

COMMUNITY LEGAL CENTRES TASMANIA

3 February 2025

Department of Justice
Office of the Secretary
GPO Box 825
Hobart TAS 7001

via email: haveyoursay@justice.tas.gov.au

To the Department of Justice,

Re: *Police Powers and Responsibilities Act – Proposal Paper*

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the consultation into the *Police Powers and Responsibilities Act* ('the proposal paper').¹ There are around 100 statutory instruments in Tasmania with powers of arrests. However, as the Attorney-General has observed "a holistic review of the legislation governing police powers has not occurred. Instead, reforms have been *ad hoc*, resulting in a proliferation of powers spread across many Acts".² We therefore support the consolidation of arrest powers on the basis that it will better ensure consistency in the use of police powers, minimise errors and make the law more accessible.

Background

In 1977 the Law Reform Commission of Tasmania published a report on the consolidation of powers of arrest, search and bail.³ The report recommended that powers of arrest be codified in a new statute. More than thirty years later, the Tasmania Law Reform Institute (TLRI) made the same recommendation noting that in 1977 there were only 14 Acts conferring powers of arrest without warrant in Tasmania and in 2011, when the TLRI was undertaking its research, there were now more than 40 Acts conferring powers of arrest without warrant. As the TLRI observed, "the proliferation in arrest powers since 1977 can be attributed partly to an increase in specialist legislation, which, in dealing with a particular issue creates powers of arrest specific to that matter".⁴ As the TLRI noted "this creates difficulties for arrestors in knowing when they have a valid power of arrest and for arrestees in knowing whether they are required to submit to the authority of the arrestor".⁵

¹ CLC Tas would like to acknowledge those persons and organisations who gave freely of their time in assisting with our submission.

² Tasmanian Government, *Police Powers and Responsibilities Act – Proposal Paper* (November 2024) at 4.

³ Law Reform Commission, *Report on Powers of Arrest, Search and Bail* (1977).

⁴ Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania* (Final Report No 15: May 2011) at 22.

⁵ Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania* (Final Report No 15: May 2011) at 22.

As well as the large number of laws containing arrest powers, the powers are inconsistently applied with the TLRI pointing out that, it is unclear why persons would be arrested for failing to provide their name, address and age or date of birth pursuant to the *Liquor Licensing Act 1990*, *Animal Welfare Act 1993*, *Gaming Control Act 1993* and *Firearms Act 1996* but will be arrested if they do not provide their name and address (age or date of birth are not required) for Acts such as the *Traffic Act 1925*, *Police Offences Act 1935*, *Road Safety (Alcohol and Drugs) Act 1970*, *Poisons Act 1971*, *Local Government (Highways) Act 1982*, *Whales Protection Act 1988*, *Wellington Park Act 1993*, *Second-hand Dealers and Pawnbrokers Act 1994*, *Environmental Management and Pollution Control Act 1994*, *Misuse of Drugs Act 2001*, *National Parks and Reserves Management Act 2002*, *Nature Conservation Act 2002*, *Police Service Act 2003*, *Racing Regulation Act 2004* and *Police Powers (Public Safety) Act 2005*.⁶

Finally, it is also confusing that there are different levels of belief or suspicion both between Acts and within Acts. For example, the *Police Offences Act 1935* (Tas) alone provides 'believes on reasonable grounds',⁷ 'has reasonable grounds to believe',⁸ 'reasonably suspects';⁹ 'reasonably believes';¹⁰ 'has reasonable grounds for believing'¹¹ and 'has reasonable grounds to suspect'.¹²

With the TLRI having recommended more than a decade ago that Tasmania consolidate arrest powers into one statute¹³ the introduction of consolidated police powers will better ensure consistency in the use of police powers, minimise errors and make the law more accessible.

We support the Government's commitment not to broaden the current limitations on the power to arrest youth or the associated duties of a police officer where a youth is arrested, that are currently provided for in sections 24 and 24A of the *Youth Justice Act 1997*. We also support other Government commitments to young people and acknowledged in the proposal paper including increasing the minimum age of detention to 16 years, raising the age of criminal responsibility from 10 to 14 years and law reform relating to the searching of youth. Finally, we welcome the Government's commitment to implementing recommendations 12.13 and 12.27 from the Commission of Inquiry into the Tasmanian Government's

⁶ Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania* (Final Report No 15: May 2011) at 14.

⁷ Section 4A(2), (6A) of the *Police Offences Act 1935* (Tas).

⁸ Section 6B(1) of the *Police Offences Act 1935* (Tas); section 6C(5)-(7) of the *Police Offences Act 1935* (Tas); section 7(3) of the *Police Offences Act 1935* (Tas); section 7A(3) of the *Police Offences Act 1935* (Tas); section 7B(2) of the *Police Offences Act 1935* (Tas); section 13(3AAA) of the *Police Offences Act 1935* (Tas); section 13A(2B) of the *Police Offences Act 1935* (Tas); section 13B(1A) of the *Police Offences Act 1935* (Tas); section 13C(1A) of the *Police Offences Act 1935* (Tas); section 14B(5) of the *Police Offences Act 1935* (Tas); section 21A(2) of the *Police Offences Act 1935* (Tas); section 37I(2) of the *Police Offences Act 1935* (Tas).

⁹ Section 15F(4)-(5) of the *Police Offences Act 1935* (Tas); section 37N(6) of the *Police Offences Act 1935* (Tas).

¹⁰ Section 15C(2) of the *Police Offences Act 1935* (Tas); section 15CA(6) of the *Police Offences Act 1935* (Tas); section 19A(1B) of the *Police Offences Act 1935* (Tas).

¹¹ Section 55(2B) of the *Police Offences Act 1935* (Tas); section 55(2D) of the *Police Offences Act 1935* (Tas); section 55(2E) of the *Police Offences Act 1935* (Tas); section 58 of the *Police Offences Act 1935* (Tas).

¹² Section 58A(1) of the *Police Offences Act 1935* (Tas).

¹³ Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania* (Final Report No 15: May 2011) at v.

Responses to Child Sexual Abuse in Institutional Settings, relating to the exercise of police discretion in cautioning, arrest, custody, charging and bail, particularly for Aboriginal children and young people.

- ***Informing of the reasons for arrest***

Section 301(2) of the *Criminal Code Act 1924* (Cth) provides that for indictable offences a person must be informed of the reason for their arrest at the time of the arrest unless it is obvious or not practicable to do so. A similar test applies at common law for summary offences.¹⁴ With the TLRI having found that the test is both unclear and ill-defined¹⁵ reform is needed. We do not support the proposal papers recommendation that a person is informed of the reasons for their arrest *as soon as practicable after their arrest*. Instead, we support the TLRI recommendation that police officers inform the other party *at the time of the arrest* why they are being arrested.¹⁶ In our experience, an understanding by a person being detained of why they have been detained is less likely to result in anger and frustration being expressed and is also likely to lead to increased transparency by police officers for the making of the arrest.

- ***Arrest as a last resort***

We strongly believe that arrest must be a last resort. This should be expressly provided in the proposed legislation as was recommended by the TLRI.¹⁷ Whilst NSW does not expressly provide that arrest is a last resort, it circumscribes that it may only be exercised when particular circumstances are present:¹⁸

99 Power of police officers to arrest without warrant

(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,

¹⁴ *Gow v Davies* [1992] 1 Tas R 1.

¹⁵ Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania* (Final Report No 15: May 2011) at 53.

¹⁶ Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania* (Final Report No 15: May 2011) recommendation 9.

¹⁷ Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania* (Final Report No 15: May 2011) recommendation 5.

¹⁸ Section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

- (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.*

As well as arrest being a last resort, the TLRI emphasised the need for alternatives to arrest including the introduction of ‘notices to appear’ as currently apply in Queensland and the Northern Territory.¹⁹ In those two jurisdictions, where a police officer finds someone committing an offence or believes on reasonable grounds that a person has committed an offence and there is no reason to believe that they will not appear in court to answer a charge, the police officer has the power to issue an on-the-spot attendance notice on that person to appear in court at the time and place specified in the notice.

In Tasmania, it is open to police to proceed by summons rather than arrest. However, the summons process is “cumbersome” requiring a complaint to be prepared, and provided to a justice accompanied by an application for a summons.²⁰ The advantage of a notice to appear as the TLRI has observed, is that it “provides an attractive and less coercive option to police officers... [and]... has the potential to discourage police officers arresting for minor offences and may offer a less cumbersome option than proceeding by way of summons”.²¹ We therefore strongly recommend that any broadening of the power to arrest include notices to appear as an alternative to arrest.

Recommendation: That it be expressly provided that arrest is a last resort and that notices to appear are introduced as an alternative to arrest.

As well as making clear that arrest is a last resort, and providing an alternative to arrest, any proposed law reform which broadens the power to arrest without warrant must include safeguards, including a requirement that in arresting a person police officer must provide evidence that they are a police officer, the police officer’s name and the reason for the arrest. A good model is found in the NSW Act:²²

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.*

¹⁹ Sections 382-390 of the *Police Powers and Responsibilities Act 2000* (Qld) and sections 133A-133E of the *Police Administration Act 2007* (NT).

²⁰ Section 32 of the *Justices Act 1959* (Tas).

²¹ Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania* (Final Report No 15: May 2011) at 80.

²² Section 202 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). See also section 637 of the *Police Powers and Responsibilities Act 2000* (Qld).

- **Reasonable belief**

The High Court case of *George v Rockett* considered the difference between 'reasonable belief' and 'reasonable suspicion'. The High Court found that the standard of 'reasonable belief' required a higher level of certainty than a 'reasonable suspicion':²³

Suspicion, as Lord Devlin said in Hussien v Chong Fook Kam [1970] AC 942 at 948, "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'" The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief..

Expressed in another way, the High Court found that different states of mind are required for suspicion and belief with suspicion more easily achieved than belief.

We strongly support the proposal papers recommendation that arrest powers require the higher standard of 'reasonable belief' "because it sets a higher threshold for the application of coercive powers and incursions on the right to liberty".²⁴ We agree with the TLRI that the higher standard of reasonable belief should apply to arrest powers. The reason that a higher standard should apply before persons are searched is because it interferes with the right of people to be free to go about their daily lives without interference. We are concerned that lowering the standard will disproportionately impact persons based on their age, race or appearance.

Recommendation: That 'reasonably believe' continue to be the standard required of police officers when arresting.

- **The use of force**

At common law it is well established that reasonable force may be used to execute an arrest, necessary and reasonable force can be used to prevent an unlawful arrest and persons who resist arrest do not commit an offence if they reasonably believe that the person executing the arrest is not a police officer.²⁵ The common law position is codified in four separate sections of the *Criminal Code Act 1924* (Tas).²⁶ However, as the TLRI has observed, the Tasmanian provisions are "unnecessarily complicated"²⁷ when it is acknowledged that some other jurisdictions cover the field in one discrete provision.²⁸ We support the proposal papers recommendation that the use of force in arrest powers be set out in one provision.

It is also critical that the use of force in effecting an arrest is proportionate. In other words, the use of force and the amount of force used be assessed according to the seriousness of the offence for which the suspect is sought to be apprehended and other factors justifying the arrest. Whilst the *Criminal Code Act 1924* (Tas) does not limit the use of force in making an arrest, both the Commonwealth and Victorian *Crimes Acts* expressly recognise the principle of proportionality.²⁹ As well, the Commonwealth *Crimes Act 1914* expressly provides that lethal or dangerous force should not be used by either police officers or private citizens

²³ *George v Rockett* [1990] HCA 26 at para. 14.

²⁴ Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania* (Final Report No. 15) at 44.

²⁵ Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania* (Final Report No. 15) at 54.

²⁶ Sections 26, 30, 31 and 32 of the *Criminal Code Act 1924* (Tas).

²⁷ Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania* (Final Report No. 15) at 54.

²⁸ See, for example, section 3ZC of the *Crimes Act 1914* (Cth) and 462A of the *Crimes Act 1958* (Vic).

²⁹ Section 3ZC of the *Crimes Act 1914* (Cth) and section 462A of the *Crimes Act 1958* (Vic).

except to protect life or prevent injury to others.³⁰ We strongly recommend that the proposed Bill adopt the recommendation of the TLRI and enact the principle of proportionality in the use of force in arrest powers.³¹

Recommendation: That the use of force in arrest be set out in one provision with express recognition that as far as practicable, it must be the least amount of force reasonable and necessary to carry out the arrest.

- ***Search powers***

The proposal paper notes that it is intended to broaden search powers including the power to search where a police officer has a reasonable suspicion a person has committed an offence and reasonably suspect that they are in possession of evidentiary material in relation to that offence. We do not support this proposed reform on the grounds that vulnerable groups including Aboriginal and Torres Strait Islander persons, young persons, persons who have impaired intellectual or physical functioning and persons of non-English speaking backgrounds will be disproportionately targeted.

Recommendation: That the status quo remain in relation to search powers.

- ***The place of arrest***

The power to enter private premises to effect an arrest is currently set out in section 26A of the *Criminal Code Act 1924* (Tas):

26A. Entry on premises for purposes of arrest

(1) A police officer may enter (using reasonable force if necessary), remain on and search premises, including a conveyance –

(a) on or in which the police officer has reasonable grounds for believing that a person named in a warrant for arrest is present; or

(b) for the purpose of making an arrest without warrant if lawful to do so.

(2) Before entering any premises pursuant to subsection (1), a police officer must communicate or attempt to communicate to a person within the premises the police officer's authority to enter the premises unless the police officer reasonably believes that communicating or attempting to communicate would be likely to endanger any person or frustrate the arrest.

We agree with the proposal that this power be moved into the consolidated arrest Act. However, as is recommended in the proposal paper a number of limitations or safeguards should be legislatively prescribed including that police have reasonable grounds for believing the person to be arrested is on the premises and that the police officer remain on the premises to effect the arrest for only such time as is reasonably necessary in the circumstances. Section 21 of the *Police Powers and Responsibilities Act 2000* (Qld) provides a useful model, noting:

21 General power to enter to arrest or detain someone or enforce warrant

(1) A police officer may enter a place and stay for a reasonable time on the place—

...

³⁰ Section 3ZC of the *Crimes Act 1914* (Cth).

³¹ Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania* (Final Report No. 15), recommendation 10.

(2) If the place contains a dwelling, a police officer may enter the dwelling without the consent of the occupier to arrest or detain a person only if the police officer reasonably suspects the person to be arrested or detained is at the dwelling.

The Queensland model provides additional safeguards including that before a forcible entry can be made the police officer must, if reasonably practicable, ask the occupier to permit entry and give the occupier reasonable opportunity to allow entry³² and the police officer provide their details.³³ A final safeguard that should be adopted is limiting the carrying out of arrests to daylight hours (subject to limited exceptions) to “protect, as far as possible, occupants’ rights to privacy, particularly of those not involved in the police investigation and to reduce the possibility of a fearful response by occupants”.³⁴ An illustrative model is contained in the *Crimes Act 1914* (Cth):

3ZB Power to enter premises to arrest offender

...

(3) A constable must not enter a dwelling house under subsection (1) or (2) at any time during the period commencing at 9 p.m. on a day and ending at 6 a.m. on the following day unless the constable believes on reasonable grounds that:

(a) it would not be practicable to arrest the person, either at the dwelling house or elsewhere, at another time; or

(b) it is necessary to do so in order to prevent the concealment, loss or destruction of evidence relating to the offence.

Recommendation: That the power of entry to effect an arrest is subject to additional safeguards including:

a requirement that police officers have reasonable grounds for believing that the person to be arrested is on the premises; and

a requirement that the police officer supply their details to the occupants and remain at the premises to effect the arrest for only such time as is reasonably necessary in the circumstances and;

a requirement that arrests (subject to limited exceptions) only be carried out during daylight hours.

- Family Violence Act 2004

The arrest power contained in section 10 of the *Family Violence Act 2004* (Tas) facilitates the issuing of a police family violence order or the making of a family violence order whilst section 11 of the Act empowers a police officer to arrest a person who they reasonably suspect has committed family violence. Whilst the lower threshold of ‘reasonably suspect’ is applied, the policy objective to make ‘the safety, psychological wellbeing and interests of people affected by family violence...paramount considerations’.³⁵ Similarly, section 11(5) of the *Family Violence Act 2004* provides that a police officer is to “give priority to the safety, wellbeing and interests of any affected people...” As the TLRI has observed, the purpose and policy basis of the arrest provisions in the *Family Violence Act 2004* seek to prevent crime rather than initiate a prosecutorial process and it is therefore “legitimate that they should

³² Section 635 of the *Police Powers and Responsibilities Act 2000* (Qld).

³³ Section 637 of the *Police Powers and Responsibilities Act 2000* (Qld).

³⁴ Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania* (Final Report No. 15) at 62.

³⁵ Section 3 of the *Family Violence Act 2004* (Tas).

continue to stand apart from those provisions and comprise exceptions to the general approach to arrest..."³⁶

Recommendation: That the arrest powers in the *Family Violence Act 2004* (Tas) remain an exception to the general consolidated arrest powers.

- **Vulnerable persons**

We support the TLRI recommendation that vulnerable persons should be afforded greater protection in the proposed Act.³⁷ Aboriginal and Torres Strait Islander people do require greater protections with current Australian Bureau of Statistics data noting that 24 per cent of the Tasmanian prison population is Aboriginal or Torres Strait Islander compared to 5 per cent in the broader Tasmanian population.³⁸ We also recognise that young persons also require greater protections with the proposal paper not intending to make any changes to the existing requirements in relation to arresting a young person contained in section 24A of the *Youth Justice Act 1997* (Tas). Nevertheless, there are other vulnerable groups that should be afforded greater protection.

In other jurisdictions, a broader range of vulnerable persons are protected including young persons, persons who have impaired intellectual or physical functioning; Aboriginal and Torres Strait Islanders and persons who are of non-English speaking backgrounds.³⁹ As well, in circumstances where a vulnerable person is detained, the custody manager is required to let the vulnerable person know that they have a right to make a telephone call to a legal practitioner, support person or other person.⁴⁰ The support person is also able to be present during investigative procedures.⁴¹ The NSW Regulations also stipulate that where the vulnerable person is an Aborigine or Torres Strait Islander the custody manager must notify the NSW Aboriginal Legal Service.⁴² Finally, we support the TLRI recommendation that police officers must record in writing the reason for effecting an arrest against a vulnerable person rather than employing an alternative to arrest.⁴³

Recommendation: That vulnerable persons including Aboriginal and Torres Strait Islander persons, young persons, persons who have impaired intellectual or physical functioning and persons of non-English speaking backgrounds are afforded greater protections in the Act.

³⁶ Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania* (Final Report No. 15) at 28.

³⁷ Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania* (Final Report No. 15), recommendation 7.

³⁸ Australian Bureau of Statistics, *Prisoners in Australia*, Table 15.

³⁹ Regulation 24 of the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW). Similarly, in Queensland there are protections for vulnerable people including Aboriginal and Torres Strait Islander people, young people, people with impaired capacity and intoxicated persons: Division 3 of the *Police Powers and Responsibilities Act 2000* (Qld). Also see Part IAD of the *Crimes Act 1914* (Cth).

⁴⁰ Regulation 25 of the *Law Enforcement (Powers and Responsibilities) Regulation 2005*. See also section 23K of the *Crimes Act 1914* (Cth) which provides that young people are unable to be questioned unless an 'interview friend' is present and Also see section 23N of the *Crimes Act 1914* (Cth) which provides that where a person is under arrest but has either inadequate knowledge of the English language or a physical disability which means they cannot communicate orally with reasonable fluency, the investigating official must arrange for the presence of an interpreter.

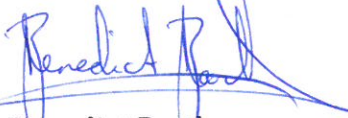
⁴¹ Regulation 27 of the *Law Enforcement (Powers and Responsibilities) Regulation 2005*.

⁴² Also see section 23H of the *Crimes Act 1914* (Cth).

⁴³ Tasmania Law Reform Institute, *Consolidation of Arrest Laws in Tasmania* (Final Report No. 15), recommendation 7.

If you have any queries, or we can be of any further assistance, please do not hesitate to contact us.

Yours faithfully,



Benedict Bartl
Policy Officer

Community Legal Centres Tasmania
