



Justice

Regulatory Impact Statement

Law Enforcement (Powers and Responsibilities) Regulation

2016

July 2016

REGULATORY IMPACT STATEMENT

TITLE OF REGULATORY PROPOSAL: **Law Enforcement (Powers and Responsibilities) Regulation 2016**

PROPONENT: **Department of Justice**

RESPONSIBLE MINISTER: **The Hon Gabrielle Upton MP,
Attorney General**

RELEVANT ACT: ***Law Enforcement (Powers and Responsibilities) Act 2002***

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Attachment: Proposed *Law Enforcement (Powers and Responsibilities) Regulation 2016*

1 INTRODUCTION

1.1 What is a Regulatory Impact Statement (RIS)?

The preparation of a RIS is required under the *Subordinate Legislation Act 1989*. This Act provides for regulations to have a limited life.

In most cases, regulations are automatically repealed 5 years after they are made. When a regulation is due for repeal, the responsible agency must review the regulation, its social and economic impacts, and the need for the regulation, and make a decision about whether the regulation should be remade. The results of this review are required to be published in a RIS and submissions invited from the public.

The *Subordinate Legislation Act 1989* does not require a RIS to be prepared where the regulation deals with matters that are machinery in nature, and not likely to impose an appreciable burden, cost or disadvantage on any sector of the public.

1.2 Why is the Regulation being proposed?

The proposed Law Enforcement (Powers and Responsibilities) Regulation 2016 (**proposed Regulation**) is to be made under the general regulation-making power in section 238 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (**LEPRA**), as well as a substantial number of particular enabling sections in the LEPRA (listed at page 2 of the Explanatory note to the Regulation).

1.3 Approach taken in this Regulatory Impact Statement

This Regulatory Impact Statement (RIS) considers:

- the various objectives of the Regulation;
- the alternative options for achieving these objectives; and
- an assessment of the costs and benefits of the proposed options.

Submissions are invited on the proposed Regulation.

The final date for receipt of submissions is **Friday, 1 August 2016**.

Submissions can be forwarded in any of the following ways:

Post

Law Enforcement (Powers and Responsibilities) Regulation Consultation
Executive Director
Justice Strategy and Policy Division
NSW Department of Justice
GPO Box 31 Sydney NSW 2001

Email

jsp.enquiries@justice.nsw.gov.au

Hand delivery

Level 3, Henry Deane Building 20 Lee Street Sydney NSW 2000

2. THE REGULATORY PROPOSAL

2.1 Overview of the Law Enforcement (Powers and Responsibilities) Act 2002

The major features of LEPR are described below.

The principal purpose of LEPR was to consolidate police powers which were previously located in a range of disparate Acts. Some of those powers also derive from the common law; LEPR does not displace the common law unless expressly stated.

There have been a number of amendments to LEPR since the commencement of the Law Enforcement (Powers and Responsibilities) Regulation 2005, including:

Power	Location in LEPR
Special powers to prevent and control public disorders	Part 6A, Division 3
Powers relating to fortified premises	Part 16A
Powers relating to intoxicated drivers with respect to supervision and testing	Part 12, Division 3
Special arrangements for investigation of stolen vehicles	Part 7
Power to require identity of suspected AVO defendant to be disclosed	Part 3, Division 1A
Powers relating to dispersal of intoxicated persons, including directions	Part 14
Power to search a person if the police officer suspects on reasonable grounds that the person has a laser pointer	Part 4, Division 3
Power to apply for search warrants, including covert and criminal organisation search warrants, and power to search for specific offences, including child abuse material.	Part 5
Power of police officer to require removal of face coverings for identification purposes	Part 3, Division 4
Power to use drug detection dogs at premises covered by the <i>Tattoo Parlours Act 2012</i> , and any public place in the Kings Cross precinct	Part 11, Division 2
Power of police officers to arrest without warrant	Part 8
Testing of certain offenders for intoxication	Part 10, Division 4
Powers relating to investigations and questioning under Part 9 made by the <i>Law Enforcement (Powers and Responsibilities) Amendment Act 2014</i>	Part 9
Changes to the safeguards in the use of police powers	Part 15
Power to conduct a search, including strip searches on children and transgender persons	Throughout the Act

In addition, the proposed Regulation makes a number of changes not currently provided in the Law Enforcement (Powers and Responsibilities) Regulation 2005 but are required to commence the *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*, including:

What is prescribed	Clause in proposed Regulation
Form of summary of Part 9 to be provided to detained persons	Clause 19 and Schedule 1, Form 31 and 32
Persons of the same sex (other than police officers) who may conduct personal searches for the purposes of section 32 (7A) (b).	Clause 46
Exercise of powers at crime scenes in prescribed rural areas under section 92(3).	Clause 47
Code of Practice for directions under Part 14 of LEPRA	Schedule 3

2.2 Background to the proposed Regulation

The proposed Regulation will remake the Law Enforcement (Powers and Responsibilities) Regulation 2005, with minor changes required by *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*. The *Law Enforcement (Powers and Responsibilities) Amendment Act 2014* is expected to commence concurrently with the proposed Regulation.

Under section 10 (2) of the *Subordinate Legislation Act 1989*, a statutory rule officially published on or after 1 September 1990 is repealed on the fifth anniversary of the date on which it was published (in the case of a statutory rule published on 1 September in any year), or on 1 September following the fifth anniversary of the date on which it was published (in any other case).

Under section 11 of the *Subordinate Legislation Act 1989* the Governor may, by order published on the NSW legislation website, from time to time postpone by one year the date on which a specified statutory rule is repealed by section 10. However the Governor may not postpone the remake of a Regulation more than 5 times.

Law Enforcement (Powers and Responsibilities) Regulation 2005 commenced 19 December 2005, and has been postponed 5 times. This proposed Regulation satisfies the requirements of Premier's Memorandum M2008-01.

2.3 Objectives of the proposed Regulation

The principal objective of the proposed Regulation is to remake the provisions of the Law Enforcement (Powers and Responsibilities) Regulation 2005, with minor changes required by *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*.

The objectives of the proposed Regulation include detailing:

- a) the form of the following:
 - (i) applications for various kinds of warrants, and for notices requiring the production of documents by authorised deposit-holding institutions (notices to produce documents), under LEPRA,
 - (ii) records to be made by or on behalf of authorised officers in relation to their determination of such applications,
 - (iii) (notices required under LEPRA to be given to occupiers of premises at which certain warrants are executed,
 - (iv) reports to authorised officers on the execution of warrants and the giving of notices to produce documents,
- b) the issue of receipts for things seized in the execution of warrants,
- c) the keeping of documents relating to warrants and notices to produce documents, and the inspection of those documents,
- d) the persons who may act as custody managers for persons detained under Part 9 of LEPRA,
- e) the guidelines to be observed by custody managers and other police officers, and the keeping and inspection of custody records, in relation to those detained persons,
- f) the detention under Part 9 of LEPRA of vulnerable persons—that is, children, persons with impaired intellectual or physical functioning, Aboriginal persons or Torres Strait Islanders and persons of non-English speaking backgrounds,
- g) the detention and return of vehicles that have been seized by police in connection with the public disorder emergency powers under Part 6A of LEPRA (including provisions for the payment of towing and storage fees in relation to seized vehicle),
- h) the train and bus routes in relation to which dogs may be used to carry out general drug detection without a warrant under the Act,
- i) the creation of a penalty notice offence for the offence of failing to comply with a direction of a police officer under Part 14 of LEPRA,
- j) persons of the same sex (other than police officers) who may conduct personal searches,
- k) exercise of powers at crime scenes under section 92(3) of LEPRA, and
- l) the code of practice for powers to give directions under Part 14 of LEPRA.

2.4 What does the proposed Regulation provide for?

Part 2 Warrants and notices to produce documents

Clauses 4–7, and associated Forms 1–20 contained in Schedule 1 to the Regulation, prescribe the various forms:

- to be completed by those applying for all kinds of warrants that may be applied for under LEPR, and notices to produce,
- to be completed by authorised officers recording their determination of applications for those warrants and notices to produce,
- of warrants and notices to produce under LEPR
- of notices given to occupiers of premises where certain warrants are executed, and
- of reports to authorised officers on execution of all kinds of warrants.

Clause 8 provides an adjoining occupier's notice under section 67B of LEPR may be in or to the effect of Form 23 (formerly Form 17B).

Clause 9 provides that a person who seizes a thing while executing a search warrant, or another kind of warrant under LEPR that allow items to be seized, must provide a receipt acknowledging seizure of the thing to the occupier if s/he is present and it is reasonably practicable to do so.

Clause 10 provides for the form of report to eligible issuing officer on execution of warrant (other than covert search warrant) or giving of notice to produce, which must be in Form 27 (formerly 20) or Form 30 (formerly 21), applying to the execution of the search warrant and any things seized under the warrant.

Clause 11 provides for the form of report to eligible issuing officer on execution of covert search warrant, with Forms 28 (formerly 20A) and 29 (formerly 20B) applying to the execution of the search warrant and any things seized under the warrant.

Clause 12 provides that all relevant documents (any application for the warrant, any record relating to the warrant made by the authorised officer determining the application, a copy of any occupier's notice and any report on execution of the warrant) must be kept, both in relation to warrants and notices to produce documents.

These documents must be retained for at least 6 years at the Local Court mentioned in the occupier's notice, or where no occupier's notice was issued, at the nearest Local Court to where the warrant was issued.

The clause also provides that the documents that must be kept under this clause, must be made available for inspection while the Local Court registry or Supreme Court registry is open, to the following classes of persons:

- in relation to notices to produce documents—an officer, or other person acting on behalf of, the authorised deposit-taking institution to which the notice relates;

- in relation to a warrant for the use of drug detection dogs—any member of the public;
- in relation to a detention warrant issued under Part 9 of LEPR—the person detained under the warrant, or anybody on that person’s behalf; and
- in relation to any warrant other than those mentioned above—the occupier of the premises to which the warrant relates, or anybody on the occupier’s behalf.

Clause 13 provides that an authorised officer may issue a certificate stating that a document or part of a document that would otherwise be available for inspection under clause 12, if disclosed, could jeopardise a person’s safety or seriously compromise the investigation of any matter. Such a certificate, once issued, prevents the relevant document or part of document from being made available for inspection under clause 12. The clause also provides that such a certificate may be revoked if (after submissions from any interested party) the authorised officer is satisfied that disclosure would no longer jeopardise any person’s safety or seriously compromise any investigation.

Part 3 Investigations and questioning

Clause 14 of the proposed Regulation provides that the Commissioner of Police must designate police stations (and other places) as designated places for the purpose of detaining persons held under Part 9 of LEPR (the detention after arrest for the purposes of investigation provisions). The Commissioner may only designate a police station or other place if it has sufficient facilities for the purpose.

Clause 15 provides that, for each designated police station or place of detention, the Commissioner is to appoint one or more police officers to act as custody manager at that place.

Clause 16 establishes an order of preference, as to where persons detained under Part 9 of the Act (‘detained persons’) are to be taken. Firstly, the detained person must be taken to a designated police station or place of detention at which there is an appointed custody manager on duty.

If the first option is not available, the detained person must be taken to a designated police station or place of detention at which there is a police officer who (while not an appointed custody manager) can act as custody manager.

If the second option is not available, the detained person must be taken to any police station or place of detention at which there is a police officer who can act as custody manager for the person. If the third option is not available, the detained person may be held at any place of detention.

Clause 17 establishes an order of preference as to who may act as custody manager for a detained person. Firstly, an appointed custody manager must act as custody manager. Secondly, if an appointed custody manager is not available, any police officer of or above the rank of Sergeant (or the officer for

the time being in charge of the police station or designated place of detention (as the case may be)) may act as custody manager. If no such person described in the second option is available, then any police officer may act as custody manager. However, in that event, no investigating or arresting officer in relation to the detained person, may act as the detained person's custody manager, unless both:

- a) no other police officer is available, and
- b) the duty officer at a designated police station has given written permission to that investigating or arresting officer, to act as the detained person's custody manager.

Clause 18 establishes an order of preference of who may act as custody manager in relation to New South Wales Crime Commission (**NSWCC**) and Australian Crime Commission (**ACC**) investigations. By virtue of clauses 16(5) and 17(5), neither clause 16 nor 17 applies to persons detained by police officers acting for those bodies. The scheme for NSWCC and ACC custody managers reflects the scheme in clause 17, altered appropriately to reflect the different organisational structure of those bodies.

Clause 19 provides that Forms 31 and 32 in Schedule 1 are the form of summary of Part 9 of LEPR, as required by section 122 (1) (b) of LEPR.

Clause 20 provides that a custody manager may still conduct functions relating to the identification of persons, and functions under the road traffic legislation (such as carrying out breath analysis), without being prevented from acting as the detained person's custody manager.

Clause 21 provides that Schedule 2 to the Regulation—Guidelines for custody managers and other police officers—has effect in guiding custody managers and other police officers who exercise functions under Part 9 of the Act.

The Guidelines for custody managers and other police officers contained in Schedule 2 provide as follows:

- Directing that custody managers should not put specific questions to the detained person about his or her involvement in any offence (Clause 1, Part 1, Schedule 2).
- The custody manager is responsible for identifying any property of the detained person (whether on the detained person, or that was taken from him or her on arrest) and keeping it safe while the person is detained (Clause 2, Part 1, Schedule 2).
- The custody manager must consider a range of issues about the detained person's behaviour and circumstances, relevant to whether a person has impaired intellectual functioning, for the purpose of determining whether the detained person is a "vulnerable person" and therefore attracts specific protections under Part 3 Division 3 of the Regulation (Clause 3, Part 1, Schedule 2).

- Adult Aboriginal persons and Torres Strait Islanders who are detained should not be placed alone in a police cell unless there is no reasonably practicable alternative, and (if held in a cell at all) should be accommodated with another Aboriginal person or Torres Strait Islander (who is an adult) wherever possible (Clause 4, Part 1, Schedule 2).
- Aboriginal persons or Torres Strait Islanders who are children should not be placed in police cells at all, unless exceptional circumstances make it necessary for the well-being of the child. In addition, if it is ever necessary to detain such a child overnight in a police cell, the custody manager must arrange for a support person to remain with the child unless it is not reasonably practicable to do so (Clause 5, Part 1, Schedule 2).
- All children (other than Aboriginal persons or Torres Strait Islanders) who are detained persons should not be placed in a cell unless: no other secure accommodation is available and the custody manager decides that the child cannot practically be supervised if not placed in a cell; or if the custody manager considers that a cell provides more comfortable accommodation than other secure accommodation in the police station. However, if placed in a cell, children should not be placed with adult detainees unless exceptional circumstances make it necessary to do so for the well-being of the child (Clause 6, Part 1, Schedule 2).
- Detained persons locked in police cells should not have any further restraints used on them, unless absolutely necessary (Clause 7, Part 1, Schedule 2).
- Police officers (including custody managers), when determining whether a detained person requires an interpreter, must bear in mind that a person who speaks some conversational English may still need the assistance of an interpreter to understand his or her legal rights. Qualified interpreters is an interpreter one who is accredited to professional level by the National Accreditation Authority of Translators and Interpreters in the language concerned. Interpreters should not be used as support persons (Clause 8, Part 1, Schedule 2).

Clause 22 defines “custody record” to mean the record required to be kept under section 131 of LEPR.

Clause 23 states that a separate custody record must be opened, as soon as practicable, for each detained person detained under Part 9 of LEPR, that entries in a custody record (which may be made in writing or electronically) must include the time at which the entry is made, and (if the entry is not made within a reasonable time of the occurrence of the event) the time of the event being recorded.

Clause 24 supplements section 131 of LEPR which contains the principal list of things that must be recorded in a custody record. Clause 23 specifies that the following additional things must be recorded:

- a) where the detained person has been arrested within the last 48 hours—the offence (or offences) for which the person was previously arrested, and the length of statutory investigation period that remains after deduction of any investigation period (or periods) that occurred during that prior arrest (or prior arrests);
- b) where Police apply for a detention warrant, and the detained person declines to make representations to the authorised officer about whether it should be granted—the fact that the person declined;
- c) if a detention warrant is issued—either a copy of the warrant or its form;
- d) the time of request of any request by the detained person to make a communication, and the time of any communication, to a friend, relative, guardian, independent person, legal practitioner, or consular official of the country of the detained person (as provided for in sections 123 and 124 of LEPRA);
- e) if a person claiming to be a friend, relative, guardian, legal practitioner, consular official or professional concerned with the welfare of the detained person contacts the police station (or other place of detention) inquiring about the whereabouts of the detained person—the time of this request for information, and any information actually provided (as provided for in sections 126 and 127 of LEPRA);
- f) any request by the detained person for an interpreter, and any arrangement by a police officer for an interpreter for the detained person, and the time of any request or arrangement;
- g) any request by the detained person for medical treatment or medication, and any arrangement by a police officer for medical treatment or medication, and the time of any request or arrangement;
- h) any request by the detained person for refreshments, toilet facilities, washing, showering or bathing facilities; and
- i) if a detained person’s clothing or personal effects are withheld from him or her—the reason for withholding them.

Clause 24 also provides that where an entry is made in the custody record about property taken from the detained person (section 131(2)(d) of LEPRA) or a person declining to make representations to an authorised officer on an application for a detention warrant (clause 23(1)(b) of the proposed Regulation), the detained person must be asked to sign an acknowledgment of the accuracy of the entry.

Clause 25 provides for inspection of the custody record, establishing the following scheme:

- a) **the detained person** may inspect the record at any time, unless the request is unreasonable or cannot reasonably be complied with;

- b) **a legal representative** for the detained person may inspect the record as soon as practicable after arriving at the place of detention; and also after the detained person leaves custody provided that reasonable notice is given to police;
- c) **a support person or consular official** may, only with the authority of the detained person, inspect the record as soon as practicable after arriving at the place of detention; and also after the detained person leaves custody provided that reasonable notice is given to police.

Division 3 of Part 3 to the proposed Regulation, spanning clauses 26–39, provides a scheme for providing additional protections to detained persons who are also “vulnerable persons”. Vulnerable persons are defined as persons under the age of 18 years (children), Aboriginal person or Torres Strait Islanders, persons with impaired intellectual or physical functioning and persons of non-English speaking background.

Persons with impaired physical functioning are not vulnerable persons if (in the reasonable judgment of the custody manager) the impairment is minor and will not significantly disadvantage the detained person compared with any other member of the community who does not have the impairment.

However, a person is not a vulnerable person if the custody manager reasonably believes that the detained person does not fall into any of the above categories.

This exception prevents arguments that a custody manager has failed to uphold the rights of a detained person, on the ground that the detained person was a vulnerable person and was entitled to additional protections set out below, if on the information available at the time the custody manager believed, and it was reasonable for him or her to believe, that the detained person did not fall within any of the categories of vulnerable persons.

LEPRA (section 112) specifically anticipates that the proposed Regulation will make provision modifying the impact of Part 9 as it applies to vulnerable persons.

The protections provided to vulnerable persons by the scheme are over and above those provided generally to detained persons. The protections provided by the scheme for vulnerable persons are set out below.

Assistance

Clause 28 provides that a custody manager must assist the vulnerable person in exercising all of his or her rights under Part 9 of LEPRA (for example by assisting in making a telephone call to a legal practitioner).

Support person—qualification, contact and presence at place of detention

Clauses 29–31 provide that a vulnerable person is entitled to have a support person attend and be present during any investigative procedure in which the person participates, and must be told that she or he has this right.

Where the person is a vulnerable person only as a result of being of non-English speaking background, providing an interpreter is sufficient.

The support person may be one of a number of categories of person who is able to care for, and act in the interests of, the detained person (such as a parent, friend or relative, or where no such person is available a person who is trained in dealing with vulnerable persons in the category to which the detainee belongs), but may not be a police officer.

The vulnerable person must be given reasonable and private facilities (such as a phone) to arrange for a support person to attend, and if a support person is attending, the investigative procedure must be deferred for such reasonable period (not exceeding 2 hours) as it takes for a support person to arrive.

The custody manager is not required to extend to the vulnerable person rights to be informed about and to contact a support person, and to defer investigative procedures until the support person arrives, if the custody manager believes on reasonable grounds that doing so will cause an accomplice avoiding arrest, the loss (or tainting) of evidence or intimidation of a witness, hindering the recovery of property or persons concerned in the offence, likely bodily injury to any person, or if the safety of others requires that the investigative procedure be carried out urgently.

A vulnerable person is entitled to a support person, or the statutory right of consulting with a friend, relative guardian or independent person under section 123 of LEPR, but not both. However, such a person called to the police station under section 123 is not prevented from acting as a support person.

Support person—waiver of right

Clause 32 provides that a vulnerable person who is a child may not waive his or her right to have a support person present. It is implicit from clause 29(5) that an adult vulnerable person may waive his or her right to have a support person present.

Support person—role in investigative procedure

Clause 33 provides that a support person is to be told by the custody manager that they are not confined to observing any interview in which the vulnerable person participates. The support person may assist and support the vulnerable person, identify communication problems that arise, and observe whether the interview is being conducted fairly.

The custody manager is to give to the support person (and any interpreter who attends) a copy of the written summary of the rights of detainees under Part 9 of the Act (that must be provided to all detained persons by virtue of section 122(1)(b) of LEPR).

In addition, if there is a written record of interview, the support person (or the legal representative for the vulnerable person) is to be given an opportunity to read and sign it, and any refusal to do so should be recorded by police.

It should be noted, however, that in practice, these provisions are rarely required, as it is standard NSW Police procedure to record all interviews with suspects on both audio-visual, and audio, equipment.

Under clause 34, however, a support person may be excluded from an investigative procedure if she or he unreasonably interferes with it. If such an exclusion occurs, the vulnerable person is entitled to have another support person attend.

Person responsible for welfare of vulnerable person to be contacted in some circumstances

Clause 35 provides that if the detained person is a vulnerable person as a result of being a child, or having impaired intellectual or physical functioning, the custody manager must attempt to find out who is responsible for the person's welfare, and once that person's identity is known, contact that person and advise him or her of:

- the vulnerable person's whereabouts, and
- the grounds for detention of the vulnerable person.

Legal assistance for Aboriginal person or Torres Strait Islanders

Clause 36 provides that if the detained person is a vulnerable person as a result of being an Aboriginal person or Torres Strait Islander, then the custody manager must tell the person that she or he will notify the Aboriginal Legal Service (NSW/ACT) Limited of the person's detention and whereabouts, and then do so.

Cautions

Clause 37 provides that the custody manager, or anyone else who gives a caution (about the right to silence) to a vulnerable person, must take steps to ensure that the person understands it. Any caution given in the absence of a support person must be given again in the support person's presence.

Time outs

Clause 38 provides that, in addition to the standard statutory time outs that apply to all detained persons as provided under section 117 of LEPR (for the purpose of determining when the clock 'stops running' towards the maximum 4 hour detention period without a warrant), the following time outs apply in relation to vulnerable persons:

- a) any time required to arrange for the support person to attend at the place of detention, and
- b) any time required to allow the support person to arrive at the place of detention,

providing always that investigative procedures actually *were* reasonably suspended or deferred during those times.

Detention warrant applications

Clause 39 provides that any application for a detention warrant relating to a vulnerable person must specify:

- that the person is (believed to be) a vulnerable person,
- the nature of the vulnerability,
- the identity of the support person who has been present during the investigative procedure, and that person's relationship to the vulnerable person, and
- any particular precautions that have been taken in respect of the vulnerable person.

Part 4 Public disorder emergency powers—seizure, detention and return of vehicles

Part 4 of the proposed Regulation details the exercise of powers with respect to Part 6A of LEPR.

Powers in relation to removal and detention of seized vehicles

Clause 41 provides that where a police officer seizes a vehicle under section 87M(1)(a) of LEPR, and the driver, or any other person, does not surrender the keys to the vehicle, the police officer may remove, dismantle or neutralise any locking mechanism required to start the vehicle by other means.

A seized vehicle may be detained at the place seized or moved to any other place determined by the Commissioner. The vehicle can be moved to another location by being driven, towed or pushed by any person directed to do so by a police officer.

Clause 42 provides that where a vehicle is towed under clause 41, the person responsible for the vehicle may be required to pay for the costs of the towing except where:

- a) The responsible person provides a statutory declaration that they did not know, and could not have reasonably have been expected to have known, that the vehicle would be used to convey any person to participate in a public disorders; and
- b) The statutory declaration names the person (and their address) who was driving the vehicle when it was stopped under section 87J of LEPR; or
- c) The person does not know and could not with reasonable diligence have ascertained the name and address of the person who was driving the vehicle at that time.

Clause 43 provides that where a vehicle is stored at a place other than where is seized a fee for the storage of the vehicle is payable to the Commissioner.

Clause 44 provides that the Commissioner has a duty to take all reasonable steps to secure the seized vehicle from theft or damage whilst it is being detained under section 87M of LEPR.

Clause 45 provides that a court may direct that any fee payable under Part 4 of the proposed Regulation in relation to towing or storage of a seized vehicle be reduced by any amount the court deems appropriate, including ordering that no fee be paid.

Any direction under clause 44 may be given by the court for reasons of avoidance of any undue hardship to any person or other injustice perceived by the court and has effect according to its tenor.

Part 5 Miscellaneous

Persons of the same sex (other than police officers) who may conduct personal searches

Clause 46 provides that the following persons are prescribed to conduct a search of a person of the same sex under section 32(7A)(b) of LEPR:

- a) corrective services officers (within the meaning of the Crimes (High Risk Offenders) Act 2006),
- b) ambulance officers (within the meaning of the Mental Health Act 2007),
- c) nurses.

Where a person of those classes is not available, and it is not reasonably practicable for a person of a class referred to in paragraphs (a)–(c) to be available for the purposes of the search, a person who, in the opinion of the Commissioner, has appropriate training, qualifications or experience in conducting personal searches may conduct the search.

This class of persons will be prescribed by the Commissioner.

Extension of time for exercise of powers at crime scenes at prescribed rural areas

The *Law Enforcement (Powers and Responsibilities) Amendment Act 2014* amended section 92(3) of LEPR to provide that a police officer may exercise the crime scene powers conferred by section 92 of LEPR for a period of up to 6 hours in prescribed rural areas. Clause 47 prescribes the following Local Area Commands as rural areas for the purpose of section 92(3):

- a) Albury LAC,
- b) Barrier LAC,
- c) Barwon LAC,
- d) Canobolas LAC,
- e) Castlereagh LAC,
- f) Chifley LAC,

- g) Cootamundra LAC,
- h) Darling River LAC,
- i) Deniliquin LAC,
- j) Far South Coast LAC,
- k) Griffith LAC,
- l) Lachlan LAC,
- m) Mudgee LAC,
- n) Monaro LAC,
- o) Orana LAC,
- p) Oxley LAC,
- q) New England LAC,
- (r) Wagga Wagga LAC.

Prescribing of authorised places for generalised drug detection without a warrant

For the purpose of section 148(1)(c) of LEPR, clause 48 prescribes the following train lines (and any buses that are running in *lieu* of trains on those lines) as places where general drug detection (by use of 'sniffer dogs') may occur under Part 11 Division 2 of LEPR:

- a) the Bankstown line
- b) the Inner West line
- c) the Eastern Suburbs line
- d) the Illawarra line (extending to Bomaderry but not including the Lysaghts to Port Kembla line)
- e) the Northern line (extending to Newcastle via Strathfield)
- f) the South line (terminating at Campbelltown)
- g) the Western line (terminating at Penrith and including the Olympic Park loop)
- h) the North Shore line (terminating at Berowra)
- i) the Southern Highlands line
- j) the Blue Mountains line (terminating at Lithgow)
- k) the Hunter line (between Newcastle and Dungog, including Maitland station and Scone station)
- l) the Airport and East Hills line
- m) the Carlingford line (between Clyde station and Carlingford station)
- n) the Cumberland line (between Campbelltown station and Schofields station)

For the purpose of section 148(1)(c) of LEPR, clause 49 prescribes the following bus routes as places where general drug detection (by use of 'sniffer dogs') may occur under Part 11 Division 2 of LEPR:

- a) the Sydney–Albury route
- b) the Sydney–Grafton route.

Code of Practice for directions under Part 14 of LEPR

Clause 50 provides that the Code of Practice required under section 200A(1) of LEPR (as introduced by the *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*) is prescribed in Schedule 3 of the proposed Regulation.

Records relating to detention of intoxicated persons

Clause 51 provides that the following particulars must be included in a record made by a police officer who detains an intoxicated person under section 209(1)(a) of LEPR:

- a) the name and rank of the police officer
- b) the name and date of birth of the intoxicated person
- c) the grounds on which the person is being detained
- d) the date and time when the following occur:
 - I. the intoxicated person's detention commences; and
 - II. the person is brought to the authorised place of detention
- e) the name and address of the authorised place of detention.

The following particulars must be included in a record made by the person in charge of the place of detention where the intoxicated person is detained under section 209(1)(b) of LEPR:

- a) the name and rank of the responsible detention officer
- b) the name and rank of the police officer who brings the intoxicated person to the authorised place of detention
- c) the name and date of birth of the intoxicated person
- d) the date and time when:
 - I. the intoxicated person is brought to the authorised place of detention; and
 - II. when that person is released from detention
- e) the name of every detention officer at the place of detention who is responsible for the intoxicated person's detention
- f) details of any medical treatment or medication provided or administered to the intoxicated person during the detention, and the time at which that arrangement is made.

Further, clause 51 provides that if a search is conducted on an intoxicated person, records must be kept of the person conducting the search and what is seized from the intoxicated person.

Penalty notice for offence of failure to comply with police direction

Clause 52 specifies that a penalty notice may be served for an offence contrary to section 199(1) of LEPR (fail without reasonable excuse to comply with a direction given under Part 14 of the Act—giving Police the power to give reasonable directions in a public place in certain circumstances). It further specifies that the penalty for the offence is \$220.

3. OPTIONS TO ACHIEVE OBJECTIVES

This RIS examines four options for the making of the proposed Regulation:

- a) Do nothing. This would mean that current Regulation lapses and no Regulation is made under LEPRAs;
- b) Address the matters through LEPRAs rather than in the Regulation;
- c) Make the proposed Regulation with changes; and
- d) Make the proposed Regulation without change.

Each of these options will be considered in the context of the objectives of the Regulation.

3.1 Option 1 – Do Nothing

This would mean that no Regulation is made under LEPRAs. The existing Regulation would lapse and the current procedures undertaken under the Act would no longer have a legal basis.

The alternative ‘do nothing’ option—that particular clauses of the proposed Regulation are not enacted—is considered below under Option 3.

Costs

Failing to make any Regulation under LEPRAs would have the effect that the entire statutory scheme provided for by the Act would cease to be effective. For example, most warrants envisaged by LEPRAs could not be issued, because section 66 of LEPRAs requires that warrants are to be in the form prescribed by the Regulations.

Benefits

It is difficult to identify any benefits of not making any Regulation under LEPRAs.

Discussion

It is considered that Option 1 fails to meet the objectives of the proposed Regulation.

3.2 Option 2 – Address the matters through the Act, not the Regulation.

Costs

Addressing each of the objectives through the Act rather than in the Regulation would result in additional costs being incurred when future amendments—even very minor or technical amendments—to the objectives set out above, are considered necessary.

These costs include Parliamentary sitting time. Significantly higher administrative costs are associated with an amendment to the Act, compared with an amendment to a Regulation.

Benefits

A possible benefit of this option would be greater scope for Parliamentary scrutiny for the matters provided for in the proposed Regulation, in that the matters would need to be specifically passed by Parliament rather than merely being subject to disallowance by Parliament (under the *Subordinate Legislation Act 1989*).

However, the existence of the Legislative Review Committee of Parliament, which provides scrutiny of statutory instruments, significantly reduces the scope of this benefit.

Discussion

A Regulation must be made. As a minimum, forms must be prescribed for applications for warrants, records of determinations on those applications, warrants, and the like. Given that not making a Regulation is not an option, it is more efficient to have all objectives that are more appropriately achieved through subordinate legislation, pursued through the Regulation and not in LEPRA.

It is considered that Option 2 fails to meet the objectives of the proposed Regulation.

3.3 Option 3— Make the proposed Regulation with changes

The costs and benefits of changing the proposed Regulation are considered below under each relevant subject heading covered by the Regulation. The below argues the benefits and costs of removing Parts of the proposed Regulation.

Warrants and notices to produce documents

Costs

Prescribing no forms in relation to how warrants are to be applied for, how records are to be made of the determination of such applications, how warrants are to appear, and like matters, would have the effect that most warrants could not be issued at all, and the entire statutory scheme for the issue of warrants would be defeated. For example, section 66 of LEPRA requires that a warrant is to be in the form prescribed by the regulations.

Making no regulation in terms of proposed clauses 8, 10 and 11 would have the effect that there was no requirement that receipts be given where things are seized by persons executing warrants that allow seizure; and also that the keeping of records in connection with the issue and execution of warrants, and the inspection of those records, would be unregulated.

As a result, there would be no specific requirement to keep each application for a warrant (or notice to produce), each record relating to the application, each occupier's notice (if the warrant was issued) and each report on execution of the notice. These records would still need to be made pursuant to the provisions of LEPRA—however authorised officers and Local Courts would receive no

guidance on whether the records needed to be stored, where, for how long, and who might seek access to them. (The general *State Records Act 1998* does not apply to courts exercising a judicial function: section 9(1)(c) of that Act.)

In addition, there would be no effective statutory direction regarding which persons may access any records that were kept by a Local Court. The *Privacy and Personal Information Protection Act 1998* does not affect courts in the exercise of their ‘judicial functions’, which is defined to include functions that “relate to the hearing or determination of proceedings before it”: subsections 6(1) and (3) of that Act. It would be difficult to guarantee that persons who had a legitimate interest in perusing the records relating to a warrant might not be denied access; or that persons mentioned in the records relating to a warrant might not have their privacy improperly interfered with, by access being granted to those with no legitimate interest.

Further, there would be no statutory means of preventing documents, or parts of documents, from being disclosed if their disclosure is likely to jeopardise a person’s safety. This disadvantage cannot entirely be mitigated by an authorised officer exercising his or her power under section 65(3) of LEPR to not record personal details in a record relating to a warrant if “the authorised officer is satisfied that to do so might jeopardise the safety of any person”, because that power only extends to records kept by authorised officers relating to applications for warrants—it does not extend to other documents associated with warrants.

Benefits

Making no regulation on this topic might arguably reduce the administrative burden on Local Courts in maintaining records, and allowing access to those records, relating to warrants. However, a failure to make a regulation on this topic would presumably not prevent interested parties from making applications to Local Courts (or other bodies in the justice system) for access to these records, and so any benefit would be minimal.

Investigations and questioning

Costs

The result of not making the proposed Part 3 of the proposed Regulation would be as follows:

- a) Police would have no statutory guidance on the issue of where persons detained after arrest may be held, with the result that detained persons may be held at inappropriate places or places with inadequate facilities.
- b) The custody manager of the detained person would be only as defined in section 3 of LEPR—“the police officer having from time to time the responsibility for the care, control and safety of a person detained at a police station or other place of detention”. This definition, without being further refined, could lead to investigating officers or arresting officers being the

custody manager of the detained person. Such a result would be undesirable, unless no other alternative is open, because compliance with the safeguards protecting detained persons' rights under Part 9 of LEPR, is best achieved by the person's custody manager being independent from the investigative process.

- c) Administrative and 'common sense' requirements in relation to custody records (as set out in proposed clauses 22–24), such as that a separate custody record must be kept in relation to every person, that the provision of medical treatment should be recorded, and that the custody record should be available for inspection by or on behalf of the detained person, would no longer be prescribed by statute.
- d) There would be no statutory regime providing special protection for the rights of vulnerable persons who are detained.

Benefits

The benefits of not re-making the existing Regulation within the proposed Regulation would, at least superficially, flow to police. Police would be freed from a number of statutory constraints currently placed upon them—for example, those constraints that limit an investigating officer's capacity to be a custody manager, require that the custody manager record a number of items of information about the detained person, and require that if the detained person is a "vulnerable person", a support person must generally be present during any investigative procedure.

Public disorder emergency powers—seizure, detention and return of vehicles

Costs

The cost of not making the proposed clauses 39 – 44 would be that the powers of removal and detention of seized vehicles during public disorder would not be clear, with police not required to look after vehicles seized.

Part 4 of the proposed Regulation details the obligations that police owe to the vehicle, including how it will be towed, stored and returned, and the fees that Police are able to charge during the time that the vehicle is seized.

Benefits

The benefits of not re-making the existing Regulation within the proposed Regulation would again, at least superficially, flow to police. Police would not be required to care for any vehicle seized after the exercise of public disorder emergency powers, and would be free to charge whatever costs borne during the seizure, towing, storage and return of the vehicle.

Prescribing of authorised places for generalised drug detection without a warrant

Costs

The cost of not making the proposed clauses 45–46 would be that the intention of the statutory scheme in Part 11 Division 2 of LEPR—*that police may use dogs to carry out generalised drug detection on certain transport routes*—would be defeated. The costs of amending the proposed clauses to remove some public passenger transport routes from the proposed list would be twofold:

- a) If amendment was made to the list of rail routes prescribed in the clause—*generalised drug detection without warrant would become lawful in some parts, but not in other parts, of the CityRail network, placing arbitrary limits on where sniffer dogs may operate within that network on any given day, and a perception of discriminatory enforcement of the law would be created*;
- b) Police would need to apply for a warrant before using a dog to conduct general drug detection on the routes that were removed from the list, leading to higher administrative costs of enforcing drug laws on public transport.

Benefits

Not making the proposed clauses would have the effect that police would be required to apply for a warrant on every occasion that they wished to carry out generalised drug detection on all public transport routes.

Alternatively, by amending the proposed clauses to remove some public passenger routes from the current list, police would be required to apply for a warrant on every occasion that they wished to carry out generalised drug detection on those public transport routes that were removed from the list.

By increasing the difficulty of the police being able to carry out generalised drug detection on these routes, it could be expected that less generalised drug detection would be conducted on these routes.

This would largely be because of the administrative costs of applying for large numbers of warrants, not because the application for any given warrant would be likely to be refused—the threshold for applying for a drug detection warrant is merely that the police officer is satisfied on reasonable grounds that the persons at any given public place *may* include persons committing drug offences; and the threshold for an authorised officer issuing such a warrant is merely that “there are reasonable grounds for doing so”: section 149 of LEPR.

Therefore the most substantial perceived benefit to some sections of the public from not making the proposed clauses, would be that those passengers who travel on these routes and consider the use of dogs to carry out generalised drug detection invasive of their privacy or offensive, would be less likely to be subject to generalised drug detection.

Failure to comply with direction

Costs

The cost of not making the proposed clause 48 would be that all offences contrary to section 199 of LEPRA would have to be prosecuted through the courts.

Given the low maximum penalty available for the offence, this would involve substantial wastage of resources by both the prosecuting authorities and the courts.

In addition, offenders who admit the offence would in many instances prefer to pay a penalty notice than to have to spend time appearing in court and risk having a criminal conviction recorded against their name for the offence (no record of criminal conviction is made if a penalty notice is paid).

Benefits

The principal perceived benefit in not making the proposed clause would be that alleged offenders would in every instance have an alleged offence against the section heard and determined by a court.

This perceived benefit is of extremely marginal utility, as a person who is served with a penalty notice has a right to make a court election in relation to that notice, following which court proceedings are commenced as if the penalty notice had never been issued. The benefit would therefore be merely that alleged offenders would not have to fill out a form.

Discussion

In relation to each of the clauses of the Regulation, the costs of not making the clause appear to substantially outweigh the benefits.

In particular, the detriment to detained persons of having none of the protections that exist in the proposed Regulation, would appear to be substantial. Detained persons who are “vulnerable persons” under the legislation would be likely to suffer significantly from the abolition of the requirement that they are entitled to have a support person present during any investigative procedure involving the vulnerable person.

Persons of the same sex (other than police officers) who may conduct personal searches

Costs

Prescribing no class of persons who are able to conduct a search would have the effect that searches of persons by a person of the same sex (other than a police officer) under section 32 of LEPRA could not occur, as section 32 of

LEPRA requires that a search by a person of the same sex (other than police officers) is to be by a person of a class prescribed by the regulations.

This would have the effect that police officers would not be able to conduct searches of detained persons as quickly as is reasonably practicable. Searches that are not conducted as quickly as is reasonably practicable may threaten the person detained, that may have dangerous items on them, as well as the police officers responsible for that person while they are detained.

Prescribing the class of persons able to conduct a search will provide greater protections to persons who are required to be search under LEPRA.

Benefits

By not prescribing the class of persons, police would not be able to conduct searches of persons without a police officer of the same sex conducting the search.

While this would prevent searches happening immediately, it is likely to result in persons being detained for longer periods of time, and often with dangerous items on the person.

Option 3 discussion

It is considered that not including all Parts of the proposed Regulation would have a detrimental effect. Making the proposed Regulation, which includes minor amendments, including changes required by the *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*. Therefore to meet the objectives of LEPRA, it is proposed that the proposed Regulation commence as drafted.

3.4 Option 4— Make the proposed Regulation without changes

Costs

By remaking the existing Regulation without amendments, a number of identified issues and restrictions would not be addressed, impeding on the efficiency of the operation of detention centres. Further, technical amendments that update terminology used or references to organisations that have changed names would not occur either.

Benefits

The existing Regulation has successfully operated since it was made in 2005, providing the necessary procedural and administrative details for the effective administration of law enforcement powers and responsibilities.

Discussion

Although it is unlikely remaking the Regulation without amendments would have a detrimental effect on any stakeholders, amendments are required to improve

and continue the effective operation of the Regulation. This option is not proposed.

4. CONSULTATION

Copies of this RIS will be forwarded to the following organisations:

- NSWPF
- Office of the Director of Public Prosecutions
- Legal Aid NSW
- Public Defenders
- Chief Magistrate of the Local Court
- Chief Judge of the District Court
- Chief Justice of the Supreme Court of NSW
- Law Society of NSW
- NSW Bar Association
- Transport for NSW
- Aboriginal Legal Service
- Aboriginal Justice Advisory Council
- Combined Community Legal Centres Group (NSW) Inc.