 4.1 [1].

Amendment of Criminal Procedure Act 1986

Part 3 of Chapter 7 of the *Criminal Procedure Act 1986* enables police officers to serve penalty notices on persons for certain prescribed minor offences.

Currently, section 334 of the Act provides that such penalty notices may only be served personally. **Schedule 4.3 [1]** amends the *Criminal Procedure Act 1986* to allow for penalty notices to also be served by post.

Section 340 of the Act currently provides that a penalty notice may be withdrawn by a senior police officer before the due date for payment under the notice. **Schedule 4.3 [2]** provides, instead, that a penalty notice may be withdrawn at any time. **Schedule 4.3 [3]** provides that if a penalty notice is withdrawn then any subsequent action taken, including any enforcement action, in relation to the notice is to be reversed and that any costs in relation to that action are not payable and, if paid, are repayable.

Section 340 (3) (c) of the Act currently provides that if a penalty notice is withdrawn then further proceedings in respect of the alleged offence to which the notice relates may be taken against any person as if the notice had never been served. **Schedule 4.3 [4]** makes it clear that such proceedings may only be taken subject to any time limit within which the relevant proceedings for the offence are required to be commenced.

Schedule 4.3 [5] is consequential on the amendments made by Schedule 4.1 [1].

Schedule 4.3 [6] provides that the Ombudsman is to review and report to the Attorney General and the Minister for Police by 30 November 2008 on the operation of Part 3 of Chapter 7 of the *Criminal Procedure Act 1986* (and related provisions) penalty notices scheme in so far as the provisions impact on Aboriginal and Torres Strait Islander communities.

Amendment of Criminal Procedure Regulation 2005

Schedule 4.4 [1] extends the operation of Part 3 of the *Criminal Procedure Regulation 2005*, which establishes a trial period for a penalty notice scheme for certain offences under the *Crimes Act 1900* and the *Summary Offences Act 1988*, until 30 April 2007.

Schedule 4.4 [2] removes the offence of common assault (under section 61 of the *Crimes Act 1900*) from the offences prescribed for which police officers may issue penalty notices.