Ombudsman
New South Wales

Restricted Premises Act: Review of police use of firearms search powers and new offence provisions

Sections 8(2A), 9(3), 10(f) and 13(3)(b)
of the *Restricted Premises Act 1943*

October 2016

Ombudsman
New South Wales

Restricted Premises Act: Review of police use of firearms search powers and new offence provisions

Sections 8(2A), 9(3), 10(f) and 13(3)(b)
of the *Restricted Premises Act 1943*

October 2016

NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

Phone 02 9286 1000
Toll free (outside Sydney Metro Area): 1800 451 524
Facsimile: 02 9283 2911
Website: www.ombo.nsw.gov.au
Email nswombo@ombo.nsw.gov.au

ISBN 978-1-925061-98-7

© Crown Copyright, NSW Ombudsman, October 2016

This work is copyright, however material from this publication may be copied and published by State or Federal Government Agencies without permission of the Ombudsman on the condition that the meaning of the material is not altered and the NSW Ombudsman is acknowledged as the source of the material. Any other persons or bodies wishing to use material must seek permission.

Foreword

Since the Second World War police could apply to a court, under the *Disorderly Houses Act 1943,* for a declaration over particular premises to curtail certain unlawful and undesirable activities. These included the unlawful supply of drugs or alcohol, and people of criminal repute frequenting the premises. Once a declaration was made, police could search the declared premises without a further warrant from a judicial officer to look for alcohol, drugs and related items. The owners and occupiers of declared premises were liable to criminal prosecution if they failed to stop the proscribed activities from continuing.

The Disorderly Houses Act was renamed the *Restricted Premises Act 1943* in 2002.

Since 2009, the NSW Police Force has used the powers conferred by this Act to target the clubhouses of suspected outlaw motorcycle gangs (OMCGs).

On 1 November 2013, amendments to the Restricted Premises Act commenced, adding new features to the existing scheme as part of reforms intended to make it easier for police to obtain a declaration over premises routinely being used by serious criminals, and to combat firearms-related crime. The amendments authorised police to search for weapons and explosives (including firearms) as well as drugs and alcohol. A new category of 'reputed criminal declaration' and new offences for owners and occupiers of declared premises were also created.

The NSW Ombudsman was given the role of keeping under scrutiny the additional police search powers and monitoring the operation of the new offence provisions, during the first two years of operation.

No declaration was made over any premises during the review period. Although police applied for a declaration in relation to one suspected OMCG clubhouse, this application was withdrawn when the owner stopped using the premises as a clubhouse and leased them to a legitimate business. As a result, police did not use the search powers to find weapons or explosives, and no charges were laid for the new offences.

Concerns were raised both in the parliamentary debates about the amendments, and in submissions to this review, about the potential operation of the new search powers and offence provisions. I have recommended a further independent review of these search powers and offence provisions be conducted should a reputed criminal declaration be made in the future.

Prior to applying for a declaration, police can apply for a warrant to search premises where they suspect proscribed activities are taking place. The 2013 amendments expanded the items that could be searched for under such a warrant to include weapons and explosives. During the review period, police executed seven of these kinds of warrants. This was an extension of an existing policing strategy that has used the search powers under the Restricted Premises Act, alongside other disruption activities, such as the giving of consorting warnings, to disrupt activities at suspected OMCG clubhouses.

During these seven searches police stripped the premises, seizing almost all of their contents, including not only drugs, alcohol, weapons and explosives, but also items such as furniture, sound systems and OMCG paraphernalia. These actions appeared to have successfully led to the closing down of most of those bikie clubhouses, as the occupants stopped using the premises following most of the searches. However, I have some concerns about the legal basis for the seizure of some of those items and recommend that the NSW Police Force seek advice to clarify the scope of their seizure powers.

Our review also identified an urgent need to clarify the powers of police to manage the people present on premises when they arrive to conduct a search. Police encountered a number of people when arriving to search 3 of the 7 premises, with 62 people present at one set of premises, 22 at another

and 6 at the third. On each occasion, prior to commencing the premises search, police detained and searched every person, obtained their identification, took their photograph and directed them to leave.

Our legal advice indicates that police do not currently have a firm legal basis, of general application, under the Restricted Premises Act to take the actions described. In my view, the Act should be amended to give police adequate powers to manage the risks associated with potentially dangerous operations and to ensure the safety of people and officers present at searches. The recommendations I have made should provide police with certainty about the scope of their powers, ensure that people on premises are managed in a reasonable manner, and ensure there is clearer and more effective accountability for police actions.

From our review, it does not appear that the expansion of powers to enable police to search under the Restricted Premises Act for weapons and explosives has enhanced police's ability to disrupt OMCGs or detect unlawful firearms. A future review of the provisions may be better placed to evaluate the efficacy of the amendments, particularly following any declaration under the Act.

Whether or not a declaration is sought in the future, the adoption of the recommendations in this report will facilitate reasonable and effective use of the Restricted Premises Act scheme and thereby assist public confidence in police being maintained.

Professor John McMillan AO
Acting Ombudsman

Acknowledgements

We would like to thank the range of organisations that made submissions to this review and the individuals who met with us to discuss the impact of the provisions under the review.

We would also like to thank the NSW Police Force for providing information and assistance for this review. In particular, we would like to thank the Investigations Coordinators of Strike Force Raptor, for their time and input.

Principal researchers and authors: Fleur Beaupert, Alice Heazlewood.

Project team: Daniele Capraro, Ryan Thomas.

Editors: Michael Gleeson, Selena Choo, with assistance from Kimber Swan.

Contents

Foreword 3

Acknowledgements 4

Acronyms and Glossary 6

Terms used in this report 7

Executive Summary 8

Chapter 1. Introduction 12

1.1 The 2013 amendments to the Restricted Premises Act 12

1.2 The Ombudsman's review role 12

1.3 Structure of this report 12

1.4 Methods 13

Chapter 2. Background and context 15

2.1 Historical use of the Restricted Premises Act declaration scheme 15

2.2 Concern about firearms-related crime and organised crime 16

2.3 The Firearms and Criminal Groups Legislation Amendment Act 19

2.4 Parliamentary intention and concerns about the amendments 19

Chapter 3. Legislative and policy framework 21

3.1 The Restricted Premises Act prior to the 2013 amendments 21

3.2 2013 amendments to the Restricted Premises Act 23

Chapter 4. Police use of the additional search powers 29

4.1 Police applications for 'reputed criminal declarations' 29

4.2 New offence provisions 29

4.3 Additional section 10 search powers 29

4.4 Additional section 13 search powers 29

4.5 Impact of the searches conducted under the additional section 13 powers 33

Chapter 5. Seizure of items under the Restricted Premises Act 35

5.1 Items police can search for and seize under the Restricted Premises Act 35

5.2 Police interpretation of the search and seizure powers 35

5.3 Meaning of the device phrase 36

5.4 The need for clarification 36

Chapter 6. Safe, reasonable and effective conduct of searches 39

6.1 Managing risks associated with the execution of section 13 search warrants 39

6.2 Police 'processing' of people during the additional section 13 searches 39

6.3 Legal basis for 'processing' people present at the premises 42

6.4 Facilitating the safe exercise of the section 13 search powers 44

6.5 Police powers to search people found on the premises 45
6.6 Obtaining information about a person's identity 46
6.7 Video-recording under the Restricted Premises Act 47

Chapter 7. Additional section 10 search powers 49
7.1 Concerns about the powers 49
7.2 Threshold for the exercise of the section 10 search powers 50
7.3 The manner in which police conduct section 10 searches 51

Chapter 8. New offence provisions 57
8.1 What the new offences added to the existing scheme 57
8.2 Concerns about the potential impact of the new offence provisions 57
8.3 Process for the rescission of a declaration 61

Chapter 9. Conclusion 64
9.1 Closing down suspected bikie clubhouses 64
9.2 Seizing weapons and explosives 64
9.3 Independent scrutiny of any future declaration and consequential use of powers and offence provisions 65

Appendix 1 66

Appendix 2 76

Acronyms and Glossary

BOCSAR	NSW Bureau of Crime Statistics and Research
COPS	Computerised Operational Policing System (NSW Police Force)
LAC	Local Area Command (NSW Police Force)
LEPRA	*Law Enforcement (Powers and Responsibilities) Act 2002*
MLC	Member of the Legislative Council
NSWPD	New South Wales Parliamentary Debates
OMCG	Outlaw Motorcycle Gang. This term has been adopted by the Australian Crime Commission and the NSW Police Force and is acknowledged by the Supreme Court in cases such as *Moefi v State Parole Authority [2009] NSWCC 1146.*
POI	person of interest
SOPs	standard operating procedure

Terms used in this report

2013 amendments	The amendments made to the *Restricted Premises Act 1943* by the *Firearms and Criminal Groups Legislation Amendment Act 2013.*
additional section 13 search powers	The powers that police can exercise under a warrant issued pursuant to section 13(3) of the *Restricted Premises Act 1943* to search for weapons and explosives.
additional section 10 search powers	The powers that police can exercise under section 10 of the *Restricted Premises Act 1943* at any time without a warrant to search for weapons and explosives.
amendment Act	The *Firearms and Criminal Groups Legislation Amendment Act 2013*
amendment Bill	The Firearms and Criminal Groups Legislation Amendment Bill 2013.
bikie gang	Bikie gang or OMCG (outlaw motorcycle gang)
COPS Event narrative	The free-text portion of a COPS Event record created by police officers. In this review, the narrative documents the use of the FPO search powers in the individual incident.
COPS Event records	Electronic records made by police on COPS of individual incidents.
proscribed activities	The activities listed in section 3(1) of the *Restricted Premises Act 1943*: • drunkenness or disorderly or indecent conduct or any entertainment of a demoralising character • unlawful sale or supply of alcohol or drugs • reputed criminals or associates of reputed criminals attend the premises • certain people, including a reputed criminal or an associate of reputed criminals, control or manage the premises.
review period	1 November 2013 to 31 October 2015. This term refers to the two-year period during which the NSW Ombudsman was required to keep under scrutiny the additional powers inserted in sections 13 and 10 for police to search for and seize weapons and explosives and to monitor the operation of the new offence provisions in sections 8(2A) and 9(3).
Search Warrant SOPs	NSW Police Force, *Standard Operating Procedures for the execution of Search Warrants*, October 2014.
the device phase	Items police are allowed to search for and seize under sections 10(e) and (f) and 13(3)(b) of the *Restricted Premises Act 1943*.
weapons and explosives warrants	The seven warrants that were issued under section 13(3) of the *Restricted Premises Act 1943* in the nine months after 1 November 2013, which authorised police to search for all items listed in section 13(3)(b), including any weapon or explosive.

Executive Summary

The *Firearms and Criminal Groups Legislation Amendment Act 2013* (the amendment Act) made changes to New South Wales laws in order to enhance the ability of police to combat firearms-related crime and organised crime. The activities of outlaw motorcycle gangs (OMCGs) were a particular target. These changes added to the scheme under the *Restricted Premises Act 1943* by which senior police can apply to the Supreme Court or the District Court for a declaration over premises where certain unlawful and undesirable activities are taking place.

Once a declaration is made:

- an owner or occupier of the premises is liable to criminal prosecution if they fail to stop the proscribed activities from continuing at the premises, and
- police can search the premises without a warrant.

Prior to applying for a declaration, police can apply for a warrant to search premises where they suspect the proscribed activities are taking place.

The amendment Act expanded the existing search powers to enable police to search for weapons and explosives, as well as drugs, alcohol and related items. The amendments also created a new category of 'reputed criminal declaration' and two new indictable offences that owners and occupiers of declared premises could commit if they fail to prevent a reputed criminal from attending, controlling or managing the premises.

The Ombudsman was given the role of keeping under scrutiny the additional police search powers, and monitoring the operation of the new offence provisions, over the two-year period from 1 November 2013 to 31 October 2015. This is the report of our findings and recommendations. Our findings are qualified at some points as we were not provided with certain information from police that we think is relevant to this review. This is a result of police's decision only to give us information they were legally obliged to provide.

Use of the search powers and offence provisions during the review period (chapters 4, 5 and 6)

No declaration under the Restricted Premises Act was made during the review period. One application, made in relation to the national clubhouse of the Rebels outlaw motorcycle gang (OMCG), was withdrawn when the club stopped using the premises as a clubhouse.

As a result, police did not exercise the additional powers to search declared premises for weapons and explosives, and no owners or occupiers were charged with any of the new offences.

However, on seven occasions police did obtain a warrant to search premises for items including weapons and explosives on the ground that proscribed activities were suspected to be taking place on the premises. These powers were used exclusively in joint operations between the Gangs Squad's Strike Force Raptor and Local Area Commands that targeted suspected OMCG clubhouses.

Six of the suspected OMCG clubhouses closed down soon after being searched. The seventh, the Rebels national clubhouse, closed down after being searched and police started proceedings for the declaration.

The most common item found was alcohol. Firearms were located during two searches. In a number of the searches small quantities of prohibited drugs and a number of knives and swords were also found.

In addition to unlawful items, police seized almost all other items at the seven premises, stripping the premises of their contents. The items seized included furniture, electrical appliances, sound and lighting systems, stages and stripper poles. As no one sought the return of the items, they were forfeited to the Crown.

We have concerns about the legal basis for the seizure of non-illicit items. We recommend in chapter 5 that the Commissioner of Police should obtain independent legal advice about the scope of powers to seize items on premises that are searched.

We also identified a lack of clarity around the powers police have to manage people present on premises subject to a search warrant. Police encountered a number of people when arriving to conduct 3 of the 7 premises searches, with 62 people present at one set of premises, 22 at another and 6 at the third. One each occasion, before commencing the search of the premises, police detained and searched every person, obtained their identification, took their photograph and directed them to leave.

On the advice of the Crown Solicitor's Office, we do not believe police have a firm legal basis, of general application, to undertake all these activities when executing searches under the Restricted Premises Act. However, we acknowledge that police need adequate powers to manage the risks associated with potentially dangerous operations, and to ensure the safety of people and officers. We recommend in chapter 6 that the Restricted Premises Act should be amended to give police the power to give reasonable directions to safely and effectively manage the search process when executing search warrants under section 13 of the Act.

We also recommend that police be provided with specific powers to require people to provide details of their identity and to search the body of a person if the officer reasonably suspects that the person has a thing mentioned in the warrant. These are intended to enhance police's ability to detect firearms and to identify if the people present are, in fact, reputed criminals.

There is currently a legislative impediment to police making video-recordings of premises searches conducted under the Restricted Premises Act. As such recordings are a standard accountability measure in the conduct of premises searches, we recommend that the necessary amendments be made urgently.

Recommendations about the practical implementation of the provisions (chapters 7 and 8)

In chapter 7 we discuss particular concerns that were expressed about the broad discretion police have to determine the circumstances in which to conduct a search following a declaration, and the absence of legislative safeguards governing the manner of those searches.

In deciding to apply the *Standard Operating Procedures for the execution of Search Warrants* (the Search Warrant SOPs) to searches under the Restricted Premises Act, police have ensured that decisions to search premises will be subject to high levels of internal supervision and accountability. We make some recommendations aimed at ensuring that the manner in which the search powers are used is fair and reasonable for the people affected.

We also observed that the rescission process set out in the Restricted Premises Act does not appear to provide an effective avenue for owners and occupiers who wish to have the declaration reversed. In our view, the new offence provisions are likely to operate more effectively as an incentive for owners or occupiers to curtail the proscribed activities if they have the ability to seek the rescission of a declaration by demonstrating that they have successfully and permanently stopped those activities from occurring at the premises. In chapter 8 we recommend an amendment effecting this change be made to the Act.

Conclusion: efficacy and concerns about the provisions (chapter 9)

We formed the view that the ability of police to obtain a search warrant to authorise searches for weapons and explosives, as well as drugs and alcohol, did not enhance their ability to close down suspected clubhouses, or to seize weapons and explosives found on premises. In scrutinising the use of the section 13 search powers, we found that the existing provisions of the Act were sufficient

to achieve police's objectives. However, in the absence of a declaration over premises, we have no evidence to indicate how the additional section 10 search powers and new offence provisions might assist police.

Concerns have been raised about the potential for misuse of the search powers that can be exercised without a warrant, following a court making a declaration. Concerns have also been raised about the potential for a declaration to be made over a broad range of premises that are not used for criminal purposes. Again, in the absence of a declaration, we have no evidence to indicate whether concerns about the potential misuse of the new powers and broader impacts will be realised in practice.

Since Parliament intended for the use of these search powers and the operation of these offence provisions to be independently scrutinised, in chapter 9 we recommend the need for an independent agency to scrutinise the exercise of the additional search powers, and the operation of the new offence provisions, in the event that police obtain a declaration over premises in the future.

Summary of recommendations

Recommendation **38**

1. The Commissioner of Police should obtain independent legal advice about the scope of the seizure powers under sections 10 and 13 of the *Restricted Premises Act 1943* and, if necessary, revise relevant procedures, guidelines and training that specify the items police are authorised to search for and seize when conducting searches under those provisions.

Recommendations **44**

2. The Attorney General propose, for the consideration of the Parliament, an amendment to the *Restricted Premises Act 1943* to provide police with a power to give any person on the premises during a search under a section 13 search warrant a direction that is reasonable in the circumstances to minimise a risk to the safety of any person on the premises.

3. The Attorney General propose, for the consideration of the Parliament, an amendment to the *Restricted Premises Act 1943* to make it an offence to fail to comply with a reasonable direction given under the Act without a reasonable excuse.

Recommendation **46**

4. The Attorney General propose, for the consideration of the Parliament, an amendment to the *Restricted Premises Act 1943* that empowers police to search any person found in or on the premises whom police reasonably suspect of having a thing mentioned in a section 13 search warrant.

Recommendation **47**

5. The Attorney General propose, for the consideration of Parliament, amendments to the *Restricted Premises Act 1943* to:
   - enable a police officer to require a person present during a section 13 search to state his or her full name and residential address,
   - make it an offence for a person to fail to comply with such a requirement, without reasonable excuse, and
   - make it an offence for a person to give a name or address that is false, without reasonable excuse.

Recommendation **48**

6. The Attorney General propose, for the consideration of Parliament, amendments to the *Surveillance Devices Act 2007* to permit the video recording of any search conducted under section 13 or section 10 of the *Restricted Premises Act 1943*.

Recommendation **54**

7. The NSW Police Force amend policies, procedures or training material relevant to the exercise of the powers under section 10 of the *Restricted Premises Act 1943* to ensure that police conducting the search provide information to occupants on the premises, both verbally and in writing, and give them an opportunity to allow police to enter.

Recommendation **55**

8. The NSW Police Force should consider amending policies, procedures or training material relevant to a declaration under the *Restricted Premises Act 1943* to ensure that police make reasonable attempts to provide notice of any such declaration to both the owner and occupier of the premises.

Recommendation **56**

9. The Attorney General propose, for the consideration of Parliament, an amendment to the *Restricted Premises Act 1943* to require police to notify the occupier of premises searched under section 10, who is not present during the search, that a search has occurred, as soon as practicable after it has taken place.

Recommendation **63**

10. The Attorney General should propose an amendment to the *Restricted Premises Act 1943*, for the consideration of Parliament, to enable the Court to rescind a declaration on application by the owner or occupier, if satisfied there is no reasonable ground for suspecting the proscribed activities giving rise to the declaration are no longer taking place at the premises and are unlikely to occur again at the premises.

Recommendation **65**

11. The NSW Police Force provide to the Attorney General a report detailing any declarations that have been made under the *Restricted Premises Act 1943*, and the use of section 10 powers and any charges laid for the new offence provisions. This report should be provided every 12 months from the date of this report for three years.

Chapter 1. Introduction

1.1 The 2013 amendments to the Restricted Premises Act

The *Restricted Premises Act 1943* – earlier titled the *Disorderly Houses Act* – has been in operation since 1943. The Act allows police to apply to the District Court or the Supreme Court for a declaration to prevent unlawful and undesirable activities from taking place at particular premises.

On 15 October 2013, the NSW Parliament passed the *Firearms and Criminal Groups Legislation Amendment Act 2013* (the amendment Act). The amendment Act intended to make it easier for police to obtain a declaration over premises that were used by 'serious criminals, such as gang clubhouses'.[1]

Prior to the amendment Act, police could only search premises for drugs and alcohol, before applying for a declaration. The amendment Act authorised police to search premises specifically for firearms, other weapons and explosives.[2]

In addition, the amendment Act introduced offences for owners and occupiers of declared premises who failed to prevent a 'reputed criminal' from attending, controlling or managing declared premises.[3]

All of the above amendments were part of a number of measures intended to assist the NSW Police Force in criminal investigations and operations targeting organised criminals.[4]

Part 2 of the Restricted Premises Act, which contains the additional police search powers, the declaration scheme and the new offence provisions, is reproduced in Appendix 1.

1.2 The Ombudsman's review role

The 2013 amendments included a requirement that the Ombudsman perform two functions to review the operation of the new provisions in the period 1 November 2013 to 31 October 2015:

- keep under scrutiny the powers conferred on police to search for and seize weapons and explosives when conducting premises searches,[5] and
- monitor the operation of the new offence provisions.[6]

The Ombudsman is required to report to the Commissioner of Police and the Attorney General on the outcome of this review. The report may include recommendations for consideration of amendments that might be made to the Restricted Premises Act with respect to the exercise of the relevant police powers and the new offence provisions.[7]

1.3 Structure of this report

This report is divided into nine chapters.

Chapters 1 to 2 set out the preliminary and background information.

Chapter 3 describes the legal and policy framework within which the new provisions operate.

Chapter 4 provides an overview of how police have used the new powers.

1. The Hon. Barry O'Farrell MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 17 September 2013, p. 23564.
2. The *Firearms and Criminal Groups Legislation Amendment Act 2013* expanded the police powers under sections 13(3)(b) and 10 to permit police to search for 'any weapon or explosive'.
3. These offences are contained in sections 8(2A) and 9(3) of the *Restricted Premises Act 1943*, inserted by the *Firearms and Criminal Groups Legislation Amendment Act 2013*.
4. The Hon. Michael Gallagher MLC, NSWPD, (Hansard), Legislative Council, 4 March 2014, p. 26926.
5. *Restricted Premises Act 1943*, s. 20A(1).
6. *Restricted Premises Act 1943*, s. 20A(3).
7. *Restricted Premises Act 1943*, s. 20A(5).

Chapters 5 and 6 discuss how police have used the new powers to search premises for weapons and explosives. Chapters 5 discusses the section 13 and section 10 search and seizure powers. Chapter 6 discusses issues relating to the safe, reasonable and effective conduct of such searches.

Chapter 7 discusses the search powers that can be used after the making of a declaration over premises.

Chapter 8 discusses issues relating to the new offence provisions that apply after a declaration has been made.

Chapter 9 considers whether and to what extent the new police powers to search for weapons and explosives have, in practice, enhanced the scheme established by the Restricted Premises Act.

1.4 Methods

In the course of this review we used the following methods.

1.4.1. Information from the NSW Police Force

We conducted a detailed analysis of NSW Police Force data and other information about the use of the search powers and offence provisions, including records from the NSW Police Force Computerised Operational Policing System (COPS) of the seven searches conducted under section 13 for weapons and explosives, video footage of the searches, the search warrants and application for the warrants, relevant operational orders, and details of charges resulting from the searches.

We reviewed and analysed relevant NSW Police Force policies and guidelines, including standard operating procedures and training materials.

We conducted the following consultations with NSW Police Force officers:

- three interviews with senior officers, and three with operational officers, from the Gangs Squad and Strike Force Raptor,
- interviews with local area commanders, crime managers and operational officers from five local area commands involved in the execution of the section 13 search warrants, and
- interviews with the Firearms Registry and the Firearms Squad.

1.4.2. Consultations with other organisations and members of the public

We consulted with a local council in an area where a section 13 search warrant was executed, and with two lawyers who represented people affected by section 13 searches. We also interviewed two people affected by the additional search powers.

1.4.3. Data from the NSW Bureau of Crime Statistics and Research

We requested and analysed data from the NSW Bureau of Crime Statistics and Research about:

- the proportion of the NSW population convicted of an indictable offence in the last ten years, and who would therefore meet the definition of a 'reputed criminal' under the Restricted Premises Act, and
- the prosecution of offences under the Restricted Premises Act.

1.4.4. Court proceedings regarding the Restricted Premises Act declaration scheme

We observed and followed the progress of two sets of court proceedings relevant to the search powers and offence provisions:

- a prosecution resulting from one of the searches conducted under the Restricted Premises Act, and
- a Supreme Court application for a declaration over the national clubhouse of the Rebels bikie gang.

1.4.5. Literature and case law review

We reviewed literature, case law and media reports relevant to the new laws, including police search powers and the legislative and operational context within which the Restricted Premises Act functions.

1.4.6. Issues paper and submissions

We published an issues paper in August 2015[8] inviting submissions to assist our review. We received six submissions from:

- a local council
- a government department
- a motorcycle club
- two non-government advocacy organisations, and
- a firearm dealers' association.

A list of the organisations which provided submissions is in Appendix 2 of this report.

1.4.7. Limitations of the data

The NSW Police Force was required to provide the Ombudsman with information about the exercise of the additional police search powers and operation of the new offence provisions to assist our review. In the past, the Commissioner of Police has been willing to provide not only information which the NSW Police Force had a legal obligation to provide, but also information that provided important background to the use of the new provisions. This approach enabled us to conduct thorough reviews, informed by the context of existing police powers and the framework of policies, procedures and systems established to support the use of the new provisions.

For this review, the NSW Police Force decided to give us only information that it was required to provide under section 20A, based on legal advice that it obtained about the scope of the statutory provisions.[9] It did agree to a limited number of requests by our office for additional information.

For example, police had powers to search for drugs and alcohol on premises prior to the 2013 amendments. During the review period, police executed many search warrants allowing them to search only for drugs and alcohol, as well as search warrants allowing them to use their new powers to search for weapons and explosives. We asked the NSW Police Force to provide us with information about the use of the former type of warrant to assist us in analysing whether and how the additional powers had enhanced the existing scheme – but our request was refused. In addition, the NSW Police Force was not prepared to provide us with information about applications for declarations, the notices of declaration given to owners and occupiers, and appeal proceedings.

As a result of the decision by the NSW Police Force to apply a narrow interpretation of the information they were required to provide and its unwillingness to negotiate requests for contextual information, we were unable to obtain information about related powers, systems and policies that would have helped us to undertake a comprehensive evaluation of the impact and effectiveness of the new provisions.

8. NSW Ombudsman, *Review of Restricted Premises Act police powers and offence provisions: Issues paper, Review under section 20A of the Restricted Premises Act 1943*, August 2015.
9. NSW Solicitor General, Advice, *Question of obligation of Commissioner of Police to provide information to Ombudsman under section 20A of Restricted Premises Act 1943*, dated 6 June 2014.

Chapter 2. Background and context

This chapter describes the historical context of the *Restricted Premises Act 1943* and the background to the 2013 amendments.

2.1 Historical use of the Restricted Premises Act declaration scheme

The scheme for the closure of declared or disorderly houses originated during the Second World War.[10] 'Sly grog shops' and 'undesirable nightclubs' proliferated in Sydney streets, and the *Disorderly Houses Act 1943* was introduced to 'put an end to these dens of vice',[11] following representations by the police and military authorities.[12] National security was the central reason for the Act's introduction:

> The Defence authorities were confirmed in their opinion that these types of places were the most likely hunting grounds for enemy agents desiring information, they are a danger to the mental and physical health of the forces, and that their closing was more than justified on moral grounds. That was demanded in the interests of national security, if tremendous and irreparable injury to the war effort and military operations was to be avoided.[13]

The Act created a scheme which allowed for premises to be declared a 'disorderly house' by a court.[14]

The grounds on which police could seek a declaration included the unlawful sale or supply of alcohol or drugs at the premises, and reputed criminals attending, controlling or managing the premises.[15] Other features of the Act were as follows:

- Section 7 made it an offence for a person to attend declared premises, unless they were there for a lawful purpose.
- Under sections 8 and 9, the owner or occupier of declared premises committed an offence if any of the activities that could give rise to a declaration continued to occur.
- Section 10 gave police the power to forcibly enter and search declared premises and seize certain items.

In addition, section 13 allowed police to apply for a warrant to search 'suspected premises' to enable them to gather information to support an application for a 'disorderly house' declaration.

During the first 10 years of the Act's operation, courts made 71 disorderly house declarations.[16]

In 2002 the Disorderly Houses Act was renamed the Restricted Premises Act by the *Disorderly Houses (Commercial Supply of Prohibited Drugs) Act 2002*. This Act also amended the disorderly houses declaration and notice provisions, and also introduced orders for the temporary closure of premises used for the commercial supply of prohibited drugs.[17] The offences for owners and occupiers under sections 8 and 9 were retained and continued to operate in revised form. However, the offence under section 7, prohibiting any person from attending declared premises, was repealed.

10. The Hon. Robert Downing MLC, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Council, 20 May 1943, p. 3492.
11. The Hon. Sir Henry Manning, NSWPD, (Hansard), Legislative Council, 20 May 1943, p. 3497.
12. The Hon. Robert Downing MLC, NSWPD, (Hansard), Legislative Council, 20 May 1943, p. 3492.
13. The Hon. Robert Downing MLC, NSWPD, (Hansard), Legislative Council, 20 May 1943, p. 3494.
14. The Hon. William McKell MP, NSWPD, (Hansard), Legislative Council, 20 May 1943, p. 3418.
15. *Disorderly Houses Act 1943*, s. 3(1).
16. National Library of Australia, 'The Sydney Morning Herald (NSW: 1842-1954)', *Trove*, http://trove.nla.gov.au/ndp/del/title/35, viewed 25 February 2014.
17. The Hon. John Della Bosca MLC, NSWPD, (Hansard), Legislative Council, 20 November 2002, pp. 7100 -7101.

Between 2001 and 2009 the Restricted Premises Act was used to make declarations over the following premises:[18]

- The Bliss Cafe in Potts Point
- The Turkish Coffee Lounge in Surry Hills
- The Sydney headquarters of the Hells Angels in Guildford, and
- The Astoria Hotel in Kings Cross

Two of these declarations were formally rescinded,[19] and the other two have become inoperative.

The declaration in January 2009 over the headquarters of the Hells Angels resulted in the closure of the premises.[20] The 2009 declaration over the Astoria Hotel in Kings Cross was operational until September 2014, when the hotel was sold and the business stopped operating.[21] This declaration was made due to suspected illicit drug trade occurring at the premises.[22]

In March 2009 – five days after a brawl at Sydney Airport between Members of the Hells Angels and Comanchero outlaw motorcycle gangs (OMCGs) that resulted in the murder of a man – the NSW Police Force launched Strike Force Raptor within the State Crime Command's Gangs Squad. The purpose of this Strike Force was to target and disrupt the criminal activities of OMCGs.[23]

The formation of Strike Force Raptor has seen a renewed use of the Restricted Premises Act to target suspected bikie clubhouses.

In 2010 the NSW Police Force began preparing another application for a suspected bikie clubhouse, but ultimately decided not to lodge the application.[24]

It has been reported that searches conducted under section 13 of the Act have been used by police since 2012 to 'dismantle' and 'close down' around 30 suspected bikie clubhouses.[25]

2.2 Concern about firearms-related crime and organised crime

In the last decade there has been growing concern nationally, including in NSW, about firearms-related crime, organised crime and criminal gangs including OMCGs. This has prompted a series of legislative and policy responses.

In the immediate aftermath of the brawl between rival OMCGs at Sydney Airport in 2009, the NSW Government enacted criminal organisation legislation intended to disrupt the activities of OMCGs,[26] in addition to launching Strike Force Raptor. The legislation provided for an organisation to be declared a criminal organisation and for control orders to be made against members of such an organisation to limit their associations and activities.

18. *Restricted Premises Act 1943*, Notice of Declaration, Shop 2, 9 Ward Avenue Potts Point, 'Bliss Cafe', NSW Government Gazette, No. 51, 5 March 2004; *Restricted Premises Act 1943*, Notice of Declaration, 53 Broughton Street Guildford, 'Hell's Angels Clubhouse', NSW Government Gazette, No. 44, 27 February 2009; *Restricted Premises Act 1943*, Notice of Declaration, 9 Darlinghurst Road Kings Cross, 'Astoria Hotel', NSW Government Gazette, No. 87, 12 June 2009; *Restricted Premises Act 1943*, Notice of Declaration, First floor of B464 Cleveland Street Surry Hills, 'Turkish Coffee Lounge', NSW Government Gazette, No. 41, 19 March 2010.
19. *Restricted Premises Act 1943*, Notice of Rescission, Shop 2, 9 Ward Avenue Potts Point, 'Bliss Cafe', NSW Government Gazette, No. 112, 14 August 2009; *Restricted Premises Act 1943*, Notice of Rescission, First floor of B464 Cleveland Street Surry Hills, 'Turkish Coffee Lounge', NSW Government Gazette, No. 71, 4 June 2010.
20. *The Sydney Morning Herald*, 'Legal first: no warrant needed to raid Sydney Hells Angels', *The Sydney Morning Herald* (online), 28 January 2009, viewed 12 September 2014.
21. Eryk Bagshaw, 'The death of Kings Cross as we know it', *The Sydney Morning Herald* (online), 22 September 2014, viewed 30 September 2014.
22. Consultation with Kings Cross LAC, 16 December 2015; Taylor Auerbach, 'State-sponsored five-star drug den: Criminals and addicts are being payrolled to The Astoria Hotel courtesy of the taxpayer', *The Daily Telegraph* (online), 4 August 2014, viewed 12 September 2014.
23. The Hon. Michael Gallagher MLC, NSWPD, (Hansard), Legislative Council, 2 April 2012, p. 10278.
24. Consultation with Strike Force Raptor, 16 October 2014.
25. NSW Police Force, 'Caught for consorting', *Police Monthly*, March 2015, p. 5; NSW Police Force, 'Raptor takes down one percenters', *Police Monthly*, May 2014, p. 7; Ashley Mullaney, 'Bikie crime crackdown: Clubbed-house', *The Daily Telegraph*, 8 June 2015, p. 9. Police officers confirmed during consultations that this action was taken using section 13 of the Restricted Premises Act: Consultation with Strike Force Raptor, 21 July 2015.
26. *Crimes (Criminal Organisations Control) Act 2009*. The legislation was subsequently found unconstitutional by the High Court in *Wainohu v New South Wales* (2011) 243 CLR 181. It has since been replaced by the *Crimes (Criminal Organisation Control) Act 2012*.

The Australian Crime Commission (ACC) has continued to report on the growth in OMCG membership, the escalation in the level of violence within and between OMCGs, and the increase in the variety and sophistication of their involvement in criminal activity across the country.[27] The ACC's 2015 report, *The Australian methylamphetamine market: The national picture*, notes the involvement of members of different OMCGs in the importation, manufacture and trafficking of the drug methylamphetamine or 'ice'.[28] According to the most recent assessment of OMCGs, more than 40 OMCGs comprising about 6,000 patched members operate in Australia.[29] The ACC acknowledges that 'it is difficult to gauge the percentage of organised crime attributed specifically to OMCG members'.[30]

In the three years prior to the 2013 amendments, a number of drive-by shootings and other firearms-related crime in Sydney received extensive media coverage.[31] These incidents occurred predominantly in the western and south-western suburbs of Sydney and were attributed to bikie gangs,[32] other organised crime groups such as the Brothers 4 Life,[33] and young men 'arming themselves with illegal guns to fight petty disputes'.[34]

This media coverage created a perception there had been an increase in firearms-related crime in New South Wales, particularly drive-by shootings. At the time, the NSW Bureau of Crime Statistics and Research (BOCSAR) found that drive-by shootings had more than doubled from 41 in 1995 to 100 in 2011.[35] However, it also reported that most types of firearms-related crime had decreased or remained stable since 1995.[36] Later analysis by the BOCSAR found that there had not been a statistically significant increase in the number of shootings in this period, including drive-by shootings:

> [T]he trends in discharge firearm into premises, shoot with intent and unlawfully discharge firearm, individually and in total, have not shown statistically significant increases in the 2 years, 5 years, 10 years or 15 years up to December 2012. Generally speaking the pattern has been one of surges in the frequency of such incidence followed by periods of relative quiescence ...[37]

The NSW Police Force launched Operations Spartan and Apollo in January 2012 and February 2013 respectively, to combat gun crime in Sydney.[38] During the course of these two operations, police seized over 140 firearms, made over 1,000 arrests and laid over 2,000 charges.[39] In August 2013, the two operations were amalgamated into Operation Talon, which is ongoing.[40]

In February 2012, the NSW Government introduced a package of reforms designed to 'combat organised crime in further support of police in the war on drive-by shootings'.[41] The reforms included:

- a new offence of firing at a house in the course of organised criminal activity[42]

27. Australian Crime Commission, *Outlaw Motorcycle Gangs,* July 2013, pp. 2-3.
28. Australian Crime Commission, *The Australian Methylamphetamine Market: The National Picture*, March 2015, p. 11.
29. Australian Crime Commission, *Outlaw Motorcycle Gangs*, July 2013, p. 2.
30. Australian Crime Commission, *Outlaw Motorcycle Gangs*, July 2013, pp. 2-3.
31. For example see Clementine Cuneo, Nathan Klein and Leigh van den Broeke, 'Wild west rocked by spree of shootings', *The Daily Telegraph* (online), 17 April 2012, viewed 24 February 2014; Stephanie Gardiner, 'Another night, another Sydney shooting', *The Sydney Morning Herald* (online), 12 January 2012, viewed 24 February 2014; Ben McClellan, 'Dodging the bullets in war zone suburbs of Sydney', *The Daily Telegraph* (online), 26 July 2013, viewed 24 February 2014.
32. Clementine Cuneo, Nathan Klein and Leigh van den Broeke, 'Wild west rocked by spree of shootings', *The Daily Telegraph* (online), 17 April 2012, viewed 24 February 2014.
33. Damien Murphy and Nick Ralston, 'Drive-by justice', *The Sydney Morning Herald* (online), 9 November 2013, viewed 24 February 2014.
34. Rachel Olding and Nick Ralston, '"Idiot factor" drives gun crime', The *Sydney Morning Herald* (online), 23 January 2013, viewed 24 February 2014.
35. Emma Birdsey, NSW Bureau of Crime Statistics and Research, *Criminal offences involving firearms in New South Wales*, *1995-2011*. October 2012, p. 6.
36. Emma Birdsey, NSW Bureau of Crime Statistics and Research, *Criminal offences involving firearms in New South Wales, 1995-2011*, October 2012, pp. 5-8.
37. Jacqueline Fitzgerald, NSW Bureau of Crime Statistics and Research, *Non-fatal shootings in New South Wales*, April 2013, p. 6.
38. Lisa Davies, Nick Ralston and Louise Hall, 'Public urged to reveal illegal guns anonymously', *The Sydney Morning Herald* (online), 13 January 2012, viewed 4 March 2014; Yoni Bashan, 'Sydney is a city under fire', *The Australian* (online), 7 February 2013, viewed 4 March 2014.
39. NSW Police Force, *Operation Talon*, http://www.police.nsw.gov.au/community_issues/operation_talon, viewed 4 March 2014.
40. NSW Police Force, *Operation Talon*, http://www.police.nsw.gov.au/community_issues/operation_talon, viewed 4 March 2014.
41. *Crimes Amendment (Consorting and Organised Crime) Act 2012*.
42. *Crimes Act 1900*, s. 93GA.

- changes to the existing offence of participating in a criminal group and two new associated offences[43]
- an updated consorting offence of habitually associating with convicted offenders,[44] and
- a revised version of the criminal organisation legislation.[45]

Other legislative responses in NSW that have increased the strategies available to police to tackle organised crime, criminal gangs and firearms-related crime have included:

- the establishment of schemes for the regulation of the tattoo, combat sports and motor dealer and repair industries, which prevent people considered by the Police Commissioner to be 'not a fit and proper person' from working in these industries,[46]
- restrictions on entry to licensed premises by bikie gang members while wearing the 'colours' or insignia of their club,[47] and
- new search powers associated with firearms prohibition orders that can be exercised without a warrant.[48]

In April 2012, the Standing Council on Law and Justice, comprising state and territory Attorneys-General, agreed that consistent state and territory legislation to disrupt the activities of criminal gangs was necessary, aimed at limiting their ability to engage in serious criminal activity.[49]

Since July 2012, the Council of Australian Governments (COAG) has discussed the need for a coordinated national strategy to combat organised crime and firearms-related crime.[50]

In March 2013 the then Prime Minister, Julia Gillard, announced a national plan in response to these issues, including a National Anti-Gang Taskforce[51] supported by national anti-gang laws, national unexplained wealth laws and reforms to tackle the illegal firearms market.[52]

In April 2013, COAG agreed to continue to cooperate to ensure that law enforcement agencies had the powers needed to respond effectively to gang violence, organised crime and illegal firearms, and agreed that the states and territories would consider measures including 'implementation of additional firearm search powers to target repeat offenders'.[53]

The NSW Police Force is now part of a multi-agency national task force named Operation Morpheus, created by the Serious and Organised Crime Coordination Committee of the Australian Crime Commission, and comprising state and territory police forces, the Australian Federal Police and federal agencies such as the Australian Tax Office and the Department of Immigration and Border Protection. Operation Morpheus, tasked with disrupting the criminal activities of OMCGs, is continuing and expanding the work of the Attero National Task Force that targeted the Rebels OMCG from 2012 to 2014.

43. *Crimes Act 1900*, ss. 93(4A), 93T(1)-(1A), 93TA.
44. *Crimes Act 1900*, ss. 93W-93Y.
45. *Crimes (Criminal Organisation Control) Act 2012*. This legislation has not yet been used to obtain a declaration in relation to a criminal organisation in NSW.
46. *Tattoo Parlours Act 2012*; *Combat Sports Act 2013*; *Motor Dealers and Repairers Act 2013*.
47. Liquor accords provisions in *Liquor Act 2007*, Part 8, and *Liquor Regulation 2008*, cl. 53K.
48. *Firearms Act 1996*, s. 74A.
49. Standing Council on Law and Justice, *Communiqué*, 12-13 April 2012. The Standing Council on Law and Justice (SCLJ) comprised the Attorneys General of the Commonwealth and states and territories and New Zealand Minister of Justice. The SCLJ and the Standing Council on Police and Emergency Management have been replaced by a single council, the Law Crime and Community Safety Council.
50. Council of Australian Governments, *Council of Australian Governments Meeting – Communique*, Canberra, 25 July 2012, p. 4.
51. The Hon. Julia Gillard (Prime Minister), *National anti-gang taskforce: Federal and State agencies to work together to tackle gang crime*, media release, 3 March 2013.
52. The Hon. Julia Gillard (Prime Minister), *National plan to tackle gangs, organised crime and the illegal firearms market*, media release, 6 March 2013. The plan to introduce national anti-gang laws did not eventuate.
53. Council of Australian Governments, *Council of Australian Governments Meeting – Communique*, Canberra, 19 April 2013, p. 4.

2.3 The Firearms and Criminal Groups Legislation Amendment Act

After a number of shootings and four deaths in July 2013, the NSW Opposition Leader Mr John Robertson MP criticised the NSW Government for failing to take action against criminal gangs and gun crime in Sydney.[54] On 29 August 2013, he introduced a private member's Bill, the Firearms Amendment (Prohibition Orders) Bill 2013. The Bill proposed amendments to the *Firearms Act 1996* to allow police to search without warrant people subject to a firearms prohibition order, and their homes and vehicles.[55]

The private member's Bill was superseded on 17 September 2013, when the Premier, the Hon. Barry O'Farrell MP introduced the Firearms and Criminal Groups Legislation Amendment Bill 2013 (the amendment Bill) into Parliament. This Bill contained proposed amendments to the firearms prohibition order scheme under the Firearms Act that were similar to those proposed under Mr Robertson's private member's Bill. The amendment Bill also proposed amendments to the Restricted Premises Act, following consultation between the NSW Ministry for Police and Emergency Services and the NSW Police Force about options for tackling criminal organisations, particularly OMCGs.[56]

2.4 Parliamentary intention and concerns about the amendments

The amendment Bill proposed a number of measures aimed at combating firearms-related crime, including changes to the Restricted Premises Act, the Firearms Act, and the *Crime Commission Act 2012*.

When introducing the amendment Bill, the Premier said:

> This bill will equip the NSW Police Force with powerful new weapons to help tackle criminals with guns. This legislation has been put together with the advice of the NSW Police Force to ensure that police have the power, the resources and the powerful new weapons to help tackle criminals with guns, in particular to target gun crime across Sydney.
>
> Nothing in this legislation should concern innocent citizens of this State. This legislation will concern those who are involved in criminal activities involving guns. This legislation will ensure that those people have no place to hide.[57]

In the second reading speech, the Premier said the amendments to the Restricted Premises Act would 'make it easier for police to get premises declared on the grounds they were routinely used by serious criminals, such as gang clubhouses'.[58] He also noted that the amendments were intended to allow police to search specifically for firearms and other weapons and to increase the penalties for offences which may be committed by owners and occupiers of declared premises.[59]

The proposed changes to the Restricted Premises Act were largely unopposed in their passage through Parliament. However, Mr Alex Greenwich MP, an Independent, expressed concern regarding the manner in which the amendment Bill had been 'rushed through the House without members being given an opportunity to consult experts and their communities about it'.[60] He also criticised the expansion of the police powers under the Restricted Premises Act to permit searches of declared premises without a warrant for weapons and explosives, stating that these powers 'should be scaled back, not expanded' and 'are open to police corruption and lack accountability'.[61]

54. Andrew Clennell, Mark Morri, Yoni Bashan and Ben McClellan, 'Latest gun murders strike at the heart of safety in Sydney', The Daily Telegraph (online), 31 July 2013, viewed 4 March 2014.
55. Peter Cunningham, *Submission to NSW Ombudsman regarding police use of FPO search powers*, 15 September 2015, Schedule 1, cl. 3.
56. Consultation with Ministry for Police and Emergency Services, 14 October 2014.
57. The Hon. Barry O'Farrell MP, NSWPD, (Hansard), Legislative Assembly, 17 September 2013, p. 23564.
58. The Hon. Barry O'Farrell MP, NSWPD, (Hansard), Legislative Assembly, 17 September 2013, p. 23564.
59. The Hon. Barry O'Farrell MP, NSWPD, (Hansard), Legislative Assembly, 17 September 2013, p. 23564.
60. Mr Alex Greenwich, NSWPD, (Hansard), Legislative Assembly, 18 September 2013, p. 23680.
61. Mr Alex Greenwich, NSWPD, (Hansard), Legislative Assembly, 18 September 2013, p. 23680.

Mr Greenwich also raised broader concerns about the introduction and expansion of powers to search a property without a warrant:

> [Warrants] act as an important check and balance on police powers. Their removal is another incremental step towards a loss of basic rights that prevent exploitation of the innocent. ... I continue to work with and support the police officers in my electorate, but I do not support removal of police oversight and accountability.[62]

The amendment Bill was referred to the Legislation Review Committee to consider whether it unreasonably encroached on specific rights and liberties.[63] The Committee's report, tabled on 15 October 2013, referred to Parliament its concern that the new Restricted Premises Act offence provisions may unduly impact on the right to freedom of association.[64] However, this issue was not discussed during the parliamentary debates on the Bill, which was passed unamended that same day.

Two days later on 17 October 2013, the Chair of the Committee, Mr Bromhead, made the following comments on the Committee's concerns about the various changes made by the *Firearms and Criminal Groups Legislation Amendment Act 2013:*

> ... this legislation is extremely tough on targeted groups. It is another example of this Government looking after the interests of the wider public, rather than the rights of those individuals.[65]

The Legislative Assembly noted Mr Bromhead's concerns.[66]

62. Mr Alex Greenwich, NSWPD, (Hansard), Legislative Assembly, 18 September 2013, p. 23680.
63. Section 8A of the *Legislation Review Act 1987* outlines the functions of the Legislation Review Committee with respect to Bills.
64. Legislation Review Committee, NSW Parliament, *Legislation Review Digest No. 45/55*, Sydney, 15 October 2013, pp. 15-16.
65. Mr Stephen Bromhead, (NSWPD), (Hansard), Legislative Assembly, 17 October 2013, p. 24296.
66. Ms Tania Mihailuk, NSWPD, (Hansard), Legislative Assembly, 17 October 2013, p. 24296.

Chapter 3. Legislative and policy framework

This chapter outlines the legislative framework of the *Restricted Premises Act 1943* and applicable police policy, describing the existing scheme and the amendments made by the *Firearms and Criminal Groups Legislation Amendment Act 2013* (the amendment Act). We detail the police search powers and offence provisions that the Ombudsman has been responsible for reviewing.

3.1 The Restricted Premises Act prior to the 2013 amendments

The Restricted Premises Act establishes a scheme under which police can apply to a court for a declaration to prevent certain unlawful and undesirable activities from taking place on specified premises. The amendment Act added certain features to this scheme, without changing any underlying aspects.

This section outlines the following key aspects of the existing scheme:

- the procedure for police to apply for a declaration over premises
- offences that can be committed by owners and occupiers of declared premises
- search warrants that police can obtain to find evidence to support an application for a declaration
- police powers to search declared premises, and
- the definition of premises.

3.1.1. Declarations

A senior police officer can apply to the Supreme Court or the District Court to obtain a declaration over premises. The officer must provide 'reasonable grounds for suspecting' that one or more of the following activities listed in section 3(1) take place on the premises:

- drunkenness, or disorderly or indecent conduct, or any entertainment of a demoralising character
- unlawful sale or supply of alcohol or drugs
- the attendance of 'reputed criminals' or 'associates of reputed criminals' at the premises, and
- that certain people control or manage the premises, including 'a reputed criminal or an associate of reputed criminals', or a person who has managed premises the subject of a declaration under the Act, or premises attended by people of 'notoriously bad character', or premises on which alcohol or drugs have been unlawfully sold or supplied.[67]

In this report we refer to these activities as the 'proscribed activities'.

An owner or occupier of premises over which police are seeking a declaration may have an opportunity to be involved in the proceedings and, if a declaration is made, will receive a notice of the declaration.[68]

3.1.2. Offences under sections 8 and 9

One effect of a declaration is to expose the owners and occupiers of declared premises to criminal prosecution if they fail to stop the proscribed activities from continuing.[69] These are summary offences, and the maximum penalty is a $5,500 fine and/or six months' imprisonment.[70]

67. *Restricted Premises Act 1943*, s. 3(1).
68. *Restricted Premises Act 1943*, s. 6(1).
69. *Restricted Premises Act 1943*, ss. 8(1), 9(1).
70. *Restricted Premises Act 1943*, ss. 8(1), 9(1).

3.1.3. Section 10 search powers

The other effect of a declaration is that police are authorised to search the declared premises without a warrant for alcohol, drugs and related devices.

3.1.4. Section 13 search warrants

Prior to seeking a declaration, if police have reasonable grounds for believing that proscribed activities are taking place at certain premises, they can apply under section 13 for a warrant to search the premises for alcohol, drugs and related devices.[71] If a warrant is issued, and police search the premises, they can seize alcohol, drugs and related devices.[72] Information gathered as a result of these searches may be used by the police in preparing an application for a declaration under the Act.

When police officers execute search warrants, they must comply with a number of requirements under the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA),[73] including the following:

- Before executing the warrant, police must announce that they are authorised by warrant to enter, and give the people present an opportunity to allow entry.[74]
- Police must provide a person who is on the premises with an occupier's notice upon entry to the premises or as soon as possible afterwards. The notice contains a summary of the nature of the warrant and police powers to search under the warrant.[75]
- The power to search is time-limited, ordinarily lasting a maximum of 72 hours from the time the warrant is issued, although police can request an extension.[76]
- Police can only seize things described in the warrant, or things police have reasonable grounds to believe are connected with an offence.[77]
- Police must report back to the issuing officer within 10 days of the search, stating whether or not the warrant was executed, outlining the results of the search and including a brief description of anything seized.[78]

3.1.5. Forfeiture or return of seized items

Any item seized by police when conducting a section 10 search is automatically forfeited to the Crown.[79] There is no avenue for a person to apply for its return.

An item seized by police when executing a section 13 search warrant is forfeited to the Crown, unless the person claiming to be its owner applies to a magistrate for its return within 21 days of the search.[80] A magistrate determining an application for the return of a seized item must order the item's forfeiture if it appears that any of the proscribed activities were taking place at the premises at the time of seizure. In any other case, the magistrate may order that the item be returned to its owner.[81]

71. *Restricted Premises Act 1943*, s. 13(2).
72. *Restricted Premises Act 1943*, s. 13(3)(b).
73. *Restricted Premises Act 1943*, s. 13(4).
74. *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), s. 68(1).
75. LEPRA, s. 67.
76. LEPRA, s. 73(3).
77. LEPRA, s. 49(1).
78. LEPRA, s. 74A.
79. *Restricted Premises Act 1943*, s. 13A(1).
80. *Restricted Premises Act 1943*, s. 13A(2), (4).
81. *Restricted Premises Act 1943*, s. 13A(2).

3.1.6. Definition of 'premises'

The definition of premises in the Restricted Premises Act determines the range of premises which can be made the subject of a declaration. Section 2 states that the word 'premises' includes 'any building and any part of any building but does not include licensed premises or the premises of any registered club'.

3.2 2013 amendments to the Restricted Premises Act

The amendment Act added the following features to the existing scheme:

- a new category of declaration, called a reputed criminal declaration
- new offences that may be committed under sections 8(2A) and 9(3) by owners and occupiers of premises the subject of a reputed criminal declaration
- definitions of the terms 'reputed criminal' and 'associate of a reputed criminal', and
- additional search and seizure powers under sections 13 and 10.

3.2.1. New category of 'reputed criminal declaration' in section 3

The 2013 amendment Act created a new category of declaration called a 'reputed criminal declaration', which may be made in the following circumstances.

> **3 Declaration by Supreme Court or District Court in relation to premises**
>
> ...
>
> (3) The appropriate Court may, in declaring premises to be premises to which this Part applies, state that the reason (or the predominant reason) for the declaration is that:
>
> (a) reputed criminals have attended or are likely to attend the premises, or
>
> (b) a reputed criminal has, or takes part or assists in, the control or management of the premises.
>
> Any such declaration is a ***reputed criminal declaration*** for the purposes of this Act.[82]

3.2.2. New offences under sections 8(2A) and 9(3)

The amending Act introduced new offences under sections 8(2A) and 9(3), for owners and occupiers of premises the subject of a reputed criminal declaration. An owner or occupier commits an offence if, after they have been served with notice of the declaration, a reputed criminal attends, controls or manages the premises.

However, the owner or occupier is not guilty of such an offence if they prove that they took all reasonable steps to prevent the reputed criminal from attending, controlling or managing the premises.[83] In addition, the owner of premises occupied by another person is not guilty of an offence if they prove that they took all reasonable steps to evict the occupier.[84]

The offences are punishable by a substantially higher fine than the old offences under sections 8 and 9. The maximum penalty is a $16,500 fine and/or three years' imprisonment. The offences are indictable offences, but can be dealt with summarily before the Local Court unless the prosecutor elects otherwise.[85] If dealt with in the Local Court, the maximum penalty is two years' imprisonment and/or a $5,500 fine.[86]

82. *Restricted Premises Act 1943*, s. 3(3).
83. *Restricted Premises Act 1943*, ss. 8(2B), 9(4).
84. *Restricted Premises Act 1943*, s. 8(3).
85. *Restricted Premises Act 1943*, s. 18A(2).
86. *Criminal Procedure Act 1986*, s. 286.

3.2.3. Definitions of 'reputed criminal' and 'associate of reputed criminal'

To provide 'certainty and guidance for police officers in preparing applications for a declaration',[87] the amendment Act inserted definitions of the terms 'reputed criminal' and 'associate of a reputed criminal'.

> ***'reputed criminal'*** includes (without limitation) a person who:
>
> (a) has been convicted of an indictable offence (including an offence under section 93X of the *Crimes Act 1900*), or
>
> (b) is engaged in an organised criminal activity within the meaning of section 46AA of the *Law Enforcement (Powers and Responsibilities) Act 2002*, or
>
> (c) is a controlled member of a declared organisation within the meaning of the *Crimes (Criminal Organisations Control) Act 2012*.[88]
>
> ***'associate of a reputed criminal'*** includes (without limitation) a person who has been given an official warning under section 93X of the *Crimes Act 1900*.[89]

Police must have regard to these definitions when applying for a declaration or a section 13 search warrant. They are also relevant to the prosecution of the new offences under sections 8(2A) and 9(3).

3.2.4. Additional search powers

The amendment Act expanded the existing search and seizure powers to enable police to search premises for weapons and explosives,[90] in addition to the items they could already search for under the existing scheme. This applies when police are executing a section 13 search warrant and when they are exercising their powers to search declared premises under section 10.

In the following sections, we have highlighted the provisions containing the additional powers, which were added by the 2013 amendments.

Section 10 search powers

Police are now empowered to search for, and seize, weapons or explosives, in addition to drugs, alcohol and related devices after entering declared premises under section 10 without a warrant, due to the insertion of subsection (f) by the amendment Act.[91]

> **10 Entry by Police**
>
> While any such declaration is in force with respect to any premises any member of the Police Force may, without warrant:
>
> (a) enter the said premises,
>
> (b) enter any land or building which the member has reasonable grounds to suspect is used as a means of access to or of exit or escape from the same,
>
> (c) pass through, from, over and along any other land or building for the purpose of entering in pursuance of paragraph (a) or paragraph (b),
>
> (d) for any of the purposes aforesaid break open doors, windows, and partitions, and do such other acts as may be necessary,
>
> (e) search such premises for, and seize, any liquor and any drug in such premises and any drinking glass, vessel, container or device in such premises which is used or is capable of being used for or in connection with the storage, supply or consumption of any liquor or drug or the user or taking of any drug,
>
> (f) search the premises for, and seize, any weapon or explosive.

87. The Hon. Barry O'Farrell MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 17 September 2013, p. 23564.
88. *Restricted Premises Act 1943*, s. 2.
89. *Restricted Premises Act 1943*, s. 2.
90. *Restricted Premises Act 1943*, ss. 10(f), 13(3)(b).
91. *Restricted Premises Act 1943*, s. 10.

Section 13 search warrants

Section 13 now allows police to obtain a warrant to search any premises suspected of being used to conduct the proscribed activities, for weapons or explosives, in addition to drugs, alcohol and related devices, and to seize any such items.[92]

> **13 Suspected premises – issue of search warrant**
>
> ...
>
> (2) A member of the Police Force may apply to an authorised officer for a search warrant if the member of the Police Force has reasonable grounds for believing that any of the conditions referred to in section 3(1) obtain, and are commonly reported to obtain, in respect of any premises.
>
> (3) An authorised officer to whom an application is made under subsection (2), may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising any member of the Police Force:
>
> (a) to enter the premises, and
>
> (b) to search the premises for, and to seize, any liquor or drug or any drinking glass, vessel, container or device referred to in section 10(e) **or any weapon or explosive** [emphasis added].

What items can police search for?

When exercising their additional search powers, police are authorised to search only for the following items:

- 'any liquor'[93]
- 'any drug'[94]
- 'any drinking glass, vessel, container or device in such premises which is used or is capable of being used for or in connection with the storage, supply or consumption of any liquor or drug or the [use] or taking of any drug',[95] and
- weapons and explosives.[96]

A 'weapon' is defined as 'a firearm, or an imitation firearm, within the meaning of the *Firearms Act 1996*' or 'a prohibited weapon within the meaning of the *Weapons Prohibition Act 1998*'.[97] Prohibited weapons include certain knives, bombs and grenades, certain imitation weapons and concealed blades, tasers and knuckle-dusters, handcuffs, silencers, brass catchers, and detachable firearm magazines.

'Explosive' has the same meaning as in the *Explosives Act 2003*,[98] which is an article or substance prescribed by the Explosives Regulation 2013.[99] There are three categories of explosives prescribed by the Explosives Regulation:

- dangerous goods of Class 1 within the meaning of the *Australian Dangerous Goods Code*[100] or the *Australian Explosives Code*[101]
- goods too dangerous to be transported (within the meaning of the *Australian Dangerous Goods Code* or the *Australian Explosives Code*) that can produce an explosive or pyrotechnic effect, and
- articles or substances that, when manufactured, mixed or assembled, can produce an explosive or pyrotechnic effect.[102]

These explosives include certain chemicals, detonators, bombs, fireworks and ammunition.

92. *Restricted Premises Act 1943*, s. 13.
93. *Restricted Premises Act 1943*, ss. 10(e), 13(3)(b).
94. *Restricted Premises Act 1943*, ss. 10(3), 13(3)(b).
95. *Restricted Premises Act 1943*, ss. 10(e), 13(3)(b).
96. *Restricted Premises Act 1943*, ss. 10(f), 13(3)(b).
97. *Restricted Premises Act 1943*, s. 2.
98. *Restricted Premises Act 1943*, s. 2.
99. *Explosives Act 2003*, s. 3(1).
100. National Transport Commission, *Australian Code for the Transport of Dangerous Goods by Road & Rail*, October 2011, pp. iii and 4.
101. Workplace Relations Ministers' Council, *Australian Code for the Transport of Explosives by Road and Rail 2009*, April 2009.
102. *Explosives Regulation 2013*, s. 4.

3.2.5. Threshold for exercising the additional search powers

When police conduct premises searches for particular items, they are generally required to establish that there is some nexus between suspected criminal activity and the items for which they are searching. For example, police can only obtain a warrant under LEPRA to search premises for a 'thing' connected to a particular offence, and then only if police reasonably believe that the thing is in or on the premises, or will be there within the next 72 hours.[103]

By way of contrast, police can search for weapons and explosives under section 13, or section 10 even if they have no reasonable belief, or suspicion, that such items are on the premises. This is because, in order to obtain a declaration or a section 13 search warrant, a senior police officer must have reasonable grounds to suspect or believe that proscribed activities are occurring on the premises, but the proscribed activities do not include conduct relating to weapons or explosives.[104]

3.2.6. NSW Police Force policy about the exercise of the additional search powers

In November 2014, a Search Warrant Toolkit was delivered via an intranet site to provide police with a 'one stop shop' for information, guidance, forms and tools to be used when executing search warrants and exercising other 'uninvited entry and search' powers.[105] These resources provide a comprehensive set of guidelines to ensure that police conduct searches in a way that minimises any risks involved and provides accountability.

These include the *Standard Operating Procedures for the execution of Search Warrants* (Search Warrant SOPs),[106]which apply to the execution of search warrants in addition to other situations where police lawfully enter premises without the consent of the occupier.[107] Police exercising search powers under section 10 or section 13 are required to follow these SOPs.

The Search Warrant SOPs set out processes including:

- the mandatory steps that must be undertaken during the pre-execution, execution and post-execution phases of searches, incorporating detailed risk assessment procedures
- the mandatory roles that must be undertaken during these three phases
- the role of the newly created Search Warrant Review Committee,[108] and
- instructions for the video-recording of searches.[109]

A police officer must complete relevant mandatory training before performing a role relating to the execution of a search warrant. The team executing the search warrant must include an Independent Observer, who is a police officer not connected with the investigation responsible for acting as an impartial observer and ensuring the propriety and integrity of the search.[110] Another mandatory role is that of the Safety Check Officer, who monitors and guides safe work practices for the search warrant team.[111]

103. LEPRA, s. 47(1).
104. *Restricted Premises Act 1943*, s. 3(1).
105. The NSW Police Force uses the term 'uninvited entry and search' powers to refer to powers exercised under search warrants to search premises in addition to other powers to enter and search premises without the consent of the occupier, such as searches without a warrant under section 10 of the *Restricted Premises Act 1943*.
106. NSW Police Force, *Standard Operating Procedures for the Execution of Search Warrants, Version 1.4*, 2014.
107. NSW Police Force, *Standard Operating Procedures for the Execution of Search Warrants, Version 1.4*, 2014.
108. This Committee is responsible for reviewing the execution of search warrants and uninvited entry operations which meet certain criteria and reviewing the contents of the Search Warrant Toolkit: see NSW Police Force, *Standard Operating Procedures for the Execution of Search Warrants, Version 1.4*, 2014.
109. NSW Police Force, *Standard Operating Procedures for the Execution of Search Warrants, Version 1.4*, 2014.
110. NSW Police Force, *Standard Operating Procedures for the Execution of Search Warrants, Version 1.4*, 2014.
111. NSW Police Force, *Standard Operating Procedures for the Execution of Search Warrants, Version 1.4*, 2014.

Police are required under the Search Warrant SOPs to provide an occupier's notice to the person occupying the premises[112] to describe the search warrant and to outline the rights and obligations of police and the occupants.[113]

A key focus of NSW Police Force policies, procedures and training about the execution of search warrants is the health and safety of police involved, as set out in the introduction to the Search Warrant SOPs:

> A search warrant is a type of warrant that allows police officers to search a specified place for evidence. A search warrant must be carefully planned and executed according to its specified terms and in accordance with NSW work health and safety legislation. The legislation requires the NSW Police Force to ensure, so far as is 'reasonably practicable', the health and safety of the police officers involved and also requires that others are not put at risk by the execution of the warrant.[114]

The Search Warrant SOPS are informed by obligations under the *Work Health and Safety Act 2011* which impose a duty of care on the Commissioner of Police, commanders and supervisors in relation to the workplace safety of NSW Police Force employees. These obligations extend to the safety of employees involved in the execution of a search warrant, including a section 13 search warrant, or an authorised search without a warrant, including the conduct of searches under section 10. Police commanders have an obligation to eliminate risks to health and safety in the workplace, so far as is reasonably practicable, and, if it is not, to minimise those risks so far as is reasonably practicable.[115]

NSW Police Force procedures relating to search warrants include arrangements to ensure effective decision making, compliance and continuous improvement. A Search Warrant Executive Committee, chaired by the Commander, Counter Terrorism Command, and including senior commanders representing specialist and local area commands, is responsible for the oversight, review and monitoring of search warrant operations across the NSW Police Force. The Committee reviews a range of warrant operations including those involving forced entry, non-compliance with mandatory requirements in the Search Warrant SOPs, where a serious injury is sustained by police personnel or others, and where firearms and/or prohibited weapons are unexpectedly discovered during the search.

The Search Warrant SOPs contain detailed mandatory procedures about the roles and responsibilities of police involved in the pre-execution, execution and post-execution stages of a search.

The pre-execution phase involves the planning, preparation and authorisation of a search warrant operation, and requires the completion of a comprehensive risk assessment that includes the identification and treatment of risks relating to the proposed search, including risks relating to the safety of police and the public. The risk assessment is informed by a detailed background analysis of police intelligence and information holdings relating to the premises and people who may be present during the search. The treatment of risks requires the consideration of the availability of resources suitable for the operation, including the need for specialist tactical resources to assist in the conduct of the operation, and especially in gaining entry to the premises and to make them secure.

The outcome of a risk assessment is a 'residual risk rating' for the proposed operation that takes into account the treatment options proposed to minimise the identified risks.

A search warrant proposal must be checked by the case officer's supervisor, recommended by an officer at a rank of Inspector or above, and is then subject to authorisation by the local area or region commander.[116] The local area commander must determine whether it is acceptable for the operation to be approved and undertaken.

112. NSW Police Force, *Standard Operating Procedures for the Execution of Search Warrants, Version 1.4*, 2014.
113. NSW Police Force, *Standard Operating Procedures for the Execution of Search Warrants, Version 1.4*, 2014.
114. NSW Police Force, *Standard Operating Procedures for the Execution of Search Warrants, Version 1.4*, 2014, p. 3.
115. *Work Health and Safety Act 2011*, s. 17.
116. NSW Police Force, *Standard Operating Procedures for the Execution of Search Warrants, Version 1.4*, 2014, p. 5.

A related mandatory step in the pre-execution phase is the preparation and authorisation of operational orders which set out a detailed plan for the execution of the search warrant. The operational orders set out the mission objective of the operation, background information about the premises, the identity of any people who may be present during the search, and the key issues arising from the risk assessment. They also include information about the command structure for the operation, including the roles to be performed by individual teams and officers, administration and logistics, and specific responsibilities for safety and any medical contingencies that may arise.[117]

Following the authorisation of operational orders by the local area commander, and before the operation is commenced, the police must be briefed to ensure that they understand not only their individual roles and responsibilities, but also the major risks identified in the risk assessment, and the treatment options that will be applied to control those risks.[118]

117. NSW Police Force, *Standard Operating Procedures for the Execution of Search Warrants, Version 1.4*, 2014, pp. 6-7; NSW Police Force, *Guide to the Search Warrant Operational Orders Template*, October 2015, p. 1.
118. NSW Police Force, *Standard Operating Procedures for the Execution of Search Warrants*, Version 1.4, 2014, pp. 10-11.

Chapter 4. Police use of the additional search powers

This chapter provides an overview of the police use of the additional search powers and operation of the new offence provisions during the review period.

4.1 Police applications for 'reputed criminal declarations'

During the review period, the NSW Police Force applied for only one declaration, over the national clubhouse of the Rebels OMCG in Leppington. This property is owned by the national president of the Rebels,[119] which is considered one of Australia's most serious criminal threats.[120]

Officers from Strike Force Raptor advised us that, in making this application, they were relying in the application mainly upon evidence about reputed criminals attending the premises, and therefore expected that any declaration made would be a reputed criminal declaration.[121]

The application was resolved by negotiation between the parties, without a declaration being made, 21 months after the application was made.[122] The owner agreed to lease the property to a business, which would end its use as a clubhouse and stop the proscribed activities taking place there.

4.2 New offence provisions

The new offence provisions are triggered by the making of a reputed criminal declaration. Since no reputed criminal declaration has been made, the new offence provisions were not used by police during the review period.

4.3 Additional section 10 search powers

One declaration which commenced prior to the review period, over the Astoria Hotel in Kings Cross, remained in force until September 2014. Accordingly, police could have exercised the section 10 search powers at the Astoria Hotel to find weapons and explosives. However, the NSW Police Force advised that the additional powers to search for weapons and explosives were not used during the review period.

4.4 Additional section 13 search powers

Police executed seven section 13 search warrants authorising them to search for weapons and explosives, as well as drugs and alcohol, during the review period. These warrants were issued by Local Court registrars.

4.4.1. On what grounds did police apply for search warrants?

All of the applications stated that the premises were suspected of being used as an OMCG clubhouse. The primary grounds on which the warrants were sought were:

- the unlawful sale or supply of alcohol, and
- reputed criminals attending, controlling or managing the premises.

Unlawful drug supply was not commonly referred to in the warrant applications.

119. Consultation with Strike Force Raptor, 30 September 2014; Consultation with Strike Force Raptor, 16 October 2014.
120. Australian Crime Commission, *Attero National Task Force*, https://www.crimecommission.gov.au/organised-crime/joint-task-forces-and-initiatives/attero-national-task-force, viewed 21 January 2015.
121. Consultation with Strike Force Raptor, 30 September 2014.
122. File note, Observation of court proceedings, *NSW Commissioner of Police v Vella* (directions listing), NSW Supreme Court, Justice Adamson, 29 February 2016.

In five of the seven applications police noted that the development or use of the property appeared to be contrary to the approved development application or zoning requirements.[123]

4.4.2. Premises that were searched

During the review period the additional section 13 search powers were used exclusively to target suspected OMCG clubhouses.[124] All of the seven premises were commercial or industrial premises, except for one property which was a converted residential unit.[125] The searches were conducted at the following suspected clubhouses and on the following dates.

Table 1: Section 13 search warrants authorising searches for weapons and explosives executed between 1 November 2013 and 31 October 2015

Location	OMCG	Date
Girraween	Nomads	6 December 2013
Boolaroo	Life & Death	13 February 2014
Newcastle	Rebels	20 February 2014
Woy Woy	Rebels	11 April 2014
Leppington	Rebels – national clubhouse	15 April 2014
Warwick Farm	Rebels	9 May 2014
Burwood	Rebels	9 May 2014

All seven premises had been set up like a bar, with tables and chairs, lounges, a bar service area and bar stools. Six of them had a stage and two of them had stripper poles. Five had the OMCG's posters and slogans on the walls.

In one of the premises there was also a separate area upstairs with bedding, indicating that someone may have been living there.[126]

The converted residential unit had separate bathrooms for men and women, a commercial music system and a modified wall which may have been used for noise insulation. There were no beds, clothing or other items on the premises to indicate the unit was being used as a residence.

4.4.3. Who conducted the searches?

Police of any rank and from any police unit can conduct section 13 searches. During the review period, the additional section 13 powers were exercised in joint operations between Strike Force Raptor and Local Area Commands (LACs), with the assistance of other police units. Strike Force Raptor, a unit within the Gangs Squad, conducts operations to disrupt the criminal activities of OMCGs and prevent violence between them.

Strike Force Raptor was primarily responsible for applying for, planning and executing six of the seven warrants. These six searches were conducted by a team including officers from the LAC in which the premises were located, with the support of specialist units such as the Public Order and Riot Squad, the Rescue and Bomb Disposal Unit and the Dog Unit.

The seventh warrant was issued to an officer of the LAC and then executed by officers of that command, with the support of Strike Force Raptor and the Rescue and Bomb Disposal Unit.[127]

123. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.
124. Consultation with Strike Force Raptor, 30 September 2014.
125. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.
126. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.
127. Consultation with Burwood LAC, 4 December 2014.

4.4.4. What items were found and seized?

Police found substantial quantities of alcohol during all seven searches. Small quantities of prohibited drugs (amphetamines and cannabis) were located in three of the searches.

Firearms and ammunition were found during one of the searches.[128] At this premises, police seized an air rifle, a pistol, a sawn-off shotgun and 52 rounds of ammunition. During that search, police also seized a ledger relating to the manufacture of explosives, a rifle scope and a speed loader for .38 firearm cartridges.

Explosives (a quantity of Powergel (C4)) were found during one search.[129]

In four of the searches, police also located and seized a number of knives and swords,[130] and in one case a set of knuckledusters.[131]

Police seized all of these items. In addition, during six of the searches, they seized almost the entire contents of each premises, including:

- cash and bar tickets
- fridges, electrical appliances and bar stools
- bikie gang clothing and memorabilia
- sound and lighting systems
- entertainment units
- furniture, such as couches, chairs and tables
- a laptop, USBs, ledgers, letters and other documents
- tattoo equipment, and
- bedding.

Based on our observation of video footage of the searches, police also seized fixtures, leaving the premises practically empty. They used equipment to dismantle bars, pull up stages, and dislodge and remove stripper poles. They also took posters down from the walls and removed OMCG memorabilia.

In relation to the search of the national clubhouse of the Rebels at Leppington, police did not seize the entire contents. They seized alcohol, cash and bar tickets, bar signs, documentation and small amounts of cannabis.[132] However, as discussed above, police applied for a declaration over the premises and continued to monitor the way it was being used.

4.4.5. Applications for return of seized items

No applications for the return of seized items were made under section 13A(2).

4.4.6. Charges laid as a result of the searches

Charges were laid as a result of five of the searches. All but one charge led to a conviction. The types of charges laid included:

- selling alcohol without a licence
- offences under environmental planning laws governing how premises in particular areas can be fitted out and used, and
- firearms-related offences.

128. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.
129. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.
130. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.
131. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.
132. This search was part of a four-day operation targeting properties associated with the Rebels throughout greater Sydney. Over the course of the four days, police seized 18 guns, 445 rounds of ammunition and two weapons, in addition to the items seized from the clubhouse.

In one case, arising from the search of the Woy Woy premises, the charge was subsequently withdrawn after the Magistrate determined that evidence obtained during the search should be excluded due to the use of excessive force by police against one of the people present during the search.[133] The adverse comment made by the Magistrate regarding the excessive force used by police is the subject of an internal police complaint investigation. At the time of writing this investigation had not been finalised.

In another case, a man was charged with offences of assaulting and resisting police during the search of the Leppington clubhouse.

Table 2 sets out more specific details of the charges laid, and the outcomes of those charges.

Table 2: Outcomes of charges

Location	Unique person	Nature of charge(s)	Outcome of charge
Girraween	A	Carrying out a development without development consent.[134]	Convicted and fined $5,000.
Boolaroo	B	Three charges: • unauthorised possession of a firearm • unregistered possession of a prohibited firearm • not keeping a firearm safely.[135]	Convicted and fined an amount totalling $550.
Woy Woy	C	Carrying out a development without development consent.[136]	Charge withdrawn during court proceedings.
Warwick Farm	D	Three charges: • selling liquor without a licence using premises to sell liquor without a licence • refusing or failing to comply with a requirement under Part 4 of the *Gaming and Liquor Administration Act 2007*.[137]	Convicted and fined an amount totalling $15,000.
Leppington	E	Possessing a prohibited drug.[138]	Convicted and fined $1,000.
	F	Possessing a prohibited drug.[139]	Convicted and fined $500.
	G	Three charges: • resisting an officer in the execution of his or her duty • two counts of assaulting an officer in the execution of his or her duty.[140]	Convicted and received a suspended sentence of 12 months' imprisonment.
	H	11 counts relating to: • possessing and supplying prohibited drugs • having stolen goods in custody • dealing with the proceeds of crime.[141]	Convicted and received a sentence of 16 months' imprisonment with a four month non-parole period for the following charges: • supplying prohibited drugs on an ongoing basis • possessing a prohibited drug • having stolen goods in custody Found not guilty of knowingly dealing with the proceeds of crime. The remaining charges were withdrawn.

133. The Magistrate excluded the evidence under section 38 of the *Evidence Act 1995*.
134. *Environmental Planning and Assessment Act 1979*, ss. 76A(1)(a), 125(1).
135. *Firearms Act 1996*, ss. 7A(1), 36(1), 39(1)(a).
136. *Environmental Planning and Assessment Act 1979*, ss. 76A(1)(a), 125(1).
137. *Liquor Act 2007*, ss. 7(1) and 8(1)(a); *Gaming and Liquor Administration Act 2007*, s. 34(1).
138. *Drug Misuse and Trafficking Act 1985*, s. 10(1).
139. *Drug Misuse and Trafficking Act 1985*, s. 10(1).
140. *Crimes Act 1900*, s. 58.
141. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

4.5 Impact of the searches conducted under the additional section 13 powers

The seven searches involving the use of section 13 were conducted for much the same purpose as the searches conducted by Strike Force Raptor prior to the 2013 amendments – to disrupt the activities of OMCGs and close down suspected OMCG clubhouses.

As discussed further below, police seized almost the entire contents of the premises during each search, including disassembling and removing bars and stages.

Police officers with whom we consulted observed that six of the seven searches had been effective in shutting down the suspected clubhouse, because the OMCG members and their associates stopped using the premises and had not to their knowledge returned.[142]

The parliamentary debates about the Firearms and Criminal Groups Legislation Amendment Bill 2013 suggest that Parliament contemplated that the declaration itself would be the mechanism that police would use to close down clubhouses.[143] Instead, six suspected clubhouses were closed down as a result of the use of the additional section 13 search powers, without the need for a declaration. Police applied for only one declaration during the review period following the execution of a section 13 search warrant.

During the review period, police continued to execute a number of section 13 search warrants authorising them to search only for drugs, alcohol and related devices at suspected bikie clubhouses during the review period, also resulting in the premises closing down.[144] As discussed in chapter 1, the NSW Police Force was not prepared to provide us with information about these particular searches.

Although numerous bikie clubhouses exist throughout NSW, police have not searched all of them using the new section 13 powers. Officers from Strike Force Raptor advised us that they use a strategic and intelligence-led approach in selecting clubhouses to target using the section 13 search powers.[145] The Strike Force uses an approach it calls 'consequence-based policing', meaning that it develops strategies to respond to any detected increase in violence or overt criminal activity by a particular OMCG, rather than targeting OMCGs generally:[146]

> That is, if they participate in violent criminal activity then targeting them and their associates will become a priority for us.[147]

4.5.1. Use of other legislative tools while conducting section 13 searches

The strategies police employ to disrupt OMCG activities vary, depending upon the gang, the chapter, gang members, and the associated problems.[148] This may involve using a number of legislative tools in tandem.[149]

Strike Force Raptor officers we consulted told us that the additional section 13 search powers provided them with an opportunity to investigate certain offences suspected of being committed at clubhouses, in addition to the proscribed activities.[150] In particular, they investigated possible breach

142. Consultation with Strike Force Raptor, 30 September 2014; Consultation with Strike Force Raptor, 16 October 2014; Consultation with Lake Macquarie LAC and Brisbane Water LAC, 26 November 2014; Consultation with Burwood LAC, 4 December 2014; Consultation with Tweed Byron LAC, 1 October 2015; Consultation with Fairfield LAC, 9 October 2015.
143. The Hon. Barry O'Farrell MP, New South Wales Parliamentary Debates, (NSWPD), (Hansard), Legislative Assembly, 17 September 2013, p. 23564.
144. For example, QLD Police Service, *Major interstate police crackdown on bikies – Tweed-Byron LAC*, media release, 21 March 2014; NSW Police Force, *Rebels Liverpool clubhouse dismantled, bikies arrested and cannabis house shut down – SCC Gangs Squad*, media release, 9 May 2014; NSW Police Force, *Police dismantle OMCG clubhouse in Tweed Heads following search warrant – Strike Force Raptor*, media release, 23 November 2014.
145. Consultation with Strike Force Raptor, 30 September 2014; Consultation with Strike Force Raptor, 16 October 2014.
146. NSW Police Force, *SCC Gangs Squad dismantles Rebels Newcastle clubhouse*, media release, 20 February 2014; NSW Police Force, 'Caught for consorting', *Police Monthly*, March 2015, p. 5.
147. NSW Police Force, 'Raptor takes down one percenters', *Police Monthly*, May 2014, p. 8.
148. NSW Police Force, 'Raptor takes down one percenters', *Police Monthly*, May 2014, p. 8.
149. NSW Police Force, 'OMCGs feel the weight of the law', *Police Monthly*, February 2016, p. 4.
150. Consultation with Strike Force Raptor, 21 July 2015.

of liquor laws and use of the premises contrary to environmental planning laws.[151] In three cases, the officers executing the warrants told the occupants that they could be committing a criminal offence if they continued to use the premises in the same manner.[152]

The consorting provisions in the *Crimes Act 1900* have been used widely by the NSW Police Force since they were updated in 2012,[153] including significant use by the Gangs Squad to prevent members of OMCGs and other gangs from associating with each other.[154] Police issued 22 outstanding consorting warnings to a number of people present at the search of the suspected clubhouse in Girraween, in addition to a number of firearms prohibition orders.[155]

151. Police media has also reported that police have investigated breaches of the *Environmental Planning and Assessment Act 1979* at the same time as executing a section 13 search warrants: NSW Police Force, 'OMCGs feel the weight of the law', *Police Monthly*, February 2016, pp. 4-5.
152. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.
153. The consorting provisions in ss 93W-93Y of the *Crimes Act 1900* were updated by amendments made by the *Crimes Amendment (Consorting and Organised Crime) Act 2012*.
154. NSW Ombudsman, *The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900*, April 2016.
155. Firearms prohibition orders can be made by the Commissioner of Police under section 73 of the *Firearms Act 1996*. The Act contains a number of offences that may be committed by people who are subject to these orders, and since 2013 police have had powers to search such people and their homes and vehicles without a warrant: *Firearms Act 1996*, ss. 74-74A.

Chapter 5. Seizure of items under the Restricted Premises Act

As discussed in chapter 4, police exercised the additional section 13 search powers seven times during the review period. On each occasion, police seized almost the entire contents and 'dismantled' the premises,[156] which included disassembling and removing bars, stages and stripper poles. Six of the seven suspected clubhouses subsequently closed down.[157]

The items seized as a result of those seven searches included substantial quantities of alcohol, small quantities of prohibited drugs and some weapons and explosives. In addition to unlawful items, police seized furniture, pool tables, entertainment units, and sound and lighting equipment.

Analysis of police records associated with these seven searches indicated that no applications were made for the return of any of the items seized during these searches, and they were forfeited to the Crown and disposed of.

During other types of searches police do not normally strip the premises of almost all of their contents. The *NSW Police Force Handbook* explains that 'the actual seizure of an item is often unnecessary' and 'on most occasions, photographs of an exhibit will suffice as evidence' of an offence because 'you only need to keep the actual item where there is something special about it that would not be obvious from the photograph'.[158]

5.1 Items police can search for and seize under the Restricted Premises Act

The *Restricted Premises Act 1943* allows police to search for alcohol, drugs, weapons and explosives, and seize them.[159] Police also have the authority to search for and seize any 'drinking glass, vessel, container' or:

> device in such premises which is used or is capable of being used for or in connection with the storage, supply or consumption of any liquor or drug or the [use] ... or taking of any drug'.[160]

In this chapter we refer to this phrase as 'the device phrase'.

The word 'device' is not defined in the Restricted Premises Act.

5.2 Police interpretation of the search and seizure powers

Police records indicate that the items were seized under the authority of the Restricted Premises Act search warrant. Early in the review period we requested advice from police about their interpretation of their powers under that Act, as we were unclear its provisions authorised the seizure of a number of these items.

The NSW Police Force advised that 'all items were seized in good faith and in accordance with seized property policy' and that the items seized 'all contribute to enhance the ambience of the premises to support the sale and consumption of alcohol in the same way that legitimate commercial licensed premises undertake fitouts'.[161]

156. NSW Police Force, 'Raptor takes down one percenters', *Police Monthly*, May 2014, pp. 7-9.
157. Consultation with Strike Force Raptor, 2 April 2015.
158. NSW Police Force, *NSW Police Force Handbook*, 20 January 2015, p. 139.
159. Under sections 10(e) and (f), and 13(3)(b) of the *Restricted Premises Act 1943*.
160. *Restricted Premises Act 1943*, ss. 10(e) and 13(3)(b).
161. Correspondence from Nick Kaldas, Deputy Commissioner Field Operations, NSW Police Force, dated 18 February 2015.

Nevertheless, they also stated that amendments that clarified or made the definitions more inclusive would be 'beneficial to operational police'.[162]

Following the NSW Police Force response, we raised this matter in our issues paper. In its submission, the NSW Police Force wrote that 'the description of the items is deliberately broad to ensure the police have the power they need to disrupt the activities of criminal organisations'.[163] It also submitted that it 'considers there is an argument to explicitly include electronic records linked to the unlawful sale of alcohol and drugs among items available to be seized'.[164]

5.3 Meaning of the device phrase

In the absence of a definition in the Restricted Premises Act of the word 'device', or any suggestion of a legislative intention that the word should convey anything other than its ordinary meaning, we looked for dictionary definitions of the word 'device'. These describe a 'device' as:

- a thing made for a particular purpose; an invention or contrivance especially a mechanical or electrical one, and
- a machine or tool used for a specific task.[165]

Importantly, police are only empowered to seize a device of a kind that is 'used or is capable of being used for or in connection with the storage, supply or consumption of any liquor or drug'.

When interpreting a statutory provision, the context in which the provision appears, and the purpose and policy behind the legislation, are guiding factors.[166] Where a provision lists a number of things belonging to a particular category (drinking glasses, vessels and containers) and then includes a general term (device), courts generally restrict the meaning of the general term to things falling within the particular category.[167]

Using this legal rule of construction, and in light of the ordinary meaning of the term 'device', in our view the device phrase would extend to two categories of items:

- items used in connection with the storage, supply and consumption of alcohol, such as beer taps, refrigerators and bottle openers, and
- items used in connection with the storage, supply and consumption of drugs, such as syringes, pipes and bongs.

In our view, a number of the items seized by police, such as furniture, electrical appliances, sound and lighting systems, stages, pool tables, bedding, clothing, memorabilia, laptops and USBs, did not clearly fall within these categories.

5.4 The need for clarification

During our consultations with police, some officers told us that it would assist them if the legislation was amended to clarify exactly what items they could seize. These officers were of the view that it was currently unclear whether the terminology covered a lounge, for example.[168]

162. Correspondence from Nick Kaldas, Deputy Commissioner Field Operations, NSW Police Force, dated 18 February 2015.
163. NSW Police Force, *Submission to NSW Ombudsman Regarding Police Powers and Offence Provisions – Review of the Restricted Premises Act*, 12 October 2015, p. 1.
164. NSW Police Force, *Submission to NSW Ombudsman Regarding Police Powers and Offence Provisions – Review of the Restricted Premises Act*, 12 October 2015, p. 1.
165. Oxford Dictionaries (online), viewed 6 March 2016, http:/www.oxforddictionaries.com/definition/english/device.
166. *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69], [78].
167. This is the *ejusdem generis* principle: see *Cody v JH Nelson Pty Ltd* (1947) 74 CLR 629, 648-49; *Deputy Commission of Taxation v Clark* (2003) 57 NSWLR 113 at [125]-[30]; *Chief Commissioner of State Revenue v Tasty Chicks Pty Ltd* [2012] NSWCA 181 at [54].
168. Consultation with Tweed Byron LAC, 1 October 2015.

Some of the submissions by other organisations expressed the view that the device phrase required clarification.[169] Submissions expressed concern at the NSW Police Force's broad interpretation of the device phrase[170] because it resulted in police seizing objects which have no significant connection to, or are not intrinsically connected with, the unlawful sale or consumption of alcohol.[171] The Women in Prison Advocacy Network expressed the view that the Restricted Premises Act should be amended so that a more direct connection is required between the nature of the items seized and the 'storage, supply or consumption of any liquor or drug'.[172] The Brotherhood Christian Motorcycle Club stated:

> Clarification is most definitely needed on this point. A sensible and reasonable reading of the Act does not include dismantling and stripping out club houses – for example, furniture is not intrinsically connected with the supply or consumption of alcohol or drugs. As the police's wide interpretation has neither been sensible nor reasonable, a clear definition is required. (It is unclear why police have not extended their interpretation to take light fittings, ceilings, walls, doors. In fact, a natural extension of their logic would be to seize and take away the entire building).[173]

The Tenants' Union of NSW expressed concern that a broad application of the device phrase could pose serious potential issues for tenants:

> Statistics regarding consumption of alcohol and both licit and illicit drugs in Australia strongly suggest that 'consumption, storage or supply of alcohol or drugs' takes place in an overwhelming majority of ordinary residential premises. There is therefore no reason why any tenanted residential property could not be stripped of its contents in the course of a section 13 search. Such mass seizure would render the property uninhabitable in the short term.[174]

Although police have not to date used section 13 to search ordinary residential premises, the legislation does not prevent them from doing so in future. It is unclear whether the current broad approach by the NSW Police Force to the type of items that police can seize is within the scope of the powers under the Act. We consider that it is in the public interest that the NSW Police Force should exercise their search and seizure powers under the Restricted Premises Act within the law and in a reasonable manner.

Police told us during consultations[175] that if they locate certain items during a Restricted Premises Act search, they could potentially rely upon other statutory provisions[176] and the common law to seize certain items.[177] Police also have other powers to seize items connected to a serious indictable offence by declaring the premises a crime scene and applying for a crime scene warrant,[178] and could obtain a standard search warrant under the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) to seize items connected to a 'searchable offence'.[179]

---

169. Brotherhood Christian Motorcycle Club, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act,* 12 October 2015, p. 2; *Women in Prison Advocacy Network, Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act,* 16 October 2015, pp. 8-9.
170. Brotherhood Christian Motorcycle Club, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 12 October 2015, p. 2; Tenants' Union of NSW, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 30 September 2015, p. 4.
171. Women in Prison Advocacy Network, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act*, 16 October 2015, p. 8; Brotherhood Christian Motorcycle Club, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 12 October 2015, p. 2.
172. Women in Prison Advocacy Network, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act*, 16 October 2015, pp. 8-9.
173. Brotherhood Christian Motorcycle Club, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 12 October 2015, p. 2.
174. Tenants' Union of NSW, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 30 September 2015, pp. 4-5.
175. Consultation with Strike Force Raptor, 30 June 2016.
176. For example, section 26(2)(f) of the *Gaming and Liquor Administration Act 2007* provides that a police officer may seize anything connected with an offence if the premises is being used in contravention of the gaming and liquor legislation. Section 119F of the *Environmental Planning and Assessment Act 1979* provides police with the power to seize items connected with an offence under that Act.
177. For example, the common law principles of 'chance discovery' may be applicable to items connected to a serious offence which are incidentally discovered while conducting section 13 and section 10 searches – see *Ghani v Jones* [1970] 1 QB 693 at 708- 9, as cited in *Director of Public Prosecutions v Tamcelik* [2012] NSWSC 1008 at [67]-[68].
178. LEPRA, ss. 94(10), 95(1)(m).
179. LEPRA, ss. 47, 49. A searchable offence in relation to a warrant refers to an indictable offence, a firearms or prohibited weapons offence, a child abuse material offence, or an offence involving a stolen thing. A searchable offence also refers to a covert search warrant or a criminal organisations search warrant.

Given police have other seizure powers; it is important that they are clear about what powers they are using when they seize items found during a search. This is because the power they use determines the rights of the owner of a seized item (that was not possessed illegally) to have the item returned. Items seized under section 13 of the Restricted Premises Act will be forfeited automatically unless the owner applies for their return (whether or not they are possessed legally).[180] Items that were lawfully possessed by a person that are seized under other powers will generally be returned to the person unless there is a need to retain them for evidentiary purposes.[181]

In our view, there is evidence of a lack of clarity around the scope of the seizure powers under the Restricted Premises Act. We therefore recommend that the NSW Police Force obtains independent legal advice about the scope of those powers and, if necessary, revises its procedures, guidelines and training in relation to the exercise of those powers.

Recommendation

1. **The Commissioner of Police should obtain independent legal advice about the scope of the seizure powers under sections 10 and 13 of the *Restricted Premises Act 1943* and, if necessary, revise relevant procedures, guidelines and training that specify the items police are authorised to search for and seize when conducting searches under those provisions.**

180. *Restricted Premises Act 1943*, s. 13A.
181. NSW Police Force, *NSW Police Force Handbook*, 20 January 2015, p. 360.

Chapter 6. Safe, reasonable and effective conduct of searches

In this chapter we report on some of the actions taken by police in relation to people found on the premises when executing three of the seven warrants under the additional section 13 search powers. These actions included searching, detaining and photographing people on the premises. The police have described these measures as the 'processing' of those people. We discuss the reasons police engaged in these actions, and the legal basis for those actions. We also discuss the legality of the police practice of video-recording searches under the *Restricted Premises Act 1943*.

6.1 Managing risks associated with the execution of section 13 search warrants

As outlined in chapter 3, the police execution of search warrants is governed by a legislative and policy framework that includes provisions in the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) and procedures under the NSW Police Force *Standard Operating Procedures for the execution of Search Warrants* (Search Warrant SOPs).[182]

The Search Warrant SOPS are also informed by obligations under the *Work Health and Safety Act 2011*. This Act imposes a duty of care on the Commissioner of Police, commanders and supervisors in relation to the workplace safety of NSW Police Force employees. The duties imposed on commanders under the Work Health and Safety Act include an obligation to eliminate risks to health and safety in the workplace so far as is reasonably practicable.[183] This duty of care extends to the safety of police officers involved in the execution of search warrants, including the execution of search warrants under section 13 of the Restricted Premises Act and searches under section 10 of the Act.

The SOPS contain detailed procedures that police must follow during the pre-execution, execution and post-execution phases of searches. The first step during the pre-execution phase is the completion of a comprehensive risk assessment. The outcome of the risk assessment is a 'residual' risk rating for the proposed operation that takes into account the options proposed to minimise any identified risks. The proposed risk assessment must be reviewed and approved by the three senior officers including the local area commander and regional commander.[184]

A related mandatory step in the pre-execution phase is the preparation of operational orders which set out the specific objectives, contingencies and responsibilities for the search.[185] Following the authorisation of operational orders the search warrant participants are briefed about the major risks identified in the risk assessment and the treatment options that should be applied during the operation.[186]

6.2 Police 'processing' of people during the additional section 13 searches

The risk assessments prepared by police prior to the seven section 13 searches gave four of the searches a 'medium risk rating'[187] and the three other searches a 'low risk rating'.[188]

182. NSW Police Force, *Standard Operating Procedures for the Execution of Search Warrants,* Version 1.4, 2014.
183. *Work Health and Safety Act 2011*, s. 17.
184. NSW Police Force, *Standard Operating Procedures for the Execution of Search Warrants*, Version 1.4, 2014, p. 5. Our office was advised during a consultation with Strike Force Raptor on 30 June 2016 that recent changes have been made to this approval process. The proposed risk assessment must now be reviewed and approved by the unit commander after initial approval by the case officer's supervisor. Approval by the regional commander is now only sought in particularly high risk searches.
185. NSW Police Force, *Standard Operating Procedures for the Execution of Search Warrants*, Version 1.4, 2014, pp. 10-11.
186. NSW Police Force, *Standard Operating Procedures for the Execution of Search Warrants*, Version 1.4, 2014, pp. 10-11.
187. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.
188. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

The search operations were led by Strike Force Raptor, which has officers with specialist skills relevant to the investigation of OMCG activities. The risk assessments identified a support role for the Rescue and Bomb Disposal Unit at the seven searches. For two of the searches officers of the Public Order and Riot Squad who were trained in dealing with public order and high risk incidents, were also present.[189]

The operational orders for all but two of the seven premises[190] included instructions requiring police to take the following actions in relation to any OMCG members or other people found on the premises following police entry:

- search all people and vehicles
- obtain personal details of occupants, and
- photograph occupants.

Police referred to these actions as 'processing' the people.

However, these actions were only taken during the execution of three of the searches, at Leppington, Girraween and Woy Woy. There was no one present when police arrived to search the premises at Boolaroo and Warwick Farm.[191]

The COPS records, video footage of the searches, and consultations with police show that:

- there were approximately 65 people at the Rebels national clubhouse in Leppington, 22 at the suspected Nomads clubhouse in Girraween, and six at the suspected Rebels clubhouse in Woy Woy
- police detained every person, searched them, obtained their identification details, photographed them, and then asked or directed them to leave the premises, and
- police searched all vehicles on the premises.[192]

In total, police conducted approximately 88 person searches and 53 vehicle searches in conjunction with conducting these three searches, with the majority of these conducted at Leppington. See table 3.

Table 3: Number of person and vehicle searches conducted during execution of section 13 search warrants authorising searches for weapons and explosives between 1 November 2013 and 31 October 2015

Suspected clubhouse	Person search	Vehicle search
Leppington	62	39
Girraween	22	8
Woy Woy	6	6
Total	**90**	**53**

As a result of the person searches at Leppington, police seized a knife, a flick knife, a bottle of steroid tablets and a small amount of cannabis. They also seized two bags of methylamphetamine ('ice') found during one of the vehicle searches.

COPS records indicate that the person searches were purportedly conducted pursuant to section 21 of LEPRA.[193] According to police, the vehicle searches were conducted on the basis that police were lawfully on premises to execute a search warrant; they could also search vehicles on the premises.[194]

189. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.
190. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.
191. At both these premises, a person did arrive while police were conducting the search, but the person was not 'processed'.
192. Consultation with Strike Force Raptor, 30 September 2014; Consultation with Strike Force Raptor, 16 October 2014; Consultation with Strike Force Raptor, 2 April 2015.
193. Consultation with Strike Force Raptor, 30 May 2016.
194. Consultation with Strike Force Raptor, 2 April 2015.

We have set out below an overview of the 'processing' stage at the three searches based on COPS records, NSW Police Force media releases and our consultations with police and people affected by the search process. We were also able to view video footage of the 'processing' stage at the Leppington search, which extended well into the actual search of the premises. Police did not start filming searches at Girraween and Newcastle until after the processing stage had been completed and the premises had been cleared.

6.2.1. Search of the Rebels clubhouse at Leppington – 15 April 2014

Police made the following record about the execution of the section 13 search warrant at the national clubhouse of the Rebels OMCG at Leppington:

> Approximately 50 police in full Police Uniform entered the building through an open door. Police announced their presence and reason for being there continuously by yelling 'Police, Search Warrant' as they entered the building. Police located approximately 65 males inside the building, being members and associates of the Rebels Outlaw OMCG.[195]

The video-recording of the search commenced after police had already started 'processing' the occupants. The footage shows approximately 40 people lying on the ground close to each other, with their hands behind their head and their feet crossed and their shoes and socks next to them. Most people were in front of the bar, and three people were in the bar area. Police pulled them up, one by one, and took them away with their hands behind their heads, so that they could search them, obtain their identity details and photograph them. The footage shows that at least four people were still lying on the ground with their hands behind their head an hour and a half after the video-recording commenced.

A senior officer explained to the occupier that police would be using a drug dog to search the occupants and the premises. The dog was taken around the premises, running close to each occupant and making five indications on particular people.

The COPS records state all of the occupants were 'searched for any item that may harm police' on the basis that police suspected they might possess an item to be used in connection with an offence. A number of records relating to the person searches also indicate that police were particularly concerned about their safety on the basis that 'OMCG members are known to carry' drugs and weapons.

The search of one person indicated by the drug dog resulted in the discovery of some cannabis. In view of the small quantity involved, police did not prefer a charge against this person.[196]

Police served nine people with exclusion orders, banning them from attending a casino. They also issued 14 traffic infringement notices, 10 defect notices and one suspension notice.[197]

Police asked the occupants to 'leave the location' after their processing was completed.

6.2.2. Search of the suspected Nomads club at Girraween – 6 December 2013

Police executed a section 13 search warrant at the suspected Nomads clubhouse at Girraween at 8pm on a bikie 'church night', a monthly tradition when OMCG members meet to discuss club matters.[198] Approximately 22 people were at the suspected clubhouse. COPS records state:

> Entry was gained to the premises by Police from Strike Force Raptor. The premises was cleared and the Nomads members on site were searched and their details obtained. 22 outstanding consorting warnings were issued, along with a number of firearms prohibition orders. They were then given a move along from the location. During the entry police received nil resistance and the Nomads immediately submitted to Police directions.[199]

195. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.
196. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.
197. NSW Police Force, *Strike Force Raptor targets Rebels OMCG as part of Attero National Task Force*, media release, 19 April 2014.
198. Ben Pike, 'Strike Force Raptor gang squad police arrest 13 Nomad bikies, close down Wetherill Park clubhouse', *The Daily Telegraph* (online), 31 January 2015, viewed 31 January 2015.
199. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

The reason given by the police for searching everyone on the premises was that, recent intelligence reports suggested Nomads members were arming themselves due to increased conflict with another OMCG. The police suspected the occupants might possess weapons and use them against police.

Police found no items as a result of their person searches, including their searches of eight vehicles at the premises.

Police issued two people with firearms prohibition orders during the search.[200] (They may have had the power to search these two people under section 74A(2) of the *Firearms Act 1996*, notwithstanding the searches were purportedly conducted pursuant to LEPRA.)[201]

Police issued all occupants with consorting warnings, making it an offence for them to associate with other people present at the premises.[202] The occupants were 'asked to leave the location' after the process was completed.

6.2.3. Search of suspected Rebels clubhouse at Woy Woy – 11 April 2014

After entering the suspected Rebels clubhouse at Woy Woy at around 7.30pm, police announced their office, and said they were authorised to enter under search warrant powers and told the six occupants to 'get on the ground'.[203]

According to the COPS event, the occupants 'were detained, searched, their vehicles searched and [they were] moved on from the location'.[204] The reason given for searching the occupants was that the police suspected the occupants might possess weapons and use them against police.

Police found no items as a result of the person searches and vehicle searches. They issued three people with traffic infringement notices and vehicle defect notices before they left the premises.[205]

The COPS records state that six move on directions were purportedly issued pursuant to section 197(1)(a) and (c) of LEPRA, on the basis that the occupants were causing 'fear/alarm/obstruction'.

One of the occupants described their experience of processing as follows:

> They came in and took us out. They made us all lie on the ground.... Afterwards, they searched us. Then they took everyone to the front ... I've never been involved in anything like that before. It was pretty scary to me.[206]

6.3 Legal basis for 'processing' people present at the premises

Detaining, searching and identifying people found on premises during a section 13 search, and giving them directions to leave, may assist police to exercise their powers safely and to conduct investigations.

The Restricted Premises Act does not include provisions allowing police to take these actions. In addition, there is a question as to whether the Act allows police to search vehicles on the premises. Accordingly, there was an issue regarding the legal basis for some of the steps taken by police during the processing stage.

200. A firearms prohibition order made by the Commissioner of Police takes effect when it is personally served on the recipient by police officers: *Firearms Act 1996*, s. 73.
201. Police are empowered to conduct a person search of a person who is subject to a firearms prohibition order: *Firearms Act 1996*, s. 74A(2).
202. *Crimes Act 1900*, s. 93X.
203. File note, Observation of court proceedings, *R v Symons*, Gosford Local Court, Magistrate Lee, 15-16 April 2016.
204. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.
205. NSW Police Force, *OMCG clubhouse closed following search warrant – Strike Force Raptor*, media release, 12 April 2014.
206. Consultation with affected occupant, 9 September 2015.

We asked the NSW Police Force to provide us with its views on this issue. In response, the NSW Police advised us as follows:

> The NSW Police Force considers it derived its authority to process the subjects of the seven section 13 Restricted Premises Act searches under various Acts, including under section 26 and section 31 of the *Gaming and Liquor Administration Act 2007*, given the clubhouses were being used in contravention of liquor and gaming legislation.
>
> The NSW Police Force intends to remind its officers of this and other empowering legislation, such as the *Environmental Planning and Assessment Act 1979* (particularly section 119D and section 119F) and the *Law Enforcement (Powers and Responsibilities) Act 2002* (particularly section 70) that can be called upon to maintain pressure on organised crime while maintaining a safe work environment.[207]

When we consulted police involved in executing the search warrants about the legal basis for undertaking person searches, some officers told us they were exercising their powers under section 21 of LEPRA, which allows police to search people where they form a reasonable suspicion that the person is carrying certain items, such as an illegal firearm, or an item intended to be used to commit an offence.[208]

Strike Force Raptor officers told us the 'processing' of occupants on the premises was critical to ensure a safe working environment for police and the safety of other people present.[209] They considered the 'processing' stage was necessary in order to manage the large numbers of people present at some of the searches, who were suspected OMCG gang members or associates and who were 'potentially violent' and 'potentially armed', in a confined space.[210]

Against this background, we sought legal advice from the Crown Solicitor on whether the legislative provisions could provide a firm legal basis to authorise 'processing' activities. This advice was sought in general terms and not in relation to any particular police operations. It was also agreed that the Crown Solicitor would provide a draft advice to both our office and the NSW Police Force for comment, in accordance with the Crown Solicitor's usual practice.

In commenting on the Crown Solicitor's draft advice,[211] the NSW Police Force suggested that section 230 of LEPRA, the 'objects' in section 6 of the *Police Act 1990*, workplace safety obligations under the Work Health and Safety Act, and an appropriate construction of search warrant powers, provided an adequate legal basis for police to detain people at the premises and direct them to leave the premises.[212]

In providing its final advice, the Crown Solicitor advised us that the police powers to search premises under the Restricted Premises Act carry an implied power to search vehicles found at the premises.[213]

The Crown Solicitor also advised us that the statutory provisions in legislation apart from the Restricted Premises Act, such as the *Gaming and Liquor Administration Act 2007* and the *Environmental Planning and Protection Act 1979*, would allow police to obtain details about a person's identity,[214] and take photographs at the premises,[215] in some circumstances.

However, the Crown Solicitor advised us that police may not have a firm legal basis, of general application when conducting searches under the Restricted Premises Act to:

- detain people
- search people
- require people to be photographed, and
- direct them to leave the premises.

207. Correspondence from Commissioner of Police to Deputy Ombudsman, dated 14 October 2015, pp. 1-2.
208. Consultation with Strike Force Raptor, 30 September 2014; Consultation with Strike Force Raptor, 16 October 2014.
209. Consultation with Strike Force Raptor, 2 April 2015.
210. Consultation with Strike Force Raptor, 2 April 2015.
211. NSW Crown Solicitor, Advice, *Police powers during a search under s. 13 of the Restricted Premises Act*, dated 14 December 2015.
212. NSW Police Force Office of the General Counsel, *NSWPF's observations in relation to the CSO's draft advice (210503576)*, dated 2 March 2016.
213. NSW Crown Solicitor, Advice, *Police powers during a search under s.13 Restricted Premises Act*, dated 8 April 2016, pp. 8-11.
214. NSW Crown Solicitor, Advice, *Police powers during a search under s.13 Restricted Premises Act*, dated 8 April 2016, pp. 29-30, 34.
215. NSW Crown Solicitor, Advice, *Police powers during a search under s.13 Restricted Premises Act*, dated 8 April 2016, pp. 28-29, 33.

In further correspondence from the NSW Police Force they said:

> To the extent that the Crown Solicitor's advice is that the powers cited by the NSW Police Force are not powers of general application in the execution of section 13 search warrants, the NSW Police Force agrees that they are not powers of general application.
>
> The NSW Police Force holds the view that the powers cited must always be exercised reasonably and proportionately, having objective regard to the circumstances in which they are exercised.[216]

6.4 Facilitating the safe exercise of the section 13 search powers

Conducting searches at suspected OMCG clubhouses may involve police in high risk operations. For example, police said that at the Leppington search they were confronted with a potentially dangerous situation due to a large number of people on the premises.

The effective use of the police powers under the Restricted Premises Act allowing police to search premises for weapons and explosives may be frustrated if there is not a clear legal basis for police to take appropriate steps to minimise unacceptable risks of harm to both police officers and people on the premises. In our view there is a need for legislative amendment to ensure that police have the appropriate powers to ensure their safety when searching premises under the Restricted Premises Act.

At the same time, it is important to recognise that the potential use of the search powers is not limited to premises such as suspected OMCG clubhouses and premises on which weapons or explosives may be found. In our view, any legislative amendment should include adequate safeguards to ensure the police 'processing' of people on premises is limited to situations where there is a significant risk to safety. In recommending an extension of the powers of police to facilitate high risk searches we expect that the Minister and Parliament will carefully consider public concerns about the impact of any amendments on common law rights and the need for adequate safeguards to ensure police use these powers reasonably.

It should be emphasised that police already have some powers to respond to a threat of harm during a section 13 search. Section 11 of the Restricted Premises Act makes it an offence for a person to obstruct police, or aid in obstructing police in the exercise of any power conferred by the Act. Similarly, LEPRA allows police to arrest a person where they reasonably suspect a person is committing an offence, and to protect the safety or welfare of any person.[217]

The steps police take to manage the search process should be reasonable and proportionate to the circumstances at the particular premises. In our view, this balance could be achieved by including a power in the Restricted Premises Act that allows police to issue reasonable directions to manage the search process and making it an offence to disobey a reasonable direction. The exercise of a 'directions' power should allow police to use reasonable force, as permitted by section 230 of LEPRA, and at the same time be subject to the safeguards provided for under section 201 of LEPRA.

Recommendations

2. **The Attorney General propose, for the consideration of the Parliament, an amendment to the *Restricted Premises Act 1943* to provide police with a power to give any person on the premises during a search under a section 13 search warrant a direction that is reasonable in the circumstances to minimise a risk to the safety of any person on the premises.**
3. **The Attorney General propose, for the consideration of the Parliament, an amendment to the *Restricted Premises Act 1943* to make it an offence to fail to comply with a reasonable direction given under the Act without a reasonable excuse.**

216. Correspondence from Commissioner of Police to Acting Ombudsman, dated 14 September 2016.
217. LEPRA, s. 99(1).

6.5 Police powers to search people found on the premises

As discussed above, the Restricted Premises Act does not include a provision specifically allowing police to 'process' people found on the premises. Similarly, the Act does not include a provision specifically allowing police to search people on the premises.

A number of police officers suggested there should be such a power.[218] They used the example of the power in section 50 of LEPRA, which allows police, when executing a LEPRA search warrant, to search a person found on the premises where they reasonably suspect the person has 'a thing mentioned in the warrant'.[219]

The NSW Police Force advised that if sections 21(1) and 36(1) of LEPRA do not permit police to search people and vehicles during a search, such powers should be available:

> [T]his can best be achieved by amending the search powers under LEPRA to expressly apply to all search warrants in all Acts. The amendment should provide that the power to search premises includes the power to search any person or vehicle on the premises.
>
> The threshold should be that the person or vehicle is found on the premises. There is no policy reason that there should be a different threshold to people or vehicles found upon the premises.
>
> The current test in s 50 relating to the search of persons on the premises is too restrictive as it requires a further layer of suspicion about the particular person. The presence of a person or a vehicle on the premises is unable to be determined at the point when the application is made for the search warrant. Depending on the nature of the item listed in the warrant, it may be just as likely to be found in the possession of a person, or located in a vehicle, as in any other part of the premises.
>
> The authorised justice must be satisfied of the threshold conditions to justify the issuing of a warrant to search anything in the premises. LEPRA should explicitly state the search power in all Acts applies to a person or a vehicle in those premises.[220]

As noted above, the Crown Solicitor had advised that the powers to search premises under the Restricted Premises Act carry an implied power to search vehicles found on the premises. [221]

However, in relation to the question of the powers of police under the Restricted Premises Act to search people on the premises, the Crown Solicitor has provided the following advice:

> [In] my view, there is not a firm legal basis, of general application, for police who have entered premises pursuant to section 10 of the *RP Act*, or pursuant to a search warrant granted under section 13, to remain on the premises for the purpose of exercising general powers under section 21 of LEPRA to stop, search and detain a person.
>
> That said it seems plain that powers under section 21 are not limited to exercise in a public place, since section 21(1)(c) identifies items that may justify a search if a person is suspected to have possession or control of them in a public place, since section 21(1)(c) identifies items that may justify a search if a person is suspected to have possession or control of them in a public place. This suggests that the section contemplates that powers in respect of items referred to in other paragraphs may be exercised on private premises.
>
> In any case, I point out that powers under section 21 are limited to circumstances where the police officer suspects, on reasonable grounds, that the person has possession or control of items referred to in the section, being:
>
> (a) anything stolen or otherwise unlawfully obtained,
>
> (b) anything used or intended to be used in or in connection with the commission of a relevant offence,
>
> (c) in a public place, a dangerous article that is being used in or in connection with the commission of a relevant offence,

218. Consultation with Strike Force Raptor, 30 September 2014; Consultation with Strike Force Raptor, 16 October 2014; Consultation with Burwood LAC, 4 December 2014.
219. LEPRA, s. 50.
220. NSW Police Force, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act*, 12 October 2015, pp. 2-3.
221. NSW Crown Solicitor, Advice, *Police powers during a search under s.13 Restricted Premises Act*, dated 8 April 2016, pp. 8-11.

(d) a prohibited plant or a prohibited drug, in contravention of the *Drug Misuse and Trafficking Act 1985*.[222]

In light of the Crown Solicitor's advice, we are of the view the Restricted Premises Act may not provide a firm legal basis for police to search people when conducting a search of premises under this Act. We also recognise that this may well pose practical problems for the police, for example, a person on the premises might hide drugs or a firearm on their person in an attempt to prevent police from finding the item.

In our view, police should have adequate powers to support the effective conduct of searches under the Restricted Premises Act to search for evidence of proscribed activities and prohibited items. We consider this could best be achieved by providing police with the same powers to search people as those available to police when executing a general search warrant under Part 5 of LEPRA.

As noted above, the NSW Police Force has suggested the threshold for a person search under section 50 of LEPRA – that police 'reasonably suspect' a person has 'a thing mentioned in the search warrant' – should generally be removed when police search premises pursuant to a search warrant. We do not propose to comment on the merits or otherwise of this suggestion, because this broader issue is not within the scope of our review.

Recommendation

4. **The Attorney General propose, for the consideration of the Parliament, an amendment to the *Restricted Premises Act 1943* that empowers police to search any person found in or on the premises whom police reasonably suspect of having a thing mentioned in a section 13 search warrant.**

6.6 Obtaining information about a person's identity

As discussed earlier, part of the 'processing' of the occupants of the three suspected OMCG clubhouses involved obtaining information about the occupants and photographing them. Police advised us that the photographs were taken for investigative purposes.

During consultations with Strike Force Raptor, police suggested that they should be able to demand the names and addresses of people on the premises when exercising the section 13 search powers.[223] This information could be used by police when applying for a declaration under section 3 on the grounds that reputed criminals attend, control or manage the premises.

The Restricted Premises Act does not contain a provision allowing police to demand information about a person's identity or take their photograph when searching premises. However, police may have powers under other legislation to do this in some circumstances. According to the Crown Solicitor, police have limited powers to demand identity details and take photographs of occupants under the Environmental Planning and Assessment Act and the Gaming and Liquor Administration Act when conducting premises searches under the Restricted Premises Act. These powers can be exercised where police suspect that the premises are being used for the unlawful supply of alcohol or in contravention of environmental planning laws. However, the powers do not extend to the photographing of occupants as a matter of routine

The Restricted Premises Act is intended to prevent reputed criminals from attending, controlling and managing premises. One way in which police could determine whether people on premises being searched under the Act are, in fact, reputed criminals, would be to obtain information from those people about their identity. Police could also take photographs of these people to compare their faces to other photographs in police holdings.

222. NSW Crown Solicitor, Advice, *Police powers during a search under s.13 Restricted Premises Act*, dated 8 April 2016, p. 13.
223. Consultation with Strike Force Raptor, 30 September 2014; Consultation with Strike Force Raptor, 16 October 2014.

In our issues paper we discussed whether police should be given the power to require a person present at premises searched under the Restricted Premises Act to provide information about their identity.

The NSW Police Force submitted such a change would be beneficial because 'it would promote the objects of the Act by assisting with the identification of reputed criminals' and also suggested that such a power 'should be accompanied by a penalty for a failure to disclose [the person's] correct identity'.[224] The Women in Prison Advocacy Network also supported such an amendment.[225] However, the Brotherhood Christian Motorcycle Club expressed the view that 'there is no justification for extending police powers to demand identity in these situations'.[226]

The powers under the Environmental Planning and Assessment Act and the Gaming and Liquor Administration Act may permit police conducting searches under the Restricted Premises Act to require individuals to provide their identity details. However, these powers do not cover all situations. For example, where police are searching the premises solely on the basis that 'reputed criminals' have attended the premises, these powers are unlikely to be of assistance.

In our view, the ability of the NSW Police Force to require identity details would improve the effectiveness of the scheme under the Restricted Premises Act by facilitating police applications for reputed criminal declarations. It also supports the objectives of Parliament, when introducing the 2013 amendments, to assist police to target premises used by 'serious criminals'.[227]

Recommendation

5. The Attorney General propose, for the consideration of Parliament, amendments to the *Restricted Premises Act 1943* to:

- **enable a police officer to require a person present during a section 13 search to state his or her full name and residential address,**
- **make it an offence for a person to fail to comply with such a requirement, without reasonable excuse, and**
- **make it an offence for a person to give a name or address that is false, without reasonable excuse.**

6.7 Video-recording under the Restricted Premises Act

During the review period, police video-recorded the execution of all seven search warrants.

It is an offence under the *Surveillance Devices Act 2007* for any person to use a video camera[228] on premises where the use involves entry onto the premises without the consent of the owner or occupier.[229] However, there is an exception to this provision which allows police to lawfully video-record searches of premises when executing a LEPRA search warrant or crime scene warrant.[230] This exception does not extend to searches under the Restricted Premises Act.

224. NSW Police Force, Submission, *Review of the Restricted Premises Act: Police powers and offence provisions*, 12 October 2015, p. 3.
225. Women in Prison Advocacy Network, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act*, 16 October 2015, p. 10.
226. Brotherhood Christian Motorcycle Club, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 12 October 2015, p. 3.
227. The Hon. Barry O'Farrell MP, New South Wales Parliamentary Debates, (NSWPD), (Hansard), Legislative Assembly, 17 September 2013, p. 23564.
228. A video camera falls within the definition of an 'optical surveillance device' under the Act because it is a 'device capable of being used to record visually or observe an activity, but does not include spectacles, contact lenses or a similar device used by a person with impaired sight to overcome that impairment': *Surveillance Devices Act 2007*, s. 4(1).
229. *Surveillance Devices Act 2007*, s. 8(1)(a).
230. *Surveillance Devices Act 2007*, s. 8(2)(d). Only particular kinds of search warrant are covered by this exception: see *Surveillance Devices Act 2007*, s. 8(3).

The Search Warrant SOPS, in force since 1 November 2014, require police to make a continuous video record of all searches to which the SOPS apply, including recording all persons present and any evidence found.[231]

Significantly, the SOPS explain the rationale for this requirement:

> The searching of premises and the seizure of property/exhibits requires video recording to ensure the credibility and integrity of police actions. It is during the execution of search warrants that video recording provides the most reliable account of police activities and serves as a valuable tool to address evidentiary and behavioural risks.[232]

The previous version of the Search Warrant SOPS applied only to searches conducted under warrant. The current version extends to all uninvited entry search powers, including searches without warrant under section 10 of the Restricted Premises Act. In the course of our review, it came to our attention that the police practice of video-recording section 13 searches, in accordance with the Search Warrant SOPS, was unlawful. On 12 January 2015 we raised this issue with the NSW Police Force, which acknowledged that police had no powers to video-record under the Restricted Premises Act.[233] The NSW Police Force attributed this to a legislative oversight and undertook to seek an amendment to the Surveillance Devices Act to permit video-recording of these searches.

The NSW Police Force told us that it was 'not in the public interest to disregard the importance of [the] accountability measure' and asked us for suggestions as to how to resolve this issue until such time as appropriate amendments were made to the Surveillance Devices Act.[234] We explained that we did not consider it is the Ombudsman's responsibility to determine how the new police powers should be implemented, but suggested, as an interim measure, that police consider using other oversight methods to enhance accountability, including the presence of independent observers, enhanced note-taking and the use of scene plans.[235]

The NSW Police Force issued a state-wide message to all staff instructing them not to make a video-record of Restricted Premises Act searches.[236]

The NSW Police Force told us that it has sought an amendment to the Surveillance Devices Act to allow an exemption for searches conducted under the Restricted Premises Act.[237] However, these amendments have not yet been made. We agree with police that video-recording of searches provides an important accountability measure and, accordingly, we recommend that urgent changes be made to the Surveillance Devices Act.

Recommendation

6. The Attorney General propose, for the consideration of Parliament, amendments to the *Surveillance Devices Act 2007* to permit the video recording of any search conducted under section 13 or section 10 of the *Restricted Premises Act 1943*.

231. NSW Police Force, *Standard Operating Procedures for the Execution of Search Warrants*, Version 1.4, 2014, pp. 26-27, 41-43.
232. NSW Police Force, *Standard Operating Procedures for the Execution of Search Warrants*, Version 1.4, 2014, p. 41.
233. Correspondence from Fleur Beaupert, NSW Ombudsman, dated 12 January 2015.
234. Correspondence from Nick Kaldas, Deputy Commissioner Field Operations, NSW Police Force, dated 18 February 2015.
235. Correspondence from Deputy Ombudsman (Police), NSW Ombudsman, dated 20 March 2015.
236. Communication with Ken Finch, Director, Organised Crime Directorate, NSW Police Force, 30 March 2015.
237. Communication with Ken Finch, Director, Organised Crime Directorate, NSW Police Force, 30 March 2015.

Chapter 7. Additional section 10 search powers

Police did not use the additional section 10 powers to search premises for weapons and explosives during the review period. This has limited our ability to identify practical issues arising from their use. Nevertheless, there are issues regarding the nature and scope of the powers that have caused concern to some stakeholders. In particular, people have expressed concerns about the broad discretion conferred on police to determine the circumstances in which to conduct a search, and the absence of legislative safeguards governing the manner of those searches.

7.1 Concerns about the powers

Once a declaration under the *Restricted Premises Act 1943* is made, police can search the premises without a warrant at any time. Since the additional section 10 search powers came into force, the items police are authorised to search for now include weapons and explosives, as well as alcohol and drugs (and associated items).

The ability to search for these items without a warrant distinguishes the powers from ordinary search powers, which require court authorisation and can only be used to search for nominated items and within a limited period of time.[238] The powers are also different from other search without warrant powers because police are not required to have any information that weapons and explosives are, or are likely to be, on the premises, when seeking a declaration, or when deciding to search them.[239]

This expansion of the search powers attracted the following criticism by Mr Alex Greenwich MP during the parliamentary debate:

> I share community concern about gun violence and agree that we must act to curb gun use and to protect people from harm. I support laws that limit access to guns and weapons and hope to see more legislation introduced that strengthens current restrictions.
>
> I particularly support the provisions in this bill which make it an offence to lend a firearm or firearm part to a person who is not authorised to possess it and which place stronger restrictions on people subject to a firearms prohibition order. However, I do not support search powers without a warrant. The bill allows police officers to enter the premises of someone subject to a firearms prohibition order and search for firearms and ammunition. An officer does not even have to have a reasonable suspicion that the person is not complying with the firearms prohibition order. This bill opens the way for police corruption and abuse of power. A warrant allows oversight of the what, where and when of police searches when they are often dealing with criminals, and removing accountability is dangerous and completely unnecessary. Warrants are easy and quick to access if there is a reasonable reason to search a property.
>
> They act as an important check and balance on police powers. Their removal is another incremental step towards a loss of basic rights that prevent exploitation of the innocent. The bill also adds firearm offences to the Restricted Premises Act, allowing police officers to enter premises with force and to seize storage devices and vessels, again without a warrant. These powers should be scaled back, not expanded. They are open to police corruption and lack accountability. I continue to work with and support the police officers in my electorate, but I do not support removal of police oversight and accountability.[240]

Submissions to our review also expressed concern that the lack of legislative constraints on the exercise of the section 10 search powers meant the powers could potentially be misused.[241] For example, the Tenants' Union of NSW submitted the powers could 'result in substantial infringements

238. *Law Enforcement (Powers and Responsibilities) Act 2002*, ss. 47, 47A and 48.
239. By way of contrast, for example, powers to search without a warrant under the *Terrorism (Police Powers) Act 2002* can only be conducted if an authorisation of special powers to prevent or investigate terrorist acts has already been given and the officer forms certain reasonable beliefs. See sections 15 and 19(1).
240. Mr Alex Greenwich, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 18 September 2013, p. 23680.
241. Brotherhood Christian Motorcycle Club, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 12 October 2015, p. 3; Tenants' Union of NSW, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 30 September 2015, pp. 2-3; Women in Prison Advocacy Network, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act*, 16 October 2015, p. 11.

upon a tenant's right to peace, comfort, and privacy for little or no reason'.[242] The Tenants' Union said this right under section 50(2) of the *Residential Tenancies Act 2010*, was 'fundamental to the use and enjoyment of any private residence'.[243] The Women in Prison Advocacy Network submitted that the search powers could result in 'unreasonable deprivation of personal property rights' and allow 'too much room for arbitrary actions, police brutality, harassment and abuse of power'.[244]

7.2 Threshold for the exercise of the section 10 search powers

On each occasion when police consider searching declared premises, no additional threshold or conditions need to be met. Police need not form a 'reasonable belief' or 'reasonable suspicion', or have information about the possible presence of drugs, alcohol, weapons or explosives on the premises.

We discussed this in our issues paper. In its response, the NSW Police Force emphasised that the search powers cannot be exercised unless a court declaration has been made, and that all declarations since 2007 were made by the Supreme Court.[245] It submitted that a court declaration was itself a sufficient threshold for the exercise of the search powers:

> [N]o further threshold or legal tests should be considered as to the appropriateness of either the existing or the additional s10 search powers, the use of which will have already been considered by the court in determining whether or not to exercise its discretion to grant a declaration.[246]

A number of submissions expressed an alternative view, supporting a legislative amendment to incorporate an additional threshold for the exercise of the section 10 search powers.[247] Some submissions suggested that police should have a purpose related to preventing or investigating a criminal act,[248] or a reasonable belief that one or more of the proscribed activities has been occurring at the premises.[249]

The policy decision of the NSW Police Force to apply the *Standard Operating Procedures for the execution of Search Warrants* (Search Warrant SOPS) to all 'uninvited entry operations' means that, as a matter of practice, any section 10 search can only be conducted after consideration by a number of senior police.[250] As described in chapter 3, the application of these SOPs provides a relatively high level of internal accountability for decisions to conduct section 10 searches.

One LAC did conduct searches authorised under section 10 during the review period, primarily to look for drugs. Kings Cross LAC searched the Astoria Hotel[251] on 13 occasions up until its closure in September 2014.[252] Significantly, the Kings Cross police developed local guidelines, called *Standard Operating Procedures – Searching of Astoria Hotel under Restricted Premises Act Declaration* (which we refer to as the 'Kings Cross LAC SOPs'). These complement the Search Warrant SOPS

242. Tenants' Union of NSW, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 30 September 2015, p. 3.
243. Tenant' Union of NSW, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 30 September 2015, p. 2.
244. Women in Prison Advocacy Network, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act*, 16 October 2015, p. 11.
245. NSW Police Force, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act*, 12 October 2015, p. 3.
246. NSW Police Force, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act*, 12 October 2015, p. 3.
247. Brotherhood Christian Motorcycle Club, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 12 October 2015, p. 3; Women in Prison Advocacy Network, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act*, 16 October 2015, p. 11; Tenants' Union of NSW, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 30 September 2015, p. 3.
248. Brotherhood Christian Motorcycle Club, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 12 October 2015, p. 3-4.
249. Women in Prison Advocacy Network, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act*, 16 October 2015, p. 11.
250. NSW Police Force, *Standard Operating Procedures for the Execution of Search Warrants*, *Version 1.4*, 2014, p. 3; NSW Police Force, *Overarching policy and procedures for search warrants and other 'uninvited entry and search' operations*, p. 2.
251. This property was made subject to a declaration in 2009 due to illicit drug trade occurring at the premises: Consultation with Kings Cross LAC, 16 December 2015.
252. In these searches, police were looking for drugs, alcohol and related devices: Correspondence from Detective Superintendent Scott Cook, NSW Police Force, dated 7 December 2015.

by providing police with guidance about the specific grounds on which they may seek approval to conduct a search of the Astoria Hotel. The Kings Cross LAC SOPs describe a two-step process, which indicated all searches should be based on intelligence:

1) When recent information is obtained regarding alleged criminal activity at the Astoria Hotel police should, at the first opportunity, create an Intelligence Report or COPS Event for that information. This information could relate to alleged drug possession, drug supply or any other criminal offence.
2) Immediately upon receiving such information a Duty Officer or Crime Manager should be informed and a decision should be made as to whether Police should enact the powers conferred under this declaration. This may take the form of a search of a room, or rooms or any other area of the Astoria Hotel.[253]

It is our understanding that the Kings Cross LAC SOPs provide a framework for officers seeking to exercise the section 10 powers, with the effect that the powers can only be exercised on the basis of current intelligence, consultation with a senior officer, and after following the approval processes in the Search Warrant SOPs.

We reviewed the COPS narratives for eight of the 13 searches and found that – consistent with the requirement of the Kings Cross LAC SOPS – police had formed the opinion that unlawful drug distribution may have been taking place at the premises, or in a particular part of the premises, before conducting each of the searches.[254]

Because the additional search powers have not been exercised during the review period, we do not know whether concerns about the potential misuse of those powers will be realised in practice. The limited information we do have – about the use of the existing section 10 search powers by the Kings Cross LAC – is evidence of policing practices that would reduce the risk of the concerns being realised.

In our view, the accountability framework provided by the Search Warrant SOPs provides appropriate safeguards in relation to the police exercise of the additional section 10 power. Kings Cross LAC SOPs provide a useful model for giving police further specific guidance about the appropriate use of the powers in relation to particular premises, and the NSW Police Force should encourage similar guidance be provided in the future. In chapter 9, we discuss the need for any future uses of these search powers to be subject to independent scrutiny. This would include evaluating whether the searches were reasonable.

7.3 The manner in which police conduct section 10 searches

The Restricted Premises Act places no limitations on the manner in which police should conduct section 10 searches.

The *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), which imposes certain requirements on police when conducting searches of premises (the 'LEPRA search requirements'), do not apply to section 10 searches.[255] Police only need to comply with section 202 of LEPRA, which requires police to identify themselves as police officers, provide their name and place of duty, and explain the reason for exercising the powers.[256]

In our issues paper, we discussed whether any additional legal requirements should apply to the conduct of section 10 searches, and whether the LEPRA search requirements should apply to or be adapted to the conduct of such searches.

253. NSW Police Force (Kings Cross LAC), *Standard Operating Procedures – Searching of Astoria Hotel under Restricted Premises Act Declaration,* Version 1, 26 September 2009, p. 2.
254. We were able to identify, and locate records of, only eight of the 13 section 10 searches conducted at the Astoria Hotel in COPS.
255. Part 5, Division 4 of LEPRA applies to the warrants on police powers listed in section 59 of LEPRA.
256. LEPRA, s. 202. This information must be provided to the person subject to the exercise of the power 'as soon as it is reasonably practicable to do so': LEPRA, ss. 202(1), (2)(a).

Some of the submissions supported legislative amendment to ensure that the LEPRA requirements apply to section 10 searches, or expressed concern about the absence of such requirements.[257] For example, the Brotherhood Christian Motorcycle Group submitted that 'some sense of reasonableness must be included in [section 10], relating to the timing of searches, the frequency of searches and the time a search can take'.[258] The Women in Prison Advocacy Network, while opposing the continuation of the section 10 search powers, argued that, if those powers were to be retained, the sort of safeguards provided for under LEPRA should apply in order to 'act as a constraint on a very broad power, and would protect against potential abuses of power'.[259]

On the other hand, the NSW Police Force submitted that it was not appropriate for these requirements to apply to section 10 searches because these searches 'are not warrant searches; they are statutory searches which can only be exercised after a declaration has been made by the court'.[260]

In our view, and for the reasons discussed below, police should adopt policies and practices consistent with some of the LEPRA search requirements when conducting section 10 searches, to ensure that the manner in which police conduct such searches is fair and reasonable. These are the requirements that:

- police must announce that they are authorised to enter and give people an opportunity to allow them entry[261]
- police must serve a notice on the occupier, that communicates information including their authority, powers, and identifying details,[262] and
- the warrant must generally be executed by day, between 6am and 9pm.[263]

The nature of the search powers raises additional issues relating to the need for information to be provided to the owners and occupiers of declared premises. We also discuss these issues below.

7.3.1. Announcing authority to enter and provision of information to the people on the premises

Police are generally required to provide written advice about the conduct of a premises search to the occupier of the premises,[264] in addition to announcing their authorisation to enter the premises and providing the occupier with an opportunity to allow entry.[265]

The NSW Police Force advised us that police exercising section 10 powers will not provide occupiers with an occupier's notice.[266] Instead, occupiers will be verbally notified of an intention to carry out a section 10 search.[267]

257. Brotherhood Christian Motorcycle Club, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 12 October 2015, p. 4; Women in Prison Advocacy Network, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act*, 16 October 2015, p. 11; Tenants' Union of NSW, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 30 September 2015.
258. Brotherhood Christian Motorcycle Club, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 12 October 2015, p. 3.
259. Women in Prison Advocacy Network, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act*, 16 October 2015, p. 12.
260. NSW Police Force, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act*, 12 October 2015, p. 4.
261. LEPRA, s. 68(1).
262. LEPRA, s. 67(4).
263. LEPRA. s. 72(1)-(3). The issuing officer cannot authorise the execution of the warrant by night unless satisfied that there are reasonable grounds for doing so, including because execution by day is unlikely to be successful, there is likely to be less risk to the safety of any person, or an occupier is likely to be on the premises only at night to allow entry without the use of force.
264. LEPRA, s. 67.
265. LEPRA, s. 68.
266. Correspondence from Nick Kaldas, Deputy Commissioner Field Operations, NSW Police Force, dated 18 February 2015.
267. Correspondence from Nick Kaldas, Deputy Commissioner Field Operations, NSW Police Force, dated 18 February 2015.

As discussed earlier in this chapter, Kings Cross LAC gave their officers further guidance about the use of the section 10 powers to search the Astoria Hotel. Under the Kings Cross LAC SOPs, officers were to provide a copy of the declaration to the person in charge, on entering. The LAC SOPs stated:

5) At the time of the search the case officer will have a copy of the declaration in their possession and upon entering the Astoria Hotel the manager or the person in charge of the hotel will be identified and their particulars recorded. Police must also show the person in charge of the Astoria Hotel a copy of the declaration which should be recorded on video.

6) Where possible attempts must be made to allow management to open any locked doors within the Astoria Hotel prior to any forced entry being made.[268]

This practice achieved the same purpose as the provision of an occupier's notice when executing a search warrant.

The Tenants' Union stated in its submission to our review that the LEPRA search requirements requiring police to announce their authorisation to enter the premises, and provide an opportunity for an occupant to allow entry, should apply to the conduct of section 10 searches.[269]

It is premature to recommend that legislative requirements similar to the LEPRA search requirements should apply to police when undertaking section 10 searches. However, in our view, police who follow comparable practices will ensure that people understand what they are required to do, and give them an opportunity to cooperate with police requests. This should contribute to the safe conduct of the search.

In our view, the most effective way to achieve this would be to provide information both verbally and in writing. People who do not know about the declaration, or the associated police power to search, are less likely to be suspicious of the authority or motives of police (and, as a result, obstruct, challenge, or complain about their conduct) if this information is provided in written form.

The NSW Police Force should therefore consider amending relevant policies, procedures and training materials in the following way.

First, amendments should be made to ensure that the following practices are adopted when police exercise section 10 powers:

- announce that they are authorised to enter the premises by virtue of the declaration
- give the occupants an opportunity to allow entry into the premises
- provide a verbal explanation of the section 10 search powers to the occupants and make a video- record of this, and [270]
- provide the person in charge of the premises with a copy of the declaration.

Second, amendments should be made to ensure that information is provided in some written form that includes details comparable to those included in an occupier's notice. These include:

- the authority of the police to conduct the search on the basis of the declaration
- details of the LAC or unit conducting the search
- the specific powers the police can exercise under section 10, and
- details of any associated offences, such as the offence under section 11 of the Restricted Premises Act of obstructing police in the exercise of any power under the Act.

268. NSW Police Force (Kings Cross LAC), *Standard Operating Procedures – Searching of Astoria Hotel under Restricted Premises Act Declaration, Version 1*, 26 September 2009, p. 2.
269. Tenants' Union of NSW, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 30 September 2015, p. 4.
270. Relevant if this is authorised under the *Surveillance Devices Act 2007.*

Recommendation

7. The NSW Police Force amend policies, procedures or training material relevant to the exercise of the powers under section 10 of the *Restricted Premises Act 1943* to ensure that police conducting the search provide information to occupants on the premises, both verbally and in writing, and give them an opportunity to allow police to enter.

7.3.2. Time of day at which searches are conducted

There is nothing in the Restricted Premises Act that limits the timing of a section 10 search. Once a declaration has been made, police officers are empowered to enter and search the premises at any time of day. An 'anytime' approach to section 10 searches may be operationally effective, assisting police to detect firearms, other weapons and explosives, by providing police with the element of surprise and the ability to respond to a threat of the use of firearms.

Under the LEPRA search requirements, searches of premises at night are typically only permitted in exceptional circumstances. Police must obtain permission from the authorising officer to conduct a search at night. Permission will only be given if:

- the execution of the search warrant by day is unlikely to be successful
- there is likely to be less risk to the safety of any person if it is executed by night, or
- the person who occupies the property is only on the premises at night and is needed to be present to allow entry.[271]

The Tenants' Union of NSW argued that section 10 searches 'should be executed between 6am and 9pm unless specifically authorised for execution by night'.[272]

Since the Search Warrant SOPs apply to the conduct of section 10 searches, police planning a search are required to obtain approval for the search from a number of senior officers. In providing this approval, one of the matters that senior officers must consider is the proposed time of the search; the safety of police and people present is a critical factor in considering this issue.

We are satisfied that this level of oversight by senior police should serve to mitigate the risk of unreasonable searches by night.

7.3.3. Informing both the owner and occupier about the declaration and related search powers

Police have the discretion to decide whether to provide the owner or occupier, or both, with notice of the declaration. This leaves open the possibility that police will conduct a search and encounter a person who is the owner or the occupier, who had not been previously been given notice of the declaration.

NSW Fair Trading, in its submission to this review, commented:

> [S]ection 6 of the Act only requires notification of the declaration to *either* an owner *or* occupier. As a result it is possible that a landlord may not be aware of ... a declaration having been made in relation to their premises.[273]

NSW Fair Trading submitted that a landlord of declared premises should be advised about the declaration.

271. LEPRA, s. 72.
272. Tenants' Union of NSW, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 30 September 2015, p. 4.
273. NSW Fair Trading, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 20 October 2015, p. 1.

There would seem to be sound operational reasons for police to provide notice of a declaration to both the owner and occupier, so they can take steps to prevent the proscribed activities taking place at the premises. For an owner of the premises, this might include evicting an occupier who allowed proscribed activities to occur. Ideally, this information would be provided before police conduct the first section 10 search at the premises.

As we do not consider such a requirement would be unreasonably onerous on police, the NSW Police Force should consider amending any relevant policies, procedures or training material to ensure that police make reasonable attempts to provide notice of a declaration to both the owner and occupier of premises to which the declaration relates.

Recommendation

8. The NSW Police Force should consider amending policies, procedures or training material relevant to a declaration under the *Restricted Premises Act 1943* to ensure that police make reasonable attempts to provide notice of any such declaration to both the owner and occupier of the premises.

7.3.4. Notifying the occupier of declared premises that a search has occurred in their absence

Police conducting a section 10 search are required to comply with Part 15 of LEPRA, which requires police to provide the person who is 'subject to the exercise of the power' with:

- evidence that they are police,[274]
- their name and place of duty,[275] and
- the reason for the exercise of the power.[276]

This information must be provided to the person as soon as reasonably practicable.[277]

It is unclear whether compliance with the safeguards in Part 15 of LEPRA would necessitate police informing the formal occupier of declared premises (the lessee or owner) that a search of their premises has been conducted, if the search took place in their absence. It is not clear whether an absent owner or occupier would be considered to be the 'subject of the exercise of the power'.

This raises the possibility that the occupier of premises might never be made aware that a search has taken place while they were absent.

Other powers authorising covert searches require police to inform the person whose premises have been searched that a search has taken place.[278] For example, police are ordinarily required to serve an occupier's notice on an occupier of premises who was absent during the search within 48 hours after execution,[279] or within six months of a search authorised under a covert search warrant.[280] This ensures that owners and occupiers are in a position to challenge the exercise of illegal or improper invasions of their rights.

274. Unless they are in uniform, see LEPRA, s. 202(1)(a).
275. LEPRA, ss. 201(1)(c) and 202(1)(b).
276. LEPRA, ss. 201(1)(c) and 202(1)(c).
277. LEPRA, s. 202(2)(a).
278. A covert search warrant is a search warrant issued under Division 2 of Part 5 of LEPRA that may be executed covertly.
279. LEPRA, s. 67(4).
280. LEPRA, s. 67A.

In our view, there is no reason why occupiers of declared premises should be placed in a different position and police should also be required to notify them if a search has taken place in their absence. Such a notification could be made verbally or in writing.

Recommendation

9. **The Attorney General propose, for the consideration of Parliament, an amendment to the *Restricted Premises Act 1943* to require police to notify the occupier of premises searched under section 10, who is not present during the search, that a search has occurred, as soon as practicable after it has taken place.**

Chapter 8. New offence provisions

The amendments to the *Restricted Premises Act 1943* which created a new form of reputed criminal declaration were intended to 'make it easier for police to get premises declared on the grounds that they are routinely used by serious criminals, such as gang clubhouses'[281] and thereby stop such people associating and planning criminal activities at the declared premises. The new offence provisions in sections 8(2A) and 9(3) are the mechanisms intended to achieve this outcome. Under those sections, an owner or occupier of the premises that are the subject of a reputed criminal declaration commit an offence if a reputed criminal attends, controls or manages the premises.

No reputed criminal declarations have been made under the Restricted Premises Act during the review period. Accordingly, there have been no criminal charges preferred under the new offence provisions.

In this chapter we discuss concerns about the potential breadth and impact of the new offence provisions. We also discuss the process for the rescission of a declaration.

8.1 What the new offences added to the existing scheme

It is an offence for the owner or occupier of declared premises to fail to stop the proscribed activities while the declaration is in force.[282] This includes a failure to prevent a reputed criminal from attending, controlling or managing the premises.

According to the Bureau of Crime Statistics and Research, there have been no finalised charges for these offences since 1994.[283]

With the introduction of the new offence provisions, the owner or occupier of premises that are the subject of a reputed criminal declaration commits both the existing offence[284] as well as the new offence,[285] if they fail to prevent a reputed criminal from attending, controlling or managing the premises.

If an owner or occupier is charged under the new offence provisions, the length of the maximum prison sentence they could serve has increased six-fold (from six months' to three years' imprisonment), and the maximum fine that could be imposed has tripled (from $5,500 to $16,500). These significantly higher penalties may give owners and occupiers a stronger incentive to stop reputed criminals from attending, controlling or managing declared premises.

8.2 Concerns about the potential impact of the new offence provisions

The new offence provisions were intended to operate to affect those people who are reputed criminals, by motivating owners and occupiers to take measures to curtail their presence at the premises.

When the Firearms and Criminal Groups Legislation Amendment Bill 2013 (the amendment Bill) was introduced into Parliament, the Legislation Review Committee[286] referred the following concerns about the proposed new offence provisions:

> The Committee is concerned that the Bill may further criminalise association between convicted criminals. Further, there is no need to prove such individuals have committed any other offence whilst associating with each other at restricted premises (or that they have ever committed any offence other than associating with convicted criminals) for an owner/occupier of restricted premises to be subject to a significant penalty. The Bill may therefore impact unduly on the right to freedom of association.[287]

281. The Hon. Barry O'Farrell MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 17 September 2013, p. 23564.
282. *Restricted Premises Act 1943*, ss. 8(1), 9(1).
283. NSW Bureau of Crime Statistics and Research, NSW Criminal Court Statistics 1994 to 2015 (unpublished data). Data was unavailable for the period before 1994.
284. *Restricted Premises Act 1943*, s. 8(1) for owners and s. 9(1) for occupiers.
285. *Restricted Premises Act 1943*, s. 8(2A) for owners and s. 9(3) for occupiers.
286. The Committee is responsible for considering Bills introduced into Parliament and reporting on their impact on specific rights and liberties.
287. Legislation Review Committee, NSW Parliament, *Legislation Review Digest No. 45/55,* Sydney, 15 October 2013, pp. 15-16.

The issue was not addressed in the parliamentary debates on the amendment Bill. After the amendment Bill had been passed, Mr Bromhead, the Chair of the Committee, said:

> [T]his legislation is extremely tough on targeted groups. It is another example of this Government looking after the interests of the wider public, rather than the rights of those individuals.[288]

The offence provisions form part of 'a number of pre-emptive association-based criminalisation strategies' introduced in NSW since 2009 with the primary objective to disrupt the activities of OMCGs and other criminal gangs, including criminal organisation legislation and the updated consorting offence in the *Crimes Act 1900*.[289] These measures are controversial because they 'include the criminalization of ordinarily harmless and seemingly innocent behaviour in order to allow authorities to intervene at an early stage'.[290]

Additional concerns about the potential for the unreasonable use of the offence provisions arise from their breadth. There are two aspects to this. The first is the breadth of the definition of 'reputed criminal', people whose activities on the premises are intended to be curtailed. The second is the breadth of the places over which a reputed criminal declaration can potentially be made.

8.2.1. 'Reputed criminal'

The *Firearms and Criminal Groups Legislation Amendment Act 2013* (the amendment Act) introduced a new definition of 'reputed criminal' to include a person who:

a) has been convicted of an indictable offence (including an offence under section 93X of the *Crimes Act 1900*), or

b) is engaged in an organised criminal activity within the meaning of section 46AA of the *Law Enforcement (Powers and Responsibilities) Act 2002*, or

c) is a controlled member of a declared organisation within the meaning of the *Crimes (Criminal Organisations Control) Act 2012*.[291]

The definition of 'reputed criminal' determines when a reputed criminal declaration can be made, as well as the range of people whom owners and occupiers of declared premises must attempt to exclude from the premises to avoid being charged with one of the new offences. It also affects when the section 13 search powers can be exercised.

It appears that the intention of making this definition broad is to improve the ability of police to obtain declarations relating to premises frequented by people convicted of an offence or suspected of involvement in serious organised criminal activity. When introducing the legislation, the then Premier indicated the Act should be used in relation to premises 'routinely used by serious criminals' and people involved in gun crime.[292]

In keeping with this intention, the second and third categories included in the definition of 'reputed criminal' include descriptions of people who are covered by other schemes intended to target organised crime and criminal gangs.[293]

The first category of the definition covers all people who have been convicted of an indictable offence. These people represent over 3.5% of the NSW adult population. As table 4 shows, more than 200,000 people in NSW had been convicted of an indictable offence during the 10-year period from 2004 to 2014, with almost a quarter being young men under 30 years old.

---

288. Mr Stephen Bromhead, (NSWPD), (Hansard), Legislative Assembly, 17 October 2013, p. 24296.
289. David Brown et al., *Criminal laws: Materials and commentary on criminal law and process of NSW*, The Federation Press, 6th edition, 2015, p. 1217.
290. Andrew Ashworth, Lucia Zedner and Patrick Tomlin, eds., *Prevention and the limits of the criminal law*, Oxford University Press, Oxford, 2013, p. 1
291. *Restricted Premises Act 1943*, s. 2.
292. The Hon. Barry O'Farrell MP, NSWPD, (Hansard), Legislative Assembly, 17 September 2013, p. 23564.
293. The scheme under the *Crimes (Criminal Organisations Control) Act 2009*, the provisions in section 46AA of *Law Enforcement (Powers and Responsibilities) Act 2002*, and the consorting offence in section 93X of the *Crimes Act 1900*.

Table 4: Percentage of adult population in NSW convicted of indictable offences between 1 July 2004 and 30 June 2014

Age at 30 June 2014	Women		Men		Total	
	Number of people	% of cohort	Number of people	% of cohort	Number of people	% of cohort
18-29	10,525	1.71	48,457	7.63	58,982	4.72
30 and over	27,793	1.19	118,406	5.34	146,199	3.21
Total	**38,318**	**1.30**	**166,863**	**5.85**	**205,181**	**3.53**

Source: NSW Bureau of Crime Statistics and Research, NSW Criminal Courts Re-offending Database June 2004 to June 2014, Adults convicted of an indictable offence, excluding those dealt with under s. 10 *Crimes (Sentencing Procedure) Act 1999*, appearances in Children's Court and people aged under 18 at finalisation (unpublished data); Australian Bureau of Statistics, *Population Projections, Australia, 2012 (base) to 2101*, 'Table B1. Population projections, By age and sex, New South Wales – Series B', time series spreadsheet, cat. No. 3222.0, Canberra, 2013.

The definition of 'reputed criminal' applies to people whose convictions have been 'spent' after a crime-free period of 10 years.[294] This means that a person's conviction, despite being spent, may be relevant to their status as a 'reputed criminal' for the purposes of charging an owner or occupier with one of the new offences.[295]

Furthermore, because the definition of 'reputed criminal' says that it 'includes' people in the specified categories, the definition is not exhaustive. Accordingly, it could potentially cover people who have no convictions, but nevertheless have a 'reputation' of criminality.[296]

Police officers said the broad scope of the definition is beneficial because it allows them to legitimately target individuals who may not have recent convictions but are known to be currently engaged in criminal activity. These police said narrowing the definition could prevent them from targeting premises used by such people.[297]

Police also told us that the new definition had assisted them to use the Act more effectively by clarifying the sorts of people covered by the legislation. In one case, uncertainty about the scope of the term had contributed to police abandoning the preparation of an application for a reputed criminal declaration.

Submissions to our review said that because the definition of 'reputed criminal' is over-inclusive, the new offence provisions are too expansive.[298] The Tenants' Union submitted that the definition of reputed criminal should be 'drastically narrowed to reflect the gravity of [the] consequences'.[299] The Women in Prison Advocacy Network (WIPAN) stated:

> WIPAN is particularly concerned about the fact that the definition of 'reputed criminal' includes those who have been convicted of an indictable offence. As the issues paper has noted, such persons represent more than 3.5% of the population in NSW. To label such persons as 'reputed criminals' and to subject them to

294. Sections 7 and 8 of the *Criminal Records Act 1991* govern the circumstances in which certain convictions become spent. Some convictions can never become spent, including convictions where a prison sentence of more than six months was imposed and convictions for sexual offences: *Criminal Records Act 1991*, s. 7(1).
295. See *Tajjour v New South Wales* (2014) 88 ALJR 860 at 871 (French CJ): 'there is no upper limit on the age of a conviction which would constitute the person convicted a "convicted offender" for the purposes of s 93W'. In this decision, French CJ was interpreting the comparable term 'convicted offender' in relation to the consorting offence in section 93X of the *Crimes Act 1900*, which means a person convicted of an indictable offence.
296. It was held by the Supreme Court of South Australia in the case *Dias v O'Sullivan* [1949] SASR 195, that when considering the offence of consorting with a 'reputed thief', a reputation known only to police was sufficient to bring a person within the terms 'reputed thief'.
297. Consultation with NSW Police Force, 2 April 2015.
298. Brotherhood Christian Motorcycle Club, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 12 October 2015, p. 5; Women in Prison Advocacy Network, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act*, 16 October 2015, p. 12; Tenants' Union of NSW, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 30 September 2015, p. 7.
299. Tenants' Union of NSW, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 30 September 2015, p. 8.

> further regulation under the criminal law is at odds with the principle of redemption. WIPAN is of the view that the scheme acts as a form of extra-curial punishment for such persons and is counterproductive to enhancing the rehabilitation of these individuals.[300]

8.2.2. Criteria for making a reputed criminal declaration

In applying for a declaration, police must show 'reasonable grounds for suspecting' that one or more of the proscribed activities take place on the premises. There is no requirement for police to demonstrate that the reputed criminals are undertaking any criminal activity on the premises.

The court can make a 'reputed criminal declaration' by stating that the reason, or predominant reason, for the declaration is that reputed criminals attend, control or manage the premises.[301] This has the potential for declarations to be made over a broad range of premises that people who fall within the definition of 'reputed criminal' may attend in their day-to-day life, including residential houses, retail businesses, schools, health clinics and community service centres, that may not be being used by these people for criminal purposes or firearms-related activities.

The Brotherhood Christian Motorcycle Club submitted that the provisions were problematic because the threshold for making a reputed criminal declaration does not include a sufficient connection between the premises and organised crime or gun crime, but rather focuses on 'ancillary matters that may or may not be associated with crime'.[302] Like the Women in Prison Advocacy Network, the Brotherhood Christian Motorcycle Club suggested that the scope of the 'reputed criminal declaration' provisions should be limited in scope by a threshold relating to current suspected criminal activity at the premises, or by people associated with the premises, rather than past convictions or criminal reputation alone.[303]

The Tenants' Union of NSW expressed concern that if a declaration was made over a leased residential property, this could impact upon 'the housing stability of both tenants whose conduct caused a declaration to be made, and any later tenants'.[304]

The NSW Police Force submitted that:

> Even where the evidence establishes that one or more of the prescribed conditions obtain in respect of the premises, the court nevertheless retains the discretion as to whether or not it is appropriate in the circumstances to declare the premises. In making that determination the court applies the Act to the evidence, in accordance with Parliament's intention.[305]

During the review period, police have used the declaration provisions judiciously. The only application for a reputed criminal declaration was made by Strike Force Raptor in relation to the clubhouse of an OMCG that is considered to be one of Australia's most serious criminal threats.[306] As discussed earlier, this declaration was subsequently withdrawn. Declarations were not sought in relation to any other types of premises.

---

300. Women in Prison Advocacy Network, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act*, 16 October 2015, p. 12.
301. *Restricted Premises Act 1943*, s. 3(3).
302. Brotherhood Christian Motorcycle Club, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 12 October 2015, p. 3.
303. Brotherhood Christian Motorcycle Club, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 12 October 2015, p. 4; Women in Prison Advocacy Network, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act*, 16 October 2015, p. 13.
304. Tenants' Union of NSW, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 30 September 2015, p. 8.
305. NSW Police Force, *Submission to NSW Ombudsman regarding plice powers and offence provisions – Review of the Restricted Premises Act*, 12 October 2015, p. 4.
306. Australian Crime Commission, *Attero National Task Force*, viewed 21 January 2015, https://www.crimecommission.gov.au/organised-crime/joint-task-forces-and-initiatives/attero-national-task-force. This was the application for a declaration over the Rebels' national clubhouse in Leppington, which was subsequently withdrawn, as discussed in section 4.1.

Some police officers we consulted said that they would consider using the declaration provisions in other contexts in future, in particular to target other criminal gangs, such as gangs involved in the illicit drug trade.[307] Other officers told us that a boarding house at which the owner was suspected of being a drug supplier might be suitable premises for using the declaration provisions.[308]

Since there were no reputed criminal declarations made, and no charges were brought under the new offence provisions, we were unable to assess whether or not the concerns about unreasonable use were realised, or are likely to be realised in the future.

Since Parliament's intention was that the operation of the new offence provisions should be independently monitored, we recommend that a further review of the operation of those provisions should be conducted by an independent agency.

8.3 Process for the rescission of a declaration

A declaration over premises is in force until it is rescinded.[309]

A senior police officer or the owner or occupier of the declared premises can apply to the court that made the declaration for its rescission.[310] A declaration may be rescinded if:

- the owner or occupier proves that he or she has not at any time allowed any of the proscribed activities to take place in relation to the premises,[311] or
- a senior police officer proves that there is no reasonable ground for suspecting that any of the proscribed activities 'obtain in relation to' the premises.[312]

Of the four declarations made since 2001, two have been rescinded by police.[313] One of these declarations lasted for three months, the other five years. The other two were made in relation to premises that closed down following the making of the declaration. The NSW Police Force submitted:

> In the past the NSW Police Force has not opposed, and in fact has assisted, new owners to have a declaration rescinded.[314]

The rescission process provides police with a straightforward way to end a declaration where it is no longer needed to prevent the proscribed activities from occurring. This situation can arise where the premises are taken on by a new owner or occupier who is not considered to be a risk, or police are satisfied that the proscribed activities have not taken place on the premises for some time.

By way of contrast, the rescission process does not appear to provide an effective avenue for owners and occupiers who wish to have the declaration reversed on their own initiative. An owner or occupier must prove that he or she has not *at any time* allowed *any* of the proscribed activities to take place on the premises, even if police initially alleged that only *some* of those activities occurred.

The practical impact of this approach is that even if an owner or occupier of premises took steps to stop reputed criminals from attending, controlling or managing the premises as soon as they received notice of the making of a reputed criminal declaration, it may be virtually impossible for them to satisfy a court that the declaration should be rescinded.

307. Consultation with Lake Macquarie LAC and Brisbane Water LAC, 26 November 2014; Consultation with Tweed Byron LAC, 1 October 2015.
308. Consultation with Tweed Byron LAC, 1 October 2015.
309. *Restricted Premises Act 1943*, s. 3(2).
310. *Restricted Premises Act 1943*, s. 4(1).
311. *Restricted Premises Act 1943*, s. 4(1)(a).
312. *Restricted Premises Act 1943*, s. 4(1)(b).
313. Restricted Premises Act 1943, Notice of Rescission, Shop 2, 9 Ward Avenue Potts Point, 'Bliss Cafe', NSW Government Gazette, No. 112, 14 August 2009; Restricted Premises Act 1943, Notice of Rescission, First floor of B464 Cleveland Street Surry Hills, 'Turkish Coffee Lounge', NSW Government Gazette, No. 71, 4 June 2010.
314. NSW Police Force, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act*, 12 October 2015.

The parliamentary debates in the lead up to the enactment of the original provisions[315] suggest that rescission applications by owners and occupiers should only be granted for owners and occupiers who had never allowed the proscribed activities to take place,[316] such as a new purchaser or lessee of the declared premises.

In considering the original provisions, the High Court has observed:

> The terms require the applicant ... to negative a very large proposition, namely that at any time he has allowed any of the conditions to obtain ... On its very clear literal terms that means that one by one the very numerous possible examples of misbehaviour or breach of decorum which that sub-section enumerates must be shown at no time to have been allowed by the applicant.[317]

The High Court considered that this interpretation of the provisions was the only one available:

> [I]n spite of the stringent and onerous nature of the condition a literal interpretation imposes, the words of s. 4(1) are clear and explicit and really allow no escape from a construction of the condition they prescribe which makes it necessary that the applicant must offer some proof that never at any time did he allow any of the things to obtain ... Of course in proving negatives of this kind slight evidence will often be enough to set up a prima facie inference and it will always be open to those attempting to support the original order to narrow the issues and dispense with unnecessary formal proofs.[318]

The NSW Police Force submitted that there is no need for any changes to the rescission process for the following reasons:

> If there is no longer a basis for the declaration to apply, rescission under s 4 would not be opposed by the NSW Police Force. In the past the NSW Police Force has not opposed, and in fact has assisted, new owners to have a declaration rescinded.[319]

There is no evidence to suggest that police would be unwilling to support an owner or occupier in seeking rescission if there is no basis for a declaration to continue. However, the rescission process should provide owners and occupiers with an avenue to seek rescission independent from police where they have successfully taken steps to stop the proscribed activities listed in the original application for the declaration from occurring at the premises.

A number of submissions we received supported this approach, arguing that owners and occupiers should be able to have a declaration rescinded if they can show that the proscribed activities forming the basis for the declaration no longer took place at the premises.[320] The Tenants' Union said that the current provision allowing an owner or occupier of premises to seek a rescission 'serves little to no purpose, in that it demands the satisfaction of what is in practical terms an impossible standard'.[321]

The new offence provisions are likely to operate more effectively if owners and occupiers of declared premises have an incentive to permanently stop the proscribed activities from occurring at the premises. Having a mechanism by which owners and occupiers can demonstrate that they have successfully done this, through the rescission process, could function as a reward for taking conclusive action (just as the offence provisions function as a disincentive for failing to take action).

315. These provisions were in the *Disorderly Houses Act 1943*.
316. The Hon. Robert Downing MLC, (Hansard) (NSWPD), Legislative Council, 20 May 1943, p. 3493.
317. *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 393 (Dixon CJ and Webb J).
318. *Commissioner of Police v Tanos (*1958) 98 CLR 383 at 393 (Dixon CJ and Webb J).
319. NSW Police Force, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act*, 12 October 2015.
320. Brotherhood Christian Motorcycle Club, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 12 October 2015, p. 4; Women in Prison Advocacy Network, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of the Restricted Premises Act*, 16 October 2015, p. 16; Tenants' Union of NSW, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 30 September 2015, p. 7.
321. Tenants' Union of NSW, *Submission to NSW Ombudsman regarding police powers and offence provisions – Review of Restricted Premises Act*, 30 September 2015, p. 6.

Recommendation

10. The Attorney General should propose an amendment to the *Restricted Premises Act 1943*, for the consideration of Parliament, to enable the Court to rescind a declaration on application by the owner or occupier, if satisfied there is no reasonable ground for suspecting the proscribed activities giving rise to the declaration are no longer taking place at the premises and are unlikely to occur again at the premises.

Chapter 9. Conclusion

Our review has found that use of the additional search powers and new offence provisions during the two-year review period has been limited. The power to search declared premises has not been used at all, as police withdrew the one declaration they applied for.

Police did obtain warrants under the additional section 13 power to search suspected OMCG clubhouses, and to look for weapons and explosives as well as drugs and alcohol. From our analysis of those seven searches, and for the reasons discussed below, it is our view that those additional powers did not enhance police's ability:

- to close down suspected clubhouses, nor
- to seize weapons and explosives found during premises searches, including firearms.

9.1 Closing down suspected bikie clubhouses

Before the additional search powers were introduced, Strike Force Raptor had already been using section 13 searches as a tool to disrupt the activities of OMCGs and close down suspected OMCG clubhouses. The presence of drugs or alcohol was a sufficient basis for police to obtain a section 13 search warrant to enter and search premises being used by OMCGs. Police continued to search suspected OMCG clubhouses under section 13 search warrants authorising them to search for drugs and alcohol only following the amendments in 2013. It has been reported that police executed approximately 30 such warrants at suspected OMCG clubhouses between 2012 and 2015,[322] and that the clubhouses were dismantled and closed down as a result.[323] During the two-year review period,[324] Strike Force Raptor conducted at least 13 searches of suspected OMCG clubhouses under section 13 search warrants of this nature.[325]

The seven section 13 search warrants to search for weapons and explosives, as well as drugs and alcohol, were issued by the courts on the basis that police suspected that the unlawful sale or supply of alcohol was taking place on the premises, and that reputed criminals attended, or were controlling or managing the premises. These grounds could have supported the issuing of a search warrant under the existing section 13 provision.

Accordingly, in practice, police's ability to search suspected OMCG clubhouses was not enhanced by the additional search powers.

9.2 Seizing weapons and explosives

The additional search powers gave police the power to search for and seize any weapons or explosives they found while executing a *Restricted Premises Act 1943* search warrant.

Police already have a range of other powers that allow the seizure of such items during the execution of a search warrant authorising searches for drugs and alcohol. For example, police have existing

322. Ashley Mullaney,''Bikie crime crackdown: Clubbed-house', *The Daily Telegraph*, 8 June 2015, p. 9; Consultation with Strike Force Raptor, 2 April 2015.
323. NSW Police Force, 'Caught for consorting', *Police Monthly*, March 2015, p. 5; NSW Police Force, ''Raptor takes down one percenters', *Police Monthly*, May 2014, p. 7; Ashley Mullaney, 'Bikie crime crackdown: Clubbed-house', *The Daily Telegraph*, 8 June 2015, p. 9. Police officers confirmed during consultations that this action was taken using section 13 of the *Restricted Premises Act 1943*: Consultation with Strike Force Raptor, 21 July 2015.
324. 1 November 2013- 31 October 2015.
325. We identified 13 section 13 searches for drugs and alcohol only, conducted during the review period, by reviewing media articles and NSW Police Force media releases, and reviewing the COPS records for these events. The number of such searches actually conducted may have been higher. The NSW Police Force would not provide us with data about section 13 search warrants permitting searches for drugs and alcohol only during the review period, as it considered this information to be beyond the scope of information that the Commissioner of Police was required to provide to us.

powers under the common law doctrine of chance discovery to seize items connected to a serious offence in certain circumstances.[326] They also have existing statutory powers enabling them to seize weapons and explosives they come across while lawfully on any premises.[327]

Strike Force Raptor officers said that prior to the amendments, police had sufficient powers to seize any illicit firearms, weapons or explosives discovered during the search,[328] even though the warrant itself only authorised the seizure of drugs, alcohol and related items. Officers expressed the view that, in this sense, the amendments had not expanded the powers of police to seize weapons and explosives.[329]

During the review period, police discovered firearms-related items that included a pistol, a rifle, a shotgun, a bullet, and 28 rounds of ammunition during the execution of three of the section 13 search warrants for drugs and alcohol only.[330] Police were able to seize these items in the absence of a section 13 search warrant that authorised a search for weapons and explosives.

Accordingly, in practice, the additional search powers have not added to police's ability to seize illicit firearms-related items found during section 13 searches.

9.3 Independent scrutiny of any future declaration and consequential use of powers and offence provisions

From the information available to us, it is our view that the additional search powers have not enhanced the strategies previously available to police to combat firearms-related crime and stop the use of premises as OMCG clubhouses.

However, it is possible that police might apply for declarations in the future. Our review, conducted in the absence of a declaration, gives us no information to indicate how the additional section 10 search powers and new offence provisions might assist police. We also do not know whether concerns about those powers and offence provisions will be realised in practice.

Parliament's intention was that the exercise of the additional search powers and the operation of the new offence provisions should be subject to independent scrutiny. We therefore recommend that an independent agency be required to scrutinise the exercise of the additional search powers, and the operation of the new offence provisions, in the event that police obtain a declaration over premises in the future. This will enable an objective assessment to be made of the efficacy of the amendments, including whether the concerns expressed about the potential use and application of these provisions in practice have been realised.

To enable the Attorney General to consider whether a future review is required, the NSW Police Force should provide reports to the Attorney General about any declarations made, and related information about the use of the section 10 search powers, so the Attorney General can advise Parliament of the need for independent scrutiny of the exercise of those powers and any use of the offence provisions.

Recommendation

11. The NSW Police Force provide to the Attorney General a report detailing any declarations that have been made under the *Restricted Premises Act 1943*, and the use of section 10 powers and any charges laid for the new offence provisions. This report should be provided every 12 months from the date of this report for three years.

326. *Ghani v Jones* [1970] 1 QB 693 at 708-9, as cited in *Director of Public Prosecutions v Tamcelik* [2012] NSWSC 1008 at [67]-[68].
327. For example, police can seize any 'dangerous article' suspected of being used in the commission of a 'relevant offence' or any ammunition not being kept safely: LEPRA, s. 22; *Firearms Act 1996,* s. 42. Police also have the option to apply for a *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) search warrant or a crime scene warrant to authorise them to search for and seize weapons or explosives found when conducting a section 13 or section 10 search: LEPRA, ss. 47(1), 94.
328. Consultation with Strike Force Raptor, 30 September 2014; Consultation with Strike Force Raptor, 16 October 2014.
329. Consultation with Strike Force Raptor, 30 September 2014; Consultation with Strike Force Raptor, 16 October 2014.
330. Details provided to the NSW Police Force by the NSW Ombudsman in a draft of this report.

Appendix 1

Extracts of Parts 1, 2 and 4 of the *Restricted Premises Act 1943*

Part 1 Preliminary

1 Name of Act

This Act may be cited as the *Restricted Premises Act 1943.*

2 Definitions

In this Act unless the context or subject matter otherwise indicates or requires:

appropriate Court, in relation to a declaration under Part 2, means the Court that made the declaration.

area, in relation to a local council, means the area of the council within the meaning of the *Local Government Act 1993*.

associate of a reputed criminal includes (without limitation) a person who has been given an official warning under section 93X of the *Crimes Act 1900*.

brothel means premises:

(a) habitually used for the purposes of prostitution, or

(b) that have been used for the purposes of prostitution and are likely to be used again for that purpose, or

(c) that have been expressly or implicitly:

(i) advertised (whether by advertisements in or on the premises, newspapers, directories or the internet or by other means), or

(ii) represented,

as being used for the purposes of prostitution, and that are likely to be used for the purposes of prostitution.

Premises may constitute a brothel even though used by only one prostitute for the purposes of prostitution.

explosive has the same meaning as in the *Explosives Act 2003*.

Licensed premises has the meaning ascribed to it in the *Liquor Act 2007*.

Liquor has the meaning ascribed to it in the *Liquor Act 2007*.

local council means a council within the meaning of the *Local Government Act 1993*.

Occupier of premises includes the lessee or sub-lessee who is not the owner as defined in this section.

Owner of premises includes every person who is, whether by law or in equity:

(a) entitled to the same for any estate of freehold in possession, or

(b) in actual receipt of, or entitled to receive, or if the premises were let to a tenant, would be entitled to receive the rents and profits of the same.

In the case of premises sub-leased ***owner*** includes any lessee or sub-lessee from whom a sub-lessee holds.

Premises includes any building and any part of any building but does not include licensed premises or the premises of any registered club.

related sex uses means the following:

(a) the use of premises for the provision of sexual acts or sexual services in exchange for payment,

(b) the use of premises for the provision of massage services (other than genuine remedial or therapeutic massage services) in exchange for payment,

(c) the use of premises for the provision of adult entertainment involving nudity, indecent acts or sexual activity if the entertainment is provided in exchange for payment or if the entertainment is ancillary to the provision of other goods or services.

reputed criminal includes (without limitation) a person who:

(a) has been convicted of an indictable offence (including an offence under section 93X of the *Crimes Act 1900*), or

(b) is engaged in an organised criminal activity within the meaning of section 46AA of the *Law Enforcement (Powers and Responsibilities) Act 2002*, or

(c) is a controlled member of a declared organisation within the meaning of the *Crimes (Criminal Organisations Control) Act 2012*.

reputed criminal declaration—see section 3 (3).

senior police officer means a police officer of or above the rank of sergeant.

weapon means:

(a) a firearm, or an imitation firearm, within the meaning of the *Firearms Act 1996*, or

(b) a prohibited weapon within the meaning of the *Weapons Prohibition Act 1998*.

2A Notes

Notes included in this Act are explanatory notes and do not form part of this Act.

Part 2 Disorderly houses

3 Declaration by Supreme Court or District Court in relation to premises

(1) On a senior police officer showing reasonable grounds for suspecting that all or any of the following conditions obtain with respect to any premises, that is to say:

(a) that drunkenness or disorderly or indecent conduct or any entertainment of a demoralising character takes place on the premises, or has taken place and is likely to take place again on the premises, or

(b) that liquor or a drug is unlawfully sold or supplied on or from the premises or has been so sold or supplied on or from the premises and is likely to be so sold again on or from the premises, or

(c) that reputed criminals or associates of reputed criminals are to be found on or resort to the premises or have resorted and are likely to resort again to the premises, or

(d) that any of the persons having control of or managing or taking part or assisting in the control or management of the premises:

(i) is a reputed criminal or an associate of reputed criminals, or

(ii) has been concerned in the control or management of other premises which have been the subject of a declaration under this Part, or

(iii) is or has been concerned in the control or management of premises which are or have been frequented by persons of notoriously bad character or of premises on or from which liquor or a drug is or has been unlawfully sold or supplied,

(e) (Repealed)

the Supreme Court or the District Court may declare such premises to be premises to which this Part applies.

(2) Such declaration shall be in force until rescinded.

(3) The appropriate Court may, in declaring premises to be premises to which this Part applies, state that the reason (or the predominant reason) for the declaration is that:

(a) reputed criminals have attended or are likely to attend the premises, or

(b) a reputed criminal has, or takes part or assists in, the control or management of the premises.

Any such declaration is a ***reputed criminal declaration*** for the purposes of this Act.

4 Rescission of declaration

(1) Any such declaration may be rescinded by the appropriate Court subject to such terms as the Court thinks fit, on application being made to it:

(a) by the owner or occupier of the premises, the subject of the declaration, on proof that the owner or occupier has not at any time allowed any of the conditions referred to in subsection (1) of section 3 to obtain in relation to such premises, or

(b) by a senior police officer on proof that there is no reasonable ground for suspecting that any of the conditions referred to in subsection (1) of section 3 obtain in relation to such premises.

(2) Where an application under this section is made by the owner or occupier of the premises notice in writing of intention to make the same shall be served on a senior police officer two days at least before the hearing of such application.

5 Publication of notice of declaration and rescission

(1) Notice of any such declaration or any rescission of the same shall be published in the Gazette.

(2) In any proceedings under this Act the production of a copy of the Gazette containing such notice shall be evidence that the declaration or rescission therein notified was duly made.

6 Notice given of declaration

(1) A senior police officer is to cause notice of the making of a declaration under this Part to be served on the owner or occupier of the premises to which the declaration relates:

(a) personally, or

(b) if personal service cannot be effected promptly, by causing a copy of the notice to be fixed at or near to the entrance of the premises.

(2) A person must not deface, destroy, cover or remove a copy of a notice fixed under this section at or near the entrance to premises unless the person is a police officer or the owner or occupier of the premises.

Maximum penalty (subsection (2)): 20 penalty units.

7 (Repealed)

8 Offence by owner of premises

(1) After the service of a notice under section 6 on the owner of premises of the making of a declaration, the owner is guilty of an offence if any of the conditions referred to in section 3 (1) apply to the premises while the declaration is in force.

Maximum penalty: 50 penalty units or imprisonment for 6 months, or both.

(2) An owner of premises is not guilty of an offence under subsection (1) if the owner proves that he or she has taken all reasonable steps to prevent the conditions referred to in section 3 (1) applying to the premises.

(2A) After the service of a notice under section 6 on the owner of premises of the making of a reputed criminal declaration, the owner is guilty of an offence if, while the declaration is in force, a reputed criminal:

(a) attends the premises, or

(b) has, or takes part or assists in, the control or management of the premises.

Maximum penalty: 150 penalty units or imprisonment for 3 years, or both.

(2B) An owner of premises is not guilty of an offence under subsection (2A) if the owner proves that he or she has taken all reasonable steps to prevent a reputed criminal:

(a) attending the premises, or

(b) having, or taking part or assisting in, the control or management of the premises.

(2C) A person is not liable to be convicted of an offence under both subsections (1) and (2A) in respect of essentially the same facts.

(3) An owner of premises that are occupied by a person other than the owner is not guilty of an offence under this section if the owner proves that he or she has taken all reasonable steps to evict the occupier from the premises.

9 Offence by occupier of premises

(1) After the service of a notice under section 6 on the occupier of premises of the making of a declaration, the occupier is guilty of an offence if any of the conditions referred to in section 3 (1) apply to the premises while the declaration is in force.

Maximum penalty: 50 penalty units or imprisonment for 6 months, or both.

(2) An occupier of premises is not guilty of an offence under subsection (1) if the occupier proves that he or she has taken all reasonable steps to prevent the conditions referred to in section 3 (1) applying to the premises.

(3) After the service of a notice under section 6 on the occupier of premises of the making of a reputed criminal declaration, the occupier is guilty of an offence if, while the declaration is in force, a reputed criminal:

(a) attends the premises, or

(b) has, or takes part or assists in, the control or management of the premises.

Maximum penalty: 150 penalty units or imprisonment for 3 years, or both.

(4) An occupier of premises is not guilty of an offence under subsection (3) if the occupier proves that he or she has taken all reasonable steps to prevent a reputed criminal:

(a) attending the premises, or

(b) having, or taking part or assisting in, the control or management of the premises.

(5) A person is not liable to be convicted of an offence under both subsections (1) and (3) in respect of essentially the same facts.

10 Entry by police

While any such declaration is in force with respect to any premises any member of the Police Force may, without warrant:

(a) enter the said premises,

(b) enter any land or building which the member has reasonable grounds to suspect is used as a means of access to or of exit or escape from the same,

(c) pass through, from, over and along any other land or building for the purpose of entering in pursuance of paragraph (a) or paragraph (b),

(d) for any of the purposes aforesaid break open doors, windows, and partitions, and do such other acts as may be necessary,

(e) search such premises for, and seize, any liquor and any drug in such premises and any drinking glass, vessel, container or device in such premises which is used or is capable of being used for or in connection with the storage, supply or consumption of any liquor or drug or the user or taking of any drug,

(f) search the premises for, and seize, any weapon or explosive.

11 Obstructing police

Any person who wilfully obstructs or aids in obstructing or solicits any other person to obstruct or aid in obstructing a member of the Police Force in the exercise of any power conferred on the member by this Act shall be guilty of an offence against this Act and is liable to a penalty not exceeding 50 penalty units or imprisonment for 6 months, or both.

12 Evidence of certain matters

Where any member of the Police Force authorised under this Act to enter any premises, land or building is wilfully prevented from or is obstructed or delayed in entering the same or any part thereof, or where any external or internal door of, or means of access to any such premises, land or building authorised to be entered, is found to be fitted or provided with any bolt, bar, chain or any means or contrivance for the purpose of preventing, delaying or obstructing the entry into the same or any part thereof, of any member of the Police Force authorised as aforesaid, or for giving an alarm in case of such entry, or if such premises are found to be fitted or provided with any means or contrivance for concealing, removing or destroying any liquor or drug or any such glass, vessel, container or device as is referred to in paragraph (e) of section 10 or any weapon or explosive, it shall be evidence until the contrary is made to appear that the conditions referred to in subsection (1) of section 3 obtain in relation to such premises.

13 Suspected premises – issue of search warrant

(1) In this section:

authorised officer has the same meaning as it has in the *Law Enforcement (Powers and Responsibilities) Act 2002*.

(2) A member of the Police Force may apply to an authorised officer for a search warrant if the member of the Police Force has reasonable grounds for believing that any of the conditions referred to in section 3 (1) obtain, and are commonly reported to obtain, in respect of any premises.

(3) An authorised officer to whom an application is made under subsection (2) may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising any member of the Police Force:

(a) to enter the premises, and

(b) to search the premises for, and to seize, any liquor or drug or any drinking glass, vessel, container or device referred to in section 10 (e) or any weapon or explosive.

(4) Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies to a search warrant issued under this section.

13A Forfeiture or disposal of seized articles

(1) Any article seized either before or after the commencement of the *Disorderly Houses (Amendment) Act 1943* in any disorderly house by a member of the Police Force in pursuance of powers conferred on the member by section 10 shall be forfeited to the Crown.

(2) Any person claiming to be the owner of any article seized by a member of the Police Force so authorised by a search warrant under section 13 may:

(a) if such seizure was made before the commencement of the *Disorderly Houses (Amendment) Act 1943*, within twenty-one days after such commencement, or

(b) if such seizure was made after such commencement, within twenty-one days of such seizure,

make application to a Magistrate for the return to the person of such article.

Such Magistrate shall inquire into the matter and if it appears to the Magistrate that at the time of the seizure any of the conditions mentioned in section 3 obtained on the premises where the seizure was made, the Magistrate shall order the forfeiture of such article, to the Crown.

If it appears to such Magistrate that at the time of the seizure any of the conditions mentioned in section 3 did not obtain on such premises, the Magistrate may order that the article so seized be handed over to the owner or occupier of such premises or to such other person as may appear to the Magistrate to be the rightful owner.

(3) Any person who makes application to a Magistrate under subsection (2) shall, at least seven days prior to the hearing of such application, serve on a Superintendent or Inspector of Police a notice in writing of such application.

(4) Where, in respect of any article seized by a member of the Police Force so authorised by a search warrant under section 13, no application is made under subsection (2) within the time prescribed by that subsection such article shall be forfeited to the Crown.

(5) In this section:

article means any liquor, drug, drinking glass, vessel, container or device or any weapon or explosive.

14 Existing declarations and savings

(1) Any declaration of premises as a disorderly house made or purporting to have been made by a Stipendiary or Police Magistrate before the commencement of this Act under the Order Number Ten of the State of New South Wales made by the Premier of the said State and published in the Gazette of the tenth day of March one thousand nine hundred and forty-two shall, if such declaration has not before the commencement of this Act been rescinded by a Court of Petty Sessions in accordance with the provisions of the said Order Number Ten, be deemed to have the same force and effect as if it had been made under section 3 and this Act shall apply accordingly; and any act, matter or thing done or commenced or purporting to have been done or commenced in pursuance of the said Order Number Ten before the commencement of this Act shall be deemed to have been duly done or commenced:

Provided that nothing in this subsection shall affect the operation of any judgment, order or conviction obtained or made before the commencement of this Act.

(2) No claim shall be made and no action, suit or other proceeding shall be maintainable in any court against any person in respect of anything done or purporting to have been done under the said Order Number Ten before the commencement of this Act.

(3) The Supreme Court is, on application by the owner or occupier of premises, to rescind a declaration under section 3 in respect of the premises (subject to such terms as the Court thinks fit) if:

(a) the declaration was made before the commencement of the *Disorderly Houses Amendment Act 1995*, and

(b) the Court is satisfied that the declaration could not be made now because of section 16.

(4) An owner or occupier of premises who makes an application under subsection (3) must give notice in writing to a Superintendent or Inspector of Police of the intention to make the application at least 2 days before the hearing of the application.

15 Rules of the Supreme Court

(1) Rules may be made under the *Supreme Court Act 1970* for or with respect to any matters that by or under the provisions of this Part are required or permitted to be prescribed for carrying out or giving effect to those provisions.

(2) Subsection (1) does not limit the rule-making powers conferred by the *Supreme Court Act 1970*.

15A Rules of the District Court

(1) Rules may be made under the *District Court Act 1973* for or with respect to any matters that by or under the provisions of this Part are required or permitted to be prescribed for carrying out or giving effect to those provisions.

(2) Subsection (1) does not limit the rule-making powers conferred by the *District Court Act 1973*.

Part 2A Special provisions relating to closure of premises

15B Definition

In this Part, ***prohibited drug*** has the same meaning as in the *Drug Misuse and Trafficking Act 1985*.

15C Order by Magistrate for temporary closure of premises

(1) A Magistrate may, on application made by a senior police officer, order the owner or occupier of any premises to close the premises from a time specified in the order until a later specified time.

(2) An order may only be made under subsection (1) if the senior police officer provides reasonable grounds for suspecting that the premises are being used by the owner or occupier (or with the knowledge of the owner or occupier) for a commercial purpose in order:

(a) to supply prohibited drugs unlawfully to persons, or

(b) to keep prohibited drugs to enable their unlawful supply to persons, or

(c) to make arrangements for the unlawful supply of prohibited drugs to persons at another place.

(3) An order must not require the closure of premises for a period longer than 72 hours.

(4) An order may require the closure of premises until specified conditions are met but must not require closure for a period longer than 72 hours.

(5) An order under this section must be served on the owner or occupier of the premises concerned or on the person apparently in charge of the premises.

(6) A person must not fail to comply with an order under this section.

Maximum penalty: 50 penalty units or imprisonment for 6 months, or both.

(7) Two or more orders closing the same premises may not be made under this section in any period of one week.

15D Revocation of closure order

(1) The owner or occupier of premises the subject of an order under section 15C may apply to a Magistrate for the revocation of the order.

(2) A Magistrate may revoke an order under section 15C if the Magistrate is satisfied that:

(a) the premises concerned are not being used for a purpose referred to in section 15C (2), or

(b) the applicant for revocation of the order has no knowledge that the premises are being used for a purpose referred to in section 15C (2).

Part 3 Brothels

...

Part 4 Miscellaneous

18A Proceedings for offences

(1) Proceedings for offences against this Act are to be dealt with summarily before the Local Court.

(2) Despite subsection (1), an offence under section 8 (2A) or 9 (3) may be prosecuted on indictment. However, Chapter 5 of the *Criminal Procedure Act 1986* (which relates to the summary disposal of certain indictable offences unless an election is made by the prosecution to proceed on indictment) applies to and in respect of an offence under section 8 (2A) or 9 (3).

19 Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

20 Objects of *Disorderly Houses Amendment Act 1995*

The enactment of the *Disorderly Houses Amendment Act 1995* should not be taken to indicate that Parliament endorses or encourages the practice of prostitution, which often involves the exploitation and sexual abuse of vulnerable women in our society.

20A Monitoring of police powers and new offence provisions by Ombudsman

(1) For the period of 2 years after the commencement of the amendment made to section 10 of this Act by the *Firearms and Criminal Groups Legislation Amendment Act 2013*, the Ombudsman is to keep under scrutiny the exercise of powers conferred on police officers as a consequence of the amendments made to this Act by that amendment Act (the ***relevant police powers***).

(2) For that purpose, the Ombudsman may require the Commissioner of Police to provide information about the exercise of the relevant police powers.

(3) In that period, the Ombudsman is to also monitor the operation of sections 8 (2A) and 9 (3) (the ***new offence provisions***). For that purpose, the Commissioner of Police is to ensure that the Ombudsman is provided with information about any prosecutions brought under the new offence provisions.

(4) The Ombudsman must, as soon as practicable after the end of that 2-year period, prepare a report on the exercise of the relevant police powers and on the operation of the new offence provisions and furnish a copy of the report to the Minister, the Attorney General and the Commissioner of Police.

(5) The Ombudsman may in the report identify, and include recommendations for consideration by the Minister about, amendments that might appropriately be made to this Act with respect to the exercise of the relevant police powers and the new offence provisions.

(6) The Minister is to lay (or cause to be laid) a copy of the report furnished to the Minister under this section before both Houses of Parliament as soon as practicable after the Minister receives the report.

(7) If a House of Parliament is not sitting when the Minister seeks to lay a report before it, the Minister may present copies of the report to the Clerk of the House concerned.

(8) The report that is 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 so printed, 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.

21 Savings, transitional and other provisions

Schedule 1 has effect.

Schedule 1 Savings, transitional and other provisions

(Section 21)

1 Regulations

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

this Act

Disorderly Houses Amendment (Commercial Supply of Prohibited Drugs) Act 2002

Brothels Legislation Amendment Act 2007

any other Act that amends this Act

(2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.

(3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

2 Existing declarations

A declaration under this Act of premises as a disorderly house in force at the commencement of this clause is taken to be a declaration under Part 2 of the premises as premises to which that Part applies.

Appendix 2

List of submissions

Brotherhood Christian Motorcycle Club

Burwood Council

NSW Fair Trading

NSW Firearm Dealers Association

Tenants' Union of New South Wales

Women in Prison Advocacy Network

NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

General enquiries: (02) 9286 1000
Toll free (outside Sydney Metro Area, NSW only): 1800 451 524
Tel. typewriter (TTY): (02) 9264 8050
Facsimile: (02) 9283 2911

Email: nswombo@ombo.nsw.gov.au

www.ombo.nsw.gov.au