

Did police provide their name and place of duty?

Review of compliance with section 202(1)(b) of the *Law
Enforcement (Powers and Responsibilities) Act 2002*

December 2016

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Foreword

The *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) sets out, in consolidated form, the powers and responsibilities of police. The Act was introduced in response to findings from the 1996 Royal Commission into the NSW Police Service, which investigated police corruption. Part 15 of the Act provides for a number of safeguards, designed to ensure police accountability, that require police to provide certain information to members of the public including proof of their identity, reasons for exercising the power, and their name and place of duty. Police must provide this information when exercising relevant powers such as the power to stop, search, or arrest a person, to enter or search premises, and to give directions to people in public places.

In 2014, Part 15 of LEPRA was amended to include a 'validity clause', following a review conducted jointly by the former Police Minister, the Hon. Paul Whelan, and former Shadow Attorney General, Mr Andrew Tink AM. The effect of this clause was to remove as a ground of challenge to the lawful exercise of a police power that an officer had failed to provide their name and place of duty to the person affected. The purpose of the validity clause was to prevent prosecutions being dismissed by courts because of a failure of police to comply with this obligation.

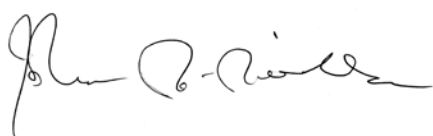
The Government and police expressed an expectation that, notwithstanding the validity clause, police should continue to comply with the obligation to provide their name and place of duty. The validity clause was intended to operate only in cases of inadvertent breaches. It did not remove the legal obligation to provide name and place of duty; it altered only the legal consequences of a failure to do so.

The Ombudsman was given the role of keeping under scrutiny compliance by police officers with the obligation to provide their name and place of duty. The purpose was to determine and report on the impact of introducing the validity clause and to make recommendations about amendments to LEPRA that could be made to secure police compliance with the obligation.

Over the last 20 years the Ombudsman has conducted almost 30 legislative reviews that have required us to 'keep under scrutiny' the exercise of powers by police. These reviews have involved a detailed examination of issues relating to whether the exercise of the relevant powers was consistent with the intention of Parliament, was lawful and reasonable, and was conducted in a manner that was in the public interest. In comparison, the scope of this review is narrower, as it is limited to an examination of police compliance with the obligation that police provide their name and place of duty. The review did not provide an opportunity to examine the overall effectiveness of the safeguards under Part 15 of LEPRA.

We estimated there were 408,000 occasions during the review period on which it appears that police were obliged to state their name and place of duty. However, as a result of considerable limitations to our research, including a lack of reliable data to measure levels of compliance, we were unable to determine the extent to which police complied with the obligation. Nor could we determine whether compliance levels were higher or lower than previous years. We cannot advise the Government or the public that the introduction of the validity clause did not have the effect of reducing compliance, as some had anticipated. In these circumstances we could not reach any firm conclusions on which to make recommendations to ensure police compliance with the obligation to provide their name and place of duty.

It is our view that securing compliance will require the NSW Police Force to continue the current training it provides to police about the obligation under Part 15 and to develop some procedures to monitor compliance. The NSW Police Force holds the view that complaints are an adequate mechanism by which to monitor non-compliance with the obligation. We do not agree. Complaints are not a reliable mechanism for this purpose. If the Government and NSW Police Force are committed to ensuring the safeguard is complied with, we suggest that alternate processes for monitoring compliance will need to be considered.



Professor John McMillan AO
Acting Ombudsman

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Glossary

information safeguards	Requirements under Part 15 of the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> that require police officers, when exercising relevant powers, to provide the person subject to the exercise of a power with: <ul style="list-style-type: none"> • evidence that the police officer is a police officer (unless the officer is in uniform) • the officer's name and place of duty, and • the reason for the exercise of the power.
NSW	New South Wales
LAC	Local Area Command (NSW Police Force)
LEPRA	<i>Law Enforcement (Powers and Responsibilities) Act 2002</i>
Tink/Whelan review	Mr Andrew Tink and the Hon. Paul Whelan, Review of the <i>Law Enforcement (Powers and Responsibilities) 2002</i> report: Part 2, December 2013
validity clause	Section 204A of the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i>
COPS	Computerised Operational Policing System
c@ts.i	Police complaints database
relevant power	A police power that is subject to the name and place of duty requirement. These powers are listed in Part 15, section 201 of LEPRA

Chapter 1. Introduction

In New South Wales (NSW), police officers are required under Part 15 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) to provide their name and place of duty when exercising a wide range of powers, include the powers of arrest and search.¹ Police are also required to provide evidence that they are police officers and to inform the person affected of the reason the powers are being used.

Previously, the failure by an officer to provide their name and place of duty could render the exercise of the power unlawful. Legislative amendments that came into force in November 2014 introduced a new section that provided that the failure of an officer to comply with the name and place of duty requirement will not render the exercise of power unlawful, with minimal exceptions.

1.1 Our role

The NSW Ombudsman was required to keep under scrutiny police compliance with the name and place of duty requirement for one year after the introduction of the new section.² The then Attorney General and Minister for Justice, Mr Brad Hazzard, noted that the Ombudsman's scrutiny was 'to ensure that a proper assessment of the impact of these reforms is made'.³

In addition, the Ombudsman was given scope to 'identify, and include recommendations for consideration by the Government about, amendments that might appropriately be made to Part 15 of this Act to secure compliance by police officers with the obligations under that Part'.⁴ The provision about our role is extracted in Appendix A.

At the end of the review, the Ombudsman is required to prepare a report of the Ombudsman's work and activities in performing the function, and provide it to the Attorney General, the Minister for Justice and Police⁵ and Commissioner of Police as soon as reasonably practicable.⁶ The Attorney General or other Minister is then required to table the report in Parliament as soon as practicable.⁷

Our review period commenced on 1 November 2014 and concluded on 31 October 2015.

1. *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), s. 201.

2. LEPRA, Schedule 5, Part 8, cl. 17(1).

3. The Hon. Brad Hazzard MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 15 May 2014, p. 28962.

4. LEPRA, Schedule 5, Part 8, cl. 17(4).

5. This position was previously referred to as 'Minister for Police and Emergency Services'.

6. LEPRA, Schedule 5, Part 8, cl. 17(3).

7. LEPRA, Schedule 5, Part 8, cl. 17(5).

Chapter 2. Background

The expectation that NSW police officers provide their name and place of duty when exercising certain powers is not a recent concept. According to the Policing Issues and Practice Journal, 'the exercise of safeguards has always existed in policy'.⁸

Under the common law, police were not required to provide the information in order for their exercise of powers to be lawful.⁹ The requirement was included as one of the statutory safeguards when police powers were consolidated in the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA). A failure to comply with a safeguard would render the exercise of the power unlawful.¹⁰ Prior to the introduction of LEPRA, the safeguard only applied when police exercised a power to require that people identify themselves.¹¹ Under LEPRA, the safeguard applied to a broader range of powers, including stop, search and arrest powers.

The amendments to LEPRA that came into force in November 2014 did not change the existing requirement. However, a new section 204A was inserted into the Act, which provides that an officer's failure to provide their name and place of duty does not render the exercise of the power unlawful or otherwise affect the validity of anything resulting from the exercise of that power. In this report we refer to this as the 'validity clause'.

This chapter discusses the background to the introduction of the name and place of duty requirement in LEPRA and the amendments in 2014 that affected that requirement. It also discusses the current legislative and policy framework in which the requirement operates.

2.1 The name and place of duty requirement prior to the November 2014 amendments¹²

The consolidation of police powers into LEPRA was in response to findings from the 1996 Royal Commission into the NSW Police Service investigating police corruption.¹³ Before that, police powers were found in multiple Acts, often causing confusion and ambiguity,¹⁴ with no clear guidance on how police should exercise their powers.¹⁵ Consolidation was intended to make it easier for both the public and police to understand the scope, operation and responsibility of police powers by reducing uncertainty in how powers are exercised and applied.¹⁶ The powers included the power to arrest, search and stop people, to stop and search vehicles, to establish crime scenes, and to question and give directions to people.

8. Senior Constable Steven Evans, Sergeant Chris Whalley and Karen Nicholas, 'Introduction to powers and responsibilities', *Policing Issues & Practice Journal*, 13(3), July 2005, pp. 7-8.

9. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, p. 12. Mr Tink and Mr Whelan indicated that 'the common law has never evolved to require the provision of name and place of duty for the exercise of a police power to be lawful'.

10. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, p. 10.

11. For example, see section 563 of the *Crimes Act 1900* (historical version as at 21 December 2001 to 21 February 2002) and section 6 of the *Police Powers (Vehicles) Act 1998* (historical version as at 1 January 2002 to 30 November 2005).

12. This is a brief overview of the background to the change. A comprehensive overview of the background to the change was documented in the first review of LEPRA conducted by the NSW Ombudsman; for more information please see the report: NSW Ombudsman, *Review of certain functions conferred on police under the Law Enforcement (Powers and Responsibilities) Act 2002*, February 2009.

13. The Hon. Justice JRT Wood, *Royal Commission into the New South Wales Police Service. Final report Volumes I-VI*, May 1997.

14. The Hon. Bob Debus MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 17 September 2002, p. 4846.

15. NSW Ombudsman, *Review of certain functions conferred on police under the Law Enforcement (Powers and Responsibilities) Act 2002*, February 2009, p. 3.

16. The Hon. Justice JRT Wood, *Royal Commission into the New South Wales Police Service. Final report. Vol. II: Reform*, May 1997, p. 396; The Hon. Bob Debus MP, NSWPD, (Hansard), Legislative Assembly, 17 September 2002, p. 4846.

LEPRA contained a number of specific obligations on officers relating to the exercise of particularly intrusive powers, such as searches.¹⁷ General safeguard provisions – mandatory obligations placed on police when exercising the most commonly used powers – were in Part 15 of LEPRA. The reason for including these safeguards was that:

With power comes responsibility. The bill represents ideals of transparency, accountability and legitimacy.

Over time this Parliament, as the representative of the community, and the courts have given police certain powers required to effectively fulfil their role in law enforcement. In return for these powers, however, police are required to exercise their power responsibly, particularly when these powers affect the civil liberties of members of the community whom the police serve.¹⁸

Part 15 included three categories of requirements. The first related to information that officers were required to provide the person subject to the exercise of a power with, being:

- evidence that the police officer is a police officer (unless the officer is in uniform)
- the officer's name and place of duty, and
- the reason for the exercise of the power.¹⁹

In this report we refer to these as the 'information safeguards'.

The second was a requirement that officers warn the person that a failure or refusal to comply with a request of an officer, in the exercise of that power, may be an offence.²⁰ In this report we refer to this as the 'warning safeguards'.

The third was a requirement that an officer must not detain any vehicle, vessel or aircraft for a search for any longer than reasonably necessary.²¹

Due to the magnitude of work required to implement the change in legislation,²² LEPRA came into effect on 1 December 2005, three years after its assent. Since then it has been amended numerous times, to respond to contemporary policing challenges and practical implementation issues.

2.1.1. Information safeguards prior to the 2014 amendments

The information safeguards have remained substantially the same since LEPRA was introduced. However, LEPRA also specifically describes the time at which officers are required to provide that information during the interaction. The description of this has changed over time.

As originally enacted, in exercising most of the relevant powers, officers were required to provide the information before or at the time of exercising a power, or as soon as is reasonably practicable after exercising the power.²³ However, the information had to be provided *before* exercising the power if the power was to:²⁴

- request a person to disclose his or her identity or the identity of another person²⁵

17. For example, officers were required to conduct the least invasive kind of search practicable in the circumstances and strip searches of people under the age of 10 were prohibited: LEPRA, ss. 32 and 34 (historical version as at 29 November 2002 to 29 June 2003).

18. The Hon. Bob Debus MP, NSWPD, (Hansard), Legislative Assembly, 17 September 2002, p. 4849.

19. LEPRA, s. 201(1)(a)-(c) (historical version as at 29 November 2002 to 29 June 2003).

20. LEPRA, s. 201(1)(d) (historical version as at 29 November 2002 to 29 June 2003).

21. LEPRA, s. 204 (historical version as at 29 November 2002 to 29 June 2003).

22. Primary responsibility for administering LEPRA belonged to the Attorney General and Attorney General's Department; however, as the bulk of the powers and functions specifically relate to police officers, the NSW Police Force was also responsible for its implementation. Some of the activities the Attorney General's Department undertook prior to the law coming into effect included: making policy and procedural changes; communicating the changes via publications; and conducting training and information sessions. The NSW Police Force established a LEPRA steering committee; conducted mandatory training for all police officers; produced articles on the changes; altered policy and procedures; and updated technology to reflect the change. For a more comprehensive overview of how these agencies implemented the LEPRA provisions see NSW Ombudsman, *Review of certain functions conferred on police under the Law Enforcement (Powers and Responsibilities) Act 2002*, February 2009, chapter 6: Implementation, pp. 21-24.

23. LEPRA, s. 201(1) (historical version as at 29 November 2002 to 29 June 2003).

24. LEPRA, s. 201(2) (historical version as at 29 November 2002 to 29 June 2003).

25. LEPRA, s. 201(3)(g) (historical version as at 29 November 2002 to 29 June 2003).

- give a direction to a person,²⁶ or
- request a person to submit to a frisk search or to produce a dangerous implement or a metallic object (under section 26).²⁷

The only substantial change occurred in 2006²⁸ whereby if a direction was being given to a group of two or more people the information had to be provided by police, to each person given a direction, as soon as reasonably practicable.²⁹

2.1.2. Reviews of the name and place of duty requirement

Disquiet among some police about certain aspects of the information safeguards, particularly the name and place of duty provisions, was identified in 2009 by the NSW Ombudsman in a review of certain LEPRAs.³⁰ The police concerns included:

- the potential for unsuccessful prosecutions, resulting from a failure to provide the information
- potential safety concerns for officers if offenders were able to locate them using the details provided
- a lack of clarity regarding police obligations in relation to the information safeguards, and
- 'accurate and effective compliance' being hindered by the law's lack of clarity regarding which powers the obligation applied to, and which officers are required to comply and when.³¹

Criticism of the LEPRAs arrest power³² by a judge in a District Court appeal³³ was viewed as providing a catalyst for reviewing and amending sections of LEPRAs.³⁴ The judgment made pointed references to the volatility of policing – particularly when dealing with situations involving alcohol, drugs and aggressive behaviour – and the inability of LEPRAs to make allowances for such circumstances when police exercise some of their powers. The judge called for the section to be amended to rectify this problem. After the judgment was reported in the local paper the following day³⁵ – swiftly followed by a media release³⁶ by the NSW Police Association supporting an amendment to the legislation – NSW Premier Barry O'Farrell announced that he was seeking 'urgent advice' on how to improve Part 9 and sections 99 and 201 of LEPRAs.³⁷ This announcement was made 14 days after the judgment was handed down.

At that time, the then Department of Attorney General and Justice³⁸ and the Ministry for Police and Emergency Services were in the process of conducting a statutory review of LEPRAs.³⁹ The Premier appointed former Police Minister, the Hon. Paul Whelan, and former Shadow Attorney General,

26. LEPRAs, s. 201(3)(i) (historical version as at 29 November 2002 to 29 June 2003).

27. LEPRAs, s. 201(3)(j) (historical version as at 29 November 2002 to 29 June 2003).

28. *Police Powers Legislation Amendment Act 2006*, Sch 1 [38].

29. LEPRAs, s. 201(2B) (historical version as at 29 August 2014 to 31 October 2014).

30. NSW Ombudsman, *Review of certain functions conferred on police under the Law Enforcement (Powers and Responsibilities) Act 2002*, February 2009.

31. NSW Ombudsman, *Review of certain functions conferred on police under the Law Enforcement (Powers and Responsibilities) Act 2002*, February 2009, p. 79.

32. LEPRAs, s. 99 gives police the power to arrest without a warrant.

33. Judgment of his Honour Judge Conlon SC, 27 September 2013, cited in Mark Dennis, "What the fuck's happening?" A discussion paper on sections 99, 105 and 201 of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), April 2014, p. 2, viewed 19 October 2015, http://www.criminalcle.net.au/attachments/What_The_Fucks_Happening_Mark_Dennis_April_2014.pdf.

34. Mark Dennis, "What the fuck's happening?" A discussion paper on sections 99, 105 and 201 of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), April 2014, p. 2, viewed 19 October 2015, http://www.criminalcle.net.au/attachments/What_The_Fucks_Happening_Mark_Dennis_April_2014.pdf.

35. Shannon Tonkin, 'Conlon calls for review of police powers', *Illawarra Mercury* (online), 28 September 2013, viewed 21 June 2016, <http://www.illawarramercury.com.au/story/1806916/conlon-calls-for-review-of-police-powers/>.

36. Police Association of New South Wales, *Judge calls for urgent review of arrest law*, media release, Sydney, 2 October 2013.

37. The Hon. Barry O'Farrell (Premier), *Law Enforcement (Powers and Responsibilities) Act*, media release, 10 October 2013.

38. This is now known as the NSW Department of Justice.

39. The completed statutory review was released on 20 December 2013: NSW Department of Attorney General and Justice and Ministry for Police and Emergency Services, *Review of the Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRAs)*, December 2013.

Mr Andrew Tink, to complete it. However, as the statutory review was well advanced, Mr Tink and Mr Whelan only looked at the 'residual issues and made recommendations on those issues not [already] included'.⁴⁰ In this report we refer to this as the 'Tink/Whelan review'.

2.2 Tink/Whelan review

The Tink/Whelan review examined two specific parts of LEPRA:

- 1) Part 9 – investigations and questioning, and
- 2) Part 15 – safeguards relating to police powers.

Part 15 was earmarked for consideration in this review due to criticism that it was hard to understand and apply,⁴¹ and a perception that an officer's non-compliance with the name and place of duty provision had been exploited by offenders to avoid conviction and be awarded payouts for this breach.⁴²

In the Tink/Whelan report, titled *Review of the Law Enforcement (Powers and Responsibilities) Act 2002 Report Part 2*, dated 12 December 2013, the reviewers noted that the chief objectives of the LEPRA changes recommended by the Hon. Justice Wood in the NSW Royal Commission into the New South Wales Police Service were to balance individual rights with effective law enforcement, and to enhance clarity in the law.⁴³ The report authors' purpose in reviewing Part 15 of LEPRA was to build on these original objectives. They noted:

The recommendations in this report, and in the statutory review report, have been formulated to ensure the legislation is as clear and simple as possible. This will allow operational police to clearly understand powers, as well as ensuring the community is aware of the extent of police powers.⁴⁴

In completing their review, Mr Tink and Mr Whelan consulted with representatives from the NSW Police Force, Ministry for Police and Emergency Services, Department of Attorney General and Justice (now Justice NSW), Parliamentary Counsel and Department of Premier and Cabinet.

The Tink/Whelan review supported the view that the information safeguards were difficult for police to interpret and apply, particularly in relation to when it is practicable to provide the information required.⁴⁵ They also supported the NSW Police Force's opinion that only one warning should be required when issuing a direction or request, rather than two as was stipulated in the Act.⁴⁶

They observed that 'all stakeholders were in agreement that a police officer should be required to provide evidence that they are an officer and the reason for the exercise of the power'.⁴⁷ However, there was disagreement about the requirement that an officer provide their name and place of duty. In particular, the NSW Police Force was of the view that 'unintentional non-compliance with the name of duty requirement should not invalidate the power being exercised where a failure to comply was reasonable'.⁴⁸

The NSW Police Force provided the review with details of 10 cases heard in recent years that had been dismissed by courts because the officers involved had failed to provide their name and place of duty, thus rendering the exercise of a power invalid.⁴⁹

40. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, pp. 1-2.

41. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, p.10.

42. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, p. 14.

43. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, pp. 2-3.

44. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, p. 3.

45. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, pp. 10-11.

46. See LEPRA, s. 201(2C)(a)-(b) (historical version as at 29 August 2014 to 31 October 2014) prior to the 2014 amendment on the two-stage warning.

47. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, p. 11.

48. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, p. 12.

49. Correspondence from Acting Commissioner of Police to NSW Ombudsman, dated 20 January 2015.

The review concluded that ‘in the heat of the moment, an officer may not always be able to provide their name and place of duty’,⁵⁰ and determined that a judge has the benefit of ‘considered hindsight’ to hear both sides of a volatile event, which is not a luxury afforded police when the power is being exercised.⁵¹ In light of this concern, and to reduce the risk of a breach of the requirement leading to offenders avoiding conviction and suing the police, changes to Part 15 were recommended.

The recommendations were based on the Premier’s specific request to make the legislation ‘as clear and simple as possible’,⁵² so that police powers are easier to apply and the community’s rights in relation to these powers are easier to understand.⁵³ The Tink/Whelan review recommended two primary changes to Part 15 of LEPPRA:

- 1) simplifying the Part 15 safeguard requirements so that it is less complex and written in plain English,⁵⁴ and
- 2) amending the name and place of duty requirement so that failure to provide this information does not render the power used as unlawful.⁵⁵ This provision would also cover any subsequent actions resulting from the exercise of that power.⁵⁶

The Tink/Whelan review acknowledged that the validity clause may be viewed controversially, and recommended that the Ombudsman be required to monitor the operation of the validity clause for the first 12 months after its commencement,⁵⁷ to determine whether or not it had the unintended effect of reducing compliance with the obligation.

2.3 The amendment Bill

On 15 May 2014, the Law Enforcement (Police Powers and Responsibilities) Amendment Bill 2014 was introduced into the Legislative Assembly. The Bill proposed a suite of changes to LEPPRA, adopting the recommendations of the Tink/Whelan review and separate recommendations arising from the review by the Department of Attorney General and Justice and Ministry for Police and Emergency Services.⁵⁸

Importantly, the Ombudsman’s role was expressed differently to the recommendation of the Tink/Whelan review. The Ombudsman was required to keep under scrutiny compliance by police with their obligation to provide their name and place of duty, not the operation of the validity clause as had been recommended.

The amendment Act passed both Houses of Parliament on 18 June 2014, and was assented to on 24 June 2014. The provisions relating to the name and place of duty requirement commenced on 1 November 2014.

50. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, p. 13.
 51. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, p. 14.
 52. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, p. 2.
 53. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, p. 2.
 54. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, pp. 18-19.
 55. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, p. 19.
 56. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, pp. 18-19.
 57. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, p. 19.
 58. NSW Department of Attorney General and Justice and Ministry for Police and Emergency Services, *Review of the Law Enforcement (Powers and Responsibilities) Act 2002 (LEPPRA)*, December 2013.

2.4 Parliamentary debate and reception to the proposed Part 15 amendments

The NSW Police Force welcomed the Part 15 amendments, describing the changes as ‘long-awaited’.⁵⁹ However, as predicted by the Tink/Whelan review, the amendments were not universally embraced. Concerns were expressed in Parliament and by some sectors of the community. Key criticisms of the review centred on the limited consultation by the Tink/Whelan review – which was confined to representatives from law enforcement and related government agencies – and the short, less than two-month time frame they were allocated to review the concerns raised about Part 15 requirements. The consultation process was labelled by one member as ‘highly unorthodox’, which resulted in a ‘lopsided’ and ‘truncated’ approach for reviewing such an important piece of legislation.⁶⁰

Another member was also critical, labelling the review ‘a shanghai process, a kangaroo court’,⁶¹ considering the consultation process ‘a joke’,⁶² resulting in ‘a pretend consultation, which is truly an embarrassing spectacle if ever there was one’.⁶³ He was particularly critical that there was no consultation with the public and representative groups such as the NSW Bar Association or the NSW Council for Civil Liberties when considering changes to safeguards designed to protect the public from police powers.⁶⁴ Opposition to the legitimacy of the Tink/Whelan review’s consultations was countered by the Parliamentary Secretary and another member of Parliament, claiming that the reviewers ‘had access to and utilised the results of the substantial consultation process’⁶⁵ that was undertaken as part of the departmental statutory review by the Attorney General and Ministry for Police and Emergency Services,⁶⁶ as well as the 2009 NSW Ombudsman LEPR review.⁶⁷

Some members questioned the necessity for a validity clause, particularly as it appeared to absolve police of their statutory duty. One was concerned that the validity clause suggests that police do not have to obey the law, which is a different standard applied to other people who break the law.⁶⁸ Another acknowledged that balancing effective police powers and protecting the community’s rights and liberties is ‘always complex and often involves a competing mix of issues’,⁶⁹ and described the validity clause as ‘a significant departure from the universality of the rule of law’.⁷⁰ He remarked that ‘police irritation with the exercise of their powers being declared unlawful in courts should not be addressed by the removal of appropriate and necessary legal provisions but by police complying with them’,⁷¹ echoing the same point raised by another member when the Bill was debated in the Legislative Assembly.⁷²

One member also commented that it is a worry if police cannot comply ‘with such a modest requirement’,⁷³ particularly in light of the increase in powers granted to them in other parts of the amending Act.⁷⁴ In particular, the member noted the NSW Council of Civil Liberties’ strong opposition to the validity clause, due to fears the change will weaken the safeguards and police accountability.⁷⁵

59. Sgt Kate French (Executive Legal Advice Unit), NSW Police Force, ‘LEPRA safeguards are now clearer’, *Police Monthly*, November 2014, p. 31. The *Police Monthly* is a NSW Police Force magazine distributed internally, and is available to all NSW police officers.

60. The Hon. Adam Searle MLC, NSWPD, (Hansard), Legislative Council, 17 June 2014, p. 29566.

61. Mr David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 17 June 2014, p. 29568.

62. Mr David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 17 June 2014, p. 29568.

63. Mr David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 17 June 2014, p. 29569.

64. Mr David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 17 June 2014, p. 29571.

65. The Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 17 June 2014, p. 29574.

66. The Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 17 June 2014, p. 29574.

67. The Hon. Paul Green MLC, NSWPD, (Hansard), Legislative Council, 17 June 2014, p. 29572.

68. The Hon. Adam Searle MLC, NSWPD, (Hansard), Legislative Council, 17 June 2014, p. 29567.

69. The Hon. Ernest Wong MLC, NSWPD, (Hansard), Legislative Council, 17 June 2014, p. 29573.

70. The Hon. Ernest Wong MLC, NSWPD, (Hansard), Legislative Council, 17 June 2014, p. 29573.

71. The Hon. Ernest Wong MLC, NSWPD, (Hansard), Legislative Council, 17 June 2014, p. 29573.

72. Mr Jamie Parker MP, NSWPD, (Hansard), Legislative Assembly, 27 May 2014, p. 29143.

73. Mr David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 17 June 2014, p. 29570.

74. Mr David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 17 June 2014, p. 29570.

75. Mr David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 17 June 2014, p. 29570.

Another criticism raised in Parliament was whether the changes actually simplified the provision of the safeguards, which was a key objective of the amendments.⁷⁶

Both the Labor opposition⁷⁷ and the Greens party⁷⁸ welcomed the proposed Ombudsman's scrutiny of the change, but did not think that the 12-month review period was adequate to measure any resulting change in police behaviour.⁷⁹ Of particular concern was the potential for police to relax their adherence to the name and place of duty requirement in the absence of penalties via the courts.⁸⁰ A motion to amend the review period from 12 months to three years – with reports every 12 months – was rejected by Parliament.⁸¹ Opposition to extending the review period was based on the view that any problems arising from the amendments should 'be addressed sooner rather than later'⁸² and that further scrutiny could be decided after considering the findings from the Ombudsman's 12-month review of the provisions.⁸³

76. The Hon. Adam Searle MLC, NSWPD, (Hansard), Legislative Council, 17 June 2014, p. 29566.

77. The Hon. Adam Searle MLC, NSWPD, (Hansard), Legislative Council, 17 June 2014, p. 29567.

78. Mr David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 17 June 2014, p. 29571.

79. Mr David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 18 June 2014, p. 29669; The Hon. Adam Searle MLC, NSWPD, (Hansard), Legislative Council, 18 June 2014, p. 29669.

80. Mr Jamie Parker MP, NSWPD, (Hansard), Legislative Assembly, 27 May 2014, p. 29142.

81. NSWPD, (Hansard), Legislative Council, 18 June 2014, p. 29671.

82. The Hon. Paul Green MLC, NSWPD, (Hansard), Legislative Council, 18 June 2014, p. 29669.

83. The Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 18 June 2014, p. 29669.

Chapter 3. Relevant changes made by the amendment Act

The *Law Enforcement (Police Powers and Responsibilities) Amendment Act 2014* (the amendment Act) amended Part 15 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), but many of the provisions remained substantively the same, with a number of the changes relating only to numbering and expression. The most significant change was the introduction of a new section (section 204A) that provides that a failure to provide an officer's name and place of duty does not render the exercise of the power unlawful (with some limited exceptions). In this report we refer to this as the 'validity clause'. Part 15 of LEPRA is extracted in full in Appendix B.

The explanatory note described the changes in the following way:⁸⁴

In particular, the Bill amends LEPRA as follows:

... (b) to clarify and simplify the provisions of Part 15 (relating to safeguards applying to the exercise of police powers) by recasting the provisions in plain language, and in particular:

- (i) to clarify the time at which police officers exercising a relevant police power must provide evidence they are a police officer (if not in uniform), provide their name and place of duty and provide the reason for exercising the power (so that it is to be provided as soon as reasonably practicable or, in the case of direction, requirement or request to a single person, before exercising the power), and
- (ii) to consolidate the warnings to a person to whom a direction, requirement or request is given to a single warning that the person must by law comply with the direction, requirement or request (instead of a warning that the person must comply and a warning that failure to comply is an offence), and
- (iii) to retain the requirement that a police officer provide his or her name and place of duty, but to provide that a failure to do so does not render the exercise of the power unlawful (except in the case of a direction, requirement or request to a single person), and
- (iv) to provide that the Ombudsman is to monitor the operation of the Part relating to the provision of the name and place of duty of a police officer and provide a report for tabling in Parliament

...

In this chapter, we outline in more detail the provisions that are relevant to our review of compliance with the requirement to provide name and place of duty.

3.1 Information safeguards, including the name and place of duty requirement

The information safeguards, which were previously listed in section 201(1), were moved without amendment to section 202(1). That section now states:

202(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 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.

A police officer who is wearing civilian clothing must comply with all three information safeguards.

84. Law Enforcement (Powers and Responsibilities) Amendment Bill 2014. Explanatory note, p. 2.

A police officer who is in uniform need not provide further evidence that he or she is a police officer, but is still obliged to provide his or her name and place of duty, and the reason for the exercise of the power.

3.2 Relevant powers

The obligation to comply with the information safeguards only arises when a police officer is exercising 'a power to which the Part applies'.⁸⁵ Those powers are now described in section 201 of LEPR, extracted in full below. They were previously described in section 201(3), (3AA) and (6). Although there are some changes to the way the powers are described, there were no substantive changes made to the powers to which the Part applies, and the powers that are excluded.

201 Police powers to which this part applies

- (1) This Part applies to the exercise of the following powers by police officers:
- (a) a power to stop, search or arrest a person,
 - (b) a power to stop or search a vehicle, vessel or aircraft,
 - (c) a power to enter or search premises,
 - (d) a power to seize property,
 - (e) a power to require the disclosure of the identity of a person (including a power to require the removal of a face covering for identification purposes),
 - (f) a power to give or make a direction, requirement or request that a person is required to comply with by law,
 - (g) a power to establish a crime scene at premises (not being a public place).

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

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

- (2) This Part does not apply to the exercise of any of the following powers of police officers:
- (a) a power to enter or search a public place,
 - (b) a power conferred by a covert search warrant, or
 - (c) a power to detain an intoxicated person under Part 16.
- (3) This Part does not apply to the exercise of a power that is conferred by an Act or regulation specified in Schedule 1.⁸⁶

Appendix C outlines the Acts listed in Schedule 1 of LEPR. The effect of that Schedule is that there are several routine and highly visible interactions that take place between police and members of the public where police are not required to provide their name and place of duty. These interactions include conducting random breath tests,⁸⁷ checking tickets on public transport,⁸⁸ responding to people with mental health issues,⁸⁹ removing people from licensed premises,⁹⁰ taking actions to protect children and young people,⁹¹ and dealing with young offenders.⁹²

85. *Law Enforcement (Powers and Responsibilities) Act 2002 (LEPR)*, s. 202(1).

86. LEPR, s. 201.

87. *Road Transport Act 2013*.

88. *Passenger Transport Act 1990* and *Passenger Transport Regulation 2007*. The regulation is in regards to inspection of tickets and the Act is in regards to the accreditation/authorisation of officers and provisions relating to inspection powers.

89. *Mental Health Act 2007*.

90. *Liquor Act 2007*.

91. *Children and Young Persons (Care and Protection) Act 1998*; *Children (Care and Protection) Act 1987*.

92. *Young Offenders Act 1997*.

3.3 When the information needs to be provided

Provisions which stipulated when the information was to be provided during the interaction, were moved from section 201(2), (2A) and (2B) to section 202(2) and some details were changed. Section 202(2) now provides that:

202(2) A police officer must comply with this section:

- (a) as soon as it is reasonably practicable to do so, or
- (b) in the case of a direction, requirement or request to a single person – before giving or making the direction, requirement or request.

3.4 More than one officer exercising a relevant power

A provision about a scenario where more than one officer is exercising a relevant power was moved from section 201(4) to section 202(4), without amendment, and repeated in section 203(4).⁹³ Section 202, which contains the name and place of duty requirement, now states that:

202(4) If 2 or more police officers are exercising a power to which this Part applies, only one officer present is required to comply with this section.

This means that, if more than one officer is, for example, searching a person's premises, only one of them is required to provide their name and place of duty.

3.5 Officer exercises more than one power to which the Part applies

A provision about a scenario where an officer exercises more than one relevant power during the same event (for example, searches the person and then directs them to move on) was moved from section 201(3A) to section 202(6), without amendment. That section states that:

202(6) A police officer who is exercising more than one power to which this Part applies on a single occasion and in relation to the same person is required to comply with subsection (1)(a) and (b) only once on that occasion.

This section means that an officer need not provide identification as a police officer, nor their name and place of duty, more than once. However, a separate reason must still be provided for the exercise of each power (the requirement in subsection (1)(c)).

3.6 If a person asks for an officer's name and place of duty

A requirement that, in any circumstances where the person subject to the exercise of a relevant power asks any officer his or her name and place of duty, this information must be provided, was moved from section 201(5) to section 202(5), without substantive amendment. That section states that:

202(5) If a person subject to the exercise of a power to which this Part applies asks a police officer present for information as to the name of the police officer and his or her place of duty, the police officer must give to the person the information requested.

93. This is because certain requirements to give people a warning that they are required by law to comply with a police direction, requirement or request, were moved from section 201 to section 203, and section 201(4) was relevant to the information safeguard (moved to section 202) as well as the warning requirement.

3.7 The validity clause: section 204A

The validity clause provides as follows:

204A Validity of exercise of powers

- (1) A failure by a police officer to comply with an obligation under this Part to provide the name of the police officer or his or her place of duty when exercising a power to which this Part applies does not render the exercise of the power unlawful or otherwise affect the validity of anything resulting from the exercise of that power.
- (2) Subsection (1) does not apply if the failure to comply occurs after the police officer was asked for information as to the name of the police officer or his or her place of duty (as referred to in section 202 (5)).
- (3) Subsection (1) does not apply to the exercise of a power that consists of a direction, requirement or request to a single person.

The inclusion of this provision was intended by Parliament as a 'safety net for inadvertent breaches'.⁹⁴

The validity clause contains two significant exceptions. A failure to provide name and place of duty may nonetheless render the exercise of the power unlawful if:

- the officer has been asked for that information by the person who was subject to the exercise of the power, or
- the officer was giving a direction, requirement or request to an individual person.

3.8 Impact on whether a person commits an offence

The amendment Act also introduced a new section 204B, which states:

204B Commission of offence in relation to exercise of powers where failure by police officer to comply with this Part

- (1) A person does not commit an offence under this Act of failing to comply with a direction, requirement or request given or made by a police officer under or in connection with a power to which this Part applies unless the obligations under this Part are complied with when exercising the power.
- (2) Subsection (1) does not apply to a failure by a police officer to comply with an obligation under this Part that does not render the exercise of the power by the officer unlawful because of section 204A.

Because of section 204B, a person does not commit any offence even if he or she does not comply with an officer's direction, requirement or request in these circumstances:

- the officer has given the direction, requirement or request to an individual person, and
- the officer has not complied with the information and warning safeguards.

94. The Hon. John Ajaka MLA, NSW Parliamentary Debates, (Hansard), Legislative Council, 28 May 2014, p. 29255.

3.9 Police policy and practice since the introduction of the 2014 amendments

As the validity clause does not alter the requirement for police to provide their name and place of duty, the NSW Police Force indicated that no changes were made to police practices following the amendment.⁹⁵

Police were nonetheless provided with information on the revised Part 15 safeguards, and existing training and materials were updated to reflect these changes.⁹⁶ Specific information pertaining to the Part 15 amendments and its implications were publicised in the November 2014 edition of the *Police Monthly*,⁹⁷ and were earlier flagged in the July 2014 edition, alerting police to the impending change.⁹⁸ These articles and a further summary developed to help police understand the safeguards and the validity clause are available via the NSW Police Force's Executive Legal Support Unit (ELAU) intranet page. Three Six Minute Intensive Training (SMIT) packages are available on the police intranet specifically in relation safeguard requirements. Two training packages address the requirement to provide the three safeguards in regards to powers of arrest,⁹⁹ and the third training package addresses the validity clause.¹⁰⁰

The NSW Police Force has advised that a copy of a master lecture¹⁰¹ on the Part 15 amendments is available on the police law site,¹⁰² as well as an audio file on the Part 15 requirements.¹⁰³

The NSW Police Force advised us that when they communicated the introduction of the validity clause to officers, it was not promoted 'in such a way as to provide a disincentive to police to provide their name and place of duty. On the contrary, we strongly emphasised the legal obligation to provide [it] regardless of the clause.'¹⁰⁴ Many of the policy and training materials emphasise that the validity clause is a safety net, not an excuse for officers to relax their application of the requirement.¹⁰⁵

There are also policy documents which include guidance encouraging police to provide their name and place of duty even in circumstances where it is not a legislative requirement.¹⁰⁶

95. Correspondence from Acting Commissioner of Police to NSW Ombudsman, dated 20 January 2015.

96. At the NSW Police Academy, the pre attestation curriculum provides instruction on Part 15, and incorporates scenarios on when it should be provided. In addition, the Field Support Command delivers a Powers of Police Workshop as part of the Constables Development Program. In this workshop the application of LEPRAs safeguards are incorporated into lessons and case studies. The publicly available Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence) provides the community with a simplified overview of the name and place of duty requirements, including the implications of the validity clause. The legislative requirement is also covered by the Code of Conduct and Ethics, which provides that police must 'comply with the law whether on or off duty', as well as any related policy, procedures and guidelines.

97. Sgt Kate French (Executive Legal Advice Unit), NSW Police Force, 'LEPRA safeguards are now clearer', *Police Monthly*, November 2014, p. 31; NSW Police Force, 'Understanding LEPRAs: Safeguard provisions', *Police Monthly*, November 2014, pp. 42-43.

98. Sgt Kate French (Executive Legal Advice Unit) and Traci Palladino, NSW Police Force, 'LEPRA long-awaited amendments', *Police Monthly*, July 2014, pp. 3-5.

99. That is, the requirement of officers to provide evidence of being an officer, their name and place of duty, and the reason for exercising the power(s).

100. NSW Police Force, Education and Training Command, *Six Minute Intensive Training (SMIT): Powers of arrest: PA053 – LEPRAs Part 15 safeguards, no. 1: IPE*, 1 November 2014; NSW Police Force, Education and Training Command, *Six Minute Intensive Training (SMIT): Powers to arrest: PA054 – LEPRAs Part 15 safeguards, no. 2*, 1 November 2014; and NSW Police Force, Education and Training Command, *Six Minute Intensive Training (SMIT): Powers to arrest: LEPRAs safeguards Part 15, no. 3: The validity clause*, 1 November 2014.

101. Charles Sturt University and NSW Police Force Power Point presentation, *Law Enforcement (Powers and Responsibilities) Act 2002, Part 15 Safeguards: As amended by the Law Enforcement (Powers and Responsibilities) Amendment Bill 2014*.

102. Correspondence from Acting Commissioner of Police to NSW Ombudsman, dated 20 January 2015.

103. Correspondence from Acting Commissioner of Police to NSW Ombudsman, dated 20 January 2015.

104. NSW Police Force, Submission, *NSW Police Force response to Ombudsman's review questions – Part 15 of the Law Enforcement (Powers and Responsibilities) Act 2002*, received 4 September 2015, p. 1. Emphasis in the original.

105. See, for example, Charles Sturt University and NSW Police Force PowerPoint presentation, *Law Enforcement (Powers and Responsibilities) Act 2002, Part 15 Safeguards: As amended by the Law Enforcement (Powers and Responsibilities) Amendment Bill 2014*; NSW Police Force, Education and Training Command, *Six Minute Intensive Training (SMIT): Powers to arrest: LEPRAs safeguards Part 15, no. 3: The validity clause*, 1 November 2014; NSW Police Force, Education and Training Command, *Six Minute Intensive Training (SMIT): Powers to arrest: PA054 – LEPRAs Part 15 safeguards, no. 2*, 1 November 2014; NSW Police Force, 'Understanding LEPRAs: Safeguard provisions', *Police Monthly*, November 2014, pp. 42-43.

106. See, for example, NSW Police Force, *NSW Police Force customer service guidelines*, 2011, p. 12.

Chapter 4. Method and limitations

Over the last 20 years the Parliament has passed 28 Acts requiring the Ombudsman to keep under scrutiny the exercise of a range of new or amended powers and functions given to police, including Acts that established new or amended schemes and offences.¹⁰⁷ This review required the Ombudsman to keep under scrutiny compliance by police officers with an existing obligation, in Part 15 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), requiring police to provide their name and place of duty. In this chapter we discuss the challenges that this narrower scope posed for our research.

4.1 Limitations arising from the narrow scope of our role for this review

The Ombudsman has traditionally interpreted the ‘keep under scrutiny’ function broadly. Previous legislative reviews have typically included a detailed examination of a range of questions, such as whether powers had been exercised by police in a manner consistent with the intention of Parliament, and whether the use of powers has been lawful and reasonable. We generally also look at implementation issues, including whether the use of the powers has resulted in any unintended and unanticipated consequences.

In previous reviews our broad focus has enabled us to gain insight into the experience of police, members of the public, the community at large and other parties with an interest in the implementation of the laws under review. Our method usually involves analysing police records, policy documents and complaints relating to the powers under review, observing police activity, consulting stakeholders and considering public submissions. This enables us to develop informed and balanced recommendations to improve the law’s operation.

The scope of the role of the Ombudsman for this review – by requiring the scrutiny of *compliance* by police officers with a statutory obligation, rather than *exercise* of statutory powers – was significantly narrower than previous ones. As a result, although we adopted our usual mixed-methods approach, the extent to which we were able to explore the issues and questions that we typically examine was greatly limited. Significantly, this review was unable to include an examination of the adequacy of the other information safeguards (that officers must provide evidence that they are police officers and the reason for the exercise of the power), or whether these safeguards have been implemented effectively and reasonably by police. The review was also unable to effectively examine the need for any reform or amendment to Part 15 generally.

When the Bill proposing our review role¹⁰⁸ was introduced into Parliament, the Ombudsman wrote to the then Attorney General raising his concerns as follows:

I am concerned that the construction of clause 17 may impede the ability of my office to effectively perform the functions under the clause.

The scope of the function to ‘keep under scrutiny’

I am concerned that the construction of clause 17 is unclear in terms of the scope of the Ombudsman’s function to keep matters under scrutiny.

Clause 17(1) appears to confine the function to ‘keep under scrutiny’ the compliance of police officers with the proposed new section 202(1)(b) of LEPRA, which is the obligation that police provide a person with their name and place of duty. However, clause 17(4) requires the Ombudsman to identify and make

107. For example, see the NSW Ombudsman’s reports, *Policing public safety: Report under section 6 of the Crimes Legislation Amendment (Police and Public Safety) Act*, November 1999; *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000*, August 2004; *On the Spot Justice? The Trial of Criminal Infringement Notices by NSW Police: A report to Parliament pursuant to section 344 of the Criminal Procedure Act 1986*, April 2005; *Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002*, September 2008; *The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*, April 2016.

108. Law Enforcement (Powers and Responsibilities) Amendment Bill 2014.

recommendations for amendments to Part 15 of LEPRA to secure compliance with that Part. The limited scope of clause 17(1) appears to be at odds with the broad requirement under clause 17(4).

It is my view that my office cannot effectively comply with the obligations under clause 17(4) which requires me to consider the general operation of Part 15 without an amendment to clause 17 such that the Ombudsman is able to 'keep under scrutiny' the operation of Part 15 generally not just compliance with section 202(1)(b).

In my view it would be sensible to make an amendment to remove any ambiguity about the obligations of the Ombudsman in conducting this review. This would allow my office to examine and make recommendations to improve the effectiveness of the operation of Part 15 as a whole including the operation of section 204A.

I note that the intention in drafting the Bill may have been that the Ombudsman should only keep under scrutiny compliance with section 202(1)(b) and to confine any recommendations to the operation of this section. It is my strong view that there may be limited public interest in the Ombudsman spending scarce public resources to conduct a legislative review under this limitation as it would be difficult to make any sensible recommendations without considering the operation of Part 15 generally. I am also concerned that there may not be any significant recommendations that could be made by my office about police compliance with section 202(1)(b) given the intention of the new section 204A to remove the potential legal consequences of a failure by police to comply with the requirement under section 202(1)(b) in most cases.¹⁰⁹

We received no response to this letter and the amendments we sought were not made.

4.2 Limitations on the availability of information to assess police compliance

The research methods for previous legislative reviews have been significantly shaped by the availability of quantitative and qualitative information from police, other agencies, and member of the public, and by the level of participation and cooperation of stakeholders in assisting us to collect and interpret the information. This review has been seriously limited by the availability of information provided to us by the NSW Police Force and by its decision to limit the involvement of its officers in the review.

In the months prior to the beginning of the review period, we entered into discussions with the NSW Police Force about the information we required to provide quantitative measures of the level of police compliance with the obligation, and about our proposals to gather qualitative information through direct observation of police activities, for example, where using their powers to give directions when policing public places. The NSW Police Force advised that, consistent with recommendations 18, 19 and 20 made by the Tink/Whelan review,¹¹⁰ it would provide the Ombudsman with information relating to complaints about police failure to provide name and place of duty, and with information about adverse comments made by judicial officers regarding compliance with safeguards under Part 15 of LEPRA.¹¹¹ Those recommendations were that:

18. The Ombudsman be given authority to monitor for a period of 12 months the operation of the new provision in Part 15 that will uphold the exercise of a police power despite a failure to provide name and place of duty as soon as reasonably practicable.
19. Subject to the agreement of the Police Commissioner and the Ombudsman, for a period of 12 months from the commencement of the new Part 15, complaints about failure of police to provide name and place of duty should be 'notifiable' complaints under the Police Act and subject to automatic review by the Ombudsman.
20. Guidelines being developed by the Commissioner under s 75D of the Police Integrity Commission Act to capture within the police complaints system adverse comments by judicial officers about police conduct should be finalised and implemented as a matter of priority.¹¹²

109. Correspondence from NSW Ombudsman to the Attorney General, dated 23 May 2014.

110. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, p. 19.

111. Correspondence from Assistant Commissioner of Police to Deputy Ombudsman (Police), dated 29 August 2014.

112. Mr Andrew Tink and the Hon. Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) 2002 report: Part 2*, December 2013, p. 19.

We advised the NSW Police Force of our view that although we welcomed receiving this information, on its own such information would be inadequate to scrutinise police compliance with the relevant provisions under the Act, stating that:

The key issue at this stage is whether or not police will be required to record information about providing name and place of duty ...

It is our view that requiring police to record information about Part 15 is desirable to meet the intentions of the Parliament for this review notwithstanding that such records may have some limitations in being used as a measure of compliance.

Parliament requires the Ombudsman to monitor and make recommendations to secure the compliance of police officers with the amended Part 15 provisions. Therefore any procedures that the NSW Police Force puts in place to monitor officers' compliance with the requirements will be a focus of the review and any related recommendations.

Although we believe that a recording requirement relating to Part 15 should be adopted for the period of the review, ultimately this is a matter for the Commissioner. If he decides against such a proposal, his reasons will be reflected in our report together with our views about the constraints imposed by the lack of police data. Alternatively, if the proposal is adopted this will enable the Ombudsman to better evaluate how such records could assist the NSWPF in ensuring ongoing police compliance with relevant safeguards into the future. Another strategy might be to adopt a recording requirement in a limited number of commands for the period of the review so that both issues of compliance with Part 15 and the usefulness of such records could be assessed.¹¹³

From the beginning of our discussions, the NSW Police Force indicated that it did not agree to have its officers make records of providing their name and place of duty when relevant powers were being exercised.¹¹⁴ In response to our concerns that 'the Ombudsman will be unable to meet his obligations to conduct an adequate review with the limited information that the NSW Police Force is proposing to provide'¹¹⁵ the NSW Police Force advised that '[w]e genuinely cannot support (nor fund) significant changes to the COPS system or additional paper records'.¹¹⁶

We met with representatives from the NSW Police Force (including an Assistant Commissioner and the Commander of Police Prosecutions), the Department of Justice, the Department of Premier and Cabinet and the Ministry for Police and Emergency Services, to discuss our concerns. At that meeting, it was made clear that police would not make records of providing their name and place of duty when exercising relevant powers, but would provide complaints information and information about adverse comments made by judicial officers regarding compliance with the safeguards. We communicated our concerns that this decision would seriously limit our ability to conduct this review.¹¹⁷

4.2.1. Consultations with, and observations of, police officers

We had planned to observe police working in the field to gain some insight into how police communicated the information during real-life interactions with the public. We have conducted these kinds of activities in previous legislative reviews.¹¹⁸ To prepare for this activity, we sent the NSW Police Force a draft memorandum of understanding to facilitate conducting observations of police officers using relevant powers.¹¹⁹

In its response, the NSW Police advised that it would not facilitate our request, because this 'carries significant risks to operational police, Ombudsman staff and the public'.¹²⁰

113. Correspondence from Deputy Ombudsman (Police) to Assistant Commissioner of Police, dated 18 August 2014.

114. Record of conversation between Deputy Ombudsman (Police) and Assistant Commissioner of Police, 18 August 2014. Correspondence from Assistant Commissioner of Police to Deputy Ombudsman (Police), dated 29 August 2014 advised that information about 'the number of occasions that police exercise the relevant powers ... is not currently captured in a manner that allows the NSW Police Force to reconcile this information. Unfortunately the NSW Police Force is not funded for these significant changes to the COPS system. Any other paper based recording method has been deemed unfeasible'.

115. Correspondence from Deputy Ombudsman (Police) to Assistant Commissioner of Police, dated 8 September 2014.

116. Correspondence from Director, Office of the Commissioner of Police to Deputy Ombudsman (Police) dated 11 September 2014.

117. File note, record of meeting, dated 19 September 2014.

118. For example, see NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, June 2006.

119. Correspondence from Deputy Ombudsman (Police) to Commissioner of Police, dated 27 April 2015.

120. Correspondence from Acting Commissioner of Police to NSW Ombudsman, dated 12 June 2015.

In addition, and although we had not raised this in our correspondence, the NSW Police Force advised that it considered 'that visits to Local Area Commands and the Police Transport Command by Ombudsman staff are not necessary, and they would involve a diversion of operational policing resources'.¹²¹ As a result, we were unable to conduct any further consultations with police.

Our ability to gain a more comprehensive understanding of the views and experiences of a broad range of police officers in interpreting and complying with the requirement in practice has been limited as a result of this decision. We could not proceed with consultations planned with front-line police in metropolitan and regional areas, and the Transport Command (who police the roads). However, we had already consulted nine police officers from a Local Area Command,¹²² and five from the Police Prosecutions Command,¹²³ and we have been able to include some of their views in this report.

4.3 Methods employed for this review

Despite these obstacles and limitations, we used the following data sources and methods in an attempt to report some meaningful information about police compliance with the requirement:

- We analysed 35 complaints made during the review period, that included claims that the police involved had failed to provide their name and place of duty. We also analysed 119 historical complaints about the same issue, made in the 5 years prior to the review period.
- We reviewed information provided by the NSW Police Force in response to our information requirement,¹²⁴ including advice about whether there were any prosecutions where the issue of name and place of duty was raised, documents it provided to the Tink/Whelan review, information from its Computerised Operational Policing System (COPS), and policies, guidelines, training material and other police publications relevant to the exercise by officers of the relevant functions, particularly the requirement for them to provide their name and place of duty.
- We reviewed literature about the purpose of the name and place of duty safeguard, its effect on the balance between effective policing and individual rights, and how it promotes the ideals of police transparency, accountability and legitimacy.
- We published a fact sheet about this review, posing questions for consideration and inviting public submissions¹²⁵ (reproduced in Appendix D). We reviewed 11 submissions made by a range of stakeholders, including public interest agencies, the legal and academic community, police representative bodies and general members of the public. A list of parties that made submissions appears in Appendix E.
- We conducted two surveys, of over 150 people, and consulted with over 50 community members and organisations, described in further detail below.

We required the NSW Police Force to provide copies of any legal advice that related to substantive matters concerning the exercise of the relevant functions (for example, matters concerning legislative amendment sought by NSW Police Force, the scope of police powers under LEPR, and the requirement for police officers to provide their name and place of duty when exercising the relevant functions), but the Commissioner did not provide this, claiming legal professional privilege.¹²⁶

121. Correspondence from Acting Commissioner of Police to NSW Ombudsman, dated 12 June 2015.

122. Our consultations were conducted in five separate sessions held on 11 March 2015.

123. Our consultations comprised a telephone conference with four officers, including the Police Prosecutions Commander, on 9 February 2015, and two face-to-face meetings with two separate officers, on 21 May 2015 and 16 June 2015.

124. NSW Ombudsman, *Requirement to Provide Information*, dated 14 November 2014. This requirement was made pursuant to our statutory power in LEPR, Schedule 5, cl. 17(2).

125. NSW Ombudsman, 'Are police officers providing their name and place of duty when required?' 27 April 2015. This was published on the NSW Ombudsman website, and promoted via our Twitter account. It was also distributed via the Australian and New Zealand Society of Criminology (ANZSOC) network.

126. Correspondence from Acting Commissioner of Police to NSW Ombudsman, dated 20 January 2015.

4.3.1. Surveys of people to whom police were obliged to provide the information

To obtain the views of some of the people affected by the changes, that is, those in relation to whom police had exercised the relevant powers during the review period, we conducted two surveys. The first was of people in court waiting rooms who were having criminal charges against them heard in court. The second was of people who were in custody at correctional facilities because they had been arrested and charged, but refused bail. These cohorts of people had recent first-hand experience with police exercising a relevant power, making them an important source of information on police behaviour.¹²⁷

We conducted the surveys between May 2015 and October 2015 at the following locations:

Courts

- Blacktown Local Court
- Casino Local Court
- Downing Centre (Sydney)
- Lismore Local Court
- Parramatta Local Court

Correctional facilities

- Amber Laurel Correctional Centre
- Central Court Cells
- Lismore Court Cells
- Surry Hills Court Cell Complex

Children's courts

- Bidura Children's Court (Glebe)
- Campbelltown Children's Court
- Parramatta Children's Court
- Youth Koori Court¹²⁸

In all, we surveyed 26 people in correctional facilities and 133 people in court waiting rooms. Of the 133, 103 were adults, and 30 were children at the time of the police interaction.¹²⁹

We wanted to obtain the perspective of young people, as their experiences with police can differ from adults,¹³⁰ and young people (particularly Aboriginal and Torres Strait Islander youth) are particularly vulnerable to the power imbalance.¹³¹ With the assistance of the Children's Court Assistance Scheme,¹³² and at the suggestion of the Youth Justice Coalition,¹³³ we expanded our court survey approach to include young people waiting to attend proceedings at the Children's Courts.¹³⁴

127. Queensland Criminal Justice Commission, 'Defendants' perceptions of police treatment: Findings from the 1999 Queensland Defendants Survey', *Research Paper Series*, Vol. 6(1) March 2000, p. 2.

128. This is located at the Parramatta Children's Court precinct.

129. The person was considered a child if they were under 18 years of age at the time of the police contact.

130. Young people often come to the attention of police more than older people, and young people can often perceive that they are over-policed in public spaces and under-policed if they are victimised: Crime and Misconduct Commission Queensland, *Interactions between police and young people*, April 2009, pp. vi, 1, 2.

131. House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing time – time for doing: Indigenous youth in the criminal justice system*, June 2011, Canberra, p. 196.

132. The Children's Court Assistance Scheme provides support for young people and their families who are attending court. This can include information about the court processes, attending the court with the young person as a support person, informal counselling and referrals to welfare services.

133. The Youth Justice Coalition is a network of policy workers, youth workers, academics and lawyers advocating for the rights of children and young people in NSW. Its aims are to promote appropriate and effective initiatives in areas of law affecting children and young people; and to ensure that children's and young people's views, interests and rights are taken into account in law reform and policy debate. See Youth Justice Coalition, Submission to the New South Wales Law Reform Commission: Comprehensive Review of the Law of Bail in NSW, July 2011.

134. For the youth surveys, we sought parental and/or guardian consent.

4.3.2. Consultations with community stakeholders

We consulted with over 50 people in total, including representatives from community centres,¹³⁵ clients and workers from homeless services,¹³⁶ support and legal services,¹³⁷ academics, legal and criminal justice practitioners and local community representatives,¹³⁸ in the Sydney Metropolitan and Tweed-Byron areas.¹³⁹ A list of organisations we consulted is in Appendix E.

Our consultations included speaking with people from disadvantaged and vulnerable groups¹⁴⁰ and agencies that represented or supported them, as people from some of these groups are likely to have more contact with police. Aboriginal people are overrepresented across the criminal justice system,¹⁴¹ and people who are experiencing homelessness are more exposed to police contact, since their behaviours and presence in public spaces make them more visible to police.¹⁴² It was also important to include their perspective because people from vulnerable and disadvantaged groups experience more barriers to participating in law reform consultations (such as our review) than many other groups.¹⁴³ Our approach has tried to compensate for this potential bias.

4.4 Abandoned research method

We trialled a telephone survey of people who had been subject to a move-on direction by police and the NSW Police Force provided information to facilitate this.¹⁴⁴ We abandoned this method after conducting a pilot, primarily because 95% of the calls we made were not answered.¹⁴⁵

135. Byron Community Centre; Murwillumbah Community Centre.

136. Winsome and Lismore Soup Kitchen, Lismore; Fred's Place, Tweed Heads; You Have a Friend, Murwillumbah; Matthew Talbot Hostel, Sydney; Sheraton House Men's Accommodation, Ballina.

137. Life on Track, Lismore; Public Interest Advocacy Centre.

138. For example, a representative from Nimbin Neighbourhood and Information Centre arranged for a small forum of local representatives to come and discuss the amendments and their potential impact with us. Attending the forum were participants from the Centre, the Hemp Embassy, Southern Cross University, Nimbin Aged Care and Respite Service, and a local community member.

139. While we organised to talk to many groups in advance, we also spoke to people in local offices in the communities we visited from word of mouth referrals by people we talked to when we visited Lismore, Casino, Murwillumbah and Tweed Heads.

140. Disadvantaged and vulnerable people include people experiencing homelessness, Aboriginal people, and children and young people.

141. See, for example, Don Weatherburn and Stephanie Ramsey, 'What's causing the growth in Indigenous Imprisonment in NSW?', *Crime and Justice Statistics Bureau Brief*, No. 118, August 2016; Judy Putt and Jessica Yamaguchi, 'The implementation of Indigenous crime and justice policies and programs in Australia: Issues and challenges', *Indigenous Justice Clearinghouse Research Brief*, No. 18, April 2015, p. 2. <http://www.indigenousjustice.gov.au/briefs/brief018.pdf>, viewed 10 November 2016.

142. Jason Payne, Sarah Macgregor and Hayley McDonald, 'Homelessness and housing stress among police detainees: Results from the DUMA program', *Trends & Issues in Crime and Criminal Justice*, No. 492, p. 2.

143. Barriers can include 'needing to devote disproportionate time and resources to primary needs such as food, safety and shelter,' and 'lower levels of functional literacy'. It can also include social stigma, and 'this in turn (sic) severely restricts their participation and can make reaching out to them to meet their participation needs both time and cost prohibitive': Natalina Nheu and Hugh McDonald, 'By the people, for the people? Community participation in law reform: Summary report', *Law and Justice Foundation Justice Issues, Paper 14, October 2011, p. 7*.

144. Correspondence from Acting Commissioner of Police to NSW Ombudsman, dated 20 January 2015.

145. Reasons included disconnected phones, wrong numbers, phones that were not answered and phones switched off. In the pilot we called 99 people from 90 separate events, making approximately 200 calls. While the nominal response rate was high (63%), we only completed 7 surveys, with 4 refusals.

Chapter 5. What was the nature of compliance during the review period?

Police record information on COPS about a broad range of interactions with the public, including incidents in which they exercise the powers that trigger the obligation to provide their name and place of duty. On the basis of information recorded by police on COPS we estimate that there were over 408,000 incidents during the review period in which police were subject to the obligation because they exercised a relevant power.¹⁴⁶

This chapter presents and discusses the information we were able to gather about whether police complied with this obligation during these incidents. It includes information we gathered by monitoring complaints about police, and court proceedings, as well as proxy measures of compliance we used – by surveying two samples of people who had experienced recent interactions with police. We also present some information we obtained, through submissions and consultations, about police and community stakeholders' perceptions of compliance.

For the reasons discussed in this chapter, we have not been able to make conclusive findings about the level of police compliance with the obligation during the review period.

In addition, we were unable to assess the level of police compliance with the obligation prior to the commencement of this review, because no records are made of police providing their name and place of duty. This has limited our ability to determine whether there has been any change to the level of compliance since the introduction of the validity clause.

5.1 Complaints made about police failing to provide their name and place of duty

The NSW Police Force records complaints about police on its complaint information system, c@ts.i, and manages them in accordance with Part 8A of the *Police Act 1990*. It notifies complaints to the Ombudsman that allege or indicate conduct specified in guidelines agreed between the Ombudsman and the Police Integrity Commission.¹⁴⁷

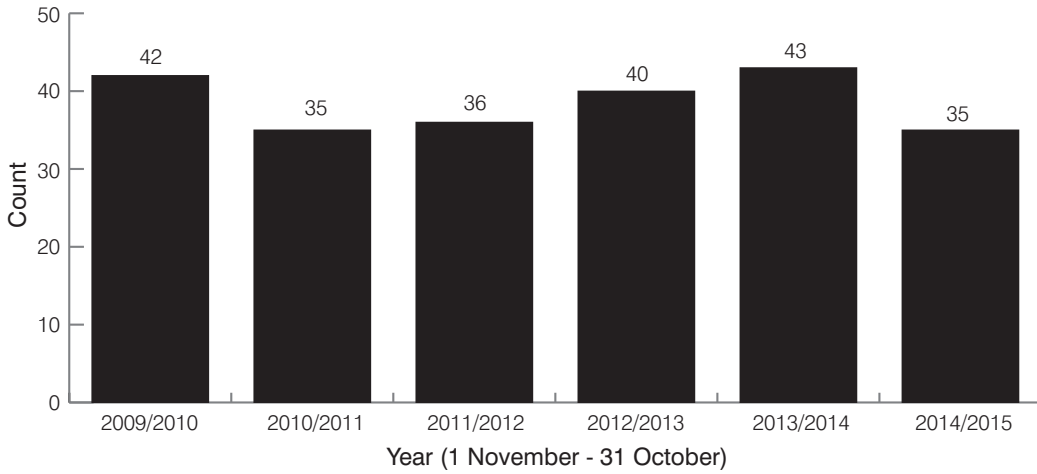
The NSW Police Force is not required to notify the Ombudsman of complaints about the failure of police to provide their name and place of duty, and these are handled by police without the oversight of the Ombudsman. Police are responsible for taking appropriate action in response to complaints not notified to the Ombudsman including any investigation, conciliation and managerial action as may be necessary in all the circumstances of the matter.

The NSW Police Force assisted this review by identifying complaints about police failing to provide their name and place of duty that had been registered on c@ts.i. We also conducted searches of complaints recorded on c@ts.i to verify that we had identified all relevant complaints during the review period. Figure 1 provides information about the number of these complaints over the six-year period prior to the end of the review period (1 November 2009 – 31 October 2014). There were no clear trends evident from this data.

146. Correspondence from Chief Statistician (NSW Police Force) to Manager, Research and Projects Team (NSW Ombudsman), dated 9 August 2016 and 19 September 2016.

147. Guidelines agreed between the NSW Ombudsman and the Police Integrity Commission under sections 121 and 122 of the *Police Act 1990*.

Figure 1. Complaints raising allegation of a failure to provide name and place of duty, by 12-month periods (1 November 2009 – 31 October 2014)



Source: NSW Police Force data, extracted using PODS Watson (1 November 2009 to 31 October 2015, generated on 15 September 2016).

Ref: 2016/172447

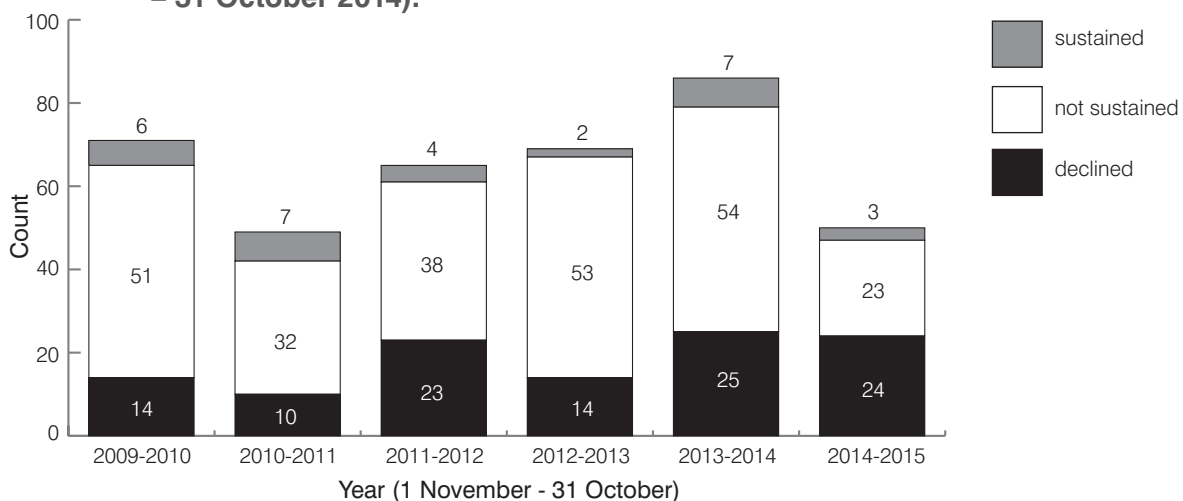
Note 1: All data were extracted using PODS Watson visual analysis tool between the 2009/10 and 2013/14 periods. For the review period, we supplemented this with complaints identified by the NSW Police Force and the Ombudsman complaints database (n=10). The data for the review period were manually cleaned for database errors, a process that was not conducted for the previous years.

Note 2: Any complaint where an outcome was unknown, or the incident date was unclear, was excluded.

5.1.1. Outcome of complaints

The NSW Police Force assesses each new complaint to determine whether it needs to be investigated. If it decides that a complaint need not be investigated, it records that the complaint has been ‘declined’ and advises the complainant of this decision. If a complaint is investigated a finding is recorded in relation to each issue, to reflect whether the allegation is found to be ‘sustained’ or ‘not sustained’. Actions taken to remedy any unreasonable or unlawful conduct of the officers the subject of the complaint are also recorded. Figure 2 provides information about the outcome of complaint issues over the six-year period prior to the end of the review period (1 November 2009 – 31 October 2014).

Figure 2. Outcome of complaint issues, by 12-month periods (1 November 2009 – 31 October 2014).



Source: NSW Police Force data, extracted using PODS Watson (1 November 2009 to 31 October 2015, generated on 15 September 2016).

Ref: 2016/172447

Note 1: All data were extracted using PODS Watson visual analysis tool between the 2009/10 and 2013/14 periods. For the review period, we supplemented this with complaints identified by the NSW Police Force and the Ombudsman complaints database (n=10). The data for the review period were manually cleaned for database errors, a process that was not conducted for the previous years.

Note 2: We calculated per issue, not per complaint because one complaint may have multiple name and place of duty issues with different results. Any complaints where an outcome was unknown, or the incident date was unclear, was excluded from the analysis.

As figure 1 shows, we identified 35 complaints made in the review period that included at least one allegation that an officer did not provide their name and place of duty. Complaints commonly make multiple allegations, each of which is recorded as a separate complaint issue.¹⁴⁸ As figure 2 shows, 50 complaint issues in total were made during the review period. Of those:

- 3 were found to be 'sustained'.
- 23 were found to be 'not sustained'.
- 24 were declined.

The complaints relating to the review period are discussed in more detail below.

Investigations resulting in sustained findings

In three complaints, the police investigator made a finding that the officer involved had failed to provide their name and place of duty, as alleged. See case studies 1, 2 and 3.

Case Study 1. A vehicle stop

The complainant was driving his car when he reached a car stopped in the middle of the road without any indicators or hazard lights activated. After waiting a short while, the complainant drove around the stationary vehicle and then stopped momentarily as a child was attempting to cross the road. The stationary vehicle was being driven by an off-duty police officer, who was wearing only part of his uniform. According to the complainant, he was unaware that the driver was an off-duty officer. The officer followed the complainant and swerved his car in front of his in a cul-de-sac near the complainant's home. The complainant alleged that the officer then demanded the complainant's driver's licence and was unprofessional in the manner that he spoke to him.

According to the off-duty officer, the actions of the complainant were dangerous as he had failed to notice the child attempting to cross the road, and he had raised his middle finger at the officer as he drove past. The officer followed the complainant in order to give him a warning about the need to be careful when driving. He claimed he had provided his name and place of duty at some stage during the conversation and explained that 'it was clearly visible that I was dressed to come to work'.

An independent witness corroborated the complainant's version of events and gave evidence that the officer had failed to provide name and place of duty. A sustained finding was made in relation to unreasonable conduct by the officer and for failing to provide his name and place of duty.

Case Study 2. Search for a missing mobile phone

The complainant and her friend attended a fundraising event at the local high school. During the event a student reported that her mobile phone had been stolen. The phone had disappeared while she was serving the complainant and her friend at her clothing stall. The student reported to her teacher that she suspected the complainant and her friend had taken it.

An off-duty police officer introduced himself to the teacher, produced his badge and offered his assistance to make enquiries of people in the area. He accompanied the teacher while she spoke to members of the public, including the complainant and her friend. The two denied taking the phone and agreed to remove the contents of their bags. The off-duty officer then explained they were suspected of stealing the phone and proceeded to conduct a search of their bags and the bottom compartment of their pram. The complainant and her friend expressed their hostility at being searched in front of their children. They returned to the school about 15 minutes later and requested the officer's details in order to make a complaint about his actions.

148. Because of this, it is possible that one complaint may have more than one name and place of duty issue raised, and be in relation to more than one officer. As such, the number of issues is more accurate than counting solely based on the number of complaints.

The complainant stated that the officer did not identify himself as a police officer until after she had requested this information. None of the witnesses interviewed during the complaint investigation supported the officer's version that he provided his name, rank and station immediately prior to conducting the search of the bags and pram.

A sustained finding was made against the officer for failure to identify his name and place of duty prior to conducting the search. The officer was spoken to and reminded that if he was making enquiries off-duty, he needed to identify himself as a police officer, show identification and provide his name and place of duty.

Case Study 3. Offence by a pedestrian

The complainant was stopped by police for a pedestrian offence on the intersection of a busy city street during a police operation targeting people breaching the law by crossing the road when the traffic light was red. The complainant later made a statement admitting that she crossed the road contrary to the red pedestrian traffic light but only after checking that there was no traffic. A police officer standing on the corner of the intersection detained her before issuing her an infringement notice. The complainant alleged that the officer unreasonably detained her and issued the notice, and used unreasonable force, resulting in bruising and a knock to her head. She also alleged that the officer yelled and swore at her when she wanted to stand up. The officer was found to have acted lawfully and reasonably in detaining the complainant because he was required to establish her identity. The use of force was also found to be reasonable because the complainant was not compliant with reasonable directions given by the officer and was attempting to leave before he could issue the infringement notice. The investigator made a finding that the officer had failed to provide his name and place of duty and he was given advice and guidance about his obligations to do so.

Investigations resulting in 'not sustained' findings

Of the 23 allegations (arising from 15 complaints) found to be 'not sustained', 10 were made on the basis that the obligation to provide the information did not arise in the circumstances. For example, there were matters where:

- police conducted a child welfare check on a child subject to a Family Law Court Order following a request from a concerned mother,¹⁴⁹ and
- police assisted in the scheduling of a mental health patient under the *Mental Health Act 2007*; this Act is explicitly excluded from the obligation by LEPR.¹⁵⁰

There was a complaint where the issue was found to be not sustained, but the letter explaining the outcome to the complainant included an acknowledgment that, although not required, it would have been preferable if the officer had given his details when requested.

Complaints that were declined

The NSW Police Force has discretion about whether a complaint needs to be investigated.¹⁵¹ During the review period, 17 of the complaints, involving 24 allegations of a failure to provide name and place of duty, were declined.

149. Such actions would not necessarily fall within the powers listed in LEPR, s. 201(1).

150. LEPR, s. 201(3) and Schedule 1.

151. *Police Act 1990*, s. 139(2).

Some reasons for these decisions were:

- the investigator was unable to pursue any lines of inquiry because the officer against whom the allegation had been made could not be identified as the officer had not provided the complainant with identifying details
- the issue was resolved for the complainant without needing to go through the investigation process, and
- the issue was considered vexatious.

5.1.2. What the complaints data shows about compliance

Complaints about police failing to provide their name and place of duty provide the NSW Police Force with an opportunity to examine whether individual police officers have complied with their statutory obligation to provide this information, and to take actions to ensure that police are aware of and comply with this obligation. Separately, monitoring of complaints may provide an opportunity to examine the reasons that police fail to provide their name and place of duty and to use this information to implement strategies to improve compliance. However, the small number of complaints during the review period provides a sample that is insufficient to properly examine or measure the general level of police compliance with their obligation during the review period or to develop strategies to improve compliance.

As outlined above, police exercised the relevant powers, requiring them to provide their name and place of duty, on over 408,000 occasions during the review period, involving over 266,000 people. Against this large volume of interactions between police and the public, the NSW Police Force recorded only 35 complaints involving 50 allegations that police failed to comply with their obligation. Of these, only 26 allegations were the subject of investigation and 3 were found to be 'sustained'. As a percentage of allegations that were investigated, these results suggest a high level of police compliance as police were not found to have failed to comply with their statutory obligation in most of the allegations investigated. However, the sample of complaints is too small for it to be extrapolated or used as a reliable measure of police compliance across the 408,000 occasions where the obligation applied. Nor does the data provide any useful information to examine the possible causes underlying any police failure to comply with this obligation.

It might separately be argued that the low number of complaints made in the first place is evidence that police are generally complying with the obligation and there is no cause to complain. It is our view, on the basis of our extensive experience of over 30 years of overseeing the police complaints system, that the number of complaints about certain issues of police conduct, including the absence of complaints, is not a useful measure or evidence that the conduct is not taking place. Importantly, there are a range of factors that may inhibit the making of complaints about police compliance with this obligation, including:

- people may not be aware that it is a lawful requirement
- even if a person is aware, it may be perceived as a relatively minor issue that may not have any practical impact on the person, or the person does not want to make the effort required to lodge a complaint
- people may not be aware that they can formally complain about an issue of this nature
- people may experience barriers to complaining including cultural, language or sensory (e.g. literacy, vision or hearing impairments)¹⁵²

152. NSW Ombudsman, *Effective complaint handling guidelines – 2nd edition*, December 2010, p. 14.

- people may fear retribution or that their complaint may not be taken seriously, or that they might be perceived as a troublemaker,¹⁵³ and
- people may have difficulty navigating the complaints system itself¹⁵⁴ and may decide not to proceed or that the complaints system cannot give them a satisfactory remedy for their dissatisfaction.¹⁵⁵

A practical impediment to the police using complaints data to monitor instances of failure to comply is that the classification system within c@ts.i currently does not have capacity to clearly distinguish between a complaint that an officer did not provide the information in circumstances where there was a statutory obligation to do so (a relevant complaint), and a complaint where no such obligation existed.¹⁵⁶ There is no straightforward means to identify complaints where the police inaction may constitute a failure to comply with the legal requirement, rather than mere discourtesy.

We found that relevant complaints made during the review period and the preceding five years were currently recorded under a number of different categories of complaint issue, including:

- Service Delivery – Fail to identify (name, station, registration number etc)
- Breach of the Code of Conduct (not elsewhere listed)
- Fail to Comply with Other Statutory Obligation.

The latter two categories are sufficiently broad that relevant complaints would only comprise a very small proportion of complaints in that category. In practice, this could make it difficult to identify which of the complaints in that category were the relevant ones. At the same time, not all of the complaints classified as ‘service delivery – fail to identify (name, station, registration number etc)’ would be relevant complaints.

From our analysis of the 35 complaints made within the review period, we found that 15 were relevant, but for 20 complaints the officer was not required by law to provide the information.¹⁵⁷ This pattern was also identified in our assessment of a sample of 119 complaints made prior to the review period.

In our view, any count of complaints automatically generated from c@ts.i, does not provide a reliable indication of instances where officers have failed to comply with a statutory requirement. Equally, any change in such a number from year-to-year does not provide an accurate or reliable indication of the extent to which compliance with the statutory obligation has changed.

5.2 Prosecutions during the review period

As discussed at the beginning of this chapter, criminal and civil proceedings in which a person has made allegations that an officer has failed to provide their name and place of duty are one source of information about compliance with that obligation.

The NSW Police Force and our search of the NSW CaseLaw database did not identify any defended proceedings where failure to provide name and place of duty was raised as an issue¹⁵⁸ and, as such, gave us no information as to levels of compliance during the review period.

153. NSW Ombudsman, *Effective complaint handling guidelines – 2nd edition*, December 2010, p. 14.

154. Many people we consulted told us that they perceived the complaints process to be inaccessible, particularly for vulnerable or disadvantaged people, and people may not therefore feel empowered to use it. This issue has previously been identified by the NSW Ombudsman; see: NSW Ombudsman, *Effective complaint handling guidelines – 2nd edition*, December 2010, p. 14.

155. NSW Ombudsman, *Effective complaint handling guidelines – 2nd edition*, December 2010, p. 14.

156. People may be dissatisfied that police did not provide the information, even where a relevant power was not being exercised.

157. For example, complaints were about police making inquiries about breaches of an AVO, an officer conducting an RBT, police removing people from licensed premises, police refusing to drive the complainant home when he was intoxicated, and police conducting a bail compliance check. None of these complaints were sustained.

158. This is still an unreliable measure of whether name and place of duty breaches are still being raised in court because only a small number of cases are included on the NSW CaseLaw site, and civil cases are generally settled, and therefore are not captured on this site.

This is unsurprising. The operation of the validity clause means that, even in instances where an officer has not provided this information, the exercise of their power remains lawful. It would be futile for a defendant to challenge the exercise of the power on this basis, in light of the validity clause.

Police prosecutors we consulted confirmed this view, explaining that, as an officer's failure to provide his or her name and place of duty is no longer seen as relevant to a defence, it is unlikely to be raised in an argument in court.¹⁵⁹ They did not consider that the fact that there were no cases where the issue was raised indicated increased compliance by officers with the requirement, but rather that this was the effect of the validity clause.¹⁶⁰ A prosecutor noted that 'they will never stamp out failure to comply with name and place of duty completely ... however, in hearings now it is never the issue'.¹⁶¹

Some prosecutors remarked that failure to provide a reason is now becoming an issue and more likely to be raised in court,¹⁶² with one attributing this to the name and place of duty requirement being a consistent, automatic safeguard whereas the reasons for exercising a power will differ for each interaction.¹⁶³

5.3 Surveys

As discussed at the beginning of this chapter, we attempted to measure compliance by surveying two samples of people who had had recent interactions with police where the information was required to be given. The first was of 133 people in court waiting rooms who were attending proceedings in which criminal charges against them were being heard in court. The second was of 26 people in custody after they had been arrested and charged following an interaction with police in the days before, but refused bail.

A little less than half of the respondents we surveyed at court reported that both name and place of duty were provided (n=57). Two thirds reported that at least one of those pieces of information was provided. See figure 3.

Less than a third of the respondents we surveyed in a correctional facility reported that police stated both their name and place of duty (n=7). A little under half of them reported receiving at least one of those pieces of information. See figure 3.

Of the 30 respondents we surveyed at court who were under 18 at the time of their police interaction, half reported that both name and place of duty were provided (n=15). Over three quarters reported receiving at least one of those pieces of information.

Of the 30 respondents we surveyed at court who identified as Aboriginal, a third reported that both name and place of duty were provided (n=11) and a little over half reported receiving at least one of those pieces of information.

We have not separately reported the levels of compliance reported by young people and Aboriginal people who participated in the correctional facility survey, as the numbers are too small to be meaningfully interpreted.

159. Consultation with Police Prosecutions Command, 9 February 2015.

160. Consultation with police prosecutors, 21 May 2015.

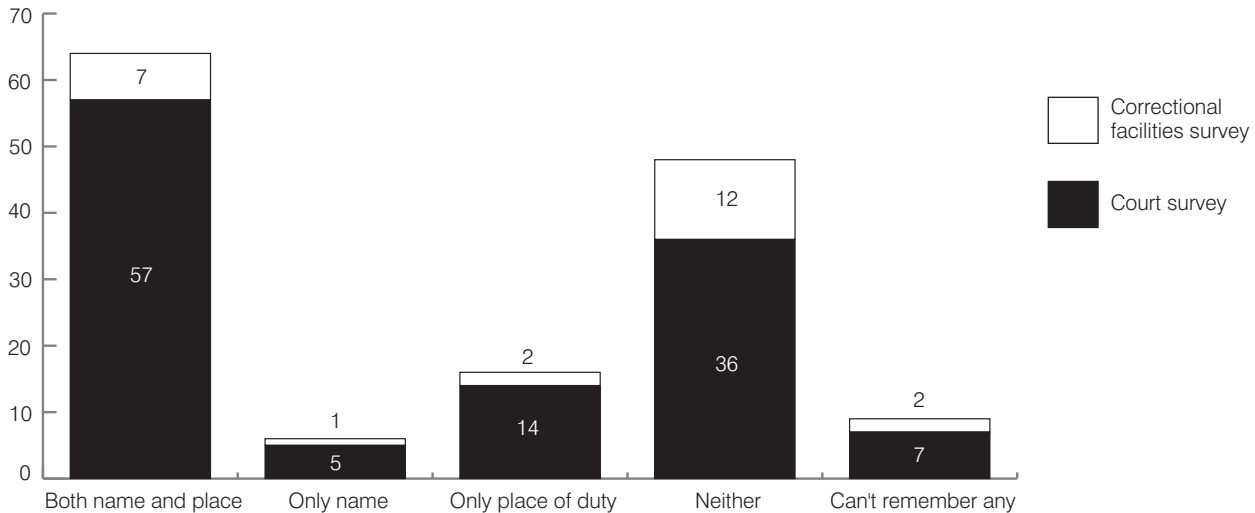
161. Consultation with police prosecutors, 21 May 2015.

162. Consultation with police prosecutors, 21 May 2015 and 16 June 2015.

163. Consultation with police prosecutors, 16 June 2015.

Proportionally more of the people we surveyed at court than those we surveyed in a correctional facility were provided with the officer's name and place of duty. However, the second sample size is much smaller. In addition, respondents in correctional facilities participated soon after being arrested by police (ranging from less than 24 hours to a week earlier). On the one hand, because their experiences were more recent, their recollections of the event may be more reliable than the respondents to our court survey, but on the other hand, the fact that they are in custody following a recent interaction with police could introduce bias into the results.¹⁶⁴

Figure 3. People who reported that they were provided with an officer's name and place of duty (surveys at court and correctional facilities)



Source: Court survey (24 June 2015 to 27 October 2015) and survey of people in custody in a correctional facility (29 May 2015 to 16 October 2015).

5.4 NSW Police Force's view of compliance by police

In its response to questions we posed in the fact sheet we published about this review,¹⁶⁵ the NSW Police Force advised that it did not believe police compliance would be affected by the amendments because police are still required by law to provide the information.¹⁶⁶ It explained that the information about the validity clause was incorporated into existing training materials¹⁶⁷ and that its communication strategy also 'strongly emphasised the legal obligation to provide name and place of duty *regardless of the clause*'.¹⁶⁸

In answer to our question that asked whether police were currently complying with the requirement, the NSW Police Force provided advice about the complaints that had been identified as having been made about a failure to comply.

164. Queensland Criminal Justice Commission, 'Defendants' perceptions of police treatment: Findings from the 1999 Queensland Defendant Survey', *Research Paper Series*, 6(1), March 2000, p. 2.
 165. NSW Ombudsman, 'Are police officers providing their name and place of duty when required?' 27 April 2015. Reproduced in Appendix D.
 166. NSW Police Force, Submission, *NSW Police Force response to Ombudsman's review questions – Part 15 of the Law Enforcement (Powers and Responsibilities) Act 2002*, received 4 September 2015, pp. 2-3; Correspondence from Acting Commissioner of Police to NSW Ombudsman, dated 20 January 2015.
 167. NSW Police Force, Submission, *NSW Police Force response to Ombudsman's review questions – Part 15 of the Law Enforcement (Powers and Responsibilities) Act 2002*, received 4 September 2015.
 168. NSW Police Force, Submission, *NSW Police Force response to Ombudsman's review questions – Part 15 of the Law Enforcement (Powers and Responsibilities) Act 2002*, received 4 September 2015, p.1. Emphasis in the original.

5.5 Police officers' perceptions of compliance

In endeavouring to gather more information about compliance with the obligation, we conducted qualitative research to gather the anecdotal views of police and community stakeholders, which are set out in this section and the next. As outlined in chapter 4, the NSW Police Force advised that it would not support our office conducting consultations for the purpose of this review and as a result the information we collected was limited to the views of nine officers.

We consulted with nine police officers at one Local Area Command in metropolitan Sydney in March 2015.¹⁶⁹ Those officers did not believe that compliance would change, and had not perceived that rates of compliance had changed. Some said the safeguard was ingrained as a habit and therefore automatic, with one officer remarking that it is 'a natural thing for me to do', and another officer saying it was 'best practice' and therefore 'just one of those boxes you tick' when performing your duty. It was also suggested that overall it would be 'harder to not do it than to do it', as it has been 'drilled into you from day one' and that if you have been taught to say it, you are going to do what you know, regardless of the validity clause. Another officer likened it to putting on a seatbelt in a car; that it was 'second nature', and that the safeguard is as much a part of the job as their other responsibilities, such as ensuring they have fuel in the police car.

Officers explained that behaviour modelled by more experienced police officers, in providing the information, was another reason for police maintaining compliance. It was also remarked that as it is still a legislative requirement, the police academy will still teach it and, as such, compliance will continue to be directly linked to training.

Officers also commented on the impact of the widespread presence of phone cameras, compounded by the rise of social media. While the prospect of being filmed could make some officers reluctant to provide their details, it was conceded that in the social media age people can find out who you are anyway. It was also commented that the media tended to follow police on Friday and Saturday nights, so police also had to be aware of the perceptions of their behaviour, particularly if footage is selectively edited.

We also received a submission from the Police Association of NSW, representing police officers. It was of the view that there would be no reduction in police compliance with the requirement as a result of the introduction of the validity clause. The Association explained that:

The education and communication strategies of the NSWPF in implementing the 2014 amendments explicitly emphasised it was still a legal obligation for an officer to provide their name and place of duty, regardless of the effect of s204A. It was clearly communicated and expressed in all policies: while section 204A may in some circumstances mean a failure to comply with these requirements does not render the exercise of a power unlawful ... [it] can still result in a complaint and potential management action.

Police officers are trained and experienced at complying with a variety of legislative and policy based obligations. Members who provided feedback indicated they still comply and still observe their colleagues complying. None had witnessed a change in practice since the introduction of s204A.¹⁷⁰

169. Consultation with officers at a LAC, 11 March 2015.

170. Police Association of NSW, Submission, *Review of changes to Part 15 of LEPPRA: Police officers providing name and place of duty*, 14 December 2015, p. 3.

5.5.1. Reasons police gave for non-compliance with the safeguard

Police told us that the situations where they may not comply were those involving volatile situations (for example, where there is violence by people affected by alcohol).¹⁷¹ In these circumstances, an officer may not provide their details until the situation is brought under control.¹⁷² Some officers said they would provide the information later if possible, either in the field or at the station.¹⁷³ One officer indicated that if she felt threatened she would not provide her details.¹⁷⁴

Officers did not indicate whether any of these reasons are more or less common since the 2014 amendments.

5.6 Perceptions of compliance from people who are not police

Many of the people we consulted, and who made submissions to our review, expressed the perception that, based on observations, personal experience or anecdotal accounts, police provided the information in only half the interactions with their clients.¹⁷⁵ However, an important limitation that needs to be carefully considered is that the law requires police to provide the information only when certain powers are used. There are a number of common interactions that take place between police and members of the public where police are not required by law to provide the information, for example, when conducting a random breath test,¹⁷⁶ checking tickets on public transport,¹⁷⁷ and removing people from licensed premises.¹⁷⁸

An officer who does not provide the information in these situations has not failed to comply with the legal requirement. However, as members of the public are often unlikely to be familiar with the intricacies of the law, they may form the opposite perception. Some of the people we consulted, and organisations that made submissions, illustrated their perception of non-compliance with examples of situations where police were not in fact subject to the statutory obligation.

5.6.1. Submissions from the community

Many of the legal centres that made submissions to the review stated that it was not uncommon for their clients to tell them that police did not comply with the requirement.¹⁷⁹ One submission, from a person whose main clients were young Aboriginal people, expressed the view that ‘there is widespread and common practice by police to not state name and place of duty’.¹⁸⁰ Another stated that its clients reported that police did not provide this information ‘even when requested to do so’.¹⁸¹

171. NSW Police Force, Submission, *NSW Police Force response to Ombudsman’s review questions – Part 15 of the Law Enforcement (Powers and Responsibilities) Act 2002*, received 4 September 2015, p.1; Correspondence from Acting Commissioner of Police to NSW Ombudsman, dated 20 January 2015; Consultation with officers at a LAC, 11 March 2015.

172. Consultation with officers at a LAC, 11 March 2015.

173. Consultation with officers at a LAC, 11 March 2015.

174. Consultation with officers at a LAC, 11 March 2015.

175. Consultation with Sarah Sherlock, Life on Track, (Case Management Service), 7 July 2015; Consultation with Amanda Lindh, Murwillumbah Community Centre, 10 July 2015; Forum Discussion, Nimbin Neighbourhood and Information Centre, 9 July 2015; Environmental Defenders Office NSW (EDO), Submission, *Submission to the NSW Ombudsman’s review of changes to Part 15 of the Law Enforcement (Powers and Responsibilities) Act 2002 regarding the obligation of police officers to state their name and place of duty when exercising certain powers*, 9 October 2015, p. 9; The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman’s review of changes to Part 15 of the Law Enforcement (Powers and Responsibilities) Act (LEPRA): Submission from the Shopfront Youth Legal Centre*, 28 August 15, p. 2; Hunter Community Legal Centre, Submission, 22 October 2015, p. 1.

176. *Road Transport Act 2013*, which is listed in Schedule 1 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA). Police exercising a power listed in that Schedule are not required to comply with the name and place of duty requirement: LEPRA, s. 201(3).

177. *Passenger Transport Regulation 2007* and/or *Passenger Transport Act 1990*. The regulation is in regards to inspection of tickets and the Act is in regards to the accreditation/authorisation of officers and provisions relating to inspection powers.

178. *Liquor Act 2007*, which is also listed in Schedule 1 of LEPRA.

179. The Law Society of NSW, Submission, 31 August 2015, p. 1; Correspondence from Aboriginal Legal Services, dated 28 August 2015; The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman’s review of changes to Part 15 of the Law Enforcement (Powers and Responsibilities) Act (LEPRA)*; p. 2; Hunter Community Legal Centre, Submission, 22 October 2015; Environmental Defenders Office NSW (EDO), Submission, *Submission to the NSW Ombudsman’s review of changes to Part 15 of the Law Enforcement (Powers and Responsibilities) Act 2002 regarding the obligation of police officers to state their name and place of duty when exercising certain powers*, 9 October 2015, p. 9.

180. Correspondence from Aboriginal Legal Services, dated 28 August 2015.

181. The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman’s review of changes to Part 15 of the Law Enforcement (Powers and Responsibilities) Act (LEPRA): Submission from the Shopfront Youth Legal Centre*, 28 August 2015, p. 2.

Three community organisations made submissions describing the results of surveys they conducted of their clients. The Hunter Community Legal Centre wrote that:

Of the 33 respondents, 18 had interactions with police officers since November 2014, where police were exercising the powers affected by the amendment. 12 of the 18 ... reported that police did not give their name and station.¹⁸²

The powers exercised on these 12 respondents were related to:

- being given a direction, requirement or request (n=7)
- having their house entered/searched (n=2)
- having their property seized (n=2), and
- having their vehicle stopped and searched (n=2).¹⁸³

Three quarters of respondents to the UNSW Law Society's online survey reported that police did not provide the information during their most recent interaction.¹⁸⁴

An individual submitted that in her experience police 'will only give this information if asked'.¹⁸⁵

5.6.2. Consultations with the community

The vulnerable clients of community service providers, whom we consulted, had varied experiences. A client at the Sheraton House for Men's Accommodation told us that police did provide the information during a recent search of his trolley.¹⁸⁶ Another client said that police provided the information when he was recently given a move on direction,¹⁸⁷ while another said he observed police providing the information to a friend when the friend was strip searched.¹⁸⁸ In contrast, during a group discussion at Fred's Place,¹⁸⁹ the overall sentiment was that police do not always provide the information, particularly when move on directions are issued to those experiencing homelessness.¹⁹⁰

Some people we spoke to told us that the requirement was only provided when they asked for it. A client of You Have a Friend¹⁹¹ told us that, when he was recently penalised for a recent intoxication and disorderly offence, he had to ask the officer twice before he gave his name.¹⁹² A client at the Sheraton House Men's Accommodation explained that this was his experience in most of his police interactions.¹⁹³

People at a small forum of local community members coordinated through the Nimbin Neighbourhood and Information Centre¹⁹⁴ perceived that compliance by the local police was 'half/half'.¹⁹⁵ Life on Track, a case management service in Lismore for adults charged with a Local Court offence, reported that approximately half of the clients they asked told them that police provided their details.¹⁹⁶ Murwillumbah Community Centre indicated that the majority of their clients they asked reported that police did not comply with the requirement.¹⁹⁷

182. Hunter Community Legal Centre, Submission, 22 October 2015.

183. Hunter Community Legal Centre, Submission, 22 October 2015. The total does not equal 12; however, it is recognised that more than one power can be exercised on a person in one interaction.

184. UNSW Law Society, Submission, *Review of Part 15 of Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA)*, 31 August 2015, p. 25.

185. The types of interactions where this occurred were not specified. Submission from an individual, dated 29 May 2015, p. 2.

186. Interview with Client 2, Sheraton House Men's Accommodation, 9 July 2015.

187. Interview with Client 3, Sheraton House Men's Accommodation, 9 July 2015.

188. Interview with Client 1, Sheraton House Men's Accommodation, 9 July 2015.

189. Fred's Place is a service provided by the St Vincent de Paul Society located in Tweed Heads. It provides a home and support services for people experiencing homelessness or who are at risk of homelessness.

190. Focus Group, Participants 3-7, Fred's Place, 10 July 2015.

191. You Have a Friend is a charity based in Northern NSW, servicing Murwillumbah, Tweed Heads and Coolangatta (Qld). It provides meals and groceries for people experiencing homelessness or marginalisation.

192. Interview with Client 5, You Have a Friend, 9 July 2015.

193. Interview with Client 1, Sheraton House Men's Accommodation, 9 July 2015.

194. Forum Discussion, Nimbin Neighbourhood and Information Centre, 9 July 2015.

195. Forum Discussion, Nimbin Neighbourhood and Information Centre, 9 July 2015.

196. Consultation with Life on Track (Case Management Service), 7 July 2015.

197. Consultation with Amanda Lindh, Murwillumbah Community Centre, 10 July 2015.

Many people indicated that it would be easier to identify whether police had complied if an officer was able to provide their details in writing to a person if requested, such as via a business card.

5.6.3. Perceived changes to compliance since the 2014 amendments

In general, many non-police participants thought that, with the introduction of the validity clause, compliance with the safeguard would go down,¹⁹⁸ but any change is likely to happen long-term, rather than immediately.¹⁹⁹ As The Shopfront Youth Legal Centre submitted:

We believe the amendments will probably make police less likely to comply with the requirement to provide their name and place of duty. However, we have not noticed any change in police compliance since 1 November 2014, and we suggest that it is probably too early to assess the impact of the amendments.²⁰⁰

The UNSW Law Society submission expressed a view that compliance would reduce over time because the validity clause removed the legal consequences for most name and place of duty breaches, thereby removing the incentive to comply.²⁰¹ They observed that, despite the validity clause being introduced as a safety net for volatile situations, it also applied to failures to provide the information in situations that were not volatile:

[B]ecause of how wide the s 204A safety net has been cast ... even in circumstances where there is clearly nothing preventing an officer from providing their name and place of duty, s 204[A] ensures that there are no consequences for failing to do so. In these non-volatile scenarios, where is the legal incentive for police officers to comply with s 202?²⁰²

198. Consultation with Associate Professor Dr Thalia Anthony, Faculty of Law, University of Technology Sydney, 4 June 2015; The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of changes to Part 15 of the Law Enforcement (Powers and Responsibilities) Act (LEPRA): Submission from the Shopfront Youth Legal Centre*, 28 August 2015, p. 2; Forum Discussion, Nimbin Neighbourhood and Information Centre, 9 July 2015.

199. The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of changes to Part 15 of the Law Enforcement (Powers and Responsibilities) Act (LEPRA): Submission from the Shopfront Youth Legal Centre*, 28 August 2015, p. 2.

200. The Shopfront Youth Legal Centre, Submission, *NSW Ombudsman's review of changes to Part 15 of the Law Enforcement (Powers and Responsibilities) Act (LEPRA): Submission from the Shopfront Youth Legal Centre*, 28 August 2015, p. 2.

201. UNSW Law Society, Submission, *Review of Part 15 of Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA)*, 31 August 2015, pp. 14-15.

202. UNSW Law Society, Submission, *Review of Part 15 of Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA)*, 31 August 2015, p. 15.

Chapter 6. Conclusion

Part 15 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) provides important safeguards to protect the public from unreasonable or arbitrary use of police powers. The Ombudsman was required to keep under scrutiny police compliance with the obligation under Part 15 to provide their name and place of duty, following amendments to address police concerns that prosecutions had failed because officers had not complied with the obligation. These amendments included the introduction of the 'validity clause' into Part 15, which made the exercise of a power lawful even if the officer had failed to provide the information.

The Government and the NSW Police Force have made it clear that officers are expected to provide their name and place of duty, but that in cases of inadvertent breaches, the validity clause would ensure that the power was not rendered invalid. In Parliament, concerns were raised that, by removing the incentive to comply with the obligation, the validity clause would weaken LEPRA safeguards and police accountability. The purpose of the Ombudsman's review was to provide an independent examination of police compliance and to make recommendations to amend LEPRA, if necessary, to ensure compliance.

From data provided by the NSW Police Force about the number of times certain powers were used, we estimated that police were required to provide their name and place of duty on over 408,000 occasions during the review period. However, as a result of the limited data available for our research, we are unable to report on how many of those occasions police provided the information. Because we have no direct measure of compliance levels for previous years, we are also unable to determine whether compliance levels have changed, compared to previous years. We are therefore unable to advise the Government and the public whether or not the introduction of the validity clause has had the effect of reducing police compliance, as some had feared.

We can report that during the review period, there were 37 complaints that included at least one allegation that an officer did not provide their name and place of duty, three of which were sustained. In our view, this sample is inadequate to draw any conclusions about police compliance.

We can also report that there were no prosecutions during the review period where the defendant claimed that the police had failed to provide their name and place of duty. This is unsurprising, as the operation of the validity clause would make any such defence futile. Again, this provides no information that enables any conclusions to be drawn about police compliance.

Around 50% of the people we surveyed told us that the officers involved gave their name and place of duty. These people had had a recent interaction with police. This result was consistent with the perception of a range of community stakeholders who made submissions to our review, and with whom we consulted. However, the sample size was again inadequate to draw any conclusions about compliance.

The Ombudsman was required to consider any recommendations that could be made to amend LEPRA to secure compliance with the obligations under Part 15. Because of the limitations to our research, we were unable to draw any firm conclusions that would enable us to make any such recommendation.

Consistent with the purpose of this review we have given consideration to whether any other measures could be taken to secure compliance. From our review of police policies and training, we are generally satisfied that the guidance currently provided to officers is adequate. It is important that the NSW Police Force continues to provide this training in the future to ensure that police are aware of their obligations under Part 15. The NSW Police Force is of the view that complaints provide an adequate measure to monitor non-compliance with the obligation and to remedy any occasions where police fail to comply.

In our view, for the reasons discussed in chapter 5, complaints do not provide an accurate measure of compliance and may not be a reliable mechanism to ensure public confidence that police are complying with their obligations. If the Minister and Commissioner of Police require a reasonable level of certainty about police compliance, it would be prudent to give further consideration to developing audit procedures to provide an ongoing capacity to monitor and remedy any identified lack of compliance by police. We acknowledge that the NSW Police Force is reluctant to introduce additional procedures that impose an administrative burden on police. For that reason, consideration might be given to whether the implementation of new technologies, for example the introduction of body-worn cameras, provides an effective opportunity to audit police compliance without imposing an additional administrative burden on frontline police officers.

Appendix A: Schedule 5, Part 8, Clause 17 of the *Law Enforcement (Powers and Responsibilities) Act 2002*

Part 8 Provisions consequent on enactment of *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*

17 Monitoring of operation of safeguard provisions relating to giving name and place of duty of police officer exercising functions

- (1) For the period of 12 months after the commencement of section 204A of this Act (as inserted by the *Law Enforcement (Powers and Responsibilities) Amendment Act 2014*), the Ombudsman is to keep under scrutiny compliance by police officers with the obligation under Part 15 of this Act to provide information about the name and place of duty of a police officer when exercising a power to which that Part applies.
- (2) For that purpose, the Ombudsman may require the Commissioner of Police to provide information about the exercise of relevant functions by police officers.
- (3) The Ombudsman must, as soon as practicable after the expiration of that 12-month period, prepare a report of the Ombudsman's work and activities under this clause and furnish a copy of the report to the Attorney General, the Minister for Police and Emergency Services and the Commissioner of Police.
- (4) The Ombudsman may in the report identify, and include recommendations for consideration by the Government about, amendments that might appropriately be made to Part 15 of this Act to secure compliance by police officers with the obligations under that Part.
- (5) A copy of a report furnished by the Ombudsman under this clause is to be tabled in each House of Parliament as soon as practicable after it is so furnished.
- (6) If a House of Parliament is not sitting when the Attorney General or another Minister seeks to table a copy of the report, the Attorney General or other Minister may present a copy of the report to the Clerk of the House concerned.
- (7) A copy of a report presented to the Clerk of a House:
 - (a) is, on presentation and for all purposes, taken to have been laid before the House, and
 - (b) may be printed by authority of the Clerk of the House, and
 - (c) if printed by authority of the Clerk, is for all purposes taken to be a document published by or under the authority of the House, and
 - (d) is to be recorded:
 - (i) in the case of the Legislative Council—in the Minutes of the Proceedings of the Legislative Council, and
 - (ii) in the case of the Legislative Assembly—in the Votes and Proceedings of the Legislative Assembly,

on the first sitting day of the House after receipt of the report by the Clerk.

Appendix B: Part 15 of the *Law Enforcement (Powers and Responsibilities) Act 2002*

Part 15 Safeguards relating to powers

Note. For other safeguards relating to seizure or confiscation of property by police, see Part 17.

For other requirements relating to personal searches, see Part 4.

201 Police powers to which this Part applies

- (1) This Part applies to the exercise of the following powers by police officers:
 - (a) a power to stop, search or arrest a person,
 - (b) a power to stop or search a vehicle, vessel or aircraft,
 - (c) a power to enter or search premises,
 - (d) a power to seize property,
 - (e) a power to require the disclosure of the identity of a person (including a power to require the removal of a face covering for identification purposes),
 - (f) a power to give or make a direction, requirement or request that a person is required to comply with by law,
 - (g) a power to establish a crime scene at premises (not being a public place).

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

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

- (2) This Part does not apply to the exercise of any of the following powers of police officers:
 - (a) a power to enter or search a public place,
 - (b) a power conferred by a covert search warrant,
 - (c) a power to detain an intoxicated person under Part 16.
- (3) This Part does not apply to the exercise of a power that is conferred by an Act or regulation specified in Schedule 1.

202 Police officers to provide information when exercising powers

- (1) A police officer who exercises a power to which this Part applies must provide the following to the person subject to the exercise of the power:
 - (a) evidence that the police officer is a police officer (unless the police officer is in uniform),
 - (b) the name of the police officer and his or her place of duty,
 - (c) the reason for the exercise of the power.

- (2) A police officer must comply with this section:
 - (a) as soon as it is reasonably practicable to do so, or
 - (b) in the case of a direction, requirement or request to a single person—before giving or making the direction, requirement or request.
- (3) A direction, requirement or request to a group of persons is not required to be repeated to each person in the group.
- (4) If 2 or more police officers are exercising a power to which this Part applies, only one officer present is required to comply with this section.
- (5) If a person subject to the exercise of a power to which this Part applies asks a police officer present for information as to the name of the police officer and his or her place of duty, the police officer must give to the person the information requested.
- (6) A police officer who is exercising more than one power to which this Part applies on a single occasion and in relation to the same person is required to comply with subsection (1) (a) and (b) only once on that occasion.

203 Police officers to give warnings when giving or making directions, requirements or requests that must be complied with

- (1) A police officer who exercises a power to which this Part applies that consists of a direction, requirement or request must give a warning to the person subject to the exercise of the power that the person is required by law to comply with the direction, requirement or request.

Note. A failure to comply with the direction, requirement or request does not constitute an offence unless a warning under this section has been given—see section 204B.

- (2) A warning is not required if the person has already complied with or is in the process of complying with the direction, requirement or request.
- (3) A police officer must comply with this section as soon as is reasonably practicable after the direction, requirement or request is given or made.
- (4) If 2 or more police officers are exercising a power to which this Part applies, only one officer present is required to comply with this section.

204 Detention period for search of vehicles etc limited

A police officer who detains a vehicle, vessel or aircraft for a search must not detain the vehicle, vessel or aircraft any longer than is reasonably necessary for the purpose of the search.

204A Validity of exercise of powers

- (1) A failure by a police officer to comply with an obligation under this Part to provide the name of the police officer or his or her place of duty when exercising a power to which this Part applies does not render the exercise of the power unlawful or otherwise affect the validity of anything resulting from the exercise of that power.
- (2) Subsection (1) does not apply if the failure to comply occurs after the police officer was asked for information as to the name of the police officer or his or her place of duty (as referred to in section 202 (5)).
- (3) Subsection (1) does not apply to the exercise of a power that consists of a direction, requirement or request to a single person.

204B Commission of offence in relation to exercise of powers where failure by police officer to comply with this Part

- (1) A person does not commit an offence under this Act of failing to comply with a direction, requirement or request given or made by a police officer under or in connection with a power to which this Part applies unless the obligations under this Part are complied with when exercising the power.
- (2) Subsection (1) does not apply to a failure by a police officer to comply with an obligation under this Part that does not render the exercise of the power by the officer unlawful because of section 204A.

Appendix C: Schedule 1 to the *Law Enforcement (Powers and Responsibilities) Act 2002*

Schedule 1 Acts not affected by this Act (Section 5(1))

Bail Act 2013 No 26

Casino Control Act 1992 No 15

Children and Young Persons (Care and Protection) Act 1998 No 157

Children (Care and Protection) Act 1987 No 54

Children (Criminal Proceedings) Act 1987 No 55

Children (Protection and Parental Responsibility) Act 1997 No 78

Crimes Act 1900 No 40

Crimes (Administration of Sentences) Act 1999 No 93

Crimes (Forensic Procedures) Act 2000 No 59

Criminal Procedure Act 1986 No 209

Drug Misuse and Trafficking Act 1985 No 226

Heavy Vehicle (Adoption of National Law) Act 2013

Heavy Vehicle National Law (NSW)

Law Enforcement and National Security (Assumed Identities) Act 2010

Law Enforcement (Controlled Operations) Act 1997 No 136

Liquor Act 2007 No 90

Mental Health Act 2007

Registered Clubs Act 1976 No 31

Road Obstructions (Special Provisions) Act 1979 No 9

Road Transport Act 2013

State Emergency and Rescue Management Act 1989 No 165

State Emergency Service Act 1989 No 164

Surveillance Devices Act 2007

Telecommunications (Interception) (New South Wales) Act 1987 No 290

Wool, Hide and Skin Dealers Act 1935 No 40

Young Offenders Act 1997 No 54

Appendix D: NSW Ombudsman's fact sheet



Are police officers providing their name and place of duty when required?

Invitation for public submissions

The NSW Ombudsman invites members of the public and interested organisations to provide information for our review on the changes to Part 15 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) regarding the obligation of police to state their name and place of duty when using certain powers.

Background to the changes

Part 15 of LEPRA contains a range of safeguards that police must apply when they exercise certain powers, such as search and arrest. For example officers must identify themselves as police, provide information about their name and place of duty, and tell the person the reason for exercising the power. These measures were introduced to promote accountability and transparency on the part of police, and to assist members of the public if they wished to complain about a particular officer.

In 2013 the then Premier Mr Barry O'Farrell appointed former Police Minister the Hon Paul Whelan and former Shadow Attorney General Mr Andrew Tink to help fast-track the completion of a statutory review of LEPRA. Police raised concerns that prosecutions were being dismissed on the basis that the officer had failed to give their name and place of duty in circumstances where it was impractical for that information to be provided as required under Part 15 of LEPRA. They provided examples of volatile circumstances where it is difficult for police to provide the required information.¹

In 2014 Part 15 of LEPRA was amended following recommendations by Mr Tink and Mr Whelan. Following the amendments an officer is still required to provide their name and place of duty as soon as reasonably practicable, but if they do not, the actions of police will still be lawful in most circumstances (see section 204A LEPRA). The changes aim to reduce the potential for otherwise lawful police actions to be considered unlawful, due to a technicality (see the Tink/Whelan report).²

The changes affect the following powers:

- stop, search (with or without a search warrant), or arrest a person
- stop or search a vehicle, vessel or aircraft
- enter or search premises
- seize property
- require the disclosure of the identity of a person (including a power to require the removal of a face covering for identification purposes)
- give or make a direction, requirement or request that a person is required to comply with by law, and
- establish a crime scene at premises (that are not a public space).

The circumstances in which an officer's failure to provide their name and place of duty may still result in a court finding that the officer's exercise of a power was unlawful are:

- where a person who is subject to the power asks an officer for this information, and
- where the power being exercised is the giving or making of a direction, requirement or request to one person.

What is the purpose of the Ombudsman's review?

The Attorney General explained when introducing the changes that 'police will still be expected to provide their name and place of duty when exercising the relevant powers covered by the provisions. New section 204A is only intended to act as a safety net for inadvertent breaches of this requirement'.³ To ensure that a 'proper assessment of the impact of these reforms' occurred, the changes included a provision requiring the Ombudsman 'to scrutinise police compliance with the name and place of duty obligations'.⁴

In order to obtain a comprehensive picture of the impact of the reforms and how they operate in practice, during our review we will:

- examine literature, media reports and legislation
- consult stakeholders including members of the NSW Police Force, the legal profession, and relevant community and government agencies
- conduct interviews and surveys of individuals who have been directly affected by the changes
- analyse complaint data, and
- examine public submissions.

Our review covers the period between 1 November 2014 and 31 October 2015. We will report our findings and recommendations to the Attorney General in 2016.

For more information about the change to LEPRA, please refer to the Tink/Whelan report, Parliamentary debates regarding the *Law Enforcement (Powers and Responsibilities) Amendment Act 2014* and Part 15 of LEPRA as amended.

Information sheet
Consultation paper

04/2015

Are police officers providing their name and place of duty when required?

Why are we seeking public submissions?

An important part of the Ombudsman's review is to seek the public's opinion and/or experiences with the legislative change to ensure it contributes to the delivery of an accountable and transparent criminal justice system in NSW. We invite any individual or organisation to contribute to the review, and particularly welcome information from members of the public who have had dealings with police.

The questions below may assist you to prepare your submission. However, you do not need to answer each question, and we welcome any additional considerations you are able to provide. Where possible, please provide examples or indicate the reasons for your opinion. We are also happy to receive any supporting materials to illustrate your point of view. Submissions can be as long or as short as you like.

Is my submission confidential?

All submissions may be made public in our report unless you advise us you do not want your submission to be made public.

How to lodge a submission

Submissions are now open. Please send your submissions and comments to:

By post: Level 24, 580 George Street
Sydney NSW 2000

By fax: 02 9283 2911

By email: review@ombo.nsw.gov.au
(Please use **Part 15 LEPPRA** as your subject line)

If you would prefer to provide your comments by telephone or if you would like to meet with us in person, please contact us on the numbers below.

Questions

1. Do you think the requirement that police provide their name and place of duty is an important safeguard? Should police be required to provide this information? Why, or why not?
2. Do you think the changes will lead to a reduction in police compliance with this requirement? Why, or why not? Have you noticed any change in police compliance since 1 November 2014?
3. In your view, was the introduction of section 204A a proportionate and reasonable response to police concerns about failed prosecutions?
4. In your experience, are police currently complying with the requirement to provide their name and place of duty? If you can tell us about a particular interaction with police, please explain the circumstances and whether police provided their name and place of duty.
5. In your view, are there sufficient checks in place to ensure that police comply with this requirement?
6. Do you think the changes regarding name and place of duty will have any impact on police application of the other safeguards in Part 15? Why, or why not?
7. Are there any other concerns or issues you wish to raise?

Endnotes

1. Mr Andrew Tink and the Hon Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) Act 2002* Report Part 2, 12 December 2013, p.14.
2. Mr Andrew Tink and the Hon Paul Whelan, *Review of the Law Enforcement (Powers and Responsibilities) Act 2002* Report Part 2, 12 December 2013.
3. Mr Brad Hazzard, Attorney General and Minister for Justice, NSW Parliamentary debates (NSWPD), (Hansard), Legislative Assembly, 15 May 2014, p. 28962.
4. Ibid.

Contact us for more information

Our business hours are: Monday to Friday, 9am–5pm (*Inquiries section closes at 4pm*)

If you wish to visit us, we prefer you make an appointment. Please call us first to ensure your complaint is within our jurisdiction and our staff are available to see you.

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Web www.ombo.nsw.gov.au

General inquiries 02 9286 1000
Facsimile 02 9283 2911

Toll free (outside Sydney metro) 1800 451 524
Tel. typewriter (TTY) 02 9264 8050

Telephone Interpreter Service (TIS): 131 450
We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.

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 This fact sheet is one of a series produced by the NSW Ombudsman. Feedback is welcome.


Appendix E: Submissions and organisations consulted

Submissions

Aboriginal Legal Service
Environmental Defenders Office
Hunter Community Legal Centre
Law Society of NSW
Monique van Toor
NSW Police Force, Ministry for Police and Emergency Services
Police Association of NSW
The Shopfront Youth Legal Centre
UNSW Law Society

Consultations

Aboriginal Legal Centre
Boolangle Local Aboriginal Land Council Inc. (Casino)
Buyinbin Aboriginal Corporation (Lismore)
Byron Community Centre
Casino Environment Centre
Dr Thalia Anthony – University of Technology, Sydney
Fred's Place
Life on Track
Murwillumbah Community Centre
Nimbin Neighbourhood and Information Centre – Forum Discussion
Public Interest Advocacy Centre (PIAC)
Red Dove
Rekindling the Spirit
Sheraton House Men's Accommodation
Tursa Employment (Casino)
Tweed Shire Council – Sylvia Roylance, Community Development Officer
Winsome & Lismore Soup Kitchen
You Have a Friend

A large, light blue, stylized number '8' graphic is positioned on the right side of the page, partially overlapping the teal background.

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