



**NSW Police Force**

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## **Person Search Manual**

*This is the principal document for the carrying out of person searches under LEPR. It provides guidance as to when and how personal searches must be carried out, as informed by legislation, the common law, and NSWPF policy.*

## Person searches under LEPR

### Person searches

There are several powers to search people under LEPR. Examples include powers to:

- stop, search and detain (s.21)
- search on arrest (s.27)
- search in lawful custody (s.28A)
- search pursuant to a warrant (s.50).

Whenever police exercise a power to search a person, they must:

- hold the state of mind required by LEPR
- comply with the rules for searching in s.32 and s.33
- comply with the safeguard requirements in Part 15, and
- make a contemporaneous record of the search.

#### State of mind

Any officer who searches a person must hold the state of mind required by LEPR.

Where a power requires the searching officer to hold a reasonable suspicion, there must be some factual basis for the suspicion. The courts have provided the following guidance:

- a. A reasonable suspicion involves less than a reasonable belief but more than a possibility. A reason to suspect that a fact exists is more than a reason to look into the possibility that a fact exists.
- b. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence, but the materials must have some probative value.
- c. What is important is the information in the mind of the searching officer at the time of the search. The next question is whether that information afforded reasonable grounds for the suspicion the police officer formed. The source of the information and its content, seen in the light of the whole of the surrounding circumstances, will be relevant.
- d. To form a reasonable suspicion officers may rely on their observations of the person, and any information they have access to, such as recent warnings on COPS.

The officer who undertakes the search must hold the required state of mind. For example, where a male officer asks a female officer to search a female, the male officer must give the female officer enough information for her to independently form the required state of mind. As the searching officer, she must have that state of mind.

Police should consider if there has been a previous search, the type of search that was carried out and the result of that search, when determining whether a search is necessary.

If a police officer of the same sex as the person to be searched is not immediately available, police may use an agent (for example, a nurse or ambulance officer) to carry out the search, in accordance with s.32(7A)(b) of LEPR. The agent is not required to form a reasonable suspicion, as long as the police officer instructing them does.

### **Privacy and dignity rules**

The rules in s.32 of LEPR apply to all personal searches and must be complied with as far as is reasonably practicable in the circumstances. These requirements are all about preserving the person's privacy and dignity.

If the search is a strip search, the rules in s.33 also apply. While some of these rules must be complied with as far as is reasonably practicable in the circumstances, most of them are compulsory.

The rules are set out in the table below (see pages 8 and 9).

### **Safeguards**

When exercising a power to search a person, police must comply with the safeguard requirements in Part 15 of LEPR. These include providing the following information to the person being searched:

- evidence that the police officer is a police officer (unless the officer is in uniform),
- the name of the officer and his or her place of duty,
- the reason for the exercise of the power.

Police must provide this information as soon as it is reasonably practicable to do so. However, where the search involves imposing a requirement (such as requiring the person to remove an item of clothing, or to open their mouth to enable it to be searched), the information must be given *before* imposing the requirement.

### **Records**

Police must make a contemporaneous record of all person searches in their notebook, and electronically in COPS and/or the custody management record. The record should clearly set out:

- the type of search carried out
- the reason for the search
- the officer/s who carried out the search, and
- whether force was used.

In the case of a strip search carried out in the field, the seriousness and urgency of the circumstances that made the strip search necessary must also be recorded.

Police may be required to justify their decision to carry out a search weeks, months, or sometimes years later, which makes proper record keeping essential.

## Types of searches

There are two types of searches:

- a person search (a person search not involving a strip search – s.30), and
- a strip search (a person search involving a strip search – s.31).

There is no need to start with a person search before moving to the strip search, provided a strip search is justified in the circumstances. Likewise, a person search may turn into a strip search. For example, an officer may locate something in the person search that gives them reasonable grounds to suspect that a strip search is necessary. If that occurs, police must then comply with the requirements set out in s.33 of LEPRA.

## Person search

For a person search, an officer may examine the person by touching their outer clothing, taking no more time than is reasonably necessary to safely carry out the search. This can include police examining the edges of the outer clothing by running their fingertips around the inside of the waistband, collar or sleeves of that clothing, but no more.

Police can require the person to remove their coat or jacket or similar article of clothing and any gloves, shoes, socks and hat (but not all of their clothes). Police must warn the person that they are required by law to comply with the requirement to remove the identified articles of clothing.

The warning should be given as soon as practicable after imposing the requirement. However, no warning is required if the person has already complied or is in the process of complying with the requirement.

If the person refuses to comply with the requirement, police may use such force as is reasonably necessary to carry out the search.

Police can also move a person's clothing to permit a visual inspection of the body, but not of the person's genital area, or the breasts of a female or transgender person who identifies as female (this would constitute a strip search – see para 28).

Police can examine anything in the possession of the person. They can also pass an electronic metal detection device over or in close proximity to the person's outer clothing or anything removed from the person.

## Strip searches

### What is a strip search?

Anything that goes beyond what is permitted by a person search (as described above) is a strip search. Strip searches may or may not involve the removal of clothing.

There are special rules for strip searching children over 10 and people with impaired intellectual functioning (see page 9).

### ***Strip searches with clothing removed***

A strip search can include requiring the person to remove all their clothing, but it must never involve the removal of more clothing than is reasonably necessary for the search. If a strip search is to require the removal of all clothing, it should be done in stages. For example, police should, where practicable, allow the person to remove their top and then replace it before asking the person to remove pants.

Police must warn the person that they are required by law to comply with the requirement to remove the identified articles of clothing.

The warning should be given as soon as practicable after imposing the requirement. However, no warning is required if the person has already complied or is in the process of complying with the requirement.

If a person is required to remove anything more than their coat or jacket (or similar item of outer clothing) or their gloves, shoes, socks or hat, it is a strip search.

### ***Strip searching with no clothing removed***

A search can go beyond a person search without the removal of any clothing at all. Requiring a person to move clothing to allow a visual examination of the person's genitals, buttocks, breasts (in the case of a female or transgender person who identifies as female) or underwear (underpants or bra) is a strip search. For example, requiring a person to pull out the waistband of their jeans to allow a visual inspection inside the jeans is a strip search.

### ***When can a person be strip searched?***

Police can never undertake strip searches as a matter of course. Police must always be able to justify each decision to strip search.

Police can only conduct a strip search in the following circumstances:

- at a police station or other place of detention – if the officer suspects on reasonable grounds that the strip search is necessary for the purposes of the search, or
- in any other place – the officer suspects on reasonable grounds that the strip search is necessary for the purposes of the search and that the seriousness and urgency of the circumstances make the strip search necessary at that place.

## **Strip search practices**

### **Can a police officer ask a person to move a part of their body for the purpose of the search?**

Police must ask for the person's cooperation.

However, officers should always consider safety first. It is not necessary to ask a person to cooperate if this would be unsafe. For example, if police suspect a person is carrying a firearm, it would not be safe to ask them to cooperate by producing it. Instead, police should do what is necessary to safely search for and secure the firearm.

Officers can ask a person to do things to allow visual inspection such as, for example:

- lift testicles
- part buttock cheeks
- spread fingers and toes
- lift breasts
- turn their body to face a different direction
- open their mouth and shake their hair, or
- squat.

However, a police officer must not search the genital area of the person, or the breasts of a female or a transgender person who identifies as a female, *unless the police officer suspects on reasonable grounds that it is necessary to do so for the purposes of the search.*

Police must not examine the person's body by touch when strip searching. This does not mean police cannot touch the person at all. For example, if officers are required to use force to carry out the search or restrain a violent person, it will be necessary to incidentally touch the person's body to remove their clothing.

### **Can police use force to carry out a search?**

Police must always ask for the persons co-operation when carrying out a search.

Where a person is resisting the lawful exercise of a search, police can use such force as is reasonably necessary to allow them to carry out the visual inspection necessary for the purpose of the search (see s.230 of LEPRA).

### **Can a strip search continue if the person voluntarily produces something, or if police find something?**

Any person search will be justified if police hold the relevant state of mind – while that state of mind exists, the search can continue. The fact that police find something on a person (or have something produced to them) does not, of itself, mean that the search should be terminated. The issue is whether police continue to hold a reasonable suspicion. For example, if a person produces bullets police may continue to hold a reasonable suspicion that the person also has a gun.

### **Can a strip search be filmed?**

The NSW Court of Criminal Appeal has been critical of police not filming a strip search. Ideally, all strip searches should be filmed as evidence of the integrity of the search.

Police should capture a strip search on BWV (or a hand-held video at a search warrant) where possible. This should be done in accordance with the BWV SOPs.

At a police station, police should also conduct a strip search where it can be captured on CCTV, where practicable.

Be mindful of CCTV cameras in public places. As far as is reasonably practicable in the circumstances, a strip search must be conducted in a private area. An area captured on public CCTV is not a private area.

### **Can police search body cavities if they suspect something is secreted internally?**

Police must never conduct a strip search by searching the person's body cavities.

Where police observe a person attempting to swallow drugs or anything else that may be harmful to ingest, they should take all necessary steps to prevent the person from doing so. This is done to prevent self-harm – it is not a search.

Where police suspect that a person has swallowed drugs or anything else that may be harmful to ingest, they should immediately arrange for the person to receive medical attention.

### **What is the role of the custody manager?**

The custody manager has responsibility for the care, control and safety of a person detained at a police station. Consequently, a custody manager may view a search on CCTV wherever necessary to ensure safety is maintained in the custody area.

This may mean it is not always reasonably practicable to comply with the requirement that a strip search not be conducted in the presence or view of a person who is of the opposite sex to the person being searched. When recording the search in the custody management record, the custody manager should note whether they viewed it on CCTV.

Police must not carry out a strip search at a police station without first advising the custody manager of their intention to carry out the strip search. Remember, it is the searching officer who must hold the state of mind required by LEPRA to search.

### **Can police carry out a search of any person in custody at a police station?**

Section 28A of LEPRA allows police to search a person in lawful custody after arrest and seize and detain anything found on the person. This may occur to ensure the safety of police, the person in custody and other people in custody at the time. If a police officer suspects on reasonable grounds that it is necessary to conduct a strip search for the purpose of the search (that purpose being to ensure the safety of police and people in custody), they can carry out a strip search.

However, police should ensure that the type of search carried out, and the extent to which it is carried out, is proportionate to the risk posed. For example, a person with no criminal history who is in custody having been arrested for the purpose of a breath analysis is unlikely to pose the same threat as a person known to be violent.

### **Can police carry out a strip search just because a person is being transferred to Correctives?**

Police do not have a power under the *Crimes (Administration of Sentences) Act 1999* to assist Corrective Services to search a person in correctives custody, or during the transfer process. Further, Correctives cannot delegate their search powers to police.

Police can search a person before they are transferred to Correctives, but they must rely on their powers under LEPRA to do so. This means they must hold the state of mind required by LEPRA, and must be able to justify their decision to carry out the search.

This does not mean that police cannot assist the correctional officers at all. For example, if the person being searched became violent towards correctional officers, police could render assistance. But this is different to assisting in the sense of participating in the search.

## PRIVACY AND DIGNITY RULES FOR ALL PERSON SEARCHES

**IN ADDITION** to the requirements above, you **MUST** also comply with the following rules as ***far as is reasonably practicable in the circumstances.***

***Police must:***

1. inform the person whether they will be required to remove clothing during the search
2. inform the person why it is necessary to remove the clothing
3. ask for the person's cooperation
4. conduct the search in a way that provides reasonable privacy for the person searched
5. conduct the search as quickly as is reasonably practicable
6. conduct the least invasive search practicable in the circumstances
7. allow the person to dress as soon as the search is finished, and
8. ensure the person searched is left with or given reasonably appropriate clothing, if clothing is seized because of the search.

***Police must not:***

9. search the genital area of the person searched, or the breasts of a female or a transgender person\* who identifies as a female, unless the police officer suspects on reasonable grounds that it is necessary to do so for the purposes of the search, or
10. carry out the search while questioning the person (police must suspend questioning while the search is carried out, but this does not prevent the asking of questions that only relate to issues of personal safety associated with the search).

***Same sex searching***

11. The search must be conducted by a police officer of the same sex as the person searched. If this is not reasonably practicable in the circumstances, the reason for not complying must be recorded.
12. If a police officer of the same sex as the person who is to be searched is not immediately available, a police officer may delegate the power to conduct the search to another person who is:
  - a. of the same sex as the person to be searched, and
  - b. of a class of persons prescribed by the regulations for this purpose (eg: nurses, corrective services officers, juvenile justice officers, and ambulance officers).
13. The search by that other person is to be conducted under the direction of the police officer and in accordance with provisions of LEPR applying to searches conducted by police officers.
14. Police should ask a person transitioning from one sex to another how they wish to be regarded.

\**Transgender* is defined in s.3 of LEPR



## ADDITIONAL PRIVACY AND DIGNITY RULES FOR STRIP SEARCHES

### ***A strip search must not be conducted on a person under 10***

#### ***The strip search must:***

1. be conducted in a private area, as far as is reasonably practicable in the circumstances.

#### ***The strip search must not:***

2. be conducted in the presence or view of a person who is of the opposite sex to the person being searched (police must comply as far as is reasonably practicable in the circumstances)
3. be conducted in the presence or view of a person whose presence is not necessary for the purposes of the search (police must comply as far as is reasonably practicable in the circumstances)
4. involve a search of a person's body cavities or an examination of the body by touch
5. involve the removal of more clothes than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purposes of the search, or
6. involve more visual inspection than the person conducting the search believes on reasonable grounds to be reasonably necessary for the purposes of the search.

#### ***Presence of other people during search***

7. A parent, guardian or personal representative may, if it is reasonably practicable in the circumstances, be present during a search if the person being searched does not object to that person being present (even if the person is of the opposite sex to the person being searched).
8. A strip search may be conducted in the presence of a medical practitioner of the opposite sex to the person searched if the person being searched has no objection to that person being present.

#### ***Children aged between 10 and 18 OR people with impaired intellectual functioning***

9. A strip search of a child who is at least 10 but under 18, or of a person who has impaired intellectual functioning\*, must be conducted:
  - a. in the presence of a parent or guardian of the person being searched, or
  - b. if that is not acceptable to the person, in the presence of another person who is not a police officer and who is capable of representing the interests of the person being searched and whose presence is acceptable to that person.

If the person could be under 18, police must ask them how old they are.

10. This does not apply if a police officer suspects on reasonable grounds that:
  - a. delaying the search is likely to result in evidence being concealed or destroyed, or
  - b. an immediate search is necessary to protect the safety of a person.
11. In this case, the officer must make a record of the reasons for not conducting the search in the presence of a parent or guardian, or other person capable of representing the interests, of the person being searched.

*\*Impaired intellectual functioning* is defined in s.33(9) of LEPR