

The Hon. P Whelan MP
Minister for Police
Level 20
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14-24 College Street
SYDNEY NSW 2000

Dear Minister,

Under Section 6 of the *Crimes Legislation Amendment (Police and Public Safety) Act 1998*, the Ombudsman was required to monitor the implementation of the Act for the first twelve months of its operation, and to prepare a report on the activities undertaken during that time. I am pleased to provide you with this report pursuant to the Act.

I acknowledge that the objectives of the Act enjoy appreciable community support, and I continue to be supportive of those objectives. From the outset, the focus of the monitoring activities undertaken by my Office was to ascertain whether the Act was being applied properly, fairly and effectively. Accordingly, the review has identified those areas where police practice and the application of the Act has been positive, as well as the areas where fine tuning is required. In light of these findings, I support the retention of the Police and Public Safety Act powers. However, there are recommendations made in the course of this report aimed at improving the operation and application of the powers.

I believe that one of the strengths of this review lies in its examination of police practice. The unprecedented scrutiny that we were able to give to practice issues relating to street policing was only possible as a result of the information provided by the Police Service, and the contributions of individual police officers in interviews and focus groups. We were also afforded the opportunity to accompany operational police during the CitySafe operation in the City of Sydney.

In the course of the focus groups, officers spoke freely and honestly about their experience of the legislation, and policing practice generally. Their insights added considerably to the quality of the review, and to this end, I acknowledge the assistance and cooperation of the officers concerned as well as the Police Association, who co-convened the focus groups.

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The views expressed by police officers that are contained in this report are not meant to embarrass the officers concerned or the Police Service; rather, they are included to illustrate very real issues associated with police practice.

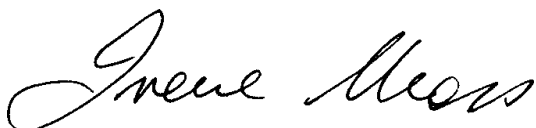
We have highlighted a number of positive initiatives developed and applied by the Police Service. These achievements are to be encouraged, and where we have seen scope for these initiatives to improve practice in other areas, we have sought to make use of them.

In order to ensure that the review was as comprehensive as possible, an extensive research strategy was developed and implemented. To this end we received considerable assistance from the NSW Bureau of Crime Statistics and Research, the Department of Education and Training, the Family Court of Australia, the Infringement Processing Bureau, and the State Debt Recovery Office. Their contributions will be evident throughout the report.

I would also like to acknowledge, and express appreciation for, the contributions of many members of the community who offered their views and insights on the implementation of the Act. In many instances, individuals and organisations went to considerable effort to compile submissions on the Act, and again, their work will be evident in the course of the report.

The opportunity to monitor legislation empowering police on the street, and regulating their use of those powers, has been greatly appreciated by my Office. I believe that the findings and recommendations contained in this report will improve the application of the law regarding, as well as the practice of, street policing. I believe that there is much in this report that will be of interest and benefit to police, and to the community that these powers are intended to protect.

Yours sincerely

A handwritten signature in cursive script that reads "Irene Moss". The signature is written in black ink and is positioned to the left of the typed name and title.

Irene Moss AO
NSW Ombudsman

11 November 1999

Policing public safety

Report under section 6 of the
Crimes Legislation Amendment (Police and Public Safety) Act

November 1999

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1. Overview

Crimes Legislation Amendment (Police and Public Safety) Act

- 1.1 The *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (the 'Police and Public Safety Act') commenced on 1 July 1998.
- 1.2 The Act made amendments to the *Summary Offences Act 1988* to make the custody of a knife in a public place an offence, permit police to conduct searches for knives and other dangerous implements, and enable police to give reasonable directions in public places to deal with persons whose behaviour or presence constitutes an obstruction, harassment, intimidation or causes fear.
- 1.3 The Act also amended the *Crimes Act 1900* to authorise police to demand the name and address of any potential witness to an indictable offence.
- 1.4 The Act provided for the Ombudsman to monitor the implementation of the powers over the first 12 months of operation, and to report to the Minister for Police and the Commissioner of Police at the conclusion of that period. This volume constitutes the report required under the Act.
- 1.5 This part of the report provides an overview of the main findings and significant arguments developed in the course of the report. Recommendations are developed throughout the course of the report, and rely on the more extensive description of findings and related analysis found in the body of the report. A summary of those recommendations is contained at the end of this report.

Chapter 2: Background

- 1.6 The Police and Public Safety Act was introduced into the New South Wales Parliament on 28 April 1998, partly in response to the stabbing murder of an off duty constable in February 1998. Its introduction coincided with significant upward trends in knife related crime. It also followed media coverage given to violent crime in the Sydney CBD, and came after representations by the Police Commissioner and the Police Association for greater police powers to deal with knife related crime and violent street offences.
- 1.7 The legislation was intended to provide police with powers which would have an immediate impact on the incidence and nature of street crime. The Bill stimulated considerable debate within the Parliament and the wider community. Concerns were expressed about the potential impact of the powers on Aborigines, young people and other groups.
- 1.8 In response to concerns about the potential for abuse and/or misuse of the powers, provision for monitoring of the legislation by the Ombudsman was incorporated into the Bill. The Parliament passed the Bill in late May 1998, and it commenced on 1 July 1998.

OVERVIEW

- 1.9 To assist the Ombudsman's Office in its role of monitoring the legislation, a research project was established by the Ombudsman. This project commenced on 1 September 1998.

Chapter 3: Methodology

- 1.10 A multi-faceted research strategy was developed to monitor the implementation of the legislation, in particular to obtain information on whether the legislation was being applied properly, effectively and fairly throughout NSW. Our aim was to obtain information on the use of the legislation from a range of sources and perspectives, using a number of different research tools.

- 1.11 The main research methods were:

Police records: use of the COPS (Computerised Operational Policing System) database

- 1.12 The data recorded on COPS is the most comprehensive record available of the extent and nature of the police use of the Police and Public Safety powers. The records on COPS have therefore formed the basis of much of the material contained in this review.
- 1.13 The scale of the research project precluded us from giving detailed attention to the use of the powers by every officer in every part of the State. Accordingly, where appropriate, we focused our attention on four locations (Bankstown, City Central, Lake Illawarra/Wollongong and Orana (Dubbo)). These commands were chosen due to their diverse characteristics in terms of location, population, and policing issues.
- 1.14 COPS records provided information about the extent to which the powers were being used in different local area commands and regions of the Police Service, changes in usage over time, and demographic details about the individuals coming into contact with police in relation to the legislation, as well as descriptions of the circumstances and manner in which the powers were exercised.
- 1.15 However, COPS is not without its limitations. It is no different to any system requiring data entry in that 'the data extracted is only as good as the information that is entered'¹. It does have an advantage of scale, in terms of the volume of entries, but this should not be confused with total reliability, objectivity or consistency.
- 1.16 Changes in the data recorded on COPS over time point to less than comprehensive recording methods within the Police Service, particularly in the early months of implementation. This concern was expressed in the *Policing Public Safety* issues paper produced by our Office, which highlighted the fact that the COPS data for the period 1 July to 31 August 1998 showed a remarkably high ratio of knives found to searches performed.² This brought into question the extent of recording of unproductive searches. This recording behaviour appeared to change over the review period.

¹ L. Hayes. 'Getting the Balance Right: The Policing of Young People in NSW'. Paper presented at the Children and Crime Conference, Australian Institute of Criminology, June 1999, p 5.

² *Policing Public Safety* A discussion paper on the Crimes Legislation Amendment (Police and Public Safety) Act, NSW Ombudsman, December 1998, p 15.

Recording behaviour of police officers

- 1.17 A number of factors influenced police recording behaviour over the review period, and the reliability of the information was influenced by police decisions whether to record a particular incident.
- 1.18 In focus groups and interviews, police discussed possible reasons for failing to record a use of the legislation:
- My only criticism is ... it is brilliant legislation, but the cops are not putting it on the system – for whatever reason. And probably, I suspect, because they're too bloody busy doing police work. It's just cumbersome, the COPS system is not user friendly and by the time they have finished 12 hour shifts, the only thing they want to do is get home ...³
- 1.19 Police may also be more inclined to record an incident in COPS where an offence is committed, and the possibility of court or other follow-up action exists, than where no offence is detected.
- 1.20 Another factor which affects the reliability of the data on COPS is the range of different ways a single event can be recorded. While the COPS database might appear to provide a uniform recording system, in fact it allows the police officer inserting the information a number of choices. For example, a situation in which a group of 10 people are 'moved on' could be recorded as one use of the legislation (one event) or as 10 uses. Information from police focus groups indicates that some police had deliberately adopted the latter approach because it gave the appearance of a greater level of usage of the legislation:
- We used to have stacks of move ons and ... each group, there might be four in the group, was [recorded as] one incident. Then some smarties in Sydney ... were putting that down as four instances, and it's a numbers game, so we had one and they had four. So, instead of the people up above having some internal fortitude, saying, 'That's one entry', now everyone is doing it the shonky way.⁴
- 1.21 The data base as a whole is also affected by the non mandatory nature of many of its fields and the practice of leaving fields blank or as 'unknown'. As a result, some information contained in the database is more comprehensive than other information. Data about age, a key area for the research, is likely to be relatively reliable because police often receive independent verification, by sighting a driver's licence or other proof of age. Aboriginality data is also likely to be relatively reliable because police cannot complete their COPS record without entering information in this field. On the other hand, police may, but are not required to, enter information on 'racial appearance'. For that reason, this field is often not completed. Another limitation of the COPS data relates to the subjective nature of some of the information it contains.

³ Comment by a supervisor in a local command in inner Sydney.

⁴ Focus group 2.

Analysis by the Bureau of Crime Statistics and Research

- 1.22 With the assistance of the NSW Bureau of Crime Statistics and Research (BOCSAR), a number of more complex areas using the COPS data were able to be examined including:
- other offences acted upon by police in combination with offences under the Police and Public Safety legislation;
 - the characteristics of persons charged with offences involving knives;
 - the number of offences against the person involving knives;
 - the location of relevant offences — whether they were in a public place.

Other sources

- 1.23 Other sources of information included:
- Complaints to the NSW Ombudsman.
 - Submissions in response to the Discussion Paper issued by our Office in December 1998.
 - Information from the Family Court of Australia.
 - Information from the Infringement Processing Bureau and State Debt Recovery Office.
 - Information from schools and the Department of Education and Training.
 - Direct observation of policing activity.
 - Surveys of legal practitioners and local area commanders.
 - Focus groups, interviews and consultations.
 - Observation of Operations and Crime Review (OCR) meetings.
 - Viewing of Closed Circuit Television (CCTV) video tapes and associated documentation.
 - Use of the Ombudsman's investigatory powers.
 - Scrutiny by the courts.

Chapter 4: Legislative survey

- 1.24 Police practices are affected by a number of factors, including various legislative powers. In order to understand the impact of the Police and Public Safety Act, it is important to consider the powers police already had at their disposal. This chapter summarises the legislative powers related to those created by the Police and Public Safety Act, notably powers to search without warrant, provide reasonable directions and demand names and addresses.
- 1.25 The latter part of this chapter summarises relevant legislative provisions in some other Australian jurisdictions. In considering whether New South Wales' provisions should be modified, it may be useful to have regard to approaches used elsewhere.

Chapter 5: Searches

Chapter 5A: Power to search for dangerous implements

1.26 The *Summary Offences Act 1988* was amended by the Police and Public Safety Act to allow a police officer with reasonable grounds to suspect that a person has unlawful custody of a dangerous implement,⁵ including a knife, to search the person, and to examine any bag or other personal effect that the person has with them.⁶

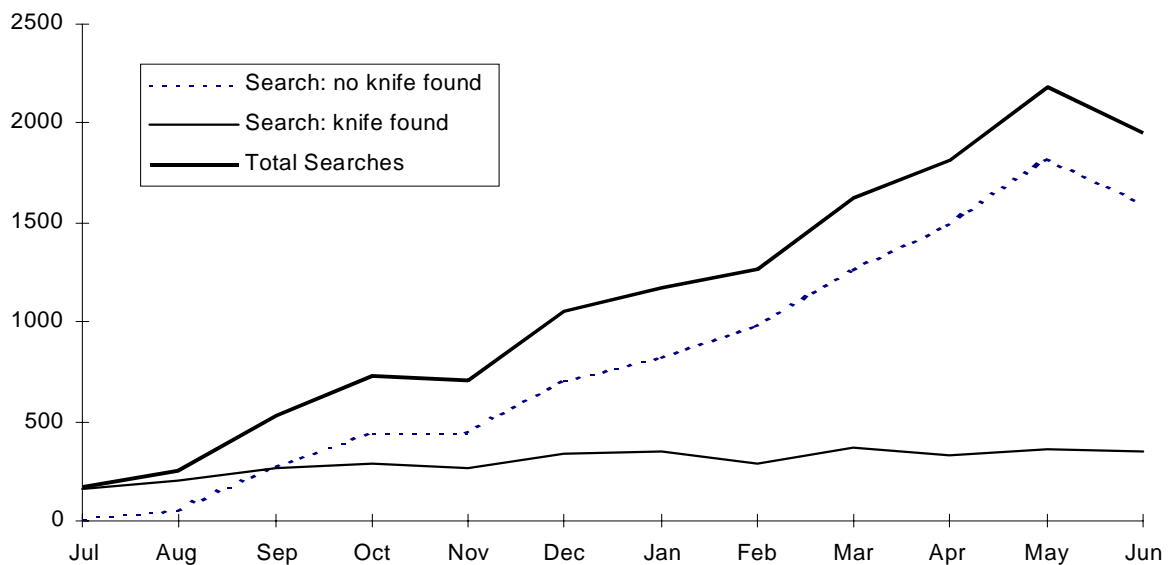
Police records of knife searches

1.27 The Police Service data highlights three key issues about the reported use of the search powers under the Police and Public Safety Act:

- The steep increase in the reported use of the search powers over the review period.
- The relatively stable number of searches in which a knife was found.
- The high number of teenagers searched.

1.28 The COPS records show that the number of recorded Police and Public Safety Act searches across NSW increased steadily throughout the review period.

Graph 5.1A Police and Public Safety recorded search incidents



Source: NSW Bureau of Crime Statistics and Research extract of COPS records of Police and Public Safety search incidents 1.7.1998 to 30.6.1999.

1.29 A combination of factors is likely to have contributed to the sharp upward trend in reported searches.

⁵ A 'dangerous implement' is defined by the legislation as a knife, a firearm, prohibited weapon or prohibited article, or an offensive implement (which is further defined as anything made or adapted to cause injury to a person, or intended to be used to injure or menace a person or damage property). See *Summary Offences Act*, s. 28.

⁶ *Summary Offences Act*, s. 28A (1) (c).

‘Ramping-up’ of searches

1.30 It is likely that there was a ‘ramping-up’ in the use of the powers, in that police conducted increasing numbers of knife searches as they became more familiar with the provisions through training and supervisory instruction. Improved training and OCR scrutiny of the use of powers are other factors that might account for the increased use of the powers. A number of commanders said they were warned in OCRs that unless the Service could demonstrate that police had a need for the new powers, the Ombudsman’s review was likely to recommend that the legislation be repealed. According to some, the message conveyed regarding the Police and Public Safety Act was: ‘Use it, or lose it’.

Better compliance with recording requirements

1.31 However, there is evidence to suggest that there was significant under-reporting of the use of Police and Public Safety powers. Of the 2199 penalty notices for custody of knife offences that were processed by the Infringement Processing Bureau, around half were recorded in the Police Service’s COPS computer system.⁷ That is, there was incomplete recording even of those incidents that resulted in action taken against offenders. Police would be even less likely to thoroughly record uses of the legislation in which no action was taken.

1.32 On the other hand, there was evidence that recording improved throughout the implementation period. At least some of the rapid increase in the reported use of the powers is attributable to more accurate recording, particularly as police officers became familiar with the new recording procedures, and as the message to record the use of the powers was continually reinforced by senior police management. One way of viewing the exponential rise in the reporting of ‘unproductive’ searches is to consider the two sets of data in terms of ratios. As the table shows, the legislation was in operation for three months before the figures showed that there were at least as many ‘unproductive’ searches as there were ‘productive’ searches:

Table 5.1: Ratio of search incidents — knife found: no knife found

July 1998	August	September	October	November	December
100 : 6	100 : 25	100 : 103	100 : 152	100 : 167	100 : 208
January 1999	February	March	April	May	June
100 : 239	100 : 346	100 : 346	100 : 449	100 : 556	100 : 454

Source: NSW Bureau of Crime Statistics and Research extract of COPS records of Police and Public Safety search incidents 1.7.98 to 30.6.99.

1.33 It would appear that the initial months of the review period were characterised by significant under-reporting of searches in which no knives were found.

⁷ As the analysis in Chapter 12 shows, there were 1120 COPS records of productive search incidents in which one or more infringement notices were issued. For most incidents, one notice would have been issued. However, it is not possible to calculate the exact number of notices with corresponding COPS entries.

- 1.34 In surveying local commanders, we asked whether commands had modified their implementation and/or recording strategies following feedback at OCRs. We were advised that this was the case. Many commanders indicated that criticism at OCRs had led to the more diligent recording of the use of the powers.

Searches in which a knife was found

- 1.35 Another feature of the reported data is the relative stability of the number of searches resulting in the discovery of knives and other implements. Although the monthly tallies for unproductive searches climbed sharply almost throughout the review period, the number of searches in which knives were found began to plateau soon after the laws were introduced (see Graph 5.1).
- 1.36 From September, the number of search incidents involving the discovery of a knife or implement ranges from 262 to 365 per month, irrespective of the total number of searches conducted. Even when the total number of recorded search incidents peaked at 2188, only 361 involved the finding of a knife or implement.
- 1.37 Although some of the increase in the number of searches can be attributed to improved recording, some of the increase is attributable to increased search activity. So although the decline in ‘productivity’ can be partly attributed to better recording, particularly of those searches where nothing was found, a real increase in the number of searches without a corresponding rise in the number of knives found has to be explained by other factors.
- 1.38 The most likely explanation for the declining ‘productivity’ of searches is that few of the additional searches are directed at people carrying knives. This might be the case, for instance, if:
- The Service’s emphasis on targeting repeat offenders has resulted in the same people being searched over and over. As there are very few instances of fines or charges for repeat knife offences,⁸ searching the same people again and again could be inflating the number of unproductive searches; or
 - Many of the additional searches from proactive policing programs are directed at young people. As the data in the next section shows, around one in seven searches of 16 or 17 year olds results in a knife being found, whereas about one in three searches of people aged in their 30s leads to a find; or
 - Fewer people are carrying knives.

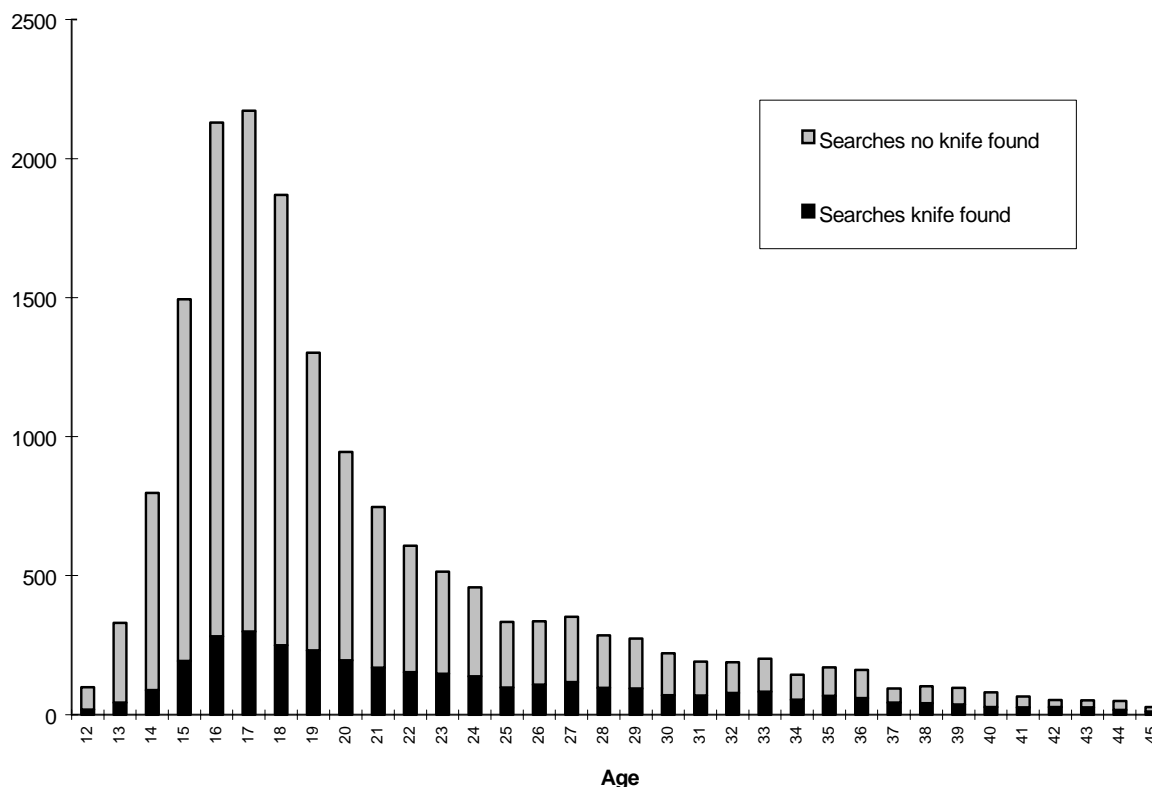
⁸ A Police Service review of charge management data showed action taken against eight people during the review period (two were charged, two were summonsed, two were issued with court attendance notices, and two were issued with field court attendance notices) for second or subsequent custody of knife offences.

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Ages of persons searched

1.39 In considering the fairness of police stop and search practices, it is important to acknowledge that police interventions must discriminate to some degree. The challenge for police is to ensure that factors used to discriminate between potential search targets are legitimate. The following chart shows the ages (where known) of people that police stopped and searched for knives during the review period.

Graph 5.2: Ages of people searched for knives



Source: Summary data from NSW Police Service on ages of persons searched for knives 1.7.98 to 30.6.99. Note, the data does not include records of those people searched whose age was not known, and 306 people searched who fall outside the age range.

1.40 The data indicates that people from 15 to 19 years of age are much more likely to be stopped and searched for knives than any other age group. The data on productive searches shows that there were more knives found on 17 year olds than on anyone else, but it is important to note the high number of people being searched. As Graph 5.2 shows, the proportion of productive searches is comparatively low for teenage suspects, but is much higher for older suspects.

1.41 In assessing the fairness of police search practices, it is important to acknowledge the comparatively high proportion of young people involved in knife-related crime. Of concern, however, is why so many knife searches of young people lead to no knife being found, whereas the ratio of productive searches is much higher for searches of suspects aged in their 20s and 30s. One factor might be difference in the way that young people make use of public space, including a propensity to 'hang out' in busy commercial precincts or transport interchanges, which offer the obvious advantages of centrality and ease of access to public transport.

- 1.42 The Police Service already monitors the ratio of productive to unproductive searches in each local area command, as an indicator of compliance with recording requirements. It should extend these reviews to carefully monitor the ages of persons searched without warrant. Increases in the proportion of unproductive searches in relation to young people could be reviewed at the Service's regular OCR briefings.

Gender and Aboriginality

- 1.43 The records of searches under the Police and Public Safety Act show 7.1% (1288) of persons searched were female and 92.3% (16,825) were male.⁹ Of those persons involved in searches where knives or other implements were found, 10% (379) were female and 89.3% (3391) were male.
- 1.44 Of the 18,224 persons searched under the Act, 6.6% (1211) were identified as Aboriginal or Torres Strait Islanders. Of those persons involved in searches where knives or other implements were found, 5.7% (216) were Aboriginal or a Torres Strait Islander.
- 1.45 The data on productive searches indicates that the police targeting of individuals from these groups would not appear to be disproportionate to the likelihood of finding knives.

Chapter 5B: Search procedures

- 1.46 In reviewing this aspect of the Police and Public Safety legislation, we have considered both police compliance with the legislative requirements, and whether compliance with the procedures could be expected to adequately safeguard the interests of citizens being searched.

Procedural safeguards

- 1.47 A police officer may request a person to submit to a search only if the police officer 'provides evidence to the person that he or she is a police officer (unless the police officer is in uniform)'.¹⁰
- 1.48 This is an issue for plain clothes police, particularly those working in specialist street crime units. In practice, they can expect resistance if the person being searched is unaware that they are police officers, raising the risk of injury to both the police and the person being searched.
- 1.49 A police officer may request a person to submit to a search only if the police officer 'provides his or her name and place of duty'.¹¹

⁹ There was no gender recorded for the remaining 111 search records.

¹⁰ *Summary Offences Act*, s. 28A(4)(a).

¹¹ *Summary Offences Act*, s. 28A(4)(b).

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- 1.50 Although our observations of police operations suggested members of the public were routinely asked their names and addresses, we observed that police rarely provided their own name and station before commencing a search. In most cases it was unclear why officers failed to comply with this requirement. However, a few officers in metropolitan areas indicated they were unwilling to give their name and place of duty to people searched, especially in areas with tense relations between police and community. By contrast, country police in focus groups said that there was often no need for police to state their name and place of duty, particularly in small communities.
- 1.51 Unless urgent circumstances make compliance impracticable, best practice continues to suggest that officers should introduce themselves either by name or (where they have legitimate concerns) number.
- 1.52 The most substantive protections in the search provisions require police to give reasons for the search and to warn people of the potential consequences for failing to cooperate. A police officer may request a person to submit to a search only if the police officer informs the person of the reason for the search,¹² and warns the person that failure to submit to the search may be an offence.¹³ If the person initially refuses to submit to a search, the police officer may again request the person to submit to the search and, in that case, must again warn the person that failure to submit to the search may be an offence.¹⁴
- 1.53 Many police advised our inquiry that they felt it was important to state reasons as people were more likely to cooperate if they knew why they were being searched. Similarly, the need to warn people about the consequences of not complying was seen as common sense, as was the requirement to repeat the warning if people initially refused to submit to the search.
- 1.54 Although police recognised the importance of giving reasons and warning people about the consequences of failure to comply, in practice there were recurring concerns about the adequacy and clarity of explanations and warnings provided by police.
- 1.55 The failure by police to give reasons does not necessarily indicate that the searches were arbitrary or groundless. However, unless people stopped by police are told why they are to be searched, there is the risk of people assuming that they came to police attention because of their age, racial appearance or some other arbitrary factor. Requiring police to explain the reasons for their search ensures that police officers turn their minds to the reasons for the search, and that the people being searched understand that police are not searching on a whim.
- 1.56 Although police may become more familiar with the statutory requirements over time, one submission highlighted the importance of proper procedures in circumstances where laws permit invasive procedures or are being used to impose penalties:
- ... given the extremely low levels of police compliance with procedural requirements ... the Ombudsman should be very wary of excusing police from complying with the

¹² *Summary Offences Act*, s. 28A(4)(c).

¹³ *Summary Offences Act*, s. 28A(4)(d).

¹⁴ *Summary Offences Act*, s. 28A(5).

statutory requirements. There is no evidence to suggest that anyone else has been excused from complying with the legislation just because it is 'new'.¹⁵

Conducting searches

- 1.57 The other key procedures in the Police and Public Safety legislation provide guidance on conducting searches. Police may either use a metal detector¹⁶ or search by 'quickly running the hands over the person's outer garments'.¹⁷ In conducting a search, police officers must not request the person to remove clothing other than certain outer garments,¹⁸ and should (where possible) examine bags 'by allowing the person to hold the bag open and move the contents so they can be more easily viewed'.¹⁹
- 1.58 If something is found, police may require the person to produce the object, but must warn 'that failure to produce any thing detected or seen by the police officer during the search may be an offence'.²⁰ The police data for NSW in 1998–99 shows just seven people involved in incidents where someone refused to produce something when required to do so.²¹
- 1.59 Officers in the focus groups said the metal detectors were useful, but personal searches were much more common than electronic scans. Less useful was the provision requiring police to examine the contents of bags by getting the owners to hold their bags open and move the contents. Although this is less intrusive than emptying the contents in view of other members of the public, our observations found that it was often impracticable for police to search bags in this way. Police focus groups cited 'officer safety' and 'practicality' as reasons why there was a continuing reluctance to ask owners to assist with bag searches.
- 1.60 Of greater concern was the potential for searches to embarrass or intimidate the people being searched. A recurring issue for many of the young people we talked to was not the fact they were searched, but the manner in which they were treated by police. A submission from a youth legal service criticised the 'invasive and aggressive manner' in which young people were often searched.²²

Discussion

- 1.61 Significantly, the new legislative requirements seem to have had very little influence on actual policing practice. Perhaps their main impact is to occasionally invalidate prosecutions arising from an otherwise valid search if the officer who conducted the search is found to have overlooked a requirement.

¹⁵ Submission, Youth Action and Policy Association NSW and the Youth Justice Coalition, Sydney, July 1999, at 65.

¹⁶ *Summary Offences Act*, s. 28A(1)(a).

¹⁷ *Summary Offences Act*, s. 28A(1)(b).

¹⁸ *Summary Offences Act*, s. 28A(2)(a).

¹⁹ *Summary Offences Act*, s. 28A(2)(c).

²⁰ *Summary Offences Act*, s. 28A(6).

²¹ Police Service summary data on use of the Police and Public Safety Act between 1.7.98 and 30.6.99.

²² Submission, The Shopfront Youth Legal Centre, 7 July 1999, at 5.

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- 1.62 In many cases it is not clear whether police searched for knives under s. 28A of the *Summary Offences Act*, or under some other power such as s. 357E of the *Crimes Act*. Both provisions give police broad discretion to search in circumstances where they have a 'reasonable suspicion'. In many cases it may be assumed that the less stringent procedural requirements for s. 357E stop and search powers governed the conduct of the search. Hence, the more comprehensive practical protections afforded by s. 28A of the *Summary Offences Act* will often only apply where police themselves state that they relied on s. 28A to conduct the search. The range of search powers appeared to be a source of confusion for both police and members of the public.
- 1.63 A preferable approach would be to consolidate the various stop and search provisions into a single legislative instrument, and for the use of those powers to be regulated by a single set of principles governing all such searches. Both the community and police would benefit from the creation of a code of practice (made pursuant to a Regulation) that clearly articulates the rights of citizens as well as the powers of police. Such a code should establish the basic principles that officers *must* consider before conducting any search without warrant.
- 1.64 In its simplest form, such a code could require police exercising the search powers to:
- establish that they are police officers (whether by uniform or by showing some form of identification);
 - have reasonable grounds to exercise the powers (based on the legislative requirements);
 - explain the reasonable grounds for the search to the person and advise the person of the consequences of failing to comply; and
 - observe any provisions regarding the responsible use of those powers (such as any special provisions relating to the conduct of a strip search), unless it is impracticable to do so.
- 1.65 For the code to effectively influence police practices, it must be drafted in a way that affords a degree of certainty in the use of these powers and ensures that they are not used inappropriately. The code must be supported by appropriate training and supervision.
- 1.66 The code need not be prescriptive about technique. It should define and regulate the limits on police practice rather than try to describe the practices. Officers would be required to make every effort to comply with the code. However, minor or technical errors should not invalidate an otherwise valid search, provided that officers can demonstrate that they made every effort to uphold the principles or provide a reasonable excuse for the breach or omission.
- 1.67 For the code to effectively influence police practices, it must be drafted in a way that affords a degree of certainty in the use of these powers, ensures that they are not used inappropriately, and be supported by appropriate training and supervision.

Chapter 5C: Reasons for search

- 1.68 Officers are only permitted to carry out a search under the Police and Public Safety Act if they have a reasonable suspicion that the person has unlawful custody of a dangerous implement, including a knife. In determining whether there are reasonable grounds to carry out the search, an officer must take into account all the relevant circumstances.²³ While the Act does not nominate what may constitute reasonable grounds, it does state that an officer may take into account the fact that the person is in a location with a high incidence of violent crime.²⁴
- 1.69 In the discussion paper, we stated that ‘the most difficult question in relation to s. 28A is that of determining what are reasonable grounds for suspecting that the person is carrying a knife.’²⁵ This view was reinforced by the submissions received and observations conducted over the past 12 months.
- 1.70 The Police Association acknowledged that ‘it is evident from discussions with police that there is not a clear understanding of what circumstances may constitute reasonable grounds to suspect.’²⁶ The Association suggested that ‘the Police Service had not provided appropriate training that would allow police to carry out their duties with the requisite knowledge. A lack of training may lead to inappropriate use of the legislation to the detriment of the police officer and members of the community, but through no fault of the officer.’²⁷

Police practice

- 1.71 We reviewed the COPS records of searches made under s. 28A of the *Summary Offences Act* for the month of June 1999 in five local area commands. In these records, police nominated a range of reasons for conducting the searches. These reasons fall into the following broad categories:
- a knife or implement was observed;
 - another offence was suspected, observed or detected;
 - a complaint or other information was received from a member of the public;
 - the person was arrested or was reporting to police on bail or other conditions;
 - police observed suspicious behaviour;
 - police had knowledge of the person’s criminal history and/or previous contact with police;
 - the person was present in a location with a high incidence of violent crime, or present in a location with a high incidence of non-violent crime;
 - the time of day when the person was observed; or
 - the clothing worn or accessories carried by the person.

²³ *Summary Offences Act*, s. 28A (1).

²⁴ *Summary Offences Act*, s. 28A (3).

²⁵ NSW Ombudsman. *Policing Public Safety: Discussion Paper on the Crimes Legislation Amendment (Police and Public Safety) Act*. December 1998. p. 11.

²⁶ Police Association of NSW ‘Response to the NSW Ombudsman: ‘Policing Public Safety’: Discussion Paper’ July 1999. p. 2.

²⁷ *Ibid.*

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- 1.72 In a number of recorded incidents, police conducted the search with the ‘consent’ of the person concerned.
- 1.73 Of significant concern were the numbers of COPS records that showed no discernible grounds for suspecting that the person was carrying a knife or other dangerous implement. As much was acknowledged in the focus groups. One officer said that searches were conducted under powers other than s. 28A, because ‘basically you have to have a reasonable suspicion that they’ve actually got a knife on them ... except in a few circumstances, that wouldn’t be the case.’²⁸
- 1.74 It needs to be made clear that, to legally conduct a search under the Police and Public Safety Act, the suspicion must be that the person is carrying a knife or other dangerous implement. While it is not yet clear how the courts might determine how a reasonable suspicion as to the carrying of a knife or other dangerous implement may be formed, officers should be mindful that the legislation requires them to establish that their reasonable suspicion related to the carrying of a knife.
- 1.75 Greater attention on this element of the test may result in the improved assessment of the reasonableness of the grounds in deciding whether or not to conduct a search. It is also recommended that consideration be given to providing police with advice as to what *does not* constitute reasonable grounds for suspicion. In the short term, such advice might be provided administratively through education and training, using practical examples of when it is and is not permissible to conduct a search. In the longer term, such advice should be included in a consolidated statutory search power.

‘Location with a high incidence of violent crime’

- 1.76 When determining whether reasonable grounds exist to search a person, police are entitled to take into account that person’s presence in a location with a high incidence of violent crime.
- 1.77 The Police Association argued that the provision lacked certainty and clarity, and left officers open to criticism for the misuse of the provision. Police officers expressed confusion about the definition of violent crime:
- When you target someone, why are you targeting someone in a high crime area? Because he’s a shit bag? Because he’s Asian? ... if you have three or four Asians sticking together, what’s the possibilities? OK, they could be part of a gang, or they could just be four blokes from the North Shore come down to have a couple of games in Timezone. All of a sudden you’re turning them over saying they’re Asians, they’re in a high crime area. We’re searching you for knives.²⁹
- 1.78 There was uncertainty about the extent to which the crime ‘hot spots’ provision can be relied upon to form the basis of the search. Other concerns were expressed that ‘area with a high incidence of violent crime’ was being interpreted too broadly. From the evidence considered in the course of this review, there is some confusion as to the extent

²⁸ Focus Group 3.

²⁹ Focus Group 3.

to which the provision can be relied upon; what determines and defines a location with a high incidence of violent crime; and what powers in the Police and Public Safety Act can be used with it as an element.

- 1.79 Accordingly, to ensure that the 'hot spots' provisions does not result in the inappropriate use of the search power, it may be better to require the Police Service to define those locations with a high incidence of violent crime that it assesses as warranting special application of the powers. This would assist in the consistent application of the powers, and would clearly define those areas in which location can be taken into account in determining whether to search a person.

Chapter 6: Custody of a knife

- 1.80 The Police and Public Safety Act amended the *Summary Offences Act* to make it an offence to have custody of a knife in a public place or school without a reasonable excuse.³⁰ The penalty for having custody of a knife in a public place or school is a fine of up to \$550 for a first offence or a fine of up to \$1100 and/or up to 12 months imprisonment if the person has previously been dealt with for a 'knife-related' offence.³¹

Detection of knives

- 1.81 While the monthly totals for recorded searches increased dramatically from 176 in July 1998 to 2997 in June 1999, the number of knives found remained comparatively stable. The number of knives detected each month, as a result of searches under the Police and Public Safety legislation, ranged from 131 in July 1998 (the first month after the introduction of the legislation) to a high of 284 in December 1998.

Carry cutting weapon

- 1.82 Section 353B of the *Crimes Act*, creates an offence, commonly referred to as 'carry cutting weapon', where a person in custody charged with any crime or offence is found with a 'razor, razor blade or other cutting weapon' without lawful purpose. There is now some overlap in what is covered by s. 353B and by the offence created under s. 11C of the *Summary Offences Act*. The number of charges under s. 353B has dropped significantly from 586 in 1997-98 to 215 in 1998-99, suggesting that a number of charges that may have previously been dealt with as 'carry cutting weapon' are now being recorded as 'custody of knife in public place'.

Types of knives confiscated

- 1.83 As stated above, the definition of 'knife' in the Act encompasses a knife blade, razor blade or any other blade. In practice police are detecting and, in the majority of cases, confiscating a range of items as a result of a search for dangerous implements.

³⁰ *Summary Offences Act*, s. 11C(1).

³¹ *Summary Offences Act*, s. 11C(1).

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1.84 Many of the complaints to this office and representations to the Infringement Processing Bureau expressed concern about what items attracted a penalty under the Act. The size of the implement, the type of implement and a lack of awareness that certain implements could not lawfully be carried in a public place or school were often raised as issues. One man who wrote to the Infringement Processing Bureau after receiving a penalty notice for custody of a 'key ring knife' wrote:

It wasn't obvious from the billboard advertisements that all kinds of knife are banned as it was showing pictures of dozens of examples of dangerously [*sic*] looking knives.

1.85 A teenage boy who had received a \$550 fine for a pair of scissors in his bag, was interviewed as part of this review. He stated that he knew about the knife laws and that officers had spoken at his school about them. However, he said he did not realise that scissors were prohibited.

1.86 The Police Service conducted an extensive public education campaign prior to and at the commencement of the Police and Public Safety legislation. The campaign featured graphic images of various knives, and in particular used the image of a double bladed dagger. While effective in communicating the existence of the new law, it was perhaps less effective in communicating the extent of its application.

1.87 Police in focus groups indicated that they would use their judgement to assess whether to take action in regard to a particular knife or implement. Some officers were satisfied with the need to use judgement while others felt that they would like the legislation to be more specific about what was considered to be a knife. One officer described an incident where he used his discretion not to confiscate a knife:

He had a pair of little fold out Swiss army type scissors on him that day and I put it upon myself that although it could be used to stab someone it's not an offensive implement. That was my judgement. But the next day he was picked up in [urban location] and charged for those scissors.³²

Scissors

1.88 Some of the telephone inquiries and complaints to this Office were in regard to scissors being classified as 'knives' under the legislation. In most of these cases the scissors in question were located in a vehicle. The following are some examples of complaints and inquiries received in relation to scissors:

- Inquiry: Police allegedly stopped and searched a young man and his car, and fined him for having scissors in the glove box of his car.
- Inquiry: A young man at a skate board complex was allegedly searched and asked to give identification. The police found nothing. The young man offered to let the officers search his car and a small pair of scissors were found in his glovebox. He was issued with an infringement notice for \$550.
- Inquiry: Two young men were issued fines under the legislation for scissors. A pair was found in a pencil case in the car of one man, another in a first aid kit belonging to the second man.
- Complaint: Police allegedly charged a man with possession of 'plastic' scissors.

³² Focus Group 3.

- 1.89 In addition, just over 20 percent of the representations to the Infringement Processing Bureau involved incidents where the issue was the custody of scissors.
- 1.90 While consideration should be given to the types of implements covered by the Act, it is advisable, at the very least, that the full range of implements presently affected by the Act be better communicated to members of the public.

Knives located in vehicles

- 1.91 Having regard to the legislation, it appears that a knife in a vehicle, a trailer or caravan in a public place, or a knife on a person in that vehicle, constitutes a knife in a public place for the purposes of the Act. Although a knife present in a car is legally considered to be in a public place, many police and members of the public appear to be unaware of this fact.
- 1.92 It may be that the issue of the appropriate treatment of knives in vehicles is best managed by providing legislative guidance to police in relation to assessing reasonable excuses. This option is discussed below. The type of knife, and the nature of its custody might reasonably contribute to a finding that the custody is reasonable in all the circumstances.

Reasonable excuses

- 1.93 Without limiting what might constitute a ‘reasonable excuse’, the Police and Public Safety Act nominates several ‘reasonable excuses’. Police have the discretion to accept other explanations, and indeed would be required to consider the reasonableness of *any* explanation offered for the custody of a knife or other dangerous implement.
- 1.94 We surveyed legal practitioners about the use of the ‘reasonable excuse’ provisions for custody of knives in the legislation. One example described by a solicitor, was of a person who had been camping in a logging protest. When charged with possession of the knife the person explained that he had used it to prepare food while camping. Although this excuse was not accepted by the police, the magistrate accepted the excuse and dismissed the charge.
- 1.95 The following quotes are taken from COPS narratives and provide some examples of reasonable excuses accepted by police:³³
- A search of POI [Person of Interest] 1’s bag revealed two pairs of small scissors. POI stated that they were for school ... Bag had other school items such as pens and pencils.
 - The POI stated that he was employed as a butcher ... showed policing [*sic*] clothing and ID that supported this. The two knives the POI had in his person were a steak knife and a boning knife. He stated that he was taking them home as he had a few days off and he did not like leaving them at work. Police were satisfied with the POI’s excuse for carrying the knife.

³³ Due to the number of incidents and data retrieval limitation a systematic review of reasonable excuses using COPS data was not able to be performed as part of the review. These examples should not be taken as representative of excuses in general.

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- 1.96 Police in one focus group indicated that they would not be inclined to take action against farmers with knives.

You've got pig chasers, you've got fishermen, farmers ... you've got so many cockies wandering around and they've got the little knife pouches on ... most of them use them to pick their teeth or peel an apple.³⁴

- 1.97 Police in this focus group also related a story of one police officer they considered to have been somewhat overzealous in his application of the laws to farmers:

... you can go overboard like [small regional town] did. Remember that twit, highway patrol fella, went out and stopped at the saleyards and went right through all the cockies because they were carrying their pocket knives, and came back with a bucket full, and of course there was outcry over that.³⁵

- 1.98 No specific guidance is provided by the legislation as to what may be considered by police in assessing the reasonableness of an excuse in the circumstances. An interesting comparison can be made with the equivalent Queensland legislation, the *Weapons Act 1990*, which prohibits the custody of a knife in a public place without reasonable excuse. Section 51(4) of the *Weapons Act* states:

In deciding what is a reasonable excuse for subsection (1), regard may be had, among other things, to whether the way the knife is held in possession, or when and where it is held in possession, would cause a reasonable person concern that he or she, or someone else in the vicinity, may be threatened or harmed.

- 1.99 An express provision of this nature may provide guidance to police who detect, for example, a pair of scissors in a car boot or glove box.

- 1.100 A number of the representations to the Infringement Processing Bureau indicated that the person fined felt that they had a reasonable excuse for carrying the implement. These included explanations that the knife in question was being taken home after purchase or receipt as a gift. Some complaints and inquiries to our Office also concerned the reasonableness of an excuse offered to police. One person stated that his scissors were for his work as a dress maker, which he tried to explain to the police officer, but the excuse was apparently not accepted.

Legitimate educational purposes

- 1.101 The Department of Education and Training's Legal and Executive Services recommended that a reasonable excuse for custody of a knife for 'legitimate educational or instructional purposes' be included in s. 11C. During our review of the legislation we found a number of incidents where a young person's excuse for having custody of the knife (usually scissors) related to educational purposes. In some cases the excuse was not accepted.

³⁴ Focus group 2.

³⁵ Focus group 2.

1.102 To include an excuse to the effect of that suggested by the Department of Education may provide police with useful guidance in their consideration of excuses. Given that custody must still be *reasonably necessary in all the circumstances* for the excuse to be valid, amending the legislation to provide for such an excuse, or providing for such an excuse in regulations, may be appropriate.

Utility knives

1.103 The audit of COPS narratives, the implement descriptions from the Infringement Processing Bureau and references to pen knives, pocket knives and Swiss army knives from other sources indicate that these types of knives are commonly dealt with under the legislation. It could be argued that these implements are designed to be carried *not* for any specific purpose, but to be available for use as a need occurs. Without a reasonable excuse, however, a police officer may confiscate such knives and issue infringement notices for them under the legislation.

1.104 In this context, it is interesting to note the Queensland approach to pen knives and Swiss army knives in its *Weapons Act*.³⁶ The Act makes possession, without reasonable excuse, of a knife in a public place an offence. One reasonable excuse listed in the legislation is 'for use for a lawful purpose'.³⁷ The Queensland Act provides examples of what might be included as such an excuse. One example is 'A person may carry a pen knife or Swiss army knife for use for its normal utility.'³⁸

Persons searched and found with a dangerous implement

1.105 Of all those searched and found with dangerous implements, 379 (10%) were female and 3391 (89%) were male.³⁹

1.106 We have found some parallels in the characteristics of the people found in custody of a knife under the Police and Public Safety legislation and the characteristics of people involved in offences where a knife was used as a weapon. The greatest disparity is in the 26 years and over age cohort who accounted for 35% of persons found with knives under the legislation compared to 24% of persons involved in crimes where a knife was used as a weapon. It is worth noting however, that the total number of searches performed in order to detect these persons carrying knives differs dramatically for different age groups.

³⁶ *Weapons Act 1990 (Qld)*.

³⁷ *Weapons Act 1990 (Qld)*, s. 51(1)(d), see discussion in Chapter 4.

³⁸ *Weapons Act 1990 (Qld)*, s. 51 (1) 'Examples for subsection (2)(d)' no. 2.

³⁹ Figures do not add up to 100% because the gender of some persons was recorded as 'unknown'.

Knife related crime and knife carrying behaviour

- 1.107 Two important measures of the effectiveness of the legislation are its impact on knife-related crime in public places and its effect on the 'knife carrying' behaviour of members of the public. Although it is probably too early to assess whether the legislation has had an impact on knife related crime we have briefly examined the available data. This is discussed in Chapter 13.
- 1.108 With respect to knife carrying behaviour, we looked at data from the Family Court of Australia. We chose to examine the Family Court's statistics because of the court's practice of scanning *all* people entering the Sydney Registry⁴⁰ and because the people scanned would not have any necessary connection or contact with the criminal justice system, criminal activity or the police.
- 1.109 We viewed knives confiscated from people entering the court's Sydney registry. Scissors constituted the largest group of implements viewed at the court. A number of Swiss army utility type knives, waiter's friends,⁴¹ foldable knives, craft knives, cutlery knives and forks, and a small number of larger knives, nail files and other weapons were also viewed.
- 1.110 The majority (57%) of implements confiscated by the Family Court in the 1998-99 period were knives between 10 cm and 15 cm in length. The next most common implement was scissors, representing (35%) of all implements, followed by the smaller knives (11%), screwdrivers, and then the larger knives.
- 1.111 The registry's figures for the past four years show that knives and scissors continue to be carried in large numbers. The documented number of knives with shorter blades being brought into the Sydney court dramatically increased from 11 to 184 between 1997-98 and 1998-99. By contrast, the number of knives with blade lengths between 15 cm and 20 cm has decreased significantly since the enactment of the new laws. Knives with blades of length between 10 cm and 15 cm also slightly decreased in occurrence in 1998-99. However, large numbers of scissors were found each year, with a fairly steady decrease in numbers each year since 1995-96.
- 1.112 Based on the data from the Family Court, it is difficult to determine any conclusive relationship between the enactment of the Police and Public Safety Act and knife carrying behaviour.
- 1.113 Further evidence of knife carrying behaviour, as it relates to knives in schools, is examined in Chapter 8.

⁴⁰ Court staff, legal practitioners, members of the judiciary and occasionally other persons at the Court for special purposes, are not required to be scanned.

⁴¹ Implement with a cork screw, small blade and bottle opener designed for opening wine and other bottles.

⁴² Being a person under the age of 18 years. See *Summary Offences Act*, s. 11D (1) (a).

⁴³ *Summary Offences Act*, s. 11D (1).

⁴⁴ *Summary Offences Act*, s. 11D (1).

Chapter 7: Parents who allow children to carry knives

- 1.114 If a child⁴² is found to have custody of a knife in a public place or school, and if the parent of that child knowingly authorised or permitted the child to carry the knife, then the parent is guilty of an offence.⁴³ The penalty is a fine of up to \$550.⁴⁴
- 1.115 The definition of parent, for the purposes of s. 11D, is the same as the definition of parent in the *Children (Protection and Parental Responsibility) Act 1997*.⁴⁵ That Act defines 'parent' as including the guardian or person who is in custody of the child.
- 1.116 According to information made available by the Police Service, there has not been a single instance of the use of this provision in the first 12 months of operation of the Act.⁴⁶
- 1.117 The Police Association advised this Office that its members 'indicated that this offence is difficult to prove'. The Association suggested that the legislation may need further clarification to provide police with guidance.
- 1.118 Most of the issues that arose in the course of this review in relation to s. 11D are related to aspects of the *Children (Protection and Parental Responsibility) Act*. It is noted that the *Children (Protection and Parental Responsibility) Act* is required to be reviewed as soon as possible after 10 July 2000.⁴⁷ It is therefore recommended that the review of the *Children (Protection and Parental Responsibility) Act 1997* also address s. 11D of the *Summary Offences Act*, relating to parental responsibility for children who are found to have unlawful custody of a knife or other dangerous implement.

Chapter 8: Schools

- 1.119 The Police and Public Safety legislation makes it an offence to have custody, without reasonable excuse, of a knife in a public place or *school*.⁴⁸ The legislation also confers a power on police to search a person in a public place or *school*.⁴⁹ When searching a student at a school a police officer must, if reasonably possible, allow the student to nominate an adult who is on school premises, to be present during the search.

⁴⁵ *Summary Offences Act*, s. 11D (5).

⁴⁶ Correspondence from Sen Constable G. Lill, Hunter Region, dated September 7, 1999.

⁴⁷ s. 50 of the *Children (Protection and Parental Responsibility) Act* requires a review of the Act to be conducted as soon as possible after the period of three years from the date of assent to the Act.

⁴⁸ *Summary Offences Act*, s. 11C.

⁴⁹ *Summary Offences Act*, s. 28A(1).

⁵⁰ It was not possible to access the data base for prior years due to a systems failure.

Knives detected at schools

1.120 The Department of Education and Training's Serious Incidents Data Base listed reports of 227 incidents involving knives or similar implements between 1 July 1997 and 30 June 1999.⁵⁰

Knife incidents

1.121 On reading the brief descriptions of incidents, it was possible to group them into a number of incident types:

- 105 or almost half (46%) the number of recorded incidents over the two year period involved a threat with the knife or other sharp object. Of these, 40 occurred in the 1997-98 period and 65 in 1998-99;
- possession of a knife, sometimes in the context of another incident, accounted for 71 (31%) incidents, with 33 occurring in 1997-98 and 38 in 1998-99;
- in 23 (10%) incidents a person was cut or stabbed, 11 occurring in 1997-98 and 12 in 1998-99;
- 16 incidents involved *allegations* of the possession of or threat with a knife;
- 11 incidents involved actual or threatened self harm, sometimes in the context of threatening another student. Eight of the 11 self harm incidents involved female students;
- most incidents (198) involved students as the alleged knife offender, while 34 incidents involved 'intruders' entering school grounds;
- of the student offenders, 146 (73%) were boys and 34 (17%) were girls;⁵¹
- of those incidents involving students as offenders and where the age or school year of the student was recorded (174 records), 4 were in year 12 (or aged 17), most (138) were between year 6 (or aged 11) and year 11 (or aged 16)⁵² and the remaining 32 were in year 5 (or aged 10) or below.

1.122 The Department of Education and Training divides NSW into 40 districts. Most districts (36) had between zero and 10 recorded incidents involving knives over the two years. The other four districts had between 11 and 17 incidents each over the two year period. The total number of knives or similar implements found rose from 100 in the 1997-98 financial year to 131 in 1998-99. Possession of an implement not in the context of another incident (such as a fight or other disturbance), increased over the two year period from 13 incidents in 1997-98 to 28 incidents in 1998-98.

1.123 In the context of the small number of events in each district, it is probably not meaningful to speculate about the cause of the increase over the two years. In the four districts where the largest number of incidents were reported, two showed an increase on 1997-98 figures and two a decrease. It does not appear, however, that the new laws have led to any reduction in the number of knife related incidents in schools.

⁵¹ In some cases the record did not specify whether the offender was male or female.

⁵² In some cases the school year of the student was referred to and in other cases the age of the student. The age and years have been grouped together according to the most common ages of students in each year, for example, 79% of students in year 6 in July 1998 were 11 years old so these two groups have been put together.

Knife searches at schools

No search conducted

- 1.124 Most incidents recorded on the data base did not involve a search. In most cases, the knife was either handed to a member of staff by the student concerned or by another student. This finding was confirmed by principals' descriptions of incidents involving knives.

Searches by police and/or school staff

- 1.125 In 11 'knife-related' incidents on the Serious Incidents Data Base, the record indicated that a search had been performed. However, only three of these searches were performed by police, the others being undertaken by either teachers or principals.
- 1.126 We audited COPS narratives for search incidents occurring at schools⁵³ in the four focus areas⁵⁴ for the review period. The review found 16 incidents that occurred on school premises. However, eight of these incidents did not occur in school hours. Of the remaining eight events that did occur in school hours, only two clearly involved searches.
- 1.127 Given the small number of recorded incidents involving police searches conducted at schools, there is too little information at this stage upon which to base any findings about the nature of police searches at schools.
- 1.128 It appears to be more common for teachers or principals to conduct a search at a school than for police to do so. A number of incidents where searches were conducted by school staff at school were described during the focus groups. In practice, it appears that searches in schools are relatively rare and occur mostly by way of the teacher or principal searching a student or their belongings.

Effect on school practice

- 1.129 Unless impractical, it would be preferable that where searches at schools are necessary, they be conducted by police officers. This is desirable for a number of reasons. Searches conducted by trained and experienced police offer a greater assurance that any concealed knives or other implements will be located during the search. This, in turn, provides a greater guarantee of safety within school communities. It minimises the immediate risk to school staff, and minimises any civil liability that might eventuate from the conduct of a search.
- 1.130 It is recognised, however, that it may be a matter of urgency and necessity that a member of staff conduct a search for a knife. It is also recognised that the Government has, on a number of occasions, plainly stated that school staff have the legal authority to conduct searches as required.

⁵³ The audit was conducted using the key words 'school' and 'student' respectively. It is possible that some relevant records may have been overlooked using this method.

⁵⁴ Bankstown, City Central, Lake Illawarra and Wollongong, and Orana.

- 1.131 It is recommended, however, that the Department of Education and Training and the Police Service enter into an agreement to govern the arrangements between the two agencies as to when police shall be called upon to conduct searches, the procedures to be adopted by school staff when they are required to conduct a search without the involvement of the police, and the responsibilities of both agencies in the event of the discovery of a dangerous and/or prohibited article. Such an arrangement should emphasise that it is desirable for police to be involved in any searches for dangerous implements, but recognise that it may be necessary for school staff to conduct such a search in the absence of police.

Chapter 9: Confiscated knives and other dangerous implements

- 1.132 A police officer has the power to confiscate from a person any thing that the officer reasonably suspects to be a dangerous implement for which the person has no reasonable excuse to be carrying.⁵⁵ The Act sets out the procedures for making an application for the return of the item. If the item is not claimed or returned, then the knife is disposed of in accordance with instructions set out by the Commissioner of Police.
- 1.133 The issue of the handling and destruction of confiscated knives was not raised in any substantive form in any of the submissions made in relation to the legislation. It has not been brought to our attention as an issue regarding the implementation of the legislation. The handling of property and exhibits generally has been made the subject of a training module in the Mandatory Continuing Police Education Scheme, for delivery between July 1999 and June 2001. Accordingly, we felt it was too soon to examine this aspect of the implementation of the legislation in detail.
- 1.134 As the relevant provisions in the NSW legislation stand, however, it is not possible for the owner of a knife to make a claim for its return even though he or she was not in custody of the knife at the time of its confiscation. There may be situations where it is not desirable to return a knife to the person from whom it was confiscated, but it is desirable to return it to its rightful owner. Should this be the case, legislative amendment is necessary to enable this to occur.
- 1.135 In those instances where a person has a legitimate reason for owning a particular knife, but does not have a reasonable excuse for carrying it at the time that it is detected by police, it is important that police make it clear that the person is entitled to make an application for the return of the knife, and that any applications for the return of a knife are dealt with as promptly as possible. Two matters were brought to our attention that indicate that this is not always the case.

⁵⁵ *Summary Offences Act*, s. 28B (1).

Chapter 10: Reasonable directions

Chapter 10A: Use of the powers

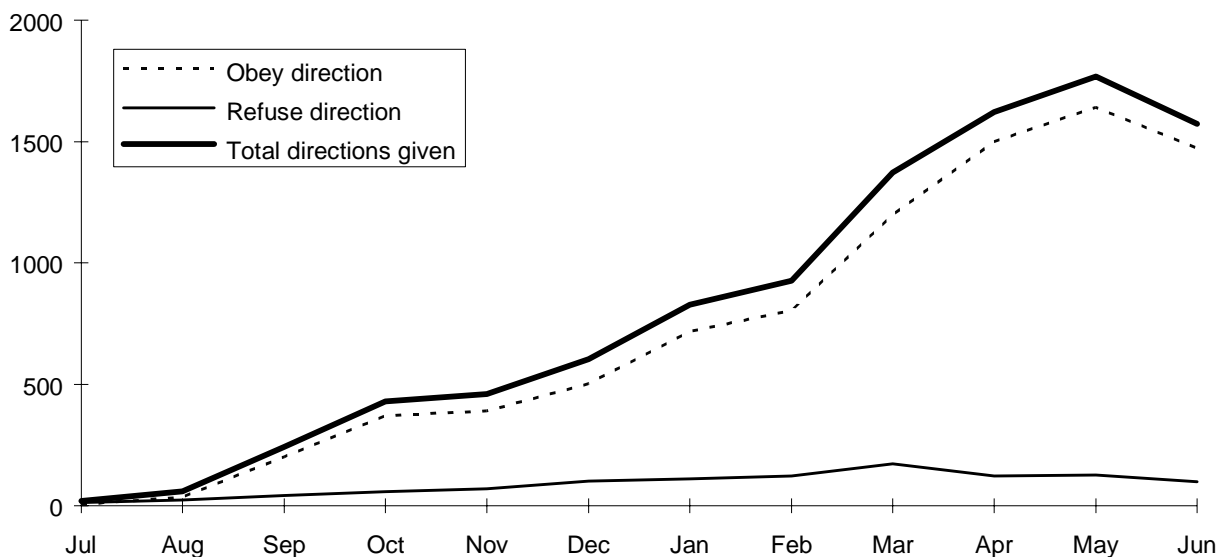
1.136 The Police and Public Safety Act amended the *Summary Offences Act* to include s. 28F, which empowers police to give a reasonable direction to a person in a public place if that person's behaviour or presence obstructs other people or traffic, constitutes harassment or intimidation, or causes or is likely to cause fear to another person (provided that the behaviour or presence would cause fear to a person of reasonable firmness).

1.137 Any such directions given by a police officer must be reasonable in the circumstances for the purpose of reducing or eliminating the obstruction, harassment, intimidation or fear.⁵⁶

Police records of 'reasonable directions'

1.138 The following graph shows the number of recorded incidents in NSW where the s. 28F 'reasonable directions' powers were used by police during the review period.

Graph 10.1: Police and Public Safety recorded 'reasonable direction' incidents



Source: NSW Bureau of Crime Statistics and Research extract of COPS records of s. 28F 'reasonable directions' incidents for all NSW 1.7.1998 to 30.6.1999.

1.139 As with the data on searches, the reasonable directions records show:

- a steep increase in the reported use of the reasonable directions powers throughout the review period; and
- high numbers of teenagers given directions.

1.140 Other significant factors which are apparent in the data on 'directions' are:

- a relatively stable number of actionable offences ie. failure or refusal to comply with directions (particularly in the latter half of the review period);

⁵⁶ *Summary Offences Act*, s. 28F (3).

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- a high proportion of those given directions under s. 28F are from Indigenous backgrounds – 3194 (22%) of the 14,455 people⁵⁷ given directions between 1 July 1998 and 30 June 1999 were Aborigines or Torres Strait Islanders, whereas Aborigines and Torres Strait Islanders constitute less than 2% of the total population of NSW; and
- per capita use of the directions powers in four western NSW local commands are many times higher than other areas of the state.

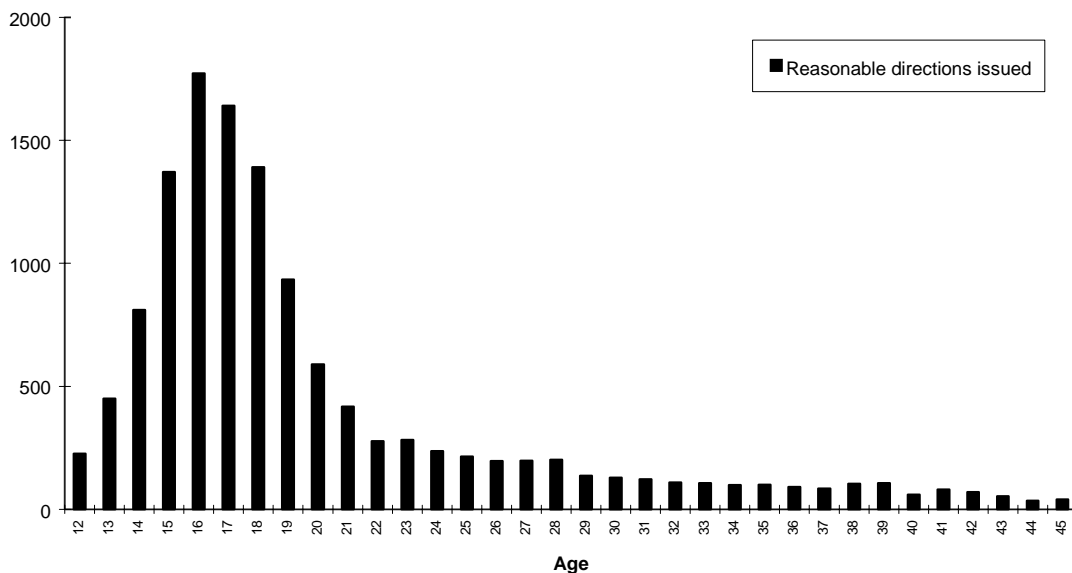
Directions given under the Police and Public Safety Act

1.141 As with the Police and Public Safety search powers, the Police Service's records show that the total number of directions issued increased steadily throughout the review period. As with data on searches, the most likely explanation for the continual increases in 'reasonable directions' recorded throughout the 12 month review period is a combination of more frequent use of the powers as police officers became familiar with the legislation, increases in policing activity, and better compliance with recording requirements.

Ages of persons given directions

1.142 Another similarity between the 'directions' data and the search data is the comparatively high numbers of young people affected by the powers. The following graph shows the ages (where known) of people that were issued with s. 28F directions during the 12 month review period.

Graph 10.2: Ages of persons given directions



Source: Summary data from NSW Police Service on ages of persons issued with Police and Public Safety directions 1.7.98 to 30.6.99. Note, the data does not include records of people moved on whose age was not known, and 562 people given directions who are younger than 12 years or older than 45.

⁵⁷ The directions given to 14,455 people relates to records of 9903 incidents.

- 1.143 The graph highlights the fact that comparatively high numbers of people aged from 14 to 19 years were issued with directions under s. 28F. Almost half of the people issued with s. 28F directions were aged 17 years or younger.
- 1.144 It is interesting to note that the proportion of persons aged 17 years or younger affected by the directions power is higher than for the knife searches. The police data indicates that 48% of persons 'moved on' were aged 17 years or younger, while 42% of persons searched were juveniles. The proportion of persons aged 26 or over and the proportion of 'age unknown' are the same for the data on both search and directions given.⁵⁸
- 1.145 In seeking reasons for why so many young people are affected by the Police and Public Safety powers, one factor to consider is the propensity of young people to socialise in public places, often in large groups.
- 1.146 It is also important to note that most directions were obeyed. Of the 14,455 members of the public issued with directions under s. 28F, 13,092 persons (more than 90%) complied. As discussed elsewhere in this report,⁵⁹ incidents involving matters which may be brought before a court are more likely to be diligently recorded than incidents where the person complies and no further action is required. There are also constraints on the practicality of recording details of individuals in situations where the power is used to disperse large crowds. For these reasons, the number of times a direction was given and the person complied, is likely to be higher than indicated by the official data.

Failure or refusal to comply with directions

- 1.147 The number of actionable offences remained relatively stable in the latter half of the review period. By contrast, the number of directions being obeyed continued to rise from 502 incidents in December, peaking at 1641 in May 1999. The biggest jumps in monthly tallies of 'obey direction' incidents were in January (215 incidents more than in December), March (395 higher than February) and April (299 more than in March).
- 1.148 However, there appeared to be some improvement in the rate of compliance during the review period. In terms of the proportion of 'move on' incidents leading to a failure or refusal by the person to comply with the direction, one in six incidents in December 1998 involved a person refusing or failing to obey. By June 1999, just one in 16 'directions' led to a failure or refusal to obey.

Aborigines and Torres Strait Islanders

- 1.149 One factor about police use of the s. 28F directions power which was not as apparent in the data on other Police and Public Safety Act powers, is the large numbers of Aboriginal and Torres Strait Islander people subjected to directions. According to the police data,

⁵⁸ Source: NSW Bureau of Crime Statistics and Research extract of COPS data 1.7.1998 to 30.6.1999. The s. 28A search data shows that 42% were aged 17 or younger, 38% were aged 18 to 25, 19% were aged 26 or over, and 2% were classified 'age unknown'.

⁵⁹ For instance, see the discussion in Chapter 3 regarding 'Information from the Police Service' and in Chapter 5 relating to 'Searches in which a knife was found'.

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3194 (or 22%) of the 14,455 people given directions were Aborigines or Torres Strait Islanders.

1.150 The following tables distinguish those who obeyed the police directions from those who refused or failed to comply.

Table 10.2A: Obey direction by police

	Age unknown	<=17	18-25	>=26	Total
Aboriginal or Torres Strait Islander	95 (31.1%)	1557 (24.0%)	748 (19.4%)	556 (22.8%)	2956 (22.6%)
Other*	210 (68.9%)	4926 (76.0%)	3115 (80.6%)	1885 (77.2%)	10136 (77.4%)
Total	305	6483	3863	2441	13092

Table 10.2B: Refuse direction by police

	Age unknown	<=17	18-25	>=26	Total
Aboriginal or Torres Strait Islander	3 (15.0%)	65 (16.1%)	95 (13.8%)	75 (29.6%)	238 (17.5%)
Other*	17 (85.0%)	339 (83.9%)	591 (86.2%)	178 (70.4%)	1125 (82.5%)
Total	20	404	686	253	1363

Source: NSW Bureau of Crime Statistics and Research extract of COPS records of s. 28F 'reasonable directions' incidents for all NSW 1.7.98 to 30.6.99.

* The category 'Other' includes records of non-Aboriginal and Torres Strait Islander people and any 'whose Aboriginality was 'Unknown'.

1.151 Just over half (1622 or 51%) of the 3194 records relating to Aborigines and Torres Strait Islanders given s. 28F directions were aged 17 years or younger. Of all the children who obeyed a police direction during the review period, almost one in four (or 24%) were from Aboriginal or Torres Strait Islander backgrounds. Aboriginal young people were not as highly represented among those refusing a direction to move on. One in six children refusing to move on was either an Aboriginal person or a Torres Strait Islander, and one in seven 18 to 25 year olds was either an Aboriginal person or a Torres Strait Islander.

1.152 The police data indicates that children generally were less likely to resist a police direction to 'move on'. Of the 6887 persons aged 17 years or younger who were given a s. 28F direction, just 404 (5.9%) refused or failed to comply, whereas 686 (15.1%) of the 4549 persons aged 18 to 25 years did not comply with the direction given. Of the 2694 persons aged 26 or older, 253 (9.4%) did not comply.

1.153 A similar analysis of records relating to Aboriginal young people shows that most complied with the direction given. The tables show that just 65 (4.0%) of the 1622 Aboriginal children who were given s. 28F directions did not comply, and 95 (11.3%) of the 843 Aboriginal people aged 18 to 25 years did not obey the direction given. Of the 631 Aboriginal people aged 26 or over who were given police directions, 75 (11.9%) refused or failed to obey.

- 1.154 These figures indicate that children, particularly Aboriginal children, are the least likely to dispute a direction given by police officers. The records of s. 28F directions shows that 18 to 25 year olds are much more likely to challenge directions given by police.
- 1.155 The powers might also be impacting on police relations with other ethnic or cultural groups in the community. However, as explained in the section on 'Information from the Police Service' in Chapter 3, the police computer system offers police the opportunity to enter information on the 'racial appearance' of individuals they come into contact with, but there is no *requirement* to do so. Hence, records on the racial or ethnic background of persons affected is less comprehensive than the data from mandatory fields such as age and Aboriginality.

Location of directions issued by police

- 1.156 The information on Aboriginality should also be considered in light of data on where the s. 28F 'directions' powers are being used. We ranked local area commands' per capita use of the directions powers from highest to lowest. According to police records, the Darling River, Castlereagh, Barwon and Barrier local commands were many times more likely to use the powers than other areas of the state.
- 1.157 The highest recorded use of the police directions power was by the Darling River local command, which takes in Bourke, Brewarrina and Cobar. Darling River police recorded that they gave directions to 1319 people. On a per capita basis, this equates to 73.5 persons 'moved on' for every 1000 residents.
- 1.158 The next highest was the neighbouring local command of Castlereagh, which is centred on the town of Walgett. Directions were given to 754 people, the equivalent of 53 persons moved on per 1000 residents. Other local commands in that area to record large numbers of s. 28F directions were Barwon command (centred on Moree) with 22.9/1000 residents and Barrier (Broken Hill, Wilcannia, Menindee) with 16.6/1000 residents.
- 1.159 The use of the 'move on' powers in these four commands is significantly higher than in other country NSW commands. Most country areas recorded rates of between one and five persons moved on per 1000 residents.
- 1.160 One feature common to Darling River, Castlereagh, Barwon and Barrier local commands is that all include large numbers of Aboriginal residents. According to 1996 census information provided by the Police Service, Aboriginal people make up 15% of Darling River's 17,956 residents, 21% of Castlereagh's 14,221 residents, 10% of Barwon's 38,686 residents and 6% of Barrier's 24,980 residents.
- 1.161 The high use of summary offences, particularly offensive language and offensive conduct charges, in relation to Aboriginal people in NSW has been well documented.⁶⁰ The remarkably high use of the directions power in areas with comparatively large numbers of Aboriginal residents, raised questions about whether the new powers had either supplanted or added to other forms of public order policing.
- 1.162 In order to obtain a more complete understanding of policing practices in areas which were making frequent use of the s. 28F directions power, we obtained information on

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offensive conduct, offensive language and resist/hinder police offences in each local command. These three summary offences provide rough indicators of public order policing practices, as detection of these offences tends to rely on policing activity.

1.163 In considering the data, it is important to note that there were significant rises in the number of all three offences throughout NSW in 1998–99, compared with the previous 12 months. According to police records:

- offensive conduct incidents in NSW increased from 2949 offences in 1997–98, to 3862 in 1998–99, an increase of 30.9%;
- resist/hinder police incidents increased from 4663 in 1997–98 to 5703 in 1998–99, an increase of 22.3%; and
- offensive language incidents increased from 5213 (1997–98) to 7180 (1998–99), up by 37.7%.⁶¹

1.164 The data shows:

- Darling River recorded increases above the state average in offensive conduct (up 49.1% on the previous 12 months) and hinder police (+86.6%) offences;
- Castlereagh recorded above average increases in offensive conduct (+49.1%) and offensive language (+38.5%);
- Barwon recorded an above average increase in offensive language matters (+40.2%); and
- Barrier recorded above average increases in all three offences — offensive conduct (+73.2%), hinder police (+52.0%) and offensive language (+69.3%).

1.165 These figures clearly indicate there has been a significant increase in public order policing activity across NSW in 1998-99. Less clear is the nature of the relationship (if any) between the Police and Public Safety powers and the police use of public order charges. Although areas recording high use of the directions power recorded above average increases in some offences, there were also significant increases in public order offences recorded in areas with low use of the Police and Public Safety directions power.

Managing relations with the community

1.166 The Police Service's COPS data clearly shows that of the people being 'moved on' by police using s. 28F, a substantial proportion are young people and Aboriginal people. Whether this is appropriate depends on the circumstances of each incident, but it appears that there is a need for the Police Service to closely monitor the situations in which each local command uses the 'reasonable directions' powers.

1.167 Frequent use of s. 28F and other police powers does not necessarily indicate that police in those areas are abusing the powers. Many other factors must be taken into account, including the number and nature of offences in each area, and the patterns of behaviour of particular groups in the community.

⁶⁰ See, for instance, R. Jochelson, *Aborigines and Public Order Legislation in New South Wales*, NSW Bureau of Crime Statistics and Research, B34, 1997.

⁶¹ Source: NSW Bureau of Crime Statistics and Research – police records of nominated offences recorded 1.7.97 to 30.6.99.

- 1.168 This kind of analysis requires careful scrutiny of the strategies employed in each area to ensure that policing activity is targeted appropriately. The Service's fortnightly OCRs already compare the use of Police and Public Safety Act powers with local crime trends. This enables commanders in areas making extensive use of the powers to discuss any impact this policing activity might be having on crime and its impact on the community generally.
- 1.169 However, even where the Police Service can demonstrate that the 'move on' powers are being used appropriately, it should still be trying to address any adverse impact this activity might have on its relations with the community in general, or sections of the community the subject of such activity. In light of the comparatively high numbers of young people and Aboriginal people affected by these powers, the Service must seek to address concerns expressed by those particular groups, as well as any other group likely to be targeted.
- 1.170 This means the onus is on the Service to build and maintain strong links with key representatives in these communities, so that police and the community are working towards common objectives.
- 1.171 What is needed is an integrated approach that accommodates community feedback as part of any proactive policing initiative. The aim is that intensive use of policing powers be used fairly, so as to avoid undermining community confidence in the integrity of police. The danger for police is that any injudicious use of police powers may erode community confidence in their police, and possibly undermine the Police Service's capacity to address crime and disorder in those communities.
- 1.172 Other measures to keep these issues under scrutiny are discussed in Chapter 13.

Chapter 10B: Reasonable directions: Police practice

- 1.173 It is apparent that the practice of police providing reasonable directions has long been occurring without benefit of statutory authority. Such powers have depended on the ability of police to obtain the consent and cooperation of members of the public, whether or not the consent and cooperation may have been given entirely freely.
- 1.174 In our focus groups, police confirmed this, saying that they had always given directions to members of the public but they had previously lacked the statutory authority to insist on the direction should someone challenge it.
- 1.175 Where the power was seen by police to have been beneficial, it often related to improvements on what had been police practice prior to the introduction of the legislation. For instance, whenever people queried the authority of police to provide reasonable directions, officers were now able to point to the legislation as the basis for their authority.
- 1.176 Police also believed there was now scope to be more confident in the directions that were provided. Some officers saw the statutory power as a 'back-up power' for situations

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where someone failed to respond to an informal direction, and used it to define zones in which people were not permitted to remain.

- 1.177 The distinction between the directions that can be made under s. 28F and previous police practice in this area largely rests on the legal requirements imposed on police when they give directions under s. 28F, as well as their capacity to impose sanctions in those situations where a person fails to comply with the direction. The legal requirements consist of procedures to be followed and thresholds to be met in relation to the exercise of the power. Accordingly, there are situations where police would not be entitled to exercise the power, meaning that police are more likely to regard, and record, these situations as 'requests' rather than 'directions'.
- 1.178 Police practice seems to often involve issuing informal directions in the first instance, and resorting to the formal legislative authority only when it is apparent that the person is not going to comply with the request. However, when commencing with an informal request, an officer might not explain why a direction is being issued, or the person might not have the opportunity to offer an explanation for their presence or behaviour. Both are practical safeguards established in the legislative scheme.
- 1.179 As with the other aspects of police practice we have observed during this review, it is important not to discourage police from working cooperatively with, or seeking the informed consent and compliance of members of the public. There are, however, common sense procedural requirements that need to be observed.
- 1.180 The reasonable direction power represents a significant departure from previous police practice in a number of respects. While it may formalise long standing practice, it is a genuinely new power. Those police who previously relied on 'bluff' to give effect to directions recognised this. The benefit to police largely derives from the certainty and authority that comes from a statutory power as well as the penalties for non-compliance, whilst the community may benefit from the regulation of police practice in this area.
- 1.181 Yet this regulated practice applies only to a limited set of circumstances. If police wish to issue a direction in response to behaviour they consider to be constituting or causing an obstruction, harassment, intimidation or fear, then they are obliged to follow a particular set of procedures. This is appropriate, as failure to comply with the direction may result in a significant penalty. Where the exercise of police powers may result in sanctions, then it is particularly important that these be appropriately regulated with suitable safeguards established and applied.

Procedural requirements

- 1.182 Prior to giving a direction, an officer is required to establish that they are a police officer, give their name and place of duty, give reasons for the direction, and provide a warning as to the consequences of failing to comply. We found from our observational research that police seldom complied with all the procedural requirements. Consistent with our observations of the search procedures, officers rarely provided their name and place of duty, gave reasons, or provided a formal warning regarding the consequences of failing to comply with the direction.

- 1.183 While it was apparent that the procedural requirements were not being universally observed, some police acknowledged the rationale and possible benefits of adhering to the requirements.
- 1.184 It was also apparent that police rarely follow all the procedural requirements when the 'reasonable directions' power is used in situations where there are a large number of people. One focus group participant said:
- if there's 200 [people to move on] you're not going to say it to all of them.⁶²
- 1.185 In fact, in some situations, the procedural requirements were seen as too cumbersome, with 'breach of peace' powers being used in preference to the power to give 'reasonable directions'. This was apparent in at least two incidents that we observed involving large numbers of people.
- 1.186 From our observational research, it is also apparent that there are many instances where police issue directions without resorting to any particular statutory authority. In such situations it can be argued that it is unnecessary, and indeed unhelpful, to insist on the strict adherence to the provisions laid out in the legislation. The officers involved in giving the directions in situations we observed did so professionally, and often with good humour, which assisted in obtaining the compliance of those in receipt of the direction.
- 1.187 There is a question of balance. As we have seen, the procedural requirements can assist in obtaining cooperation from the person given the direction; however, there are also situations where it is neither practical nor desirable to require police to strictly adhere to the requirements. There are, nevertheless, some significant safeguards which warrant retention.
- 1.188 Perhaps the most important safeguard contained in the procedures concerns the giving of reasons for the direction. Under s. 28F(7), it is not an offence for a person to fail to comply with a direction if that person ceased the conduct which was the subject of the direction. It is therefore essential that police communicate the reason for giving the direction to give the person an opportunity to cease the relevant conduct.
- 1.189 It is important to note the effect of s. 28F(7), relating to the defence against a charge of refusing to comply with a direction. The effect of that section is to establish an offence only when a person continues to engage in the relevant conduct that is the subject of a direction; that is, failure to carry out a direction does not constitute an offence provided that the person does not persist in their conduct. So, if a person or group of persons were to cease or alter their conduct, whether it relates to their behaviour or presence,⁶³ so that it no longer constitutes the relevant conduct that was the subject of the direction, then it is not an offence to fail to comply with the direction. While the COPS narratives we examined are not conclusive on this point, there may be instances of police treating a refusal to move on as a refusal to obey the direction, yet the person has ceased the conduct that led to the move on direction being given in the first place. In

⁶² Focus Group 2.

such circumstances, the person may not be guilty of an offence. Again, this needs to be addressed by way of further education and training on the issue.

- 1.190 It should also be noted that, notwithstanding the widespread reference to this power as a 'move on' power, it is more accurate to describe it as a power to *give reasonable directions for the purpose of putting an end to certain conduct in public places*, that is, behaviour that constitutes obstruction, harassment, intimidation or causes fear. To achieve this, the direction given must be 'reasonable in the circumstances for the purpose of reducing or eliminating the obstruction, harassment, intimidation, or fear.'⁶⁴ The direction may, but does not have to, consist of people moving on from a particular place.
- 1.191 For instance, a group of people may be engaged in behaviour that is intimidating or harassing. If they are issued with a direction to move on, it may not be an offence for them to remain in the same area provided they cease their intimidating or harassing conduct. In order to be able to exercise this option, the people concerned should be advised what it is about their behaviour or presence that is of concern. It is possible that this advice will be sufficient to put an end to the particular misconduct without the people having to leave the area. In fact, given the requirement that the direction be reasonable for the purpose of reducing or ceasing the offending behaviour, the most appropriate direction in such circumstances may be one aimed at putting an end to the particular conduct, rather than merely moving the persons elsewhere. This is an issue that needs to be followed up in further education and training provided to police on the application of these powers.
- 1.192 Providing reasons also assists in a number of other ways. It requires the officer to be clear about why a direction is being given, and may also make it clear to people that they have been given a direction as a result of their conduct and not because they have been unfairly targeted because of their age, gender, ethnicity or other factors.
- 1.193 The giving of reasons for the direction is perhaps the most significant element of the procedures, and it should certainly be retained in any scheme regulating police practice in this area.

Chapter 10C: Conduct warranting issuing of a direction

- 1.194 This section discusses the type of circumstances in which police issue directions to members of the public and is largely based on an audit of police records of the use of the power to give reasonable directions.

⁶³ If it were the person's presence that constituted the obstruction, harassment or intimidation or caused fear, then it is likely that the direction will be to 'move on' or 'move away'. Failure to comply with this type of direction, when it was a person's 'presence' that was of concern, may constitute an offence.

⁶⁴ See *Summary Offences Act*, s. 28F(3).

Objectives of the power to give reasonable directions

- 1.195 The Police and Public Safety legislation was introduced partly to ‘tackle gang and knife crime’ and ‘to equip police with the laws and powers that they need to make our streets safer’.⁶⁵ In particular, the power to give reasonable directions was aimed at dealing with gangs and anti-social behaviour in public places.
- 1.196 Perceptions of ‘gang’ related crime periodically feature in media and community debate. While this debate may reflect a real fear of violence, there appear to be a number of misconceptions about the prevalence of such crime and the nature of ‘gangs’ in NSW. According to one commander⁶⁶ we spoke to, the term ‘gang’ is often used in a misleading and inflammatory way to refer to *any* group of young people. His view was that ‘gangs’ should only be used to describe more traditional notions of structured groups of organised criminals. His command has made a concerted effort to discourage use of the term because of its impact on police relations with young people in his area. Another commander offered the opinion that:

[The community] would consider the Vienna Boys Choir a gang if they were in jeans, T-shirts, and standing outside the shopping area.⁶⁷

Police reasons for giving directions

- 1.197 The power to give reasonable directions under the legislation, is limited to directions given to eliminate or reduce conduct that obstructs, harasses, intimidates or causes fear. Our review of the implementation of the legislation has provided ample evidence that, in practice, police give directions for a range of reasons in a range of circumstances.
- 1.198 The purpose of Chapter 10C is to provide some insight into how police are using the power to give directions. From COPS narratives and information from observational research, complaints and submissions, we have described the circumstances in which police are directing members of the public to ‘move on’.
- 1.199 It is intended that painting this picture of police practice in this area will assist Parliament in deciding, in consultation with the community, whether and to what extent police powers in this area should be limited, broadened or clarified.
- 1.200 Some of the case studies we discuss certainly indicate a purported exercise of the power on somewhat shaky legal grounds. Other instances have been highlighted because they illustrate the breadth of the powers. A whole range of examples of the manner in which police are seeking to use the new powers has been included so as to allow an informed debate, within the community, the Police Service and the Parliament, about the extent of the powers to give directions under the Act and their fair and effective use in the context of practical issues which arise.

⁶⁵ The Hon. P Whelan, MP, Minister for Police, NSWPD, 28 April 1998.

⁶⁶ Discussion with Commander and officers from a suburban local area command, 21/5/99.

⁶⁷ Commander 17.

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- 1.201 In this context, questions of the legality or otherwise of police actions, may be less significant than the opportunity these cases provide to consider police practice, as officers deal with issues arising from the new legislation in the context of the community's desire for 'safety' balanced against the need to protect against the erosion of particular civil liberties.
- 1.202 Our discussion has been divided into two sections. The first relates to those COPS narratives where the reasons for the direction appear to meet the 'relevant conduct' requirements as set out in s. 28F(1). The second part of our discussion relates to other common factors which appear to have formed all or part of the basis for a direction.

'Relevant conduct'

- 1.203 In many cases, whether the behaviour described in these narratives is sufficient to meet the description of the 'relevant conduct' in the Act cannot be confidently assessed from the narratives alone. The fact that in most cases the person obeyed the direction makes it difficult to determine whether the police were in fact exercising a particular power.
- 1.204 The following describes incidents where the police direction appeared to be based on the 'relevant conduct'⁶⁸:

Obstructing persons/traffic

- 1.205 Section 28F(1)(a) permits police to give a person a direction where the person's behaviour or presence 'is obstructing another person or persons or traffic'. In the reviewed events, this conduct was often associated with begging. In a number of records, persons blocking the entrance to entertainment venues, shops and transport ticket offices were 'moved on'. This category also includes narratives which referred to individuals or groups sitting or standing on the footpath or roadway.
- 1.206 Interviews with a Sydney street policing unit confirmed that the powers were often employed to 'move along' intoxicated persons who were, for example, asleep on a footpath and obstructing the thoroughfare.
- 1.207 There may be merit in clarifying the meaning of 'obstruction' in circumstances such as those raised above. To what extent are persons begging, collecting for charities, busking, or sleeping in public areas to be considered to be 'obstructing' under the Act?

Intimidating/harassing

- 1.208 Section 28F(1)(b) confers a power on police to give a person a reasonable direction where their behaviour or presence constitutes harassment or intimidation of another person or persons. We adopted a broad definition of intimidation and harassment for this category. Police comments about persons 'causing trouble' or behaving 'offensively' or

⁶⁸ In some cases the persons may have engaged in more than one form of 'relevant conduct'.

'yelling' and the like, were included. Incidents which involved large disturbances, brawls and assaults have been categorised separately but may also meet the relevant conduct requirements in this category.

- 1.209 One example of the practical use of this section was provided by a street policing team in Sydney. Officers from this unit stated that they would commonly use this provision on Friday and Saturday nights to disperse groups of intoxicated men who hang around and harass women passing by.

Cause or likely to cause fear

- 1.210 Section 28F(1)(c) permits police to give a direction to a person whose behaviour or presence 'is causing or likely to cause fear to another person or persons, so long as the relevant conduct would be such as to cause fear to a person of reasonable firmness'.⁶⁹ It was rare for police to make explicit comment in their record that the relevant conduct was likely to cause fear. Only three instances appeared to fit in this category.
- 1.211 This provision includes an objective test of whether the behaviour or presence would be sufficient to cause fear to a 'person of reasonable firmness'. The objective test is intended to provide police and the courts with additional guidance as to whether a person's behaviour or presence was really capable of causing fear. It appears, however, that both police and some legal practitioners are finding the meaning of the provisions and their proper application less than clear. In order to properly and responsibly exercise these powers, police must be fully cognisant of their meaning and purpose.
- 1.212 There may be value in re-visiting these provisions to clarify their meaning and proper application. How clarification of this complex issue is best achieved, whether through appropriate police training or legislative amendment, is a matter for the Parliament and/or the Police Service. The Police Service should now be better equipped to provide officers with case studies highlighting good police practice.

Other factors associated with police directions

- 1.213 When conducting the audit of COPS narratives, it was apparent that, in addition to behaviour or presence which met the 'relevant conduct' requirements of s. 28F(1), many of the narratives indicated that other factors were taken into account by police when issuing a direction. In some cases, these factors were in addition to the 'relevant conduct' and in others they appeared to be the sole reason for the direction. The records illustrate a range of circumstances in which police are making 'requests' or giving 'directions' and provide a basis for community and Parliamentary debate about both the scope and limitations of the legislation and police practice in this area. We have dealt with the

⁶⁹ A number of individuals and organisations expressed the view that *no* person need be present to satisfy the requirements of s. 28F(1)(c) of the *Summary Offences Act*. This appears to be a misunderstanding of the provisions of the Act. Section 28F(2) requires that the person or persons obstructed, intimidated, harassed *or made fearful* 'must be near that place at the time the relevant conduct is being engaged in'. Section 28F (8) provides that no 'person of reasonable firmness' need actually be present at the scene of the relevant conduct. A person is still required to be present, however, that person need not be a 'person of reasonable firmness'.

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description of these circumstances by establishing a number of categories. These categories are:

- high crime area;
- disturbance/brawl/assault;
- complaint/information from the public;
- begging;
- other offence observed;
- suspicious behaviour;
- known to police;
- aggression/rudeness to police;
- alcohol related;
- search;
- no reason for being there;
- loitering; and
- unknown.

1.214 This overview deals only with some of these categories to flag some of the significant issues around the scope of the legislation or police practice.

High crime area

1.215 In a number of events, reference was made to the fact that the person was in a high crime area.⁷⁰ In some events, this was the *only* factor referred to, while other events included additional elements. The fact that an area is known for drug related or other crime was also a factor in a number of the directions we witnessed during the observational research.

1.216 Police in focus groups also described situations in which they use the power to give directions. Some confusion was apparent in these groups as to the relevance of an area with a 'high incidence of violent crime' with regard to the move on legislation. The powers under s. 28F do not provide for this to be the sole factor considered in determining whether to give a direction. The emphasis in the section is on the 'relevant conduct' of the person and whether it would constitute harassment, intimidation, obstruction or fear. However, police in the focus groups stated that the nature of the area the person was in might be the rationale for asking them to 'move on'.

1.217 The legislation does not specifically confer a power to give a direction to a person solely because they are in an area with a high incidence of crime. However, it may be that the location of a person is a relevant factor in determining whether their presence is likely to cause fear.

⁷⁰ Where the reference to a 'high crime area' appeared to relate only to a search rather than a direction it has not been counted in this category.

Begging

- 1.218 Begging was a factor in a number of events and was often reported as constituting harassment, intimidation or obstruction.⁷¹
- 1.219 A street policing team in inner Sydney described moving along ‘beggars’ approaching others for money in an intimidating fashion as a typical use of the power to give reasonable directions. However, these officers stated that they would be unlikely to move along someone who was sitting on the ground collecting coins.
- 1.220 On the other hand, an officer in one of the focus groups commented that the use of the power to give reasonable directions was effective in regard to persons begging:
- ... if people are begging for money, we give them directions. We’re getting good results — they’re moving out of the area because they’re getting tickets now, and they can’t afford to beg in the area.⁷²
- 1.221 There may be circumstances in which a person begging is harassing or intimidating other persons or otherwise exhibiting the ‘relevant conduct’ under the Act. However, there will also be instances where begging on its own is not sufficient to justify a police officer issuing a direction under the Act. Under the current legislation, police officers need to consider whether the ‘relevant conduct’ has been displayed in each situation.

Known to police

- 1.222 In several narratives, the fact that the person was known to police appeared to be a factor in their decision to give the person a direction.
- 1.223 Police in focus groups confirmed that the fact that someone was known to police could form the basis for a decision to move them on. In the absence of the ‘relevant conduct’, the legislation does not confer a power on police to give directions merely because the person is known to them.

Alcohol related

- 1.224 Alcohol was a factor in many of the incidents. In some cases the intoxication of the ‘person of interest’ or the presence of alcohol appear to be the only reason for the direction.
- 1.225 There may be situations where the presence of a person or group of persons affected by alcohol may be sufficient to cause fear to a ‘person of reasonable firmness’. However, the fact that persons have consumed alcohol and are present in a public place would not necessarily be sufficient to meet the ‘relevant conduct’ requirements.

⁷¹ Where this was the case the records were also counted under the ‘intimidation or harassment’ category.

⁷² Focus group 3.

Discussion

- 1.226 It is clear from our examination of the COPS narratives and the observational research we conducted that police continue to give people ‘directions’ in a wider range of circumstances than those authorised by the Police and Public Safety legislation. This does not necessarily mean that these requests will be unlawful, especially if they have been ‘consented’ to. Obtaining a person’s consent to a direction may in many cases be an example of fair and effective policing. This is likely to be the case where reasons are given for the direction and the person agrees to comply.
- 1.227 However, as explained in this report⁷³ the notion of ‘consent’ is used to describe a *range* of situations in which compliance is achieved. It may be that persons who ‘consent’ are unaware that they need not comply or that they fear the consequences of non-compliance. This issue was highlighted in a complaint received by our Office during the review. In his complaint, the complainant highlights the importance of officers having an accurate understanding of the law:
- It would be an absurd reversal of responsibility if every citizen had to inform officers about the lawful discharge of their duties. The average person does not have the requisite knowledge to assert their rights in such cases. They rely ultimately on the diligence of individual police officers to not overstep the mark. It is incumbent upon each officer to understand the nature of the statutory powers vested in them.⁷⁴

Directions which were not complied with

- 1.228 A key feature of the directions power lies in s. 28F(6) which allows police to penalise persons who refuse or fail to obey directions, without a reasonable excuse. While police may have been issuing ‘directions’ prior to the introduction of the legislation, there was no power to penalise persons who refused or failed to comply with a direction.
- 1.229 When persons are penalised for non-compliance, it is essential that the direction is one which meets the requirements of the legislation. While it may be proper and effective policing to make requests of members of the public in a range of circumstances outside the scope of this legislation, penalties can only be applied to directions given in accordance with the laws. In over a third of the 27 audited records in which the direction was not obeyed, the behaviour of the person directed appeared to fall outside the legislative requirements.

Persons affected by the ‘relevant conduct’

- 1.230 Section 28F(2) states that the persons affected by the conduct described in s. 28F(1) ‘need not be in the public place but must be near that place at the time the relevant conduct is being engaged in’. A lawful direction under the legislation therefore requires that the person affected by the ‘relevant conduct’ be present either in or near the particular public place. Once again it is valuable to examine how police purport to apply this provision in practice.

⁷³ See Chapter 3 Methodology.

⁷⁴ Complainant letter.

- 1.231 It was often unclear from the COPS narratives we examined whether other persons were present when the relevant conduct took place and, if they were, it was sometimes unclear where they were. There were some incidents where it *seemed* that no other person was present in the public place or near the ‘persons of interest’ at the time of the event.
- 1.232 Many of the COPS narratives we reviewed in regard to reasonable directions indicated that the ‘relevant conduct’ was directed towards police or occurred in the presence of the police. In some of these situations it appeared that no other persons were present or aware of the conduct. It would appear that police are interpreting the requirement for ‘presence’ of other persons as being satisfied if the other persons are the police themselves. Officers may, for example, experience harassing or intimidating behaviour by a person in a police station. Or officers may attract unprovoked aggression while patrolling an empty street.
- 1.233 While s. 28F(2) specifies that ‘other persons’ must be in or near the public place it does not place restrictions on *who* these persons might be. In some cases it may be appropriate that these ‘other persons’ are police officers. The Service may wish to acquire a suitably authoritative advising on this issue. In the absence of definitive advice or judicial determination, it may be necessary for the legislature to clarify whether, and in what circumstances, the presence of police alone would satisfy the requirements of s. 28F(2).

Behaviour or presence

- 1.234 Section 28F(1) states that an officer may give a direction if the officer has reasonable grounds to believe a ‘person’s behaviour or presence in the place’ obstructs, harasses, intimidates or causes (or is likely to cause) fear to another person.

The ‘presence provision’ and street sex workers⁷⁵

- 1.235 An example of the use of the ‘presence provisions’⁷⁶ brought to our attention in the course of the review related to the use of s. 28F to direct a sex worker to ‘move on’. The matter is of particular interest because it has been heard at the local court level and a decision reached. While the case deals with a single incident, an audit of COPS narratives revealed that the incident broadly reflects police practice in a number of localities.
- 1.236 Although the magistrate found that the police had not established their case beyond reasonable doubt, she made a written statement of her findings in regard to the law. The defence proposition was that the person directed to move on would need to have been *personally* engaged in the conduct which was the subject of the complaints in order to constitute the ‘relevant conduct’ under the Act. The police did not seek to prove that the

⁷⁵ Issues related to the use of the s. 28F powers to move on sex workers are also discussed in ‘Appendix E’.

⁷⁶ For a direction to be issued under s. 28F, it must be in response to, and deal with a person’s ‘relevant conduct’, which includes a person’s presence, as well as their behaviour, if it constitutes an obstruction, harassment, intimidation, or causes fear.

defendant was responsible for the complaints and the magistrate found that this was not necessary to meet the requirement of the legislation. The magistrate concluded:

I am ... of the view that [s. 28F(1)] is designed to cover, in addition to actual conduct or behaviour, mere presence of a person X in particular circumstances, whose presence by reason of prior experience of another person Y of events commencing with a similar presence in similar circumstances in the same place, *whether of X or another similar person* can be objectively regarded as constituting harassment or intimidation or relevant conduct causing or likely to cause fear. [*emphasis added*]

1.237 The decision provides an interpretation of s. 28F(1) as to how a person's *presence* might constitute the 'relevant conduct' under the Act. A significant feature of the magistrate's formulation of the law is that a person may lawfully be given a direction because a *similar* person's behaviour or presence met the 'relevant conduct' requirements. On the facts of the case, sex workers in a particular street were allegedly intimidating residents, therefore any sex worker in the relevant area could be given a direction irrespective of their own conduct.

1.238 In determining the kinds of factors that police may take into account when assessing whether a person's presence would meet the relevant conduct requirements, it is essential that police avoid relying on stereotypes based on such things as age, race, and/or manner of dress in determining who should be 'moved on'. This aspect of the law needs to be applied sensitively. The application of these provisions also needs to be in balance with the legitimate expectation of members of the community that they will not be penalised where they have behaved in a lawful and appropriate manner in a public place.

1.239 COPS narratives indicate that police are taking into account the location, height, build and style of dress of persons, as well as the number of persons in a group, when determining whether their presence might constitute the 'relevant conduct' under the Act⁷⁷. Police in focus groups claimed that they were able to distinguish between ordinary citizens and trouble makers largely from a person's appearance:

I could put you in a car here, and I don't know [this town], we could drive down the main street, and I could pick you out 20 people — just looking at them.⁷⁸

It's not a matter of race, colour, sex or creed ... I mean you're not going to have any 80 year olds likely to cop it, but it's just the 'feel' of them. You can drive past and 'feel' them.⁷⁹

1.240 It may be useful for the Service to consider providing advice and guidance on the situations in which a person's presence may warrant police intervention. If doubt or uncertainty remains about the extent to which a person's presence may warrant intervention, it may be necessary for the Parliament to consider further clarifying this issue.

⁷⁷ See also comments by the police investigator in relation to a complaint earlier in this chapter, and COPS narratives in relation to sex workers quoted below.

⁷⁸ Focus Group 2.

⁷⁹ *ibid.*

Presence — a comparison with the use of Council ‘No Loitering’ signage

- 1.241 Some councils have used s. 632(2)(e) of the *Local Government Act 1993* as authority to erect signs which prohibit loitering and/or disorderly behaviour. These council notices are of interest to this review because, like the power to give reasonable directions under the Police and Public Safety laws, they represent an attempt to deal with anti-social behaviour in public places.
- 1.242 In some instances local police have initiated requests to councils to erect notices to prohibit loitering in particular areas within their commands. In other areas, the local council has erected the signs of its own volition and requested police support to enforce the notices. There are a range of views as to the role and effectiveness of these notices both within local government and within the Police Service.
- 1.243 The decision to erect ‘no loitering’ notices rests with individual councils.⁸⁰ According to the Department of Local Government the authority of s. 632 of the *Local Government Act* for the erection of ‘no loitering’ signs is ‘not beyond legal doubt’.⁸¹
- 1.244 The Local Government and Shires Association has advised councils ‘to exercise caution in the use of s. 632 to justify erection of ‘no loitering’ signs’. The Association has also stated that the anti-social behaviour which police and councils seek to manage by the erection of such signs ‘is better dealt with under powers to keep public order available to the [Police] Service under other legislation’.⁸² Nevertheless, some Councils have erected ‘no loitering’ signs.
- 1.245 The main difference between the two approaches is in the type of conduct they proscribe. The Police and Public Safety legislation allows police to give directions to reduce or eliminate conduct which is obstructing, harassing, intimidating or which is likely to cause fear. The relevant council notices prohibit loitering and sometimes also disorderly conduct or behaviour.
- 1.246 It has been argued that the conduct proscribed by the notices is very wide and provides police with unduly broad discretionary powers. According to procedures adopted by police in the Lake Illawarra command, merely ‘hanging out’ in an area may be sufficient to constitute loitering.
- 1.247 It appears that the type of conduct that councils and police are attempting to control through the use of ‘no loitering’ notices, is largely able to be dealt with under s. 28F of Police and Public Safety laws. However, the nature of the conduct proscribed by s. 28F is more clearly defined than the terms used in the council notices.
- 1.248 Leaving aside questions of legality, councils are well advised to carefully consider any proposal for the use ‘no loitering’ notices to deal with anti-social behaviour in public places. The utility of these notices may need to be re-assessed in the light of the new powers to give directions in s. 28F of the *Summary Offences Act*.

⁸⁰ Letter to a Council General Manager, from Mr Garry Payne, Director General, April, 1999.

⁸¹ Ibid.

⁸² Local Government and Shires Association Weekly Circular 11/99, 19 March 1999.

Scope of 'reasonable direction'

- 1.249 The legislation leaves police a broad discretion as to the kind of directions that may lawfully be given in response to the 'relevant conduct'. The Act provides that the direction '*must be reasonable in the circumstances for the purpose of reducing or eliminating the obstruction, harassment intimidation or fear*'.⁸³
- 1.250 By far the most common direction reported in the narratives was a direction to 'move on' with no further detail. The breadth of this power has been somewhat obscured by the tendency to refer to the power to give reasonable directions as the 'move on' power. This tendency is reinforced by police recording procedures which refer to the power to give reasonable directions in this more limited way. For example, the relevant 'incident type' on the COPS data base is titled 'Street offence — obey direction to *move on*'.⁸⁴
- 1.251 It is important that police are aware that the legislation permits directions other than a direction to 'move on' people engaging in relevant conduct. While in some cases a 'move on' direction may be effective, in others police may need to be more specific in order to eliminate or reduce the relevant conduct. In some situations, issuing a 'move on' direction on its own may simply displace the conduct to another location. Given the breadth of conduct that may be involved and the need to consider the circumstances of each situation, it is appropriate that police use their discretion to tailor directions to solving the particular problem at hand. This aspect of the legislation may be need to be reinforced in future police training in this area due to the narrow emphasis that has been placed on directions to 'move on', and the confusion as to the scope of the power that was expressed by police in focus groups and interviews conducted during the review.

Chapter 10D: Industrial disputes, demonstrations, protests, processions and assemblies

- 1.252 The Police and Public Safety Act amended the *Summary Offences Act* to include s. 28G, which prevents police from giving reasonable directions to industrial disputes; apparently genuine demonstrations or protests; processions; and organised assemblies.
- 1.253 Our search of the COPS database resulted in the retrieval of two records that indicated that police had issued directions in breach of s. 28G. The Parliament clearly expressed its intention that the 'reasonable directions' power was not to be used against industrial disputes, demonstrations and protests, processions and organised assemblies. While there is no evidence that there have been any contraventions other than those identified, it is evident that there is not universal appreciation of the circumstances in which the power cannot be applied.

⁸³ *Summary Offences Act*, s. 28F(3)

⁸⁴ Emphasis added.

- 1.254 Accordingly, suitable efforts should be made to ensure that all officers are aware of the specific circumstances in which they are expressly not permitted to issue reasonable directions. Specifically, where a briefing for police officers is organised prior to an activity of the type proscribed by s. 28G, the officers involved in policing the event should be advised that they are not able to issue 'reasonable directions' in respect of the event.

Chapter 11: Power to demand name and address

- 1.255 The Police and Public Safety Act amended the *Crimes Act* to enable police officers to require the name and address of any person they reasonably believe can assist them with the investigation of an indictable offence, because they may have been at the scene at or around the time the offence was committed.
- 1.256 In addition to the limited circumstances in which it may be used, s. 563 of the *Crimes Act* requires various conditions to be met before a request can be initiated. The section requires both temporal and spatial proximity to a serious crime, and furthermore, requires a *reasonable belief* that the person can be of assistance to the investigation. These are not insubstantial tests.

Offences Arising from s. 563

- 1.257 During the implementation period, only *offences* arising from the use of s. 563 were recorded on COPS by police. There were no records made of people complying with a demand made under this provision.
- 1.258 During the review period, in the whole of NSW, there were only 77 recorded instances of people either refusing to provide their name and address, or providing a false name and address, with 60 charges, summons and/or infringement notices issued in connection with those offences.⁸⁵
- 1.259 Of all these instances of the use of the power, there was only one record of its use that was substantially in accordance with its stated purpose of assisting police to get the names and addresses of potential witnesses. The remaining records show the power being used in conjunction with, or as a substitute for, other powers to demand name and address.
- 1.260 There were a significant number of instances where the power was used in connection with a summary offence, or with an incident of public disorder, not involving an indictable offence. There were also a number of instances where the police appeared to use s. 563 in situations where its use was not valid, and for which an alternative power may have existed.

⁸⁵ NSW Police Service COPS data: July 1 1998 — June 30 1999.

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1.261 From the evidence available, it is apparent that greater training is needed on the appropriate uses of s. 563 if it is to be applied properly.

Demand name and address — compliance and consent

1.262 As we have noted, police did not record those instances of people giving their name and address when required to do so. This may be due to a number of factors. For example, the Police Association stated that its members indicated that the power had not been widely used during the past 12 months.⁸⁶

1.263 Another factor might be that where the power was used to obtain the name and address of potential witnesses to an indictable offence, the resulting information may be recorded with the record relating to the offence.

1.264 Furthermore, it is possible that obtaining the name and address of people is not so remarkable for police that it warrants recording. Indeed, it is arguable that the value of this provision to police was not the capacity to demand name and address from people, but to have a sanction in the event that a person failed to comply with the demand.

1.265 Police noted that if they had to resort to a statutory power to obtain the name and address of a person, then they were going to find it difficult to obtain any useful additional information beyond that.

1.266 We have examined the existing statutory powers for demanding name and address, as well as the common law authorities for police to demand the name and address of persons under arrest. It is not apparent from the evidence available that there is a case for extending the power to demand name and address. In fact, given the apparently improper or inappropriate uses of s. 563, greater attention needs to be given to ensuring the proper use of existing powers.

Power to demand proof of name and address

1.267 During the Committee Stage of the Bill's passage through the Legislative Council, s. 563 was amended to permit police to require *proof* of name and address. There has been subsequent confusion as to whether failure or refusal to provide proof of name and address may constitute an offence for the purposes of s. 563. It appears that it does constitute an offence.

1.268 To overcome the current confusion and uncertainty, consideration should be given to amending s. 563(3) so that an offence only arises if there is a failure or refusal to comply with the original request for name and address, and not where there is a failure to comply with the subsequent request for *proof* of name and address as well.

⁸⁶ Submission by Police Association of NSW 'Response to the NSW Ombudsman: 'Policing Public Safety': Discussion Paper' July 1999. p. 4.

Chapter 12: Penalties under the Act

Use of infringement notices

- 1.269 A significant feature of the penalty provisions is that s. 29A of the *Summary Offences Act* permits police to issue *penalty* or *infringement notices* in relation to a first offence under s. 11C (custody of a knife without a reasonable excuse) or any offence under s. 28F (failure or refusal, without reasonable excuse, to comply with a reasonable direction).
- 1.270 The ‘on the spot’ fines are \$550 for custody of knife offences and \$220 for ‘reasonable direction’ offences.⁸⁷ The amounts prescribed for on the spot fines are the same as the *maximum* penalties that a court can impose for these offences. A number of submissions criticised police for issuing infringement notices for the maximum penalty available. However, it is important to recognise that there is no discretion for police to issue fines for amounts other than the maximum amounts prescribed.
- 1.271 If a matter is brought before a court, magistrates have a broad discretion in determining penalties, up to and including the maximum penalty. In fixing a fine, courts must consider the defendant’s means to pay and other relevant matters. Therefore, it is possible for a court to set a lower penalty than the maximum penalty imposed by police.
- 1.272 Infringement notice provisions for other Acts are often structured in a way that effectively ensure that on the spot fines cannot be used to impose a maximum penalty. On the spot penalties are either set at a fixed fraction of the maximum penalty, or set a reduced maximum penalty for children, or establish separate schedules of penalties for adults and children.

Warnings and cautions

- 1.273 Police officers have a general discretion not to charge offenders, particularly if the breach is considered to be of a minor nature. When exercising their discretion not to charge, police officers usually informally caution or warn offenders that future breaches may result in their being brought before a court.
- 1.274 Under the *Young Offenders Act 1997*, less serious offences may result in a *warning*,⁸⁸ usually issued on the spot immediately after the offence was observed or reported. More serious matters can be referred for a *formal caution* or a youth justice *conference*, but only if the young person admits to the offence. These more serious interventions occur some time after the investigation of the offence. All interventions, including warnings, are recorded on the Police Service’s criminal information system.
- 1.275 One concern is that, in practice, formal cautions for young offenders are often only considered *after* an offender has been taken to a police station rather than in the field. As first-time knife offenders can be fined on the spot rather than taken into custody, formal cautions are rarely employed as an alternative to issuing an infringement notice.

⁸⁷ Summary Offences (General) Regulation 1995, s. 10B.

⁸⁸ Although police in interviews and focus groups understood the legal distinction between ‘warnings’ and ‘cautions’, the two terms were often used interchangeably in discussions.

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- 1.276 By contrast, repeat offenders are more likely to be arrested (because they cannot be dealt with by way of an infringement notice⁸⁹), and are thus more likely to be brought before a custody manager who *must* consider whether a warning or formal caution should be issued. Ironically, this may mean that repeat offenders are more likely to be formally cautioned than first-time offenders.
- 1.277 Our review of COPS narratives found some locations where warnings and formal cautions were being applied to first-time offenders. Police in focus groups said an impediment to using less formal interventions such as warnings for minor breaches, was pressure from some supervisors and commanders to act on offences. An officer from one group said this supervisory pressure was compounded by difficulties in recording informal cautions on the police information system:
- I've cautioned once, but I hit a bit of speed hump because I put it on the system, like 'knife found' and then the supervisor ... resubmits and says 'it's a bloody knife, why didn't you charge him?' ... I put the reasons for why I didn't [in the narrative field of COPS] ... it wasn't seen to be a threat. The person's a homeless person, so there's your reason why obviously I didn't charge, but they sent it back [saying]: 'You know the legislation, charge, charge'.⁹⁰
- 1.278 As discussed elsewhere in this report, our inquiry found a number of relatively minor breaches resulting in the issuing of penalty notices, including on the spot fines for possession of nail scissors, craft scissors and small utility knives. At least some of these matters could have been effectively dealt with by issuing a warning. In the case of young offenders, more serious matters could have been referred for a formal caution. In light of these cases, it may be useful to again consider ways that police officers could be encouraged to consider alternatives to issuing infringement notices in appropriate cases.

Processes used during the review period

- 1.279 The availability of infringement notices appeared to have a significant influence on the manner in which penalties were applied during the review period. Police Service records show that infringement notices make up:
- more than half (55%) of the actions taken in response to custody of knife (s. 11C) offences during the review period, and
 - more than three-quarters (77%) of the actions taken in response to 'refuse reasonable direction' (s. 28F(6)) offences.

Infringement Processing Bureau estimates of penalty notices issued

- 1.280 Another source of data for estimating the number of penalty notices issued for breaches of the Police and Public Safety Act is the Infringement Processing Bureau. The Bureau calculated that there were 2199 penalty notices issued for custody of knives during the 12 month review period, and 1329 penalty notices for failure or refusal to comply with reasonable directions by police.

⁸⁹ *Summary Offences Act*, s. 29A(6).

⁹⁰ Focus group 3.

Processing infringement notices

- 1.281 An Infringement Processing Bureau audit of penalty notices issued during the review period showed that relatively few Police and Public Safety Act penalty notices are either paid or contested. Most are referred to the State Debt Recovery Office.
- 1.282 In relation to fines for custody of a knife, 12.4% (273) of the 2199 notices issued had been paid by the date of the audit. Of the 1329 'reasonable direction' fines issued, 24.6% (327) were paid. By way of comparison, the Bureau advised our inquiry that the overall payment rate for all types of infringement notices issued is presently 71%.
- 1.283 A small number of people made representations directly to the Bureau to have the fine waived. The Bureau estimated that it received 70 representations about custody of knife (s. 11C) fines and 42 about fail or refuse reasonable direction (s. 28F) fines. None were waived.
- 1.284 The 'court election' figures refer to everyone who elected to challenge the fine at court, including some who initially made representations to the Bureau. It is interesting to note that 11% (242) of the 2199 custody of knife fines were contested at court, whereas only 5.7% (76) of the 1329 fines issued for refuse reasonable direction were contested. There is no comparable 'court election' data available for other offences.

Fine defaulters

- 1.285 Few people issued with on the spot fines for breaches of the Police and Public Safety Act pay their fines in the time allowed by the Infringement Processing Bureau. Even after these outstanding fines were referred to the State Debt Recovery Office, very few were paid.
- 1.286 An audit of the \$932,360 in unpaid Police and Public Safety Act infringement notices referred to the SDRO by 5 September 1999, showed that \$881,000 in fines remained outstanding. That is, of the 2153 infringement notices referred to the SDRO, only 131 (6%) were paid.

Table 12.1: Police and Public Safety referrals received by SDRO

	Notices received	Fines paid	% fines outstanding
s. 11C Custody of knife	1390	68	95.1%
s. 28F Refuse direction	763	63	91.7%

Source: State Debt Recovery Office audit of Police and Public Safety notices issued between 1.7.98 and 30.6.99, and referred by the Infringement Processing Bureau before 5.9.99.

- 1.287 The SDRO's debt recovery rates are generally much higher for other offences. There is no comparable figure for the overall payment rate for SDRO fine enforcement orders. However, an audit on 5 September 1999 of the 748,926 matters referred to the SDRO since it began operation in January 1998, showed that 39.9% (299,166) of debts had been recovered.

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- 1.288 One explanation for the low rates of recovery for Police and Public Safety debts might be the comparatively high fines imposed. Both the Infringement Processing Bureau and SDRO reported higher rates of payment for the \$220 'refuse reasonable direction' fines than for the \$550 fines for custody of a knife, indicating that the size of the fine may affect payment rates.
- 1.289 Related factors might be the age of fine defaulters and their capacity to pay. A SDRO analysis of Police and Public Safety fine defaulters shows that 53.7% (746) of those referred for 'custody of knife' offences and 75% (573) referred for 'refuse reasonable direction' offences, were under the age of 25.
- 1.290 There are no comparable figures on the general age profile of fine defaulters referred to the SDRO. To obtain an indication of the overall age profile, the SDRO audited a sample of all fine defaulters referred by the Bureau for several days in August 1999 (the Bureau refers more than 2000 matters a day to the SDRO). The SDRO's audit of 10,333 referrals showed that 32.2% (3329) of fine defaulters were under the age of 25. The proportion of fine defaulters in this sample who were aged under 18 years was just 4.4% (453), whereas 17.9% (386) of Police and Public Safety Act fine defaulters were under 18 years.

'Reasonable excuse' and penalty notices

- 1.291 Several submissions argued that it was inappropriate to require police officers to assess the reasonableness of a person's excuse for having custody of an implement or refusing to move on, particularly with respect to decisions on whether or not to issue a penalty notice.
- 1.292 Police officers in focus groups and interviews commented on the difficulties in achieving consistency in this area. A number of police in the groups said there was a need for more specific guidance on what constituted an offence under the Act. However, most also emphasised the importance of flexibility in exercising their discretion to determine whether to act on an offence.
- 1.293 The current provisions assume that officers will only issue penalty notices when all elements of the offence have been considered, including whether the suspected offender had a reasonable excuse for carrying an implement or refusing to obey a reasonable direction. In practice, this may require police to invite persons suspected of offences to explain their conduct.
- 1.294 Consideration should be given to amending s. 29A of the Summary Offences Act to require police:
- to seek and consider a suspected offender's excuse for custody of a knife or refusing or failing to obey a reasonable direction; and
 - to briefly note their response on any infringement notice issued.

Discussion

- 1.295 The most pressing issue arising from the penalty provisions is that such a large proportion of Police and Public Safety matters are dealt with by way of penalty notices,

and that so few of these fines are either paid or challenged. By contrast, penalty notices for other offences, such as traffic and parking offences, result in comparatively high rates of payment.

- 1.296 The low rates of payment raise questions about the efficiency and effectiveness of using such large on the spot fines to deal with Police and Public Safety offences. A related issue is the high number of young people issued with infringement notices, particularly in relation to failing or refusing to obey directions by police. The high numbers of young people being fined may well be a result of their relatively extensive degree of contact with police, rather than discriminatory treatment by police in the issuing of fines. However, questions remain about the utility of issuing penalty notices to young offenders with a limited capacity to pay. This issue should be addressed in a review by the Criminal Law Review Division of the Attorney-General's Department. Any changes to the penalty provisions of the Police and Public Safety Act that affect young people should be urgently assessed by that review.
- 1.297 We considered problems associated with infringement notices, including the possibility that they might be adversely affecting the willingness of police officers to consider warnings and cautions where appropriate. During the Committee stage of the debate on the legislation, there was a clear expectation that warnings and cautions would be routinely considered as options for dealing with less serious breaches, particularly for young offenders.
- 1.298 Notwithstanding their possible impact on the use of warnings and cautions, infringement notices are desirable for a number of reasons: their relative administrative simplicity; their impact in reducing the numbers of people coming into contact with the criminal justice system, and their effect of reducing the number of people, particularly young people and Aboriginal people, taken into custody for minor offences.
- 1.299 Accordingly, on balance, it is preferable to encourage more judicious use of the infringement notice provisions rather than remove them as an option. The effectiveness of these provisions depends on police reserving penalty notices for clear breaches of the legislation.
- 1.300 Modifications that might help to achieve this include:
- provision of more detailed guidance on what constitutes an offence under the Act, including practical examples of when use of discretion might be appropriate;
 - in the case of minor breaches, police should be encouraged to make greater use of warnings for both child and adult offenders. Opting to warn an offender for custody of a knife without reasonable excuse need not affect police officers' confiscation powers;
 - for more serious matters, police should be authorised to formally caution adult offenders for first offences. Any person cautioned should be deemed to have already been dealt with for the purposes of any subsequent knife-related offences; and
 - police should be required to consider making greater use of formal cautions for young offenders.

Chapter 13: Crime reduction & operations based policing

Reduction in crime?

- 1.301 One important objective of the Police and Public Safety Act was to bring about a reduction in crime, particularly knife related crime and other violent street offences.⁹¹ After a rapid rise from the early 1990s to 1996-97, crime levels have plateaued or fallen. The June 1999 Quarterly Update of NSW Recorded Crime Statistics indicated that some crime indicators had returned to 1996 levels, with falls between July 1997 and June 1999 in sexual assault, indecent assault and related offences, robbery with a firearm and motor vehicle theft, while other offences were stable. At the same time, indicators of policing activity such as traffic offences and drug offences were significantly higher over the same period. The release of the September 1999 Quarterly Update confirmed these trends.
- 1.302 Essentially, it is too early to determine whether there has been a sustainable decrease in crime, and the extent to which any reduction can be attributed to policing activity. Ongoing review of police use of searches, directions and other such powers should assist in examining the impact policing activity has on crime. Over time, the possible contribution of the Police and Public Safety Act powers should be examined, using a number of key measures. To do so, it is recommended that police continue to record all uses of the powers, including those searches which do not result in the discovery of a knife as well as those 'reasonable directions' that are complied with.
- 1.303 Careful monitoring of such measures as 'robbery with a weapon not a firearm' and 'assault with a knife' needs to be conducted in the future to determine whether the drop in the incidence of these categories of crime during 1998-99 is sustainable. The potential impact of the Police and Public Safety Act would be better determined by monitoring trends in the incidence of relevant knife-related crime, with suitable analysis after the legislation has been in effect for a longer period. The Bureau of Crime Statistics and Research analysis of crime statistics and policing activity will be crucial to monitoring the longer term impact.
- 1.304 The difficulty of determining whether the implementation of the Police and Public Safety Act has had a distinct impact on crime levels is that the legislation was accompanied by the implementation of a number of other initiatives by the Police Service to respond to criminal activity. The introduction of the OCR process, the focus on hot spots, and the targeting of repeat offenders by the NSW Police Service were just some of these initiatives. Any or all of these may have had an impact on the level of crime in the community.

Targeting repeat offenders

- 1.305 The Police Service has made the targeting of recidivist offenders a priority in terms of crime reduction strategies. Local area commanders are quizzed at OCRs on their activities to deal with repeat offenders. In our survey of local area commanders, every commander indicated that they were targeting these offenders in their command. We asked commanders whether the Police and Public Safety Act powers were used as part of their

⁹¹ See Chapter 2 'Background'.

targeting of repeat offenders. We were advised that the powers were used only as appropriate, or as part of an overall package.

- 1.306 'Judicial offences', which includes such offences as 'breach of bail' and 'fail to appear', are another group of offences that might indicate that repeat offenders are coming into contact with police exercising Police and Public Safety Act powers. One of the by-products of the New York experience⁹², and apparently a key to the reported success of its policing strategies, was that a significant number of people who were apprehended on fairly minor charges were found to be on outstanding warrants for other, more serious crimes.
- 1.307 In the 12 months from July 1998, there were 139 judicial offences detected in situations where the Police and Public Safety Act powers were exercised.⁹³ These judicial offences represented 3.4% of the total number of offences detected, and 0.67% of the total number of recorded actions taken under the Police and Public Safety Act. By comparison, judicial offences were detected in greater proportions as a consequence of street policing operations. Judicial offences accounted for 48 (8.8%) of the 548 charges in CitySafe III; 15 (9.4%) of the 159 charges in CitySafe IV; and 28 (11.4%) of the 246 charges in CitySafe V.
- 1.308 Presently, the crime trends are said to indicate the impact of targeting repeat offenders; that is, the overall targeting of repeat offenders is said to have brought about the decline in crime, but the exact numbers of repeat offenders identified as a result of police activity is presently unclear. Being able to identify the number of repeat offenders may assist in determining the extent to which powers, such as the Police and Public Safety Act powers, contribute to police contact with repeat offenders. It is therefore suggested that the Police Service examine the utility of developing measures of the extent to which repeat offenders are targeted by policing activity, and use these measures as part of the Operation and Crime Review process to enable local area commands to explain their strategies regarding repeat offenders.

Operations and Crime Review

- 1.309 While it is not the purpose of this report to review the function or efficacy of the OCR process, it is necessary to examine the impact that it has had on the use of the Police and Public Safety Act powers.
- 1.310 The OCRs have focused on particular crime trends, particularly those related to robbery, assault, break and enter, stealing and motor vehicle theft as well as street and drug offences. Development of strategies to identify hot spots, repeat offenders and repeat victims were identified as a priority from the outset. The OCR process is seen as a key strategy for monitoring and improving performance in the area of crime reduction.
- 1.311 The OCR process has assumed an important role in the internal accountability regime for the Police Service. Accordingly, there is merit in the Police Service combining the

⁹² The phrase 'New York experience' refers to the change in police styles and practices in the New York Police Department in the 1990s, particularly the changes that have occurred since 1994 under the Giuliani administration in New York City.

⁹³ The 'judicial offences' consist of 'bench warrant' (32 instances in the period 1 July 1998 to 30 June 1999), 'breach bail conditions' (47), 'breach of recognizance' (13), 'fail to appear' (17), and 'other judicial offences' (30). Source: NSW Bureau of Crimes Statistics and Research. 'NSW Recorded Crime Statistics — July 1998 to June 1999: Counts of incidents in same event as 'police powers' incident.'

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'numerical accountability' measures with goals and indicators that examine the impact of particular policing strategies on local communities. Modifying the OCR process in this way to better address the overall impact of policing activity on the community would be consistent with the Police Service's recently enhanced responsibility to deal with problems and complaints made to the Service about unreasonable or improper police conduct.

- 1.312 Where such developments may be of greatest benefit is in the area of police relationships with those communities where there is a significant risk of unproductive and/or non-cooperative relations. The experience of young people and Aboriginal people of the use of the Police and Public Safety Act that we have described should be subject to closer scrutiny through the OCR process. In this way, local commanders would be given the opportunity to account for the way in which these powers are used in their command, and the impact of their use, not only on crime, but on the community itself.
- 1.313 The Service should be well placed to build on the achievements of the OCR process to factor in more sophisticated analysis of local factors and the ongoing active participation of community representatives to examine the broader impact of policing strategies at the local area. We recognise the efforts of the Police Service in this area, and encourage the ongoing development of tools designed to measure the impact of policing strategies on local communities.

Operations

- 1.314 High profile and large scale targeted police operations have been developed, partly in response to the issues identified at OCRs, as a strategy to deal with local crime problems. These operations are seen as a way of developing localised and coordinated strategies for dealing with particular problems in particular areas. The reported success of some of the early initiatives in this area, most notably, Operation Puccini in Cabramatta, has also served to secure a strong reputation for highly visible and large scale police operations.
- 1.315 We were made aware of concerns about some of the strategies employed during one operation⁹⁴. The operation was said to have been 'conducted in a manner which broke down positive relations for a number of young people, community workers, and residents and shop owners.'⁹⁵ We were advised that 'the behaviour of officers ... was inappropriate and indiscriminate'⁹⁶, with complaints of police incivility and rough handling of young people. The operation was also criticised for inappropriately targeting young people who were not the subject of local intelligence, which was said to be, in part, the result of failing to involve local officers. The representations made to our Office following the operation indicated that among the concerns was a fear that the efforts to establish a positive working relationship between police and the community in the Marrickville area were undermined by the approach evident in Oilgate.
- 1.316 We have since been involved in positive discussions involving the Police Service and representatives of the local community to discuss the impact of this operation, with local police acknowledging the need for adjustments to the method and manner of

⁹⁴ Operation Oilgate, which was conducted in the Endeavour region during July 1999.

⁹⁵ Letter from Marrickville Youth Resource Centre, dated 11 August 1999

⁹⁶ Ibid

future operations to avoid or minimise potential problems. The strategies agreed on in terms of future operations in this instance may offer guidance for the management and conduct of operations in other locations.

- 1.317 Some of the strategies proposed as a result of these discussions include:
- the development and use of quality intelligence, including the involvement of specialist officers;
 - enhanced understanding and improved application of the legal standards and limitations relevant to the Police and Public Safety Act powers;
 - understanding that the expanded police powers are merely one resource available to police, who can avail themselves of other policing tools, such as the *Young Offenders Act*;
 - development of accountability measures around the use of diversionary options, such as those contained in the *Young Offenders Act*; and
 - clear communication of the overall strategy with the local community, particularly representatives of those groups who may be particularly or adversely affected by intensive police operations.
- 1.318 One of the key themes to arise from examining the conduct of the operations in Sydney City (Operation CitySafe), Bankstown (Innsbruck), Cabramatta (Puccini) and Marrickville (Oilgate), was their impact on the local community. It is clear that police have the aim of conducting these operations for the benefit of the general community, and indeed, they enjoy considerable community support. However, such operations will have costs.
- 1.319 There are indications that some of the operations have adversely affected police relations with some in the community, particularly, but not only, young people and people from non-English speaking backgrounds. This has the potential to be counter-productive considering that it can undermine positive initiatives and concerted efforts to improve police community relations on other issues.
- 1.320 In some cases, these sorts of issues have been addressed. In other instances, unnecessary friction and tension between police and the community has arisen because these kinds of issues have not been acknowledged or adequately addressed. It has long been accepted that police operations of this type can exacerbate existing tensions, particularly among groups where there has been a history of poor relationships with police, such as young people and Indigenous people.
- 1.321 The risk for police is that a backlash against these initiatives could undermine the important crime fighting strategies developed by police, which have the support of the community in general. To ensure that police operations can continue to meet the goal of effective crime reduction, it is necessary to ensure that they do not give rise to unnecessary complications that compromise or undermine those efforts.
- 1.322 Some of the criticism of these operations has focussed on the consequences of involving police with little or no knowledge of local conditions. In each of the operations we have looked at, there have been comments from community groups, and individual members of the public who come into contact with police, that problems occur not so much with local officers, but with officers brought from outside the area for the operation. While it

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may be necessary, and even useful, to involve officers from outside a particular area, there is a risk that a heavy handed approach by police with no involvement in a particular community can unnecessarily undermine attempts by local police to develop a constructive relationship.

- 1.323 It is important that a clear and comprehensive briefing be provided at the outset to *all* officers involved in the operation. This briefing needs to address the scope and limits to the police powers identified for use during the operation, as well as the style of policing the Police Service is seeking to promote.
- 1.324 Sometimes there is a failure to recognise that in seeking to target criminal behaviour, there is a risk of targeting law abiding citizens simply because they match a particular profile. These issues can be partly addressed by more sensitive and intelligence led policing.
- 1.325 It would also be helpful for appropriate consultation to occur with community representatives, including people working with groups that are possible targets of policing operations. This is not to suggest that police are obliged to pass on specific details of proposed operations, but rather it is suggested that police actively seek opportunities for working cooperatively and collaboratively with community representatives to achieve common objectives around crime reduction and police-community relations.
- 1.326 Furthermore, it is important that police be in a position to deal quickly with concerns as they arise in the course of an operation.
- 1.327 The reported success of these operations has meant that they have become almost a permanent feature of operational policing in their local areas. In essence, the operations have moved from being targeted policing strategies to ongoing policing techniques. Police also need to incorporate more effective means of managing the adverse impact such operations may have on, in particular, their relations with young people and Aboriginal people.
- 1.328 Given the critical nature of these issues, it is recommended that consideration be given to the development and adoption of a 'Proactive Operation Procedure' for the management and conduct of proactive street policing operations along the lines of the Standard Operating Procedures for 'sensitive operations' adopted by the Police Service in 1997. Any such procedure will need to be subject to ongoing review and development. It should form part of, not merely an adjunct to, any local strategies or policies that address the issue of community relations with respect of the conduct of these types of operations.
- 1.329 While it is appreciated that commanders should be held to account for their performance in crime prevention and reduction, some attention also needs to be given to the methods they employ to achieve this, and the impact that their strategies have on their relationship with the community. Commanders should be able to develop operation procedures in accordance with the particular issues facing their command. Nevertheless, it is necessary for them to be held accountable against general indicators and performance measures. Such measures offer the possibility that police efforts to reduce crime will enjoy support across the entire community, and that complaints about particular initiatives will be minimised.

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2. Background ¹

- 2.1 This chapter outlines the background to the introduction of the *Crimes Legislation Amendment (Police and Public Safety) Act*, and briefly notes some of the key organisations and issues relevant to the review of the Act by the NSW Ombudsman.

Structure of the Police Service

- 2.2 Following the appointment of a new Police Commissioner in 1996, and the *Final Report* of the Royal Commission into the NSW Police Service, a new structure was introduced for the Police Service. The Service now consists of 11 regions made up of local area commands, as well as a number of specialist commands.
- 2.3 The 80 local area commands are considered to be the primary management units of the Service, with each local area commander responsible for strategic and business planning and budget management.
- 2.4 Local area commands have been primarily responsible for setting up and conducting targeted operations aimed at preventing and reducing crime in the local area.
- 2.5 Operational aspects of the management of local area commands are examined at regular reviews convened by the Commissioner and senior police management. These Operations and Crime Reviews are intended to be intelligence-driven forums focussing on the efforts of local area commands to reduce crime
- 2.6 To assist in the coordination and promotion of initiatives within the Police Service, senior commanders are often appointed as corporate sponsors of particular projects. The implementation of the *Crimes Legislation Amendment (Police and Public Safety) Act* was made the responsibility of a corporate sponsor. Initial responsibility was given to the Commander, Special Protection Group, with an emphasis on the prompt implementation of the legislation in view of the short time between its passage through the Parliament on 27 May, and its commencement on 1 July 1998. Subsequently, corporate sponsor status for the legislation was transferred to the Commander, Hunter Region.

Role of the Ombudsman

- 2.7 The NSW Ombudsman is responsible for handling complaints about public authorities in New South Wales. The Ombudsman's Office receives a large number of complaints and telephone enquiries regarding the Police Service each year. By law, complaints are required to be submitted in writing before further action can be taken by the Ombudsman. In

¹ This chapter updates the background material contained in *Policing Public Safety: Discussion Paper on the Crimes Legislation Amendment (Police and Public Safety) Act 1998*, issued by the NSW Ombudsman in December 1998, and draws on some source material identified in G. Griffith and R. Simpson *Street Offences and Crime Prevention*. Briefing Paper No. 9/98. NSW Parliamentary Library Research Service.

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many cases, matters dealt with by telephone are relatively simple, and can be either addressed immediately or by reference to the particular local area command. Therefore, a large number of enquiries received by this Office can be, and are, dealt with and/or resolved without the matter having to be advised in writing.

- 2.8 Most complaints about police received by the Ombudsman are dealt with by the Police Service. As a result of the reforms to the NSW Police Service following the Royal Commission, as well as legislative changes to the *Police Service Act*, the Ombudsman's main role is to independently oversee and review the way the Police Service handles complaints.

Review and the role of the Ombudsman

- 2.9 Anticipating concerns about the nature and potential impact of the powers established by the *Crimes Legislation Amendment (Police and Public Safety) Act*, the Act provided for a formal monitoring period during the first 12 months of operation. This monitoring was to be conducted by the Ombudsman.²
- 2.10 At the conclusion of the 12 months, the Ombudsman is to furnish a report on the Act to the Minister and the Commissioner of Police.
- 2.11 Given that the Ombudsman's existing role in scrutinising the Police Service would have meant dealing with complaints arising from the application of the legislation in any event, it is reasonable to assume that the Parliament intended that we consider more than complaints when reviewing the legislation. During debate on the legislation in the Parliament, frequent reference was made to the safeguards established by the formal monitoring role,³ and the need for the Ombudsman to maintain a watchful eye on the implementation of the legislation.⁴
- 2.12 In relation to the gathering of information for the monitoring of the implementation of the *Crimes Legislation Amendment (Police and Public Safety) Act*, that Act and the *Ombudsman Act* afforded a number of relevant powers. Section 6 of the Police and Public Safety Act provided that the Ombudsman could require the Commissioner of Police to provide information on the Act. In the course of an investigation commenced by the Ombudsman under the *Ombudsman Act*, the Ombudsman is able to require documents and statements of information from public authorities relevant to the investigation.⁵

² *Crimes Legislation Amendment (Police and Public Safety) Act* s. 6.

³ See Second Reading Debate speeches by The Hon. P Whelan MP (NSW Parliamentary Debates (NSWPD), 28 April 1998 p. 3971 and 29 April 1998, p. 4161) and The Hon. J W Shaw MLC (NSWPD, 5 May 1998 p. 4277).

⁴ See Second Reading Debate speeches by Mr J Watkins (NSWPD, 29 April 1998, pp. 4090, 4091), Dr P Macdonald (NSWPD, 29 April 1998, p. 4096), Mr J Hunter (NSWPD, 29 April 1998, p. 4100), The Hon. I Cohen (NSWPD, 5 May 1998, p. 4328), The Hon. J Saffin (NSWPD, 5 May 1998, p. 4332), The Hon R. Jones (NSWPD, 19 May 1998, p. 4414), The Hon. A Corbett (NSWPD 19 May 1998 p. 4418), and The Hon. E. Kirkby (NSWPD, 19 May 1998, pp. 4423, 4424).

⁵ *Ombudsman Act* s. 18.

Police powers and the need for review

- 2.13 A Research Paper prepared by the NSW Parliamentary Library succinctly, and correctly, makes the point that the Royal Commission into the NSW Police Service established that ‘there is potential for the abuse of power where power itself is not subject to proper scrutiny, oversight and review’.⁶
- 2.14 The purpose of monitoring and oversight is to prevent abuse of power, or failing that, to detect abuses and ensure that they are dealt with quickly and effectively. The Parliament, having granted these new powers to police in the community interest, is entitled to expect that they will be used properly, fairly and effectively. The role of the Ombudsman generally, and through the research project in particular, is to place a check on the significant powers established by the Act.

Crime and crime prevention

- 2.15 At the time of the introduction of the Crimes Legislation Amendment (Police and Public Safety) Bill, Members of Parliament were advised that the NSW Bureau of Crime Statistics and Research had reported statistically significant upward trends in the number of recorded criminal incidents between January 1995 and December 1996 for the following offences:
- assault (up by 22.5%)
 - sexual assault (up by 23.3%)
 - robbery without a weapon (up by 8.4%)
 - breaking and entering — dwelling (up by 20.9%)
 - breaking and entering — non-dwelling (up by 7.0%)
 - motor vehicle theft (up by 4.1%)
 - steal from motor vehicle (up by 13.6%)
 - steal from dwelling (up by 11.3%)
 - fraud (up by 17.2%)
 - malicious damage to property (up by 9.0%).⁷
- 2.16 The bureau’s figures for the period indicate that the number of robberies with a weapon other than a firearm jumped from 1465 in 1995 and 1894 in 1996 to 3381 in 1997 and 4386 in 1998. Between January 1997 and December 1998, there was a 28.4% increase in robberies with a weapon other than a firearm.⁸ At the same time there was no statistically significant upward or downward trends for robbery without a weapon and robbery with a firearm. The bureau’s figures show a steady increase in robberies with a weapon other than a firearm after June 1996, peaking in early to mid-1998.⁹

⁶ G. Griffith and R. Simpson *Street Offences and Crime Prevention*. Briefing Paper No. 9/98. NSW Parliamentary Library Research Service. p.3.

⁷ Bureau of Crime Statistics and Research (1997) *NSW Recorded Crime Statistics 1996*, Sydney.

⁸ Bureau of Crime Statistics and Research. *Key Trends in Crime and Justice NSW 1998*. Statistical Report Series. Sydney. p. 6

⁹ *Ibid.* p. 11.

Young people, crime and the police

- 2.17 During the Parliamentary debate on the Police and Public Safety Act, the possible impact of the legislation on young people was referred to on a number of occasions. In light of those concerns, and some of the issues identified in the course of monitoring the legislation, it is useful to canvas the relationship between young people and crime.
- 2.18 The research literature generally acknowledges that the vast majority of young people are law abiding, and that much juvenile crime is 'spontaneous, unsophisticated and less serious than adult crimes'¹⁰, and can often be attributed to young people challenging authority and pushing boundaries. The majority of offences are crimes against property, not crimes against the person.¹¹ Juvenile offending is often conspicuously visible, because it is committed by young people in groups, in public places, in their own neighbourhoods, and where there is surveillance by police, security guards and/or cameras.¹²
- 2.19 It is said that most young people engaged in this sort of activity will either outgrow it, or put an end to it upon any meaningful contact with the criminal justice system.¹³ Recent moves in NSW for young offenders to be given the least restrictive sanction appropriate to the offence reflects this understanding of juvenile offending.¹⁴ It is reinforced by findings that seventy percent of young offenders who appear before the Children's Court will never appear again.¹⁵
- 2.20 The response to youth crime is said to be based on three approaches: coercive, developmental and accommodating.¹⁶
- 2.21 The coercive approach takes the form of an emphasis on crime control, involving police, transit police and security guards, and the extension and application of police powers.
- 2.22 The developmental approach is an attempt to address the social causes of crime such as lack of education and employment opportunities, with the involvement of the young person, their family, schools and community services. Elements of this approach can be seen in such strategies as youth justice conferencing.

¹⁰ L. Hayes (1999) 'Getting the Balance Right: The Policing of Young People in New South Wales. Paper Presented at the *Children and Crime: Victims and Offenders Conference* convened by the Australian Institute of Criminology. Brisbane. 17-18 June 1999. at p.4 citing Cuneen and White (1995) *Juvenile Justice: An Australian Perspective*, Oxford University Press, Melbourne.

¹¹ M. Cain (1997) 'An Analysis of Juvenile Recidivism'. Paper presented at Australian Institute of Criminology Conference *Juvenile Crime and Juvenile Justice: Toward 2000 and Beyond*. Adelaide. 26 & 27 June 1997. p.4.

¹² National Crime Prevention (1999) *Hanging out: Negotiating young people's use of public space (Summary volume)*. National Crime Prevention, Attorney-General's Department. Canberra. p. 7.

¹³ Cuneen and White (1995) *Juvenile Justice: An Australian Perspective*, Oxford University Press, Melbourne.

¹⁴ In particular, see the *Young Offenders Act 1997*. The philosophy of the Act, in part, seeks to arrive at a sanction that reflects the seriousness of the offence but maximises the likelihood that the young person will not reoffend, often by trying to address the causes of the young person's offending behaviour.

¹⁵ M. Cain (1996) *Recidivism of Juvenile Offenders in New South Wales*, Department of Juvenile Justice, Sydney. p. 1, pp. 13-4.

¹⁶ National Crime Prevention (1999). *Op. Cit.* p. 9

- 2.23 The accommodating approach attempts to address the underlying points of conflict and tension between young people and authorities, particularly in public spaces. There is an emphasis on inclusion, negotiation and planning of public spaces to take young people's needs and interests into account. This approach is evident in a number of town and centre management strategies, such as those employed at Hurstville and the Broadway Shopping Centre in Sydney.
- 2.24 The National Crime Prevention study on young people's use of public space stated that:
 Developmental and accommodating approaches offer a more youth friendly perspective on crime prevention. The emphasis is on diverting young people away from negative, antisocial or criminal behaviour, on enhancing their leisure, employment and educational opportunities, and providing a social environment which is inclusive of young people.¹⁷
- 2.25 While there has been increasing emphasis on the developmental and accommodating approaches to youth crime, there has also been evidence of increased use of coercive measures to deal with juvenile offending. The *Children (Protection and Parental Responsibility) Act 1997* and the Police and Public Safety Act have been cited as two examples of the growing tendency to develop and apply coercive strategies to deal with juvenile crime.¹⁸
- 2.26 For most people, including young people, their first point of contact with the criminal justice system will be the police. The relationship between young people and the police has often been vexed, but there has been recognition of the need to develop a better relationship, and there have been efforts to this end.
- 2.27 In recent years, a number of studies have examined the nature of the relationship between young people and police. In NSW, the *Kids in Justice*¹⁹ report, *Nobody Listens*,²⁰ *Anh Hai*,²¹ and *Youth Street Rights*²² have all portrayed a difficult relationship between some young people and the police. These studies have reported that some young people feel over policed yet underprotected; that they are harassed by police when they feel they are obeying the law, but feel they could not depend on police to assist them when they were in trouble; that police employ inappropriate and invasive policing strategies in dealing with young people in public places; and differing, often discriminatory treatment of young people from indigenous and non-English speaking backgrounds.
- 2.28 There have been a number of notable efforts by the Police Service to address and correct this situation. The Service's corporate sponsor for youth issues, the youth issues working

¹⁷ Ibid. p. 10.

¹⁸ Anderson, Campbell and Turner (1999) *Youth Street Rights: A Policy and Legislation Review*. University of Technology, Sydney. March 1999.

¹⁹ Youth Justice Coalition. (1990) *Kids in Justice Report: A Blueprint for the Nineties*. Sydney

²⁰ Youth Justice Coalition (1994) *Nobody Listens*. Youth Justice Coalition, the Western Sydney Juvenile Justice Interest Group and the Youth Action and Policy Association. Sydney.

²¹ Maher, L., Dixon, D., Swift, W., & Nguyen, T. (1997) *Anh Hai: Young Asian Background People's Perceptions and Experiences of Policing*. UNSW Faculty of Law Research Monograph Series, University of New South Wales, Sydney.

²² Anderson, Campbell and Turner (1999) *Youth Street Rights: A Policy and Legislation Review*. University of Technology, Sydney. March 1999.

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group, and the review of the Service's 1995 youth policy have been active elements in examining the issues around the relationship between young people and the police. The passage of the *Young Offenders Act* in 1997 offered the opportunity for a sea change in the relationship. The Act formalised a range of options for police in dealing with young offenders, including warnings, cautions and youth justice conferences. The legislation established a statutory support for specialist youth officer positions, with these Youth Liaison Officer positions subsequently filled following merit selection. These officers are responsible for providing support in the implementation of the *Young Offenders Act*, and are provided with regular training to assist them in their role. Their role has in turn required and assisted them to develop better links with youth and community organisations as well as young people.

- 2.29 Notwithstanding, these efforts, it is worth recognising that young people will still come into contact with police officers, often in public spaces, and that not all of this contact will be necessary or positive, and that the relationship between young people and police can be volatile.²³ It is this contact, often with general duties officers, who may have 'distort[ed] perceptions about the propensity of all youth toward offending behaviour',²⁴ that will continue to determine and influence relations between young people and police.

Young people and public space

- 2.30 Research conducted by the Urban Design Advisory Service of the NSW Department of Urban Affairs and Planning²⁵ found that young people were attracted to public spaces such as parks, and town and retail centres for many of the same reasons as other users, such as centrality and proximity to public transport. The presence of young people in these spaces, however, was seen as threatening or intimidating, particularly by older people and retailers. Consequently, young people reported experiences of 'harassment' from authorities, including police and private security guards.²⁶
- 2.31 The interaction between young people and security guards was heightened in those commercial districts where there was particular concern about security, but it was noted that 'complaints about young people are often business-related and reflect the view that young people are bad for the image of an area and discourage other consumers.'²⁷
- 2.32 These trends have occurred at a time when many community and public facilities have been located within commercial shopping complexes. Public libraries, youth facilities, cinemas, entertainment facilities, food outlets and government departments such as Medicare and Centrelink have increasingly been re-located inside shopping centres. It has been suggested that some shopping centres are managing and regulating the times of

²³ O. Bevan (1997) 'Young People and the Police' Paper presented at Australian Institute of Criminology Conference *Juvenile Crime and Juvenile Justice: Toward 2000 and Beyond*. Adelaide. 26 & 27 June 1997. p.5.

²⁴ Hayes (1999) Op. Cit. p. 3.

²⁵ Urban Design Advisory Service (1999) *Design Guidelines with Young People in Mind*. Department of Urban Affairs and Planning. Sydney. September 1999.

²⁶ Ibid. p. 3.

²⁷ Ibid.

access, dress, manner and behaviour of people visiting the centre, and using private security guards to enforce this regulation of attendance, appearance and behaviour.

- 2.33 A growing concern about the use of private security guards in policing publicly accessible places is that, in some significant respects, while security guards do not have powers to the same extent as police, they are not subject to the same accountability as police officers.²⁸ Sometimes this has resulted in situations where security guards have endeavoured to apply restrictions with greater breadth than anything allowed to the police. For instance, there have been instances of security guards trying to impose and enforce long bans²⁹ on individual young people visiting particular shopping centres whereas police officers are limited to providing such reasonable directions as are necessary to stop particular conduct. While police powers have been increasingly clarified and articulated, there is no similar means for people to know of the nature and extent of the powers of security guards.
- 2.34 Other issues the UDAS research highlighted regarding problems encountered by young people in public spaces included lack of free and accessible recreational facilities, few places suitable and affordable for unemployed young people, dependence on public transport, safety concerns about travelling on trains and waiting for buses, as well as exposure to crime and violence, often from other young people.³⁰
- 2.35 It was suggested that young people's use of public space should be encouraged. The UDAS research noted that:
- Being in public spaces has a useful social and personal function for young people, enabling them to relax and enjoy themselves, and form romantic attachments and friendships ... All young people including those of non-English speaking and Aboriginal and Torres Strait Islander origin view public space as a place to meet friends and spend time in groups.³¹
- 2.36 In fact, young people's use of public space was often endorsed, and encouraged, by parents and family on the grounds of safety and security.³²
- 2.37 The UDAS report suggested that to improve 'the perception of safety public spaces should be well lit, with opportunities for casual surveillance to discourage criminal activity'. A number of design suggestions were made including minimising blank walls, maximising 'active edges', such as shopfront windows, maximising entries to building to increase pedestrian traffic, enhancing lighting of lanes used as short cuts, improving landscaping so that it does not obscure sight lines or render large areas of public space unusable, and increasing the number of facilities such as public phones to increase activity. The report also discouraged the over-management and regulation of public spaces.

²⁸ See Swanton, B (1993) 'Police & Private Security: Possible Directions'. *Trends and Issues* Paper No. 42. Australian Institute of Criminology. Canberra. p 6, 7.

²⁹ In interviews conducted for this project, we were told of one young person being banned until 2003, and another one being banned for life.

³⁰ Urban Design Advisory Service (1999). Op. Cit. p. 3.

³¹ Ibid.

³² Ibid.

Public safety and police powers

- 2.38 'Street safety' legislation had been the subject of some discussion since the Government committed itself during the 1995 State Election campaign to effective 'anti-gang' measures. A number of legislative options were canvassed in the media at various times, but these apparently failed to garner the necessary support from various interested parties.³³
- 2.39 It is interesting to note that the substance of these earlier proposals was to give police the power to break up gangs, and move people on. These proposals did not address the carrying of knives or any associated search powers.
- 2.40 Concern about crimes involving knives increased in 1997 and 1998. This can be attributed to a number of factors including a rise in the incidence of knife related crime, as well as several publicised incidents, including the stabbing murder of Constable David Carty in 1997, the stabbing of a teacher in an inner-west Sydney high school, and police reports of a marked increase in the number of people, particularly young people, carrying knives. The legislative response to these incidents and reports was separate amendments made in December 1997 to the *Summary Offences Act* in relation to knives.
- 2.41 These amendments were also explained by reference to Bureau of Crime Statistics and Research figures indicating that 'in the 1996 calendar year, there were 25.1 per cent more robberies involving a knife than there were in 1995. There was also an increase of 23.6 per cent over the same period in the number of assaults involving a knife or dagger'.³⁴
- 2.42 The December 1997 amendments increased the penalties for the offence of having custody of an offensive implement in a public place from 12 months imprisonment or a \$2200 fine to two years imprisonment or a \$5500 fine. The amendments also established a new offence of using or carrying a knife in the presence of another person in a public place in manner that would cause a 'person of reasonable firmness' to fear for his or her personal safety. The application of both offences was extended to cover schools as well as other public places. The legislation also prohibited the sale of any knife or knife blade to a person under the age of 16 years.
- 2.43 Events in February and March 1998 were critical influences in the government's strategy for street crime. The fatal stabbing of Constable Peter Forsyth, an off-duty police officer, and the subsequent media reporting of a number of offences in the Sydney CBD involving knives and other offensive weapons, initiated considerable discussion and debate.
- 2.44 It also brought calls from a number of parties for the introduction of tougher police powers and penalties to deal with street crime. The Police Commissioner commented on an apparent increase of incivility and disorder, and noted that 'the police have limited powers to deal with' minor situations of public disorder.³⁵

³³ Anderson, Campbell & Turner (1999) Op. Cit. pp. 72-4.

³⁴ The Hon. J Shaw MLC, NSWPD, 5 December 1997, p. 3238.

³⁵ R. Morris, 'Laws must offer more support, says Ryan', *The Daily Telegraph*, 4 March 1998.

- 2.45 Responding to suggestions that increased powers might be introduced for designated crime ‘hot spots’, the Police Association called for an expansion of powers across the State. This call was supported by the Commissioner, who was quoted as saying that ‘I think the important thing is that people have to trust the Service to use these powers judiciously ... we have a different police force now. I think we’ll be able to make sure we use them widely and that no police officer abuses them’.³⁶
- 2.46 In a detailed submission to the Government, the Police Association called for ‘a restriction on the carrying and availability of knives, a greater authority to search, an authority to demand names and addresses and an authority to disperse or move people on’.³⁷ The Police Association was careful to emphasise that legislative changes of this nature should not be used to permit restrictions on demonstrations or industrial action. The changes sought by the Police Association had the support of a number of organisations, particularly groups representing the victims of crime.
- 2.47 Other organisations, most notably the Youth Justice Coalition and the NSW Council for Civil Liberties, opposed the expansion of police powers sought by the Police Association. In a submission to the Premier, the Youth Justice Coalition called for greater community policing; codification of existing police powers; a code of police practice; a review of the *Prohibited Weapons Act*; and no increase in police powers to search, demand names and addresses and give directions.
- 2.48 The Council for Civil Liberties noted that the call for enhanced powers came soon after the Royal Commission had exposed the abuse of existing powers. The Council was concerned about the potential impact of the powers, particularly on ‘Aborigines, young people and other groups’. The Council called for ‘smarter policing’, and urged that ‘greater attention be paid to police deployment, competence and training’.³⁸

Crimes Legislation Amendment (Police and Public Safety) Act

- 2.49 On 31 March 1998, in an answer to a Question Without Notice, the Premier announced the outline of what was to be the substance of the Crimes Legislation Amendment (Police and Public Safety) Bill.³⁹ The Premier announced that:
- new offences relating to the possession of knives would be created;
 - police across the State would be given new powers to search for and confiscate knives;
 - police would be empowered to give directions to people in public places; and
 - police would be able to demand the name and address of witnesses to serious offences.

³⁶ ‘Crackdown on knives unites Ryan and the force’, *Sydney Morning Herald*, 17 March 1998.

³⁷ M. Burgess, ‘The key to keeping streets safe’, *Sydney Morning Herald*, 23 March 1998.

³⁸ See G. Griffith and R. Simpson *Street Offences and Crime Prevention*. Briefing Paper No. 9/98. NSW Parliamentary Library Research Service. pp. 1-11 for a comprehensive survey of the submissions made by various interested parties in March-April 1998 in respect of police powers.

³⁹ The Hon. R Carr MP, NSWPD, 31 March 1998, pp. 3440-1.

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- 2.50 After detailing the provisions of the proposed legislation, the Premier advised the Parliament that it would be ‘constantly monitored and reviewed by the Ombudsman’.⁴⁰
- 2.51 The Bill itself was introduced into the Legislative Assembly on 28 April, and debated then and the following day. It was introduced into the Legislative Council on 5 May and further debated on 6 May. The Committee stage of the debate in the Legislative Council, where 60 amendments were considered, took place on 20, 21 and 27 May. In all, the Parliament spent more than 19 hours considering the Bill.
- 2.52 The Government announced a number of objectives of the legislation. The Minister for Police and the Attorney General, in their Second Reading Speeches to the Legislative Assembly and Legislative Council respectively, advised that the legislation would:
- ‘equip police with the laws and powers they need to make our streets safer’;
 - ‘help police tackle gang and knife crime’;
 - ‘tackle head on the growing propensity of people to carry knives’;
 - ‘reduce crime involving knives and to reduce the number of persons who routinely go out armed with a knife’;
 - ‘break the pattern of young people increasingly arming themselves when they go out just in case they get into a fight’;
 - ‘enable police to control antisocial behaviour in public places’;
 - ‘enable police to disperse persons acting in a disruptive manner before a situation gets out of hand’;
 - ‘give police a clear power to give lawful directions in the prescribed circumstances’;
 - ‘enable police to fight serious crime’;
 - be the ‘first stage of the review and consolidation of police powers into a single Act’;
 - ‘make NSW a safer place to live’;
 - ‘send a clear message to the community that the Government will take tough action to prevent crime and give police the powers they need’; and
 - ‘demonstrate the commitment to the safety of the people of NSW; a clear statement about the sort of community we want this state to be — a community where ordinary people, young and old, can go out without fear of harassment or intimidation; without fear for their safety from knife wielding thugs.’⁴¹
- 2.53 The powers contained in the Police and Public Safety Act were exceptional not so much for their substance as their purpose. Indeed, some of the subsequent criticism of the legislation was that it was unnecessary because police already had many of the same powers. The powers were exceptional in that they were intended by the Government to be the primary factor in bringing about an immediate and dramatic impact on the incidence and nature of street crime.

⁴⁰ The Hon. R Carr MP, NSWPD, 31 March 1998, p. 3441.

⁴¹ Second Reading Debate speeches by The Hon. P Whelan MP (NSWPD, 28 April 1998 pp. 3968-72) and The Hon. J W Shaw MLC (NSWPD, 5 May 1998 pp. 4275-7) on introducing the legislation into the Legislative Assembly and Legislative Council respectively.

2.54 The Opposition made a number of criticisms of the legislation in subsequent debate. It argued that:

- the fines for possession of a knife were too lenient, and made no provision for imprisonment of offenders;
- the reasonable excuse defence in the legislation was too broad and open to abuse;
- the procedures laid down for the conduct of a search were inconsistent with actual police procedure;
- the search procedures left police officers vulnerable to attack ('Police officers cannot always identify themselves or state their intention to search a person if they believe that person will use a knife to avoid arrest');⁴²
- the double warning procedures for the reasonable direction powers were cumbersome;
- the exemption given to industrial disputes was discriminatory and unfair;
- the penalty for failing to comply with a direction was inadequate given the amount of time and resources which went into an arrest;
- the fine for failing to provide name and address was unlikely to result in compliance with the requirement by criminal gangs; and
- the name and address powers were unlikely to be of any use where the person did not carry identification.⁴³

The concerns expressed by the Opposition about the penalties were shared by some minor parties and independents.⁴⁴ Some also expressed concern that the legislation was an insufficient response, and proposed similar, but stronger, legislation of their own.⁴⁵

2.55 Other minor parties and independent members supported the restrictions on the custody of knives, but were unable to support other aspects of the legislation on the grounds that:

- the powers duplicated those already given to police officers;⁴⁶
- widening police discretion increased the chance of overuse and abuse of police powers;⁴⁷
- the legislation required police officers, rather than the courts, to determine the reasonableness of an excuse for carrying a knife in a public place;⁴⁸
- the reasonable directions power would 'be used to target young people, particularly ... Aboriginal people, homeless people, non-English speaking young people, and young people who [due to abuse] may prefer to be in a public place than at home because of a distressing family environment';⁴⁹

⁴² The Hon M Gallacher, NSWPD, 5 May 1998, p. 4280.

⁴³ The Hon. M Gallacher, NSWPD, 5 May 1998, pp 4277-82.

⁴⁴ Mr T Windsor MP, NSWPD, 29 April 1998, p. 4089; The Hon. Rev. F Nile, NSWPD, 6 May 1998 p. 4428.

⁴⁵ The Hon. Rev. F Nile, NSWPD, 6 May 1998 p. 4428, 4430.

⁴⁶ The Hon. R Jones, NSWPD, 6 May 1998, p. 4412.

⁴⁷ Ibid; The Hon. A Corbett, NSWPD, 6 May 1998, p. 4415.

⁴⁸ The Hon. R Jones, NSWPD, 6 May 1998, p. 4413.

⁴⁹ The Hon. I Cohen. NSWPD, 5 May 1998, p. 4321.

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- the legislation would only exacerbate young people's concerns about being 'over-policed and underprotected';⁵⁰
- the grounds for using the reasonable directions powers were unclear, and no guidance was provided on what constituted a 'reasonable direction';
- the legislation breached international covenants on freedom of association and freedom of peaceful assembly;
- the legislation would limit the use and enjoyment of public space by young people; and
- the search powers were evidence of an over-reaction to the recent incidents involving knives, and their application should be limited to specific areas where knife crime was known to be a problem⁵¹.

2.56 The proposed amendments dealt with a number of issues including:

- the information required to be recorded by police;
- the review to be conducted by the Ombudsman;
- the review of the Act by the Commissioner of Police;
- the relationship of the legislation with the *Young Offenders Act* and the *Children (Protection and Parental Responsibility) Act*;
- the penalties for the offence of possession of a knife in a public place;
- the penalties for failing to comply with a request to submit to a search;
- the definition of a knife;
- parents who allow children to carry knives;
- limiting the application of the knife search powers and reasonable directions powers to defined areas;
- searches of school lockers;
- the attendance of a nominated adult, where reasonably practicable, during searches conducted at school;
- procedures for searches, including searches by an officer of the same sex as the person being searched;
- requirements for the use of the power to give reasonable directions;
- an exemption in the reasonable directions power given to industrial disputes and other organised assemblies and protests;
- provision for warnings and cautions to be given by police officers in addition to penalty notices; and
- powers for police officers to request proof of name and address.⁵²

⁵⁰ The Hon. A Corbett, NSWPD, 6 May 1998, p. 4416-7.

⁵¹ The Hon. J Tingle, NSWPD 5 May 1998, p. 4330.

⁵² See NSWPD 29 April 1998 pp. 4162-80; 20 May 1998, pp. 4805-33; pp. 4851-77; 21 May 1998 pp 5021-30; 27 May 1998, pp 5208-12; pp. 5232-37.

- 2.57 Only a small number of amendments were passed. These related to:
- an extension of one of the 'reasonable excuses' for custody of a knife in a public place to permit a knife to be carried for the purpose of preparing or consuming drink as well as food;
 - increased penalties (including terms of imprisonment) for second and subsequent knife related offences;
 - penalties for parents who allowed their children to carry knives;
 - extension of the police search powers to permit them to search school lockers; extension of the industrial disputes exemption in the 'reasonable directions' power to other organised assemblies, processions and apparently genuine demonstrations and protests; and
 - authorisation for a police officer to request proof of a person's name and address when seeking their name and address as a potential witness to an indictable offence.
- 2.58 The other amendments failed to secure sufficient support, with the Government indicating that the concerns underlying some of the amendments would be issues monitored by the Ombudsman's review of the first 12 months operation of the Act.
- 2.59 The Act commenced operation on 1 July 1998, with the Ombudsman's review commencing on that date. A research project was established to coordinate the activities of the Ombudsman's review, and this project commenced on 1 September 1998. The next chapter deals with some of the activities undertaken by that research project during the monitoring period.

Methodology

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3. Methodology

- 3.1 It was apparent from the outset of the project that although data recorded on the Police Service's Computerised Operational Policing System (COPS) and complaints to the Police Service and NSW Ombudsman would provide an essential insight into the operation of the new Police and Public Safety Act, on their own they would be insufficient to effectively scrutinise the implementation of the legislation. As a consequence, a multi-faceted research strategy was adopted to obtain information from a range of sources on the central research questions of whether the legislation was being applied properly, effectively and fairly throughout NSW. By adopting this approach we also aimed to minimise the limitations of any one research source or method.
- 3.2 The research approach was guided by an attempt to corroborate or refute issues or evidence as they were raised during the research gathering process. In general, our aim was to obtain information on the use of the legislation from a range of sources and perspectives and using a number of different research tools.
- 3.3 For example, to obtain a broad understanding of the issues from police perspectives, advice and information were sought from police of different ranks, from a variety of local area commands and regions, from specialist and general duties officers, from official police publications and training sessions, and from the Police Service's executive.
- 3.4 Similarly, information about young people's experience of the legislation was gathered from a number of sources including organisations representing young people, youth workers, submissions, complaints and directly from young people themselves.
- 3.5 Much of our statistical research was conducted for the entire state. However, due to the scale of the use of the powers, that is, their use across 80 local area commands covering all of NSW, it was decided to focus more detailed attention on four locations. This enabled us to develop an understanding of the use of the legislation in the context of the particular characteristics of these areas. Most of our interviews with police, community organisations and individuals occurred in these areas as well as some of the more detailed analysis of COPS data. Four locations were selected:
- City Central
 - Bankstown
 - Wollongong and Lake Illawarra
 - Dubbo

These commands were chosen due to their diverse characteristics in terms of location, population, and policing issues. The adjoining local commands at Lake Illawarra and Wollongong were of particular interest because of the trial of local council signs prohibiting 'loitering' in Lake Illawarra. City Central and Bankstown were of interest due to particular police operations addressing street safety issues and their higher than average youth populations. Bankstown was also of interest due to its ethnically diverse population. Dubbo was of particular interest as a major regional centre with a higher than average population of Aboriginal people.

- 3.6 Below is a summary of the main research methods utilised in this review. They are not specific to any one location, but rather describe our approaches to gathering information during the review. Some of these methods are explained in further detail in this chapter and others are described in the relevant sections later in this report.

Summary of research methods & information sources

3.7 Police records: use of the COPS database

In order to monitor the implementation of the Act, the Police Service required police to record on the Computerised Operational Policing System (COPS) database, details of all incidents in which the Police and Public Safety legislation was utilised. These records provided information about the extent to which the powers were being used in different local area commands and regions of the Police Service, changes in usage over time, and demographic details about the individuals coming into contact with police in relation to the legislation.

3.8 Data analysis by the Bureau of Crime Statistics and Research

Assistance was provided in the extraction and analysis of data from the COPS database by the Bureau of Crime Statistics and Research. The Bureau provided information that assisted in answering key research questions in relation to the effective, proper and fair use of the legislation.

3.9 Complaints to the NSW Ombudsman and Police Service

Our office and the Police Service receive a range of complaints and inquiries from members of the public in relation to police conduct. Complaints and inquiries in relation to the Police and Public Safety legislation provided descriptions of incidents involving the use of the powers from the perspective of people in contact with the police. This assisted in the identification of issues in relation to the fair and proper use of the powers.

3.10 Issues paper and submissions

In December 1998 and January 1999, an issues paper highlighting significant issues in the legislation was widely distributed. It encouraged interested individuals and organisations to contribute to the review by forwarding their submissions to this office. We received 26 submissions (see Appendix A) which included detailed papers based on surveys and other research conducted by individuals and agencies.

Four submissions were based on independent research:

- *Young People and the Police*, Carolyn Morris et al, School of Social Science and Policy, University of NSW: an analysis of 274 responses to a survey of young people aged between 12 and 24.
- Submission from the Fact Tree Youth Service (see below).
- *Submission to NSW Ombudsman Re: Crimes Legislation Amendment (Police and Public Safety) Act 1998*, The Shopfront Youth Legal Centre: an analysis of case studies from Shopfront files and a survey of 33 young people aged between 12 and 22¹. The majority of these surveys were conducted through the Fact Tree Youth Service which

¹ In some cases age was not stated.

provided its own analysis of 25 questionnaires completed by young people between the ages of 12 and 19.

- *The implementation of the Crimes Legislation Amendment (Police and Public Safety) Act 1998*, Youth Action and Policy Association and Youth Justice Coalition: an analysis of 181 surveys completed by young people between the ages of 11 and 24².

3.11 Direct observation of policing activity

In order to obtain an independent, first hand understanding of the use of the new powers in the field, a research project involving direct observation of street policing was conducted. As discussed later in this chapter, this provided practical information about the operational issues that affect the use of these and related powers.

3.12 Surveys of legal practitioners and local area commanders

Two surveys were conducted as part of the review of the legislation. The first was a survey of legal practitioners who had provided advice to or represented clients in regard to the legislation. This survey attempted to document the perceptions of these practitioners in regard to the implementation of the legislation and to obtain information about the experiences of their clients.

A survey of a sample of local area commanders covering all regions was also conducted to ensure that the perspectives and experiences of commanding officers were included in the review.

3.13 Information from the Family Court of Australia

The Sydney Registry of the Family Court of Australia screens people entering the court building and keeps statistics reporting the number and type of knives and other implements brought into the Court. Though not representing a truly random sample of the population, this information was of assistance in assessing the effectiveness of the legislation with respect to knife carrying behaviour in the community.

3.14 The Infringement Processing Bureau and the State Debt Recovery Office

The Infringement Processing Bureau and the State Debt Recovery Office both play significant roles in the processing and collection of fines issued for offences under the legislation. In order to analyse the effectiveness and fairness of the use of infringement notices under the Act, information was requested from these two agencies with regard to fine payment and other information about people issued with infringement notices.

The Infringement Processing Bureau also receives written 'representations' from persons who have received fines and are requesting reconsideration or cancellation of the fine due to particular circumstances. We asked for copies of all representations received by the Bureau between 1 May 1999 and 30 June 1999 in relation to infringement notices issued under the Act to gain an understanding of the types of issues that were raised by members of the public in this context.

3.15 Information from schools and the Department of Education and Training

To examine the operation of the legislation in schools, two consultations were held with principals, district superintendents and others from the school system. In addition, to

² In some responses age was not stated.

understand the nature and extent of knife-related incidents in schools and any impact of the legislation, relevant data on the Department of School Education 'Serious Incident Database' was examined.

3.16 Interviews and consultations

In order to obtain information about particular aspects of the legislation in relation to young people and sex workers, a number of individual interviews were conducted. These interviews provided an insight into the experiences of individuals who may be less likely to utilise formal complaints mechanisms.

3.17 Other information from the Police Service.

Focus groups of police from urban, large regional and small regional locations in NSW were conducted to obtain information on the implementation and perceived strengths and weaknesses of the legislation from the perspective of police officers using the powers. The focus groups also highlighted differences in the use of the powers in different contexts, including city/country variations.

Interviews and small group discussions were also conducted with police from a number of other local area commands, often to obtain information in relation to specific policing strategies or operations.

Police training materials, education sessions and other sources of information for police (eg Police TV and the Police Service Weekly) were examined to assess the level of educative support provided to officers to develop their knowledge of the legislation and to provide guidance in the exercise of the powers.

3.18 Operations and Crime Review (OCR) briefings

Following advice that the Police and Public Safety Act was a regular OCR agenda item about which all commanders were questioned, we requested to observe these meetings. We attended two meetings which provided an insight into the messages about the legislation being sent by the police executive to local area and region commanders. This first hand observation proved particularly useful in light of the focus given to the OCR by many police consulted as part of the research. Many police reported that the OCR process had a significant influence on their use of the Police and Public Safety powers.

3.19 Closed Circuit Television (CCTV) video tapes and associated documentation

The viewing of video footage from closed circuit television cameras installed in areas of the Sydney CBD provided the opportunity both to observe police behaviour without being physically present during an incident, and to examine levels of violent or anti-social behaviour in particular areas of Sydney.

3.20 Use of the Ombudsman's investigatory powers

An 'own motion' investigation under the *Ombudsman Act* was commenced to investigate the administration of the powers conferred upon police by the *Crimes Legislation Amendment (Police and Public Safety) Act 1998*. These formal investigatory powers were necessary to obtain important, but otherwise confidential, information from some agencies.

3.21 Judicial review

Offences under the Police and Public Safety legislation are dealt with at a local court level. It was not possible to comprehensively track local court decisions in relation to the legislation. Information regarding cases proceeding to court was captured through the survey of legal practitioners as well as through the examination of a small number of court tapes and briefing materials. A number of cases have come to the attention of the review. However, at the time of writing most had not been heard at court and no appeals from local court decisions have yet been heard.

Police records: the COPS database

3.22 Discussions were held with the Police Service early in the research project to determine how the police use of the legislation could be recorded to allow scrutiny by our office. These discussions resulted in a Police Service decision to require all officers to record details of the use of the legislation on the COPS (Computerised Operational Policing System) database.

3.23 The NSW Police Service Handbook³ advises police officers to enter all event and intelligence information into COPS as soon as possible on their return to their station after an event.

3.24 The COPS database provides a structure for police to record event details, such as date, location, offence, local area command, offender details and many other factors. COPS also has what is called a 'narrative' field which allows officers to describe an event in their own words and to record important features of the incident which may not fit under other category headings.

Using COPS in this review

3.25 For the purposes of this review, officers were instructed to record *every* use of the legislation, not only those where an offence was detected. This instruction was regularly reinforced to local area commanders by the Police Service executive at Operations and Crime Review (OCR) meetings.

3.26 The data recorded on COPS is the most comprehensive record available of the extent and nature of the police use of the Police and Public Safety powers. Police are familiar with the system and access to the system is available at all local area commands. The records on COPS have therefore formed the basis of much of the material contained in this review. The COPS records assisted in answering central research questions about:

- the number of times the powers were used across the state and in specific locations;
- the description of people that came into contact with police using the powers eg gender, age, racial appearance, Aboriginality;
- the dates on which the powers were used;
- the charges or other actions taken as a result of an offence under the legislation.

³ NSW Police Service Handbook at C-61.

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- 3.27 With the assistance of the NSW Bureau of Crime Statistics and Research, a number of more complex areas were able to be examined including:
- other offences acted upon by police in combination with offences under the Police and Public Safety legislation
 - the characteristics of persons charged with offences involving knives;
 - the number of offences against the person involving knives;
 - the location of relevant offences — whether they were in a public place.
- 3.28 Analysing samples of the narrative entries from the COPS database provided more detailed information on issues of specific interest to the review.

Limitations of COPS

- 3.29 The discussion below indicates that while the COPS database provides the most comprehensive source of information about the legislation, it is not without its limitations. The COPS system is no different to any system requiring data entry in that ‘...the data extracted is only as good as the information that is entered’⁴. The COPS data does have an advantage of scale, in terms of the volume of entries, but this should not be confused with complete reliability, objectivity or consistency.

Whether to record a use of the powers

- 3.30 In order to obtain a more comprehensive picture of the use of the legislation, police were instructed to record *all* uses of the search and ‘move on’ powers, not only those where offences were committed or those where useful ‘intelligence’ had been gathered. Nevertheless, a number of factors influenced police recording behaviour over the review period, and the reliability of the information was influenced by police decisions whether or not to record a particular incident.
- 3.31 In focus groups and interviews, police discussed possible reasons for failing to record a use of the legislation. These included:
- dissatisfaction with ‘recording for recordings sake’;
 - not having enough time;
 - not viewing recording as important: ‘It may be important to somebody but it’s not important to us’;
 - that recording took police off the street: ‘It was taking more time on the computer than it was to move people along’;
 - that informal ‘requests’ to move on might not be recorded;
 - that without name and address details there was no point in recording: ‘They’ll get annoyed and you’ll get annoyed getting details for the system and if you don’t know their details, what’s the point of recording?’;
 - the COPS system is complicated and time consuming to use.

⁴ Lisa Hayes, *Getting the Balance Right: The Policing of Young People in NSW*, paper presented at the Children and Crime Conference, Australian Institute of Criminology, June 1999, p 5.

My only criticism is ... it is brilliant legislation, but the cops are not putting it on the system — for whatever reason. And probably, I suspect, because they're too bloody busy doing police work. Its just cumbersome, the COPS system is not user friendly and by the time they have finished 12 hour shifts, the only thing they want to do is get home ...⁵

- 3.32 A street policing group from one inner Sydney command had a very positive attitude to recording because it assisted in the identification of trouble spots. However, even this group admitted to only recording uses of the 'move on' powers where identification details of the people 'moved on' had been obtained. According to these officers, this reflected by far the majority of the uses of the power to give reasonable directions.
- 3.33 Police may also be more inclined to record an incident in COPS where an offence is committed, and the possibility of court or other follow-up action exists, than where no offence is detected. For this reason it might be expected, for example, that information about searches where knives are found might be more reliable than information about searches where nothing was found. Comments endorsing this analysis were made by some commanders participating in the telephone survey one of whom reported that probably all searches where knives were found would be recorded, but only around half of those where nothing was located would be recorded.⁶ Another commander stated:

Knife searches [would be] reasonably accurate because it is an invasion on the person and recording is a safeguard for the officer.⁷

Variations in how to record

- 3.34 Another factor which affects the reliability of the data contained on COPS is the range of different ways a single event can be recorded on the system. There is some evidence to suggest that local area commands have adopted different recording practices, particularly in relation to uses of the power to give reasonable directions. While the COPS database might appear to provide a uniform recording system, in fact it allows the police officer inserting the information a number of choices. For example, a situation in which a group of 10 people are 'moved on' could be recorded as one use of the legislation (one event) or as 10 uses. In the absence of instructions from the police executive, this one choice could be a cause of significant disparity in the data from different commands.
- 3.35 It is not suggested that all commands have adopted a particular approach to recording. Indeed, it would seem more likely that these kinds of questions have largely been left to individual officers. However, information from police focus groups indicates that some police had deliberately adopted the latter approach because it gave the appearance of a greater level of usage of the legislation.

We used to have stacks of move ons and ... each group, there might be four in the group, was [recorded as] one incident. Then some smarties in Sydney ... were putting that down as four instances, and it's a numbers game, so we had one and they had four. So, instead of the people up above having some internal fortitude, saying, 'That's one entry', now everyone is doing it the shonky way.⁸

⁵ Comment made by a commander.

⁶ Survey of local area commanders, commander 5.

⁷ Survey of local area commanders, commander 14.

⁸ Focus group 2.

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- 3.36 Many officers attributed pressure to increase the use of the powers to criticisms directed at local commanders at OCR briefings.

Recording changes over time

- 3.37 Changes in the data recorded on COPS over time may also point to less than comprehensive recording methods within the Police Service. This concern was highlighted in the *Policing Public Safety* issues paper produced by this office, which highlighted the fact that the COPS data for the period 1 July to 31 August 1998 showed an incredibly high ratio of knives found to searches performed.⁹ This brought into question the extent of recording of unproductive searches. This recording behaviour appeared to change over the review period. Initially knives or other implements were recorded as being found in almost all (92%) searches. In July 1998, of all 176 searches, knives were found in 162. By June 1999, of 2648 searches in that month, 390 were productive (15%). It is probable that this change was due in part to an increased emphasis within the Service on the recording of unproductive searches and in part to greater familiarity with the powers and the recording system. Any fall in the carrying of knives might have had an influence on the figures too.
- 3.38 Familiarity with the legislation and the recording requirements is also likely to have changed overall usage and recording behaviour of police over the 12 month review period. The data shows that 176 persons were searched and 34 persons were given reasonable directions in July 1998. This had increased to 2648 searched and 2165 given directions in June 1999.

Incompleteness, subjectivity and misunderstandings

- 3.39 The data base as a whole is also affected by the non-mandatory nature of many of its fields and the practice of leaving fields blank or as 'unknown'. As a result, some information contained in the database is more reliable than other information. Data about age, a key area for the research, is likely to be relatively reliable because police often receive independent verification, by sighting a drivers licence or other proof of age. Aboriginality data is also likely to be relatively reliable because police cannot complete their COPS record without entering information in this field. On the other hand, information about 'racial appearance' is not a mandatory category and is often not completed.
- 3.40 Another limitation of the COPS data relates to the subjective nature of some of the information it contains. For example, data related to racial appearance may be based solely on a police assessment of the appearance of the person of interest.
- 3.41 Simple entry mistakes and misunderstandings about recording also affect the reliability of the data. For example, a duty officer from a station in the Sydney area contacted our office to report his confusion about the recording of information on COPS. His station had been operating under the assumption that where no identification details were

⁹ *Policing Public Safety* A discussion paper on the Crimes Legislation Amendment (Police and Public Safety) Act, NSW Ombudsman, 1998, p 15.

obtained from the person in contact with the police, no COPS entry needed to be made. As a result their statistics would not have recorded uses where no personal details were obtained.

- 3.42 A review of the narratives for incidents where police officers recorded that a person had refused to give their name and address or stated a false name and address under s. 563 of the *Crimes Act* appeared to show a substantial number of recording errors. It appeared that in many instances police were recording the use of powers under other legislation, such as s. 5 of the *Traffic Act*¹⁰, in a section of the COPS database intended solely for the use of the Police and Public Safety powers. For this reason, the accuracy of the data obtained from COPS about the use of name and address powers is highly questionable.
- 3.43 The fact that information related to the use of the demand name and address power under the Act has only been recorded on COPS when such a demand is refused and not when it is complied with, also limited our ability to assess this part of the legislation.

Influence of OCR briefings and the Ombudsman's review

- 3.44 An initiative introduced by the Police Service in January 1998, the Operations and Crime Review (OCR), is now a regular feature of the 'intelligence-led' policing strategy of the NSW Police Service. These meetings of the police executive, selected local area commanders, region commanders and observers occur approximately every two weeks.
- 3.45 At OCRs, the 'Commissioner and his Executive Team openly and frankly discussed operational policing issues with region and LAC commanders. The objective was to review specific operational policing and crime trends.'¹¹
- 3.46 The discussion of recording and usage of the Police and Public Safety powers featured regularly at OCR meetings over the 12 month review period. At these forums, commanders were asked to explain figures judged by the police executive to be unduly low, in an environment which some commanders have described as 'punitive' and 'competitive'.¹²
- 3.47 The intent of the focus on these powers seems to have been, at least in part, to encourage strict adherence to the *recording* requirements. These forums may also have conveyed a message that increased *usage* of the powers was desirable.
- 3.48 It would seem unlikely that this strong focus at OCRs would have had *no* effect on recording and usage practices. However, the extent of the influence is difficult to determine. The survey of 25 local commanders which we conducted revealed that some (13) had reminded and encouraged police in their command about the legislation and a

¹⁰ s. 5 of the *Traffic Act, 1909*, states that it is an offence for a driver of a vehicle not to provide produce their drivers licence or state their name and address when required to do so by a police officer.

¹¹ *Police Service Weekly*, 16 February 1998, Volume 10, No. 7, p3.

¹² The quoted words are attributed, respectively, to commander 5, in the survey of local area commanders, and another commander (in one of the 'focus areas') interviewed during the review.

number of commanders (6) had changed practices in their commands to improve recording as a result of OCRs. One commander stated:

... I received a flogging because figures were down. ... As a consequence of this OCR the legislation is being used less but recorded more.¹³

- 3.49 The OCR process is therefore likely to have had an influence on recording practices and possibly actual usage of the legislation.

'Consent policing'

- 3.50 Factors experienced by police in the field also affect the recording of activities under the legislation. Perhaps the most significant of these factors relates to what can be described as 'consent policing'. This aspect of policing practice can be said to occur when police *request* something of a person they are dealing with and that person complies. Consent policing can serve to obscure what particular power – if any – is being used by police.¹⁴

- 3.51 Much of the police practice we witnessed during the observational research component of the review could be described as 'consent' policing and may assist in illustrating what is meant by this term. For example, our observers often reported that it was not possible to determine whether or what police powers were being utilised because the interaction between the officer and the member of the public seemed to be *requested* rather than *compelled*. This is not in itself a criticism. Effective policing requires officers to seek the co-operation of the people they deal with. As one officer told our inquiry:

It gets down to the individual copper doing the investigation. He's got to have the communication skills. If you want to get him [the member of the public] offside and demand his name and place, you're going to get him offside. You should be able to convince him that it's in his interests to supply and not get to the demand stage ...¹⁵

- 3.52 Where there is a valid basis for a police request, consent policing might be regarded as effective policing. On the other hand, in situations where officers have no proper basis to conduct a search or require a person to obey a direction, then they should not be making the 'request' in the first place.
- 3.53 With respect to the impact of consent policing on recording activities, focus group discussions indicated that police would be unlikely to record on COPS a 'request' that someone 'move on' as a use of the legislation. Focus groups and observational research indicated that a significant amount of policing occurs by request or consent.
- 3.54 The impact of consent policing on use of the Police and Public Safety powers will be discussed elsewhere in this paper. However, for present purposes, it is relevant to the assessment of the information obtained from COPS. In examining the COPS data, it is important to bear in mind that consent policing practice is less likely to be recorded than more formal uses of the powers.

¹³ Survey of local area commanders, commander 17.

¹⁴ For a review of the impact of 'consent policing' on policing procedures, see D. Dixon, *Law in Policing – Legal Regulation and Police Practices*, Oxford University Press, 1997.

¹⁵ Focus group 3.

Other information from police and the Police Service

Police focus groups

- 3.55 To better understand the issues faced by police responsible for the day to day implementation of the Act, it was decided to conduct focus groups and discussions with police officers who use the powers. Focus groups provided a more in depth account by officers of their understanding of the new laws, the limitations of the powers and practical operational issues. Three focus groups were held in conjunction with the NSW Police Association. The groups included officers from western NSW and inner Sydney. Officers present included sergeants, constables, Aboriginal liaison officers, youth liaison officers, and education officers.
- 3.56 The focus groups proved to be a valuable source of information about many relevant issues including:
- the circumstances in which the legislation is commonly used;
 - adherence to the procedural requirements of the legislation;
 - confusion about the meaning of parts of the legislation;
 - policing styles and issues of targeting;
 - the value of the legislation to police;
 - recording the use of the legislation;
 - relationships between police and other groups in the community, such as young people and Aboriginal people;
 - variations between urban and regional issues and styles of policing.
- 3.57 Each focus group was jointly facilitated by a Police Association representative and one of our researchers. A series of questions or topics were put to each group. However, groups also explored other issues which arose during the course of discussion. It was explained at the outset of each group that individuals would not be identified in the research report and that they were encouraged to speak frankly of their experiences and perceptions.
- 3.58 It was hoped that by conducting the groups together with the Police Association that officers would be more likely to speak frankly about their perceptions and experiences than if the Ombudsman's office had acted on its own.
- 3.59 Focus groups have their limitations as an information source. Possible influences on discussions include the fact that officers of different rank were present in a single group. This may have meant that those officers at a lower rank felt pressured to support or defer to the views expressed by more senior or experienced officers. (No one present was of the rank of commander or above.) Some groups were dominated by a few group members and the information obtained is not necessarily equally representative of the opinions of all group members.
- 3.60 In addition, notwithstanding the guarantee of anonymity, the presence of an officer from the Ombudsman's office may have influenced police to tailor their comments in a

way which they felt would not reflect badly on themselves or the Service. Given the candid nature of many of the comments made at these groups our presence did not appear to have been a major impediment to officers speaking freely.

Interviews and small group discussions

- 3.61 Interviews and small group discussions were also conducted as part of the research project. Interviews were conducted by phone and in person at police stations in a range of urban and regional areas. Interviews and small group discussions were semi-structured and covered a number of pre-determined topics as well as unanticipated issues that arose during discussion. These interviews provided a more in depth understanding of the issues in the particular context of particular local commands.
- 3.62 While interviewees were guaranteed anonymity, the possible effect of an officer from the Ombudsman's office conducting interviews should be taken into account.

Complaints and inquiries to the NSW Ombudsman and Police Service

- 3.63 The NSW Ombudsman receives complaints and inquiries both direct from members of the public by phone and in writing, as well as being informed of relevant complaints made to the Police Service. These complaints and inquiries provided useful information about perceptions of unfairness, discriminatory treatment and illegality in the implementation of the legislation by police. The complaints process can provide an insight into an event from both the police and the complainant's perspective. In some instances the investigation conducted as a result of formal complaints regarding the use of the new laws has provided additional information about police practices.
- 3.64 When received by staff from our office, complaints and inquiries are registered on a computerised Complaints Management System. Because this is a file management system, it is not particularly well suited to the reporting tasks necessary for this review. To assist in the identification of relevant complaints, staff were asked to insert an identifying code in the summary section of relevant complaint reports. An audit of telephone inquiries was also conducted in May and June 1999.
- 3.65 A total of 60 complaints concerning the legislation and/or its implementation were identified during the review period and a total of 17 telephone inquiries were identified during the two month sample period. In addition, 26 complaints came to the attention of this office during the months of July and August 1999.

Who complains and who doesn't?

- 3.66 Whether a grievance against police becomes a complaint depends upon any number of variables. To begin with, in the estimation of the complainant the situation must be serious enough to warrant complaint. What one person complains of, another may not. Some communities and groups may also be less likely to complain than others.

Young People

- 3.67 When the Police and Public Safety legislation was introduced in mid-1998, a concern was expressed that young people may be targeted by police using the legislation. As there are a number of practical impediments to young people lodging formal complaints, we saw there may be a need to specifically seek out information from young people and their representatives about the concerns of young people.
- 3.68 A number of factors have been identified in the literature and during this review which reduce the likelihood of a young person making a complaint about his or her treatment by the police. According to the joint submission from the Youth Action Policy Association (YAPA) and the Youth Justice Coalition (YJC), these factors include:
- lack of knowledge about complaints mechanisms;
 - lack of confidence in formal mechanisms for dealing with complaints against police;
 - inappropriate complaints handling process (ie too long or complex)
 - fear of recrimination;
 - perceived lack of credibility of the complainant (ie 'they won't believe me because I have a criminal record');
 - a power imbalance between the complainant and the subject of the complaint (ie young person versus police officer).¹⁶
- 3.69 YAPA and the YJC found in their survey of young people that 'young people who do complain are most likely to complain to people that they already know and trust rather than official complaints handling bodies such as the Ombudsman or the Police Department itself.'¹⁷ Often these trusted persons were friends or family of the young person.¹⁸ Eighty eight (49%) respondents to their questionnaire 'complained about the police as a result of their contact with them. Of those who complained only 2% complained to the Ombudsman'.¹⁹
- 3.70 These factors were also revealed in research by Maher et al which focussed on young people in Cabramatta:
- While many young people were angry about their experiences with the police, most felt powerless to do anything about it and expressed a lack of confidence in formal mechanisms for dealing with complaints against police.²⁰

People from Non-English Speaking Backgrounds

- 3.71 Language and cultural differences may also impact on the decision or ability to utilise formal complaints mechanisms. Negative experiences with government and/or police in

¹⁶ *The Implementation of the Crimes Legislation Amendment (Police and Public Safety) Act 1998*, Youth Action and Policy Association and Youth Justice Coalition, p 67.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Maher, L, Dixon D., Swift W., and Nguyen T., Anh Hai: *Young Asian People's Perceptions and Experiences of Policing*, Sydney, 1997, p 42.

the country of origin of new migrants may influence their decisions about the usefulness of making complaints. Indeed, for some groups, government and police are associated with repressive regimes and may still engender feelings of fear and memories of trauma.

- 3.72 While interpreting services and migrant and other ethnic community organisations provide support and information to people from non-English speaking backgrounds, it may be that people from these groups are less likely to approach this office or the Police Service with complaints about police conduct. This may be due ‘to both fear of reprisals and a culturally based distrust of police and other Government agencies ... Such distrust is deepened by the perceived failure of Australian society to meet its promises of equality and justice.’²¹
- 3.73 Concerns were expressed in discussions at the time of the introduction of the legislation, that there was potential for the new powers to be inappropriately used in relation to young people of non-English speaking backgrounds. For these young people, the issues in relation to youth discussed above may be compounded by those which may affect people of a non-English speaking background.

Aboriginal people

- 3.74 Many of the factors that discourage young people and people from non-English speaking backgrounds from complaining are also common to Aboriginal people. However, historical and cultural factors unique to Aboriginal communities may also mean that Aboriginal people are less likely to utilise formal complaints mechanisms such as those provided by our office. This appears to be the case even though Aboriginal people account for a significant proportion of those people in contact with the police.
- 3.75 The history of contact between indigenous people and police is unique in Australia. Historically, police were the enforcers of government policies which included the removal of children from their families. This fraught relationship with police and with governments continues to be a significant feature of police and government relationships with Aboriginal communities. In 1991, the final report of the Royal Commission into Aboriginal Deaths in Custody was delivered, with findings which described entrenched racism and poor knowledge of Aboriginal cultural issues by police.
- 3.76 The fear of reprisal and a general sense of distrust of government agencies permeates many Aboriginal communities. As a result, the likelihood of Aboriginal people utilising any government department as a complaints mechanism is low in comparison to non-Aboriginal people.
- 3.77 Measures have been taken to begin to address these issues such as the creation of Aboriginal specific units and the introduction of designated Aboriginal positions. For example, our office has an Aboriginal Complaints Unit to address complaints from Aboriginal people. There are Aboriginal police officers, and Aboriginal Community Liaison Officers (civilian positions) have been created in the Police Service.

²¹ Maher, L, Dixon D. , Swift W., and Nguyen T., Anh Hai: *Young Asian People's Perceptions and Experiences of Policing*, Sydney, 1997, Executive Summary, p v.

- 3.78 For the purposes of this review, we have sought out the views of Aboriginal legal centres and taken care to analyse data and other information to assess potential impacts on Aboriginal people and communities. However, a comprehensive analysis of the impact of the legislation on Aboriginal communities was beyond the scope and resources of this review.

Where research, complaint handling and court hearings converge

- 3.79 Early in the research planning process the problem of possible conflict between the Ombudsman's complaints role and this new research role was anticipated. This was realised on a number of occasions during the project and is perhaps best explained by reference to a particular incident.
- 3.80 On 2 June 1999, a woman telephoned the research project officer to report an incident involving her son and a number of his friends. The incident related to use of the power to give reasonable directions and appeared to be of considerable interest in the context of the review. The woman was interested in having her son's story included in the review and volunteered to organise a discussion group which would allow the research officer to hear the stories of the various young people involved in the incident. The incident details were recorded. However, the woman also expressed an interest in making a complaint and mentioned that another parent was interested in making a formal complaint. Advice was given about the complaints procedure. To date, no formal complaint has been received. Charges arising from the incident were to be defended in court although the matter has yet to be heard.
- 3.81 In this situation, it was decided that the priority for this office lay in ensuring that the complaint and any ensuing investigation was not, and could not be perceived to be, contaminated by the research process. It was particularly important that issues raised and discussed as part of the research should not undermine the potential for the defendants to present their evidence at court. Group discussions, for example, may have presented an appearance of collusion in later court testimony. This meant that interviews and other contact with complainants by the researcher would have been inappropriate prior to the investigation of the complaint.
- 3.82 In this context, any information received for the review was thus limited to that obtained in the course of the normal complaint process and the researcher was to remain at arms length from the complaint handling. In such circumstances, information about the incident is dependent upon any decision to pursue a formal complaint to the Ombudsman and the time taken for the police to investigate any complaint.

Direction observation of policing activity

- 3.83 In order to scrutinise the implementation of the Police and Public Safety powers first hand, it was decided that a team of observers from the Ombudsman's office would accompany police in the course of a series of police operations with a street safety focus. We also accompanied police responsible for crowd control and public safety at a major

public event, the Gay and Lesbian Mardi Gras. This research provided an opportunity for independent, direct and meaningful observation of police activity in 'real life' situations. It allowed us to obtain a close view of police/public interaction which other observational methods, such as 'covert' observations and use of Closed Circuit TV (CCTV) materials, were less able to deliver.

3.84 With the agreement of the co-ordinating local area command, it was decided to observe street policing during a police operation called 'CitySafe'. Operation CitySafe has been described as:

... a high profile policing strategy focused on reducing the incidence of violent street crime in the central Sydney area.²²

3.85 CitySafe is an ongoing operation. Our observations occurred in the course of CitySafe V which commenced on 8 February 1999 and ended on 7 March 1999.

3.86 The features of CitySafe 5, as relevant to this study, were as follows:

- the operation was co-ordinated by the City Central local area command and was based in inner Sydney, primarily the CBD, Kings Cross and Darlinghurst;
- between 30 and 40 additional officers were drawn from a range of local area commands to staff the operation;
- police shifts typically ran from 4pm to 1am on Thursdays, and from 8pm to 3am on Fridays and Saturdays;
- groups of officers, usually between two and four, were allocated specific areas to patrol on foot.

3.87 The following summarises our involvement in CitySafe as observers:

- eight observers were chosen from our office, largely on the basis of their experience in a policing or similar environment or because of their knowledge of the Police and Public Safety laws;
- observers were briefed on the purpose of the research project, the nature of the operation or event, and safety procedures;
- an observer spoke to the police working on CitySafe explaining the research project and the role of the observers;
- our observers accompanied small groups of officers during six CitySafe shifts and the Mardi Gras;
- one observer was allocated to each group of police for each shift (although on occasions group allocation changed during the shift);
- observers were asked to take notes of police interactions with members of the public and were also given survey forms to complete at the end of their CitySafe shift;
- observers were instructed to minimise any potential hindrance to police which their presence may cause and to avoid any direct contact with members of the public;
- observers were asked not to discuss the events they observed with the police;
- observers were introduced to the officers they accompanied, but identifying details beyond rank and sex were not recorded.

²² D. Darcy, *City Safe 1 May 1998 to 30 June 1998 – A New South Wales Police Service initiative aimed at reducing crime, violence and fear in the central Sydney area*, 1998 (Draft), p 2.

- 3.88 This research provided a valuable insight into the complexities of policing public spaces. However, it is important to also consider some of the limitations of the method. First, there is a risk that the presence of observers may alter or influence the behaviour of police. It is not clear, however, what form this behaviour alteration may have taken. The effect may have been, for example, that some police officers consciously altered their behaviour to meet their perception of what the Ombudsman required. That is, they may have behaved in a manner they believed to be more circumspect, more ethical, more polite and respectful, or less likely to attract criticism from their superiors or from the Ombudsman. Alternatively, some police officers may have adopted a 'black letter' approach to their duties by minimising their use of discretion, and hence their feeling of individual responsibility for their actions.
- 3.89 To some extent, it may be expected that what was observed during these shifts may not have conformed in every respect to the police activity which occurs when observers are not present.
- 3.90 There are also difficulties in terms of the subjective nature of some of the data collected through the observation method. In particular, details of persons of interest such as ethnic origin and age may be considered as a guide only. In some cases, because of the noisy location, it was not possible for observers to hear the conversation between the police and the member of the public. This limited the observer's ability to understand and record the event.
- 3.91 Another factor which affected observers' understanding of policing activity was the differing perceptions of the 'cooperative' nature of much of the policing that was observed. Much police activity was observed to occur on the basis of 'requests' by police officers (such as requests to supply their name or turn out their pockets), which were complied with by members of the public. In such circumstances it was often not possible to be sure which powers the police were utilising, if any. Nor was the purpose of the police interaction with a member of the public necessarily clear. If, for example, a police officer requested a person to turn out their pockets, and no reason was given, it was not clear whether the officer was looking for drugs, for stolen property, for some kind of weapon or had some other purpose. Even if an item was found during such a search, it cannot be presumed that this was the original purpose of the search.

Survey of local area commanders

- 3.92 In order to gain an understanding of the views of local area commanders a telephone survey was conducted. Of the 80 local area commands in NSW, 27 were faxed with an invitation to participate in the survey as a part of the Ombudsman's review of the legislation. Anonymity was promised and commanders were not informed of the other areas participating in the survey. After receiving the invitation, commanders contacted the researcher conducting the survey to arrange a convenient time for an interview. Survey questions were faxed to commanders prior to the interview. Interviews were conducted by phone and the interviewer read out questions and recorded the responses of the commander. The interviewer did not provide feedback on answers and minimised any explanation of questions.

- 3.93 Commands were chosen from all 11 regions to reflect a variety of policing environments and levels of usage of the legislation as indicated by the COPS data. It was intended that the survey reflect the immediate responses of commanders rather than being the product of consultation, research or advice. For this reason, commanders were encouraged to respond to the survey as soon as they received the questions by fax. Of the 27 commanders contacted:
- one commander's response was excluded because the interview occurred two days after the questions were faxed and his responses were pre-prepared;
 - one commander was on leave and was therefore not interviewed;
 - one commander was faxed questions but was unable to be interviewed within the project time frame;
 - four interviews were with either an 'acting' commander or a representative of the commander;
 - one commander had his crime manager present during the interview;
 - one commander did a 'straw poll' of his staff regarding some of the issues prior to the interview;
 - a number of commanders mentioned that they had consulted their Education and Development Officer about training issues.
- 3.94 Although anonymity was guaranteed, this may not have been sufficient to overcome caution about the possible consequences of providing information seen as contrary to the perceived position of the Police Service or information that may have indicated inappropriate conduct in the eyes of the Ombudsman. Indeed, a number of comments from commanders suggest that such concerns directly influenced responses. Notwithstanding these limitations, the information obtained from this survey provided a useful insight into the views of commanders and complemented other sources of information from officers using the new powers.

Survey of legal practitioners

- 3.95 In order to collect data from relevant sections of the legal profession about the operation of the Act, a survey was developed in consultation with several legal practitioners. The survey was faxed to 23 Aboriginal Legal Service Offices, 24 Legal Aid Commission services (including Local Court services, Children's Legal Services and the Mental Health Advocacy Service), 16 Community Legal Centres, eight private practitioners whose practices include the representation of young people, and two legal centres run by charitable organisations.
- 3.96 Twenty completed surveys were received and analysed. These have been documented in the Appendix attached to this report. A detailed discussion of the methodology adopted for this survey is contained in that Appendix.

Interviews with young people

- 3.97 Interviews with young people, in the shopping areas and transport interchange of a western Sydney suburb, were conducted on Thursday 4 March 1999 between 3pm and 7.30pm. The decision to directly interview young people was made to:
- counter some of the problems concerning the reluctance of young people and other marginalised groups to come forward and make complaints to bodies like the Ombudsman or legal services; and
 - to verify first hand the perceptions, anecdotes and information provided by organisations dealing with young people.
- 3.98 The interviews were conducted in conjunction with a local youth and multi-cultural service as it was felt that young people would be less likely to discuss issues of policing frankly with an unknown interviewer. A total of 18 young men were interviewed. Most were between 14 and 18 years of age (in some cases ages were not stated).
- 3.99 The interview questions were not tightly structured but an attempt was made to cover the same topics within each interview. The majority of interviews were recorded on tape with the prior knowledge and permission of those interviewed.
- 3.100 Interviews varied in their level of privacy and often several young men listened in and on occasion made comments during the interview. Most of the young men did not relate a highly detailed account of their experiences, possibly due to the public nature of the interview settings.

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4. A legislative survey

- 4.1 Police practices are affected by a number of factors, including various legislative powers. In order to understand the impact of the Police and Public Safety Act, it is important to consider the powers police already had at their disposal to searches, give directions, and demand name and address. This chapter summarises the legislative powers related to those created by the Police and Public Safety Act, notably powers to search without warrant, provide reasonable directions and demand names and addresses.
- 4.2 The latter part of this chapter summarises relevant legislative provisions in some other Australian jurisdictions. In considering whether the provisions existing in New South Wales' should be modified, it may be useful to have regard to approaches used elsewhere.

What other powers operate in New South Wales?

- 4.3 For the purpose of this discussion, the powers contained in the Police and Public Safety Act are summarised as search without warrant, demand name and address, and provide reasonable directions in public places. The following is a survey of similar or equivalent legislative provisions in NSW in operation between 1 July 1998 and 30 June 1999.¹

Powers to search without warrant prior to or without arrest

- 4.4 Amendments effected by the *Crimes Legislation Amendment (Police and Public Safety) Act* to the *Summary Offences Act* regarding the police powers to search without warrant prior to arrest or without arrest, are discussed in Chapter 5. The amendment inserts s. 28A which, in part, states:

If a police officer suspects on reasonable grounds that a person who is in a public place or a school has a dangerous implement in his or her custody, the police officer may request the person to submit to a search ...

The provision sets out detailed procedures to be followed.

- 4.5 Other such search provisions in NSW are:

Crimes Act 1900

s. 357: A police officer may, without a warrant, detain or search any person or vehicle, vessel, aircraft or package in which a dangerous article is reasonably suspected as having been used in the commission of an offence, and seize and detain any such dangerous article found.

s. 357E: A police officer may stop, detain and search any person or vehicle whom the officer reasonably suspects of having or conveying anything stolen or otherwise unlawfully obtained or any thing used or intended to be used in the commission of an offence.

¹ The survey of New South Wales legislative provisions has been based, in part, on the survey of statutory provisions in Beverley Schurr, *Criminal Procedure*, Law Book Company (Looseleaf Service). While every effort has been made to ensure that this survey is comprehensive, it is possible that some powers have been omitted.

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s. 37(4): A police officer may stop, detain and search any person in whose possession the police officer reasonably believes there is any prohibited plant or drug.

Children (Protection and Parental Responsibility) Act 1997

s. 29: A police officer who believes on reasonable grounds that a person (being a person under the age of 16 years and in an area prescribed under the Act) may be carrying weapons may frisk search the person and take possession of any weapon found in the person's possession, if it is believed that retaining the weapon may be dangerous.

Intoxicated Persons Act 1979

s. 6: A police officer who has lawfully detained an intoxicated person may search the intoxicated person, and take possession of any personal belongings. When the person ceases to be detained, the belongings are to be returned.

Provide reasonable directions

4.6 Amendments effected by the *Crimes Legislation Amendment (Police and Public Safety) Act* to the *Summary Offences Act* regarding the police powers to provide reasonable directions are discussed in Chapter 10. The amendment states:

s. 28F(1) A police officer may give a direction to a person in a public place if the police officer has reasonable grounds to believe that the person's behaviour or presence in the place (referred to in this section as relevant conduct):

- (a) is obstructing another person or persons or traffic, or
- (b) constitutes harassment or intimidation of another person or persons, or
- (c) is causing or likely to cause fear to another person or persons, so long as the relevant conduct would be such as to cause fear to a person of reasonable firmness.

4.7 Similar legislative provisions in NSW are:

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cl. 14: A police officer may give reasonable directions to any person driving or riding a vehicle on Trust lands.

General Traffic (Pedestrian) Regulations 1937

cl. 7: This clause makes it an offence for any person in a public place to fail to observe or comply with any reasonable direction of any police officer as to the regulation of traffic.

Local Government Act 1993

s. 632: This section makes it an offence for a person to fail to comply with the terms of a notice erected in a public place by a council. The notice may relate to one or more of a number of things:

- the payment of a fee for entry to or the use of the place;
- the use of a vehicle in the place;
- the taking of any animal or thing into the place;

- the doing of any thing in the place; or
- the use of the place or any part of the place.

This power is relevant to this survey in that it has been interpreted by some local councils as authorising no loitering signs, which can then be enforced by police officers, thereby giving police an additional authority to move people on. There is, however, conflicting legal advice as to whether councils can use s. 632 for the purpose of erecting 'no loitering' signs.²

Police Powers (Vehicles) Act

s. 10(3): To be able to carry out a search of a vehicle under this Act, a police officer is able to give reasonable directions to any person in the vehicle, or on or near the road, road related area or other public place concerned.

Tow Truck Industry Act 1998

s. 66: A police officer may provide reasonable directions to a person attending the scene of a motor accident for the purpose of obtaining towing work.

Royal Botanic Garden and Domain Trust Regulation 1997

cl. 14: A person in the Royal Botanic Gardens or the Domain must not fail to comply with the reasonable directions of a police officer.

Demand name and address powers

4.8 Amendments effected by the *Crimes Legislation Amendment (Police and Public Safety) Act* amendments to the *Crimes Act* regarding the police powers to demand name and address in certain circumstances are discussed in Chapter 11. The amendment created s. 563 of the *Crimes Act* which states that a police officer may request the name and address of a person if the officer believes on reasonable grounds that the person may be able to assist in the investigation of an alleged indictable offence because the person was at or near the place around the time that the offence was committed.

4.9 Other name and address provisions in NSW include³:

Traffic Act 1909

s. 5: Any driver of a vehicle or rider of a horse, or a person seated next to a learner driver, must state his or her name and address if requested to do so by a police officer in the execution of his or her duty.

Police Powers (Vehicles) Act 1998

s. 6(1): Police may require the driver or owner of a vehicle to disclose the identities of persons who were in the vehicle 'at or about the time an indictable offence was or may have been committed'.

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s. 29: A police officer may require proof of identity and usual place of residence from a person to whom a permit has been issued under the Act.

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ss. 17B(2)(c), 22(3)(e): A police officer may demand the name and address from any person present in premises during the execution of a search warrant.

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s. 117A: Police may obtain the name and address from a minor on licensed premises.

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s. 680: The name and address can be obtained from any person reasonably suspected of committing an offence against the *Local Government Act* or an offence for which a penalty notice can be issued under the *Environmental Penalties and Offences Act 1989*.

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s. 27(2): A police officer may demand the name and address from a person committing, or suspected on reasonable grounds of having committed, an offence against the Act.

Rail Safety Act 1993

s. 80: A police officer may direct a person who is reasonably suspected to be committing or to have committed an offence against this Act to provide their full name and residential address.

Transport Administration (Bus Offences) Regulation 1995

cl. 31: A police officer may direct a bus driver or a passenger on a bus to provide their full name and residential address if they suspect that the person has breached a provision of the Regulation.

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cl. 35: A police officer may direct a person who is in or on a ferry or ferry wharf to provide their full name and residential address if they suspect that the person has breached a provision of the Regulation.

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cl. 41: A police officer may direct a person who is on a train or on property belonging to the State Rail Authority or the Rail Access Corporation to provide their full name and residential address if they suspect that the person has breached a provision of the Regulation.

(This Regulation was in operation for the period of implementation of the Police and Public Safety Act, but has since been repealed and replaced by the Rail Safety Regulation 1999.)

What similar powers exist in other States?

Queensland

- 4.10 In 1997, the Queensland Parliament passed *the Police Powers and Responsibilities Act 1997*. The consolidation of police powers into a single legislative instrument followed a number of inquiries and reports by the Criminal Justice Commission and the Parliamentary Criminal Justice Commission, following the completion of the Fitzgerald Inquiry.
- 4.11 It was noted that prior to the passage of the Act, police powers had been located in more than 90 legislative instruments. While the Act obviously reflects the particular concerns and issues in the Queensland jurisdiction, there is some merit in examining the equivalent provisions as a point of comparison for New South Wales. This is valuable because the Queensland legislation is recent and reflects changes to policing practices and procedures that are not apparent in similar legislation in other Australian jurisdictions. The legislation followed extensive review and consultation, and has been fine-tuned in recent years.
- 4.12 The Police Powers and Responsibilities Act is accompanied by a Police Powers and Responsibilities Regulation, which deals with operational aspects of the Act, and details the various requirements set out in the Responsibilities Code. The following sets out some of the provisions in the Queensland legislative scheme that are relevant for the purposes of this review:

Police Powers and Responsibilities Act 1997 (Queensland)

Demand name and address

s. 23: An officer is able to require a person's name and address if they find a person committing an offence; reasonably suspect a person has committed an offence; or reasonably suspects that a person may be able to help in the investigation of an alleged indictable offence because the person was near the place where the alleged offence happened before, when or soon after it happened.

Search for weapon etc

s. 26: A police officer who suspects that a person is carrying a weapon, knife or explosive that the person may not lawfully possess may, without a warrant, stop, detain and search a person and anything in that person's possession.

Reasonable direction

s. 88: A police officer may provide a reasonable direction to a person or group of persons if their behaviour or presence causes anxiety, interferes with trade or business, or disrupts the peaceable and orderly conduct of any event, entertainment or gathering, or if the behaviour is disorderly, indecent, offensive or threatening. An officer must not issue such a direction unless it is reasonably necessary for public safety or order, or the protection of the rights and freedoms of other persons.

Conduct of a search

s. 111: This section sets out certain safeguards for the protection of the dignity of a person being searched, including provisions relating to strip searches and searches by a person of the same gender as the person being searched.

Police to provide name, rank and place of duty

s. 112: This section sets out the circumstances in which an officer must provide his or her name, rank and station, and when an officer is required to provide the reason for conducting a search.

Duration of a search

s. 116: A police officer who detains a person for a search must not detain that person for any longer than is reasonably necessary.

Police Powers and Responsibilities Regulation 1998 (Queensland)

cl. 5: This clause explains the purpose of the part as providing advice on the responsibilities of officers when searching persons and vehicles. The clause explains that the provisions may not apply when people are searched with their consent, or as part of a condition of entry to a venue, such as a sports ground. The police are advised that where there is no specific search power, nothing in the Act or the Regulation prevents a police officer from searching a person or vehicle with the person's consent given after the person is told he or she need not consent to the search.

Operational Guideline 1: Police should not ask someone to give consent to a search if they are incapable of giving an informed consent and no-one is present to help look after the interests of the person. The guideline gives the examples of a young child and someone with a mental illness as people who may not be able to give an informed consent.

cl. 6: Police are instructed to ensure that the way a person is searched causes minimal embarrassment, and that they take reasonable care to protect a person's dignity.

Operational Guideline 2: Police are advised that the grounds for a search must exist before the search is conducted. Locating the thing sought is not a ground for the search.

cl. 7: the clause sets out the procedure to be followed if a search requires the removal of all items of a person's clothing or all items of outer clothing.

Operational Guideline 3: Police are advised to consider that while strip searches may be necessary, such searches should not be routinely conducted, and if conducted, searches that are not appropriately conducted may invite adverse public criticism of the police service.

Weapons Act 1990 (Queensland)

Offence of custody of a knife

In 1998, the Queensland Parliament amended the *Weapons Act* to establish provisions similar to those later introduced in NSW by the Police and Public Safety Act relating to the possession of a knife in a public place.

Possession of a knife in a public place

51.(1) A person must not physically possess a knife in a public place, unless the person has a reasonable excuse.

Maximum penalty — 20 penalty units or 6 months imprisonment.

- (2) It is a reasonable excuse for subsection (1) to physically possess a knife —
- (a) to perform a lawful activity, duty or employment; or
 - (b) to participate in a lawful entertainment, recreation or sport; or
 - (c) for exhibiting the knife; or
 - (d) for use for a lawful purpose.

Example for subsection (2)(a)

1. A person may carry a knife on his or her belt for performing work in primary production.

Examples for subsection (2)(b)

1. A scout may carry a knife on his or her belt as part of the scout uniform.
2. A person may carry a knife as an accessory while playing in a pipe band.
3. A fisher may carry a knife for use while fishing.

Example for subsection (2)(c)

1. A person who collects knives may exhibit them at a fete or another public gathering.

Examples for subsection (2)(d)

1. A person may use a knife to prepare or cut food at a restaurant in a public place or when having a picnic in a park.
2. A person may carry a pen knife or swiss army knife for use for its normal utility purposes.

- (3) However, it is not a reasonable excuse to physically possess a knife in a public place for self-defence purposes.
- (4) In deciding what is a reasonable excuse for subsection (1), regard may be had, among other things, to whether the way the knife is held in possession, or when and where it is held in possession, would cause a reasonable person concern that he or she, or someone else in the vicinity, may be threatened or harmed.
- (5) In this section—

‘knife’ includes a thing with a sharpened point or blade that is reasonably capable of —

 - (a) being held in one or both hands; and
 - (b) being used to wound or threaten to wound anyone when held in one or both hands.

- 4.13 The most important distinctions between the Queensland and NSW legislation are that the Queensland legislation explicitly permits the carrying of Swiss Army knives and pen knives for their utility purposes, and that reasonable excuse may be decided in Queensland by having regard to whether there are any grounds for concerns about possible threat or harm.

Australian Capital Territory

- 4.14 In June 1998, amendments modelled on the Police and Public Safety Act⁴ were made to the Australian Capital Territory's *Crimes Act*. Section 495 of the *Crimes Act (1900) (ACT)* makes it an offence for a person to have, without reasonable excuse, a knife in their possession in a public place or school. Section 496 makes it an offence to sell a knife to a person under the age of 16 years, which is similar to the amendments made to the NSW *Summary Offences Act* in December 1997. Section 349DB of the ACT *Crimes Act* confers on police the power to search a person for a knife⁵, while s. 349ZZD and s. 349ZZH deal respectively with the return and the forfeiture of confiscated knives. There is no provision for parental responsibility for knife offences in the ACT's *Crimes Act*.⁶
- 4.15 'Move on' powers were created by the passage of the *Crime Prevention Powers Act 1998*, but these powers were confined to situations where a police officer has reasonable grounds for believing that a person in a public place has engaged, or is likely to engage, in 'violent conduct' in that place.

South Australia

Summary Offences Act 1953

s. 18: A police officer may request a person to leave an area if the officer has reasonable grounds to believe or apprehend that an offence has occurred or is likely to occur; that a breach of the peace has occurred, is occurring or is about to occur; that the movement of pedestrians or vehicles is obstructed or about to be obstructed; or that the safety of a person in the vicinity is in danger.

Western Australia

Police Act 1892

s. 50: A police officer may require the name and address from any individual, and may arrest without warrant any person who refuses to provide his or her name and address, or provides a false name and address.

The *Police Act* was amended in 1998 to enable police to stop, detain and search a person who is suspected of causing or intending to cause damage consisting of graffiti, and empowers police to seize any thing that an officer suspects relates to the commission of a graffiti offence.⁷

⁴ See Second Reading Speech of Mr Rugendyke, *Australian Capital Territory Legislative Assembly Hansard*, 20 May 1998, p. 359.

⁵ s. 349DB only refers to a power to conduct a search of a person for a knife. No reference is made to other dangerous implements.

⁶ This proposal was rejected by Mr Rugendyke as a 'draconian provision'. *Australian Capital Territory Legislative Assembly Hansard*, 20 May 1998, p. 359.

⁷ R. Simpson & G. Griffith. *Law and Order Legislation in the Australian States and Territories, 1995-1998: A Comparative Survey*. NSW Parliamentary Library Research Service. Briefing Paper No. 7/99. p. 38. The authors advise that their survey relies extensively on Beverley Schurr's review of developments in criminal legislation in the various Australian jurisdictions, published bi-annually in the *Criminal Law Journal*.

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s. 112: This section sets out the circumstances in which an officer must provide his or her name, rank and station, and when an officer is required to provide the reason for conducting a search.

Duration of a search

s. 116: A police officer who detains a person for a search must not detain that person for any longer than is reasonably necessary.

Police Powers and Responsibilities Regulation 1998 (Queensland)

cl. 5: This clause explains the purpose of the part as providing advice on the responsibilities of officers when searching persons and vehicles. The clause explains that the provisions may not apply when people are searched with their consent, or as part of a condition of entry to a venue, such as a sports ground. The police are advised that where there is no specific search power, nothing in the Act or the Regulation prevents a police officer from searching a person or vehicle with the person's consent given after the person is told he or she need not consent to the search.

Operational Guideline 1: Police should not ask someone to give consent to a search if they are incapable of giving an informed consent and no-one is present to help look after the interests of the person. The guideline gives the examples of a young child and someone with a mental illness as people who may not be able to give an informed consent.

cl. 6: Police are instructed to ensure that the way a person is searched causes minimal embarrassment, and that they take reasonable care to protect a person's dignity.

Operational Guideline 2: Police are advised that the grounds for a search must exist before the search is conducted. Locating the thing sought is not a ground for the search.

cl. 7: the clause sets out the procedure to be followed if a search requires the removal of all items of a person's clothing or all items of outer clothing.

Operational Guideline 3: Police are advised to consider that while strip searches may be necessary, such searches should not be routinely conducted, and if conducted, searches that are not appropriately conducted may invite adverse public criticism of the police service.

Weapons Act 1990 (Queensland)

Offence of custody of a knife

In 1998, the Queensland Parliament amended the *Weapons Act* to establish provisions similar to those later introduced in NSW by the Police and Public Safety Act relating to the possession of a knife in a public place.

Possession of a knife in a public place

51.(1) A person must not physically possess a knife in a public place, unless the person has a reasonable excuse.

Maximum penalty — 20 penalty units or 6 months imprisonment.

- (2) It is a reasonable excuse for subsection (1) to physically possess a knife —
- (a) to perform a lawful activity, duty or employment; or
 - (b) to participate in a lawful entertainment, recreation or sport; or
 - (c) for exhibiting the knife; or
 - (d) for use for a lawful purpose.

Example for subsection (2)(a)

1. A person may carry a knife on his or her belt for performing work in primary production.

Examples for subsection (2)(b)

1. A scout may carry a knife on his or her belt as part of the scout uniform.
2. A person may carry a knife as an accessory while playing in a pipe band.
3. A fisher may carry a knife for use while fishing.

Example for subsection (2)(c)

1. A person who collects knives may exhibit them at a fete or another public gathering.

Examples for subsection (2)(d)

1. A person may use a knife to prepare or cut food at a restaurant in a public place or when having a picnic in a park.
2. A person may carry a pen knife or swiss army knife for use for its normal utility purposes.

- (3) However, it is not a reasonable excuse to physically possess a knife in a public place for self-defence purposes.
- (4) In deciding what is a reasonable excuse for subsection (1), regard may be had, among other things, to whether the way the knife is held in possession, or when and where it is held in possession, would cause a reasonable person concern that he or she, or someone else in the vicinity, may be threatened or harmed.
- (5) In this section—

‘knife’ includes a thing with a sharpened point or blade that is reasonably capable of —

 - (a) being held in one or both hands; and
 - (b) being used to wound or threaten to wound anyone when held in one or both hands.

- 4.13 The most important distinctions between the Queensland and NSW legislation are that the Queensland legislation explicitly permits the carrying of Swiss Army knives and pen knives for their utility purposes, and that reasonable excuse may be decided in Queensland by having regard to whether there are any grounds for concerns about possible threat or harm.

Australian Capital Territory

- 4.14 In June 1998, amendments modelled on the Police and Public Safety Act⁴ were made to the Australian Capital Territory's *Crimes Act*. Section 495 of the *Crimes Act (1900) (ACT)* makes it an offence for a person to have, without reasonable excuse, a knife in their possession in a public place or school. Section 496 makes it an offence to sell a knife to a person under the age of 16 years, which is similar to the amendments made to the NSW *Summary Offences Act* in December 1997. Section 349DB of the ACT *Crimes Act* confers on police the power to search a person for a knife⁵, while s. 349ZZD and s. 349ZZH deal respectively with the return and the forfeiture of confiscated knives. There is no provision for parental responsibility for knife offences in the ACT's *Crimes Act*.⁶
- 4.15 'Move on' powers were created by the passage of the *Crime Prevention Powers Act 1998*, but these powers were confined to situations where a police officer has reasonable grounds for believing that a person in a public place has engaged, or is likely to engage, in 'violent conduct' in that place.

South Australia

Summary Offences Act 1953

s. 18: A police officer may request a person to leave an area if the officer has reasonable grounds to believe or apprehend that an offence has occurred or is likely to occur; that a breach of the peace has occurred, is occurring or is about to occur; that the movement of pedestrians or vehicles is obstructed or about to be obstructed; or that the safety of a person in the vicinity is in danger.

Western Australia

Police Act 1892

s. 50: A police officer may require the name and address from any individual, and may arrest without warrant any person who refuses to provide his or her name and address, or provides a false name and address.

The *Police Act* was amended in 1998 to enable police to stop, detain and search a person who is suspected of causing or intending to cause damage consisting of graffiti, and empowers police to seize any thing that an officer suspects relates to the commission of a graffiti offence.⁷

⁴ See Second Reading Speech of Mr Rugendyke, *Australian Capital Territory Legislative Assembly Hansard*, 20 May 1998, p. 359.

⁵ s. 349DB only refers to a power to conduct a search of a person for a knife. No reference is made to other dangerous implements.

⁶ This proposal was rejected by Mr Rugendyke as a 'draconian provision'. *Australian Capital Territory Legislative Assembly Hansard*, 20 May 1998, p. 359.

⁷ R. Simpson & G. Griffith. *Law and Order Legislation in the Australian States and Territories, 1995-1998: A Comparative Survey*. NSW Parliamentary Library Research Service. Briefing Paper No. 7/99. p. 38. The authors advise that their survey relies extensively on Beverley Schurr's review of developments in criminal legislation in the various Australian jurisdictions, published bi-annually in the *Criminal Law Journal*.

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5A. Power to search for dangerous implements

- 5.1 The Police and Public Safety Act amends the *Summary Offences Act* to create a power to search for knives and other implements. Where a police officer has reasonable grounds to suspect that a person has unlawful custody of a dangerous implement,¹ including a knife, then the officer may carry out an electronic² or frisk search³ of the person, and may examine any bag or other personal effect that the person has with them.⁴
- 5.2 In determining whether there are reasonable grounds to carry out the search, an officer must take into account all the relevant circumstances.⁵ Although the Act does not nominate what may constitute reasonable grounds, it does state that an officer may take into account the fact that the person is in a location with a high incidence of violent crime.⁶
- 5.3 If the person is a student at school, the search power extends to that person's locker, and any bag or personal effect in that locker.⁷

Police procedures for knife searches

- 5.4 When searching a person, the police officer may not request the person to remove any item of clothing being worn by the person, other than a hat, gloves, coat or jacket.⁸
- 5.5 A search of a bag, if possible, is to be carried out by allowing the person to hold the bag open and move the contents around for examination by the officer.⁹
- 5.6 In the case of a school student, the student may, where reasonably possible to do so, nominate an adult who is on the school premises to be present during the search.¹⁰

¹ A 'dangerous implement' is defined by the legislation as a knife, a firearm, prohibited weapon or prohibited article, or an offensive implement (which is further defined as anything made or adapted to cause injury to a person, or intended to be used to injure or menace a person or damage property). See *Summary Offences Act*, s. 28.

² *Summary Offences Act*, s. 28A(1)(a).

³ *Summary Offences Act*, s. 28A (1) (b).

⁴ *Summary Offences Act*, s. 28A (1) (c).

⁵ *Summary Offences Act*, s. 28A (1).

⁶ *Summary Offences Act*, s. 28A (3).

⁷ *Summary Offences Act*, s. 28A (1) (d).

⁸ *Summary Offences Act*, s. 28A (2) (a).

⁹ *Summary Offences Act*, s. 28A (2) (c).

¹⁰ *Summary Offences Act*, s. 28A (2) (d).

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- 5.7 Prior to conducting a search for a dangerous implement under s. 28A, the officers concerned must:
- provide evidence that they are police officers to the person about to be searched;¹¹
 - give their name and place of duty;
 - give the reason for the search; and
 - warn that a failure to submit to the search may be an offence.¹²
- 5.8 If the person refuses to submit to a search, the officer must again warn the person that it is an offence not to comply, and make the request a second time.¹³ Upon refusing a second time, the person is guilty of an offence unless they have a reasonable excuse for failing to comply with the request. The penalty for failing to submit to the search is a fine of up to \$550.¹⁴
- 5.9 During the search, the officer may request that the person produce any thing that the officer has detected or seen on or with the person and has reasonable grounds to suspect is a dangerous implement; or any thing detected during the search by an electronic detection advice.¹⁵
- 5.10 The officer must warn the person that failing to produce the thing detected or seen may be an offence.¹⁶
- 5.11 Failure to produce the thing detected or seen may result in a fine of up to \$550.¹⁷
- 5.12 The searches under this section may be made subject to a regulation governing the manner in which they are conducted.¹⁸ As yet, no such regulation has been made.

Other powers to search without warrant

- 5.13 The 'knife search' powers under the Police and Public Safety Act must be considered in the context of broader powers for police to stop and search people in public places. As explained earlier in this report, the most important of these are the general stop and search provisions of the *Crimes Act* (s.357E) and the *Drug Misuse and Trafficking Act* (s.37(4)), which give police a wide discretion to search without warrant or arrest. As with the Police and Public Safety Act powers, an officer's authority to use these powers to conduct a search without arrest depends on whether he or she 'reasonably suspects' there are relevant grounds to form a legal basis for the search.

¹¹ If they are in uniform, this will be taken as sufficient to establish that they are a police officer.

¹² *Summary Offences Act*, s. 28A (4).

¹³ *Summary Offences Act*, s. 28A (5).

¹⁴ *Summary Offences Act*, s. 28A (7).

¹⁵ *Summary Offences Act*, s. 28A (6).

¹⁶ *Summary Offences Act*, s. 28A (6).

¹⁷ *Summary Offences Act*, s. 28A (7).

¹⁸ *Summary Offences Act*, s. 28A (8).

- 5.14 Significantly, the formal procedural safeguards governing the use of Police and Public Safety Act searches are not part of other general stop and search provisions. Before police may carry out a search under the Police and Public Safety Act, they *must* provide evidence that they are police officers, give their name and station, give the reason for the search and warn that failure to comply may be an offence. Also, there are practical limits on the intrusiveness of the search permitted.¹⁹ There are no such requirements or limits formally set out in the *Crimes Act* or the *Drug Misuse and Trafficking Act*. Hence, questions about the lawfulness of ‘knife searches’ and breaches of procedure must be considered in light of other search powers that are not subject to the same degree of regulation.
- 5.15 In reviewing the police use of powers under the Police and Public Safety Act, it can often be difficult to distinguish ‘knife searches’ permitted under the Act from other searches. Where a knife is found during a personal or vehicle search, apparent breaches of the Police and Public Safety Act may often be explained by reference to other search provisions. For instance, if a police officer conducting a search asks a person to strip, there might be no way of knowing if the officer has breached the Police and Public Safety Act, or whether the request to remove clothing might be justified under other search provisions.
- 5.16 An officer from a western NSW town described a search that would not have been lawful under the Police and Public Safety Act:
- Recently, we had three kids who were pulled up about 2 or 3 in the morning. They were put in the back of the police vehicle and they were searched – a full strip search. Now, I think a knife and something was found, or an implement ... it was only a couple of hours previously that they were sighted at a premises where it was broken into. We put two and two together and come up with these three.
- When asked what the officers were searching for, he replied:
- A knife.²⁰
- 5.17 An important indicator is where police themselves nominate that a particular search is a Police and Public Safety search. Yet as the following COPS narrative illustrates, a search might be warranted under some power, but not necessarily the Police and Public Safety legislation:
- Stationary police vehicle. Police have stepped out of the vehicle and identified themselves before speaking with the defendant. While speaking with the defendant a strong odour of cannabis was detected to be coming from inside the vehicle. The defendant was then informed by police that his vehicle was to be searched for drugs. The search of the vehicle located a plastic bag containing green vegetable matter on the front passenger seat. Also located was a 10cm bladed pocket knife with a locking mechanism. The defendant was informed that he was under arrest before being conveyed to the [inner Sydney suburb] police station. At the [inner Sydney] police station he made a hand written statement making full admissions to the offence. The defendant was then issued a court attendance notice before being released. There was no damage to the police vehicle resulting from the collision.

¹⁹ For instance, in practice police may not conduct a strip search under the Act (s.28A (2)(a)) and ‘if reasonably possible to do so, should carry out any examination of a bag that the person has with him or her by allowing the person to hold the bag open and move the contents so that they can be more easily viewed by the police officer...’ (s.28A(2)(c)).

²⁰ Focus Group 1.

- 5.18 Although this entry was listed as ‘Street offence — search knife/implement found’, the narrative indicates that contact was initiated by the defendant driving into a stationary police vehicle, pre-empting any police decision to stop him. The object of the search appeared to be drugs, not knives.
- 5.19 Our review of other COPS entries classified ‘Street offence — search knife/implement found’ showed there were a number of anomalous records, including searches which would not have been permitted under the Act. Reasons for these anomalies might include:
- lawful searches under other powers were inadvertently recorded as Police and Public Safety Act searches simply because an implement was found;
 - police recording the incident believed their search to be lawful under the Act but did not understand the limits of their powers;
 - police did not turn their minds to the legal basis for at least some of the searches until they attempted to enter the details on COPS. Such reasoning ‘after the event’ does not always sit easily with the law.

‘Consent’ searches

- 5.20 An even broader authority for police to stop and search without warrant relates to people who ‘consent’ to police requests without some formal authority being invoked. ‘Consent’ to a police request to submit to a search effectively obviates questions regarding the legality of police decisions to stop and search suspects:

The police officer who ‘asks’ a young person to turn out his or her pockets on the street has no more need of a legal power than the shop attendants or airline security personnel who check your bag: an explicit or implied consent (which in practice may be no more than acquiescence) is all that is needed.²¹

- 5.21 It can be difficult to determine what motivates members of the public to consent to a police request. People who stop and answer police questions do so for a variety of reasons including ‘a willingness to cooperate with police, a fear of police, a belief that a refusal to cooperate will result in arrest, or a combination of all three ...’²² Acquiescence might also occur if the person believes it is pointless or even counterproductive to insist on legal or procedural rights. Some commentators argue that many young people know all too well that asserting their ‘rights’ in response to a police request or instruction may result in them being singled out as a ‘smart-arse’.

In short, the problem is not that people are not aware of or not asserting their ‘rights’ but rather that non-cooperation is viewed by police as a challenge to their authority.²³

²¹ D Dixon (1999), ‘Beyond Zero Tolerance’, NSW Police Service Conference ‘Policing and Crime Control: What Works; What Doesn’t; What’s Promising’, University of Sydney, 14-15 February 1999.

²² LP Tiffany, DM McIntyre, and DL Rotenberg (1967), *Detection of Crime* (Boston, Mass.: Little Brown and Co), in D Dixon (1997) *Law in Policing* (Oxford: Oxford University Press), p. 93.

²³ D B Brown (1984), ‘Review of Sallman and Willis (1984)’, *Legal Service Bulletin*, Aug., 186-190, at 187 cited in D Dixon (1997) *Law in Policing* (Oxford: Oxford University Press), p. 97.

- 5.22 Whether, and at what point, police call on some formal authority to search someone depends on the circumstances. In practice, police decisions to search are often informed by the particular attitudes and responses of the person being questioned. One constable interviewed for this review explained that if young people hanging around the main street of his town in the early hours of the morning refused to ‘move on’ when asked to do so, then he might consider searching them. He said he would only invoke a formal power to search someone if the person refused to consent to the search.
- 5.23 In reviewing the COPS data, it is important to note that ‘consent’ searches are less likely to be recorded. One local area commander explained that where a person has consented to be searched, to ‘move on’, or agreed to comply with some other police request, little of this kind of policing activity would be reflected in the COPS data because no powers were formally invoked.
- 5.24 When considering formal search powers, it is important to bear in mind the dynamic nature of police interactions with the public, the variety of reasons for searches, and the range of powers governing the conduct of such searches.

Other influences on recording practices

- 5.25 Other factors affecting the reliability of police records of their policing activity were outlined earlier in this report. They indicate that the most reliable police records are likely to be those relating to matters being brought before a court, while anything seen to be ‘recording for recording’s sake’ is less diligently recorded.
- 5.26 On the other hand, the Police Service repeatedly emphasised the need for accurate recording of the powers used during the review period. There was particular pressure on local area commanders appearing at fortnightly Operations and Crime Reviews to provide COPS data demonstrating that the powers were being used in their areas. Commanders and rank and file officers reported that the OCR process had an influence in increasing both policing activity and recording of that activity.

Police records of knife searches

- 5.27 The Police Service data highlights three key issues about the recorded use of the search powers under the Police and Public Safety Act:
- One is the steep increase in the reported use of the search powers over the review period.
 - Another is the relatively stable number of searches in which a knife was found.
 - The third is the high number of teenagers searched.

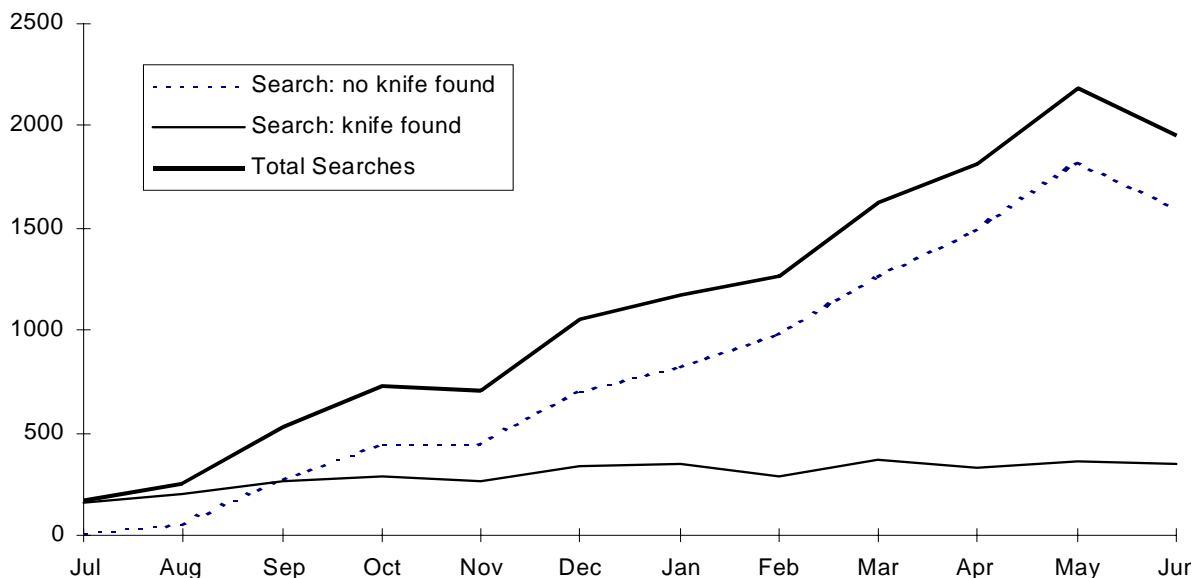
Searches under the Police and Public Safety Act

- 5.28 The Police Service records show that the number of recorded Police and Public Safety Act searches across NSW increased steadily throughout the review period. There were 169 knife searches recorded in July 1998 (the month immediately following the introduction of the

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powers), 251 in August and 532 in September. Graph 5.1A shows that the monthly tally increased almost every month, peaking in May 1999 when 2188 searches for knives were reported for that month.

Graph 5.1A: Police and Public Safety recorded search incidents



Source: NSW Bureau of Crime Statistics and Research extract of COPS records of Police and Public Safety search incidents 1.7.1998 to 30.6.1999.

- 5.29 One explanation for the almost continual increases in the number of reported searches throughout the 12-month period is that the figures show actual increases in the police use of the powers as new search procedures were progressively introduced. Another explanation might be that police made high use of the search powers from the outset, and that the reported increases simply reflect greater compliance with recording requirements.
- 5.30 In reality, a combination of both factors are likely to have contributed to the sharp upward trend in reported searches.

'Ramping-up' of searches

- 5.31 The first explanation suggests a 'ramping-up' of the powers, in that police conducted increasing numbers of knife searches as they became more familiar with the provisions through training and supervisory instruction. Although the legislation took effect on 1 July 1998, significantly enhancing police powers, it would be most unlikely that the changes in the law could be fully and immediately translated into revised police practices.
- 5.32 Implementation measures, including mandatory training in local area commands, took place throughout the review period. For instance, several local commanders at an OCR briefing we observed on 2 May 1999 were asked to state how many staff had been formally trained on use of the Police and Public Safety Act in the 10 months since the laws were introduced. One commander said 91 of his 114 officers had been trained, including 20 the day before the briefing and 15 were to be trained on the day of the briefing. Another said 100 of his 135 officers had attended the training, including

23 officers shortly before the OCR. Interestingly, the recorded use of knife searches in the latter command was among the top 10 in NSW, indicating that training is just one factor affecting the use and recording of these powers.

- 5.33 As discussed elsewhere in this report, OCR briefings provide the Police Service executive with a powerful tool for holding individual commanders to account. Pointing out deficiencies in the number of officers yet to be trained provides a powerful incentive to bring training up to date, especially if commanders are given some advance notice of issues likely to be discussed at briefings they are required to attend.
- 5.34 Similarly, both organisers of and participants in OCRs advised our inquiry that the briefings regularly focused on local commands' reported use of Police and Public Safety powers. In discussing the data on five key crime indicators (robbery, assault, break and enter, stealing and motor vehicle theft) and street and drug offences,²⁴ each commander was expected to explain their strategies to remedy crime problems in their area. At OCRs we observed in January and May 1999, use of the Police and Public Safety powers was seen as a key indicator of proactive policing activity.
- 5.35 A Police Service memorandum to commanders explained that the analysis presented at OCRs is:
- intended to highlight recidivist offenders, hot-spot locations, as well as incidents of repeat victimisation. Your LAC should have an understanding of these areas and be able to illustrate specific strategies designed to impact upon them.²⁵
- 5.36 Commanders from areas with very low reported use of the powers either advised that they were not using the powers, or that they did not record their use of the powers. Neither explanation appeared to be accepted, particularly where crime indices showed a need for anti-crime strategies in that area.
- 5.37 Local commanders surveyed for this review said the OCRs had a significant influence on their use and recording of the powers. However, four respondents indicated the push on numbers encouraged possible misuse of the legislation. One commander thought it was useful to discuss the data at OCRs, but criticised the executive's reluctance to accept explanations for low reported use of the powers:
- ... you give reasons but are told figures should be greater. I'm the commander, I know what unique factors there are. You also have to have reasonable cause to use the legislation. All this was indicated at the OCR. Just to use the legislation to build up numbers is wrong.²⁶
- 5.38 A number of commanders said they were warned in OCRs that unless the Service could demonstrate that police had a need for the new powers, the Ombudsman's review was likely to recommend that the legislation be repealed. According to some, the message conveyed regarding the Police and Public Safety Act was: 'Use it, or lose it'.

²⁴ As the number of street and drug offences detected depends on policing activity, the Police Service regards rises in the number of street and drug offences detected as indicators of increases in policing activity, not as signs that these crimes are increasing. This is consistent with the approach taken by the NSW Bureau of Crime Statistics and Research.

²⁵ Memorandum to all region and local commanders on 'Operations and Crime Review — Stage 3 (1999)' from Police Service Reform Coordination Unit, dated 16 December 1998.

²⁶ Commander 2, survey of local area commanders.

Better compliance with recording requirements

- 5.39 Although the OCR briefings seem to have played an increasingly significant role in urging police to use the powers, it is important to recognise that there was pressure on police to use the powers from 'Day One'. The legislative changes were accompanied by a high profile public awareness campaign and the Police Service provided advice directly to officers through its internal media. These provided police officers with an understanding of, and encouragement to use, the powers from the outset.
- 5.40 However, there is evidence to suggest that there was significant under-reporting of the use of Police and Public Safety powers, particularly in the initial months of the review period. As discussed in the section on the penalty provisions later in this report, of the 2199 penalty notices for custody of knife offences that were processed by the Infringement Processing Bureau, around half were recorded in the Police Service's COPS computer system.²⁷ These were uses of the powers that resulted in action against offenders. Police in focus groups indicated they would be even less likely to thoroughly record uses of the legislation in which no action was taken. On the other hand, uses of the powers associated with matters being brought before a court by way of charge or court attendance notice would presumably be more reliably recorded, as the prosecution could fail without supporting documentation on COPS.
- 5.41 At least part of the rapid increase in the reported use of the powers is attributable to more accurate recording, particularly as police officers became familiar with the new recording procedures. One indicator of more thorough recording is the willingness of police to record searches in which no knife or implement was found.
- 5.42 If taken at face value, the proportion of searches in which a knife was found was extraordinarily high in the first few months of the review period. Graph 5.1B shows that of the 169 knife searches conducted in July 1998, 159 resulted in a knife or implement being found. In August, 201 of the 251 search incidents recorded resulted in a knife being found.
- 5.43 Another way of viewing the exponential rise in the reporting of 'unproductive' searches is to consider the two sets of data in terms of ratios. The July 1998 data in Table 5.1 shows that for every 100 search incidents in which a knife was found, there were only six search incidents where no knife was found.
- 5.44 As we noted in our discussion paper circulated in December 1998, the initial high proportions of 'productive' searches indicate either remarkably prescient policing or an unwillingness or inability to make a record of police searches which do not result in the discovery of a dangerous implement. As it is extremely unlikely that such a high proportion of searches could result in the discovery of implements, it would appear that the initial months of the review period were characterised by significant under-reporting of searches in which no knives were found.
- 5.45 In surveying local commanders, we asked whether commands had modified their implementation and/or recording strategies following feedback at OCRs. One commander explained that prior to his first OCR appearance after the legislation was introduced, his

²⁷ As the analysis in the penalties section shows, there were 1120 COPS records of productive search incidents in which one or more infringement notices were issued. For most incidents, one notice would have been issued. However, it is not possible to calculate the exact number of notices with corresponding COPS entries.

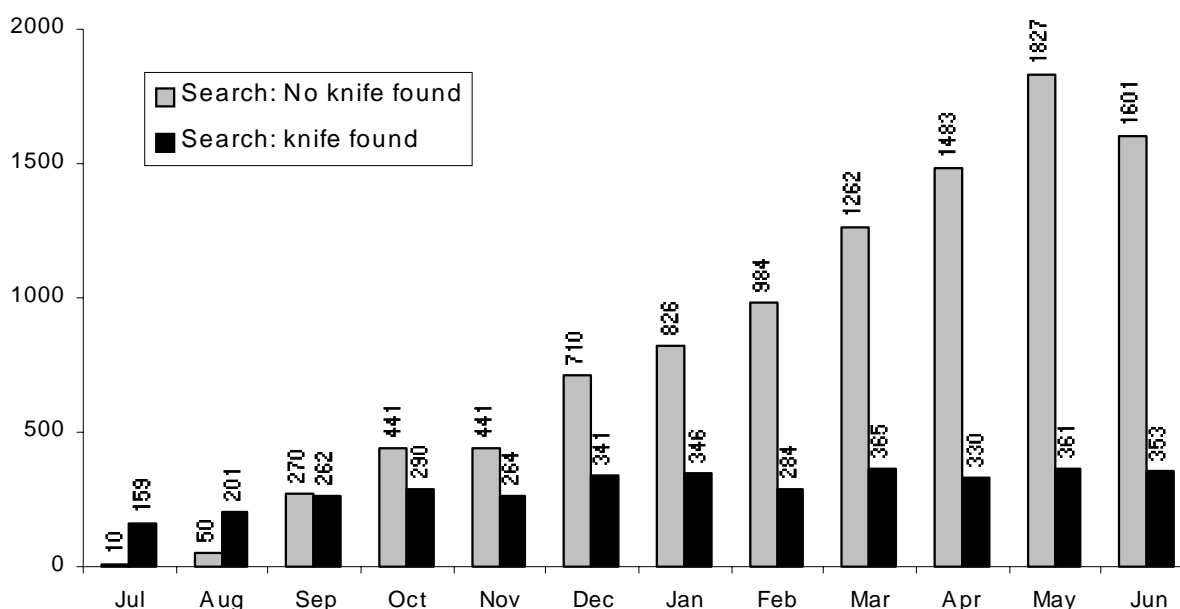
command was recording neither unproductive searches nor move-on directions where the person complied with the direction. 'Now we're recording all', he said.²⁸

5.46 Another commander commented on changes in his command:

Yes ... I received a flogging [at an OCR briefing] because the figures were down. I raised the point the legislation was being used extensively but not necessarily recorded. I believe it is important to use it comprehensively rather than spend time recording comprehensively. As a consequence of this OCR the legislation is being used less but recorded more.²⁹

5.47 Ideally, the information on searches should reflect actual police practices. In reality, changes in both recording practices and actual searches conducted would appear to have contributed to the reported rise in 'unproductive' knife searches.

Graph 5.1B: Police and Public Safety recorded search incidents



Source: NSW Bureau of Crime Statistics and Research extract of COPS records of Police and Public Safety search incidents 1.7.98 to 30.6.99.

Table 5.1: Ratio of search incidents — knife found: no knife found

July 1998	August	September	October	November	December
100 : 6	100 : 25	100 : 103	100 : 152	100 : 167	100 : 208
January 1999	February	March	April	May	June
100 : 239	100 : 346	100 : 346	100 : 449	100 : 556	100 : 454

Source: NSW Bureau of Crime Statistics and Research extract of COPS records of Police and Public Safety search incidents 1.7.98 to 30.6.99.

²⁸ Commander 26, Ombudsman survey of local commanders.

²⁹ Commander 17, Ombudsman survey of local commanders.

Searches in which a knife was found

- 5.48 Another feature of the reported data is the relative stability of the number of searches resulting in the discovery of knives and other implements. Although the monthly tallies for unproductive searches climbed sharply almost throughout the review period, the number of searches in which knives were found began to plateau soon after the law was introduced.
- 5.49 That there is little volatility in the number of productive searches is not surprising. As discussed early in this report, there tends to be more consistent recording of events that may result in court proceedings or other action, or contribute to intelligence holdings. Hence, pressure to improve recording practices may greatly expand the number of unproductive search records (because so few were recorded initially), but should have little impact on the data on productive searches data (where recording was already high).
- 5.50 Although recording practices should not affect the data on productive searches, additional search activity should. What is surprising is that there was not some increase in productive searches after the first few months. If there were additional searches during the review period, then it might be expected that some of those would result in knives being found. Assuming there were additional searches, then either police were less discriminating in who they searched, or the prevalence of knife carrying behaviour fell.
- 5.51 From September 1998, the number of search incidents involving the discovery of a knife or implement ranges from 262 to 365 per month, irrespective of the total number of searches conducted. Even when the total search incidents reported peaks at 2188, only 361 involved the finding of a knife or implement. In terms of the proportion of searches leading to the discovery of knives, one in three searches recorded in December resulted in the finding of some knife or implement, but just one in six searches in May led to a find.
- 5.52 An obvious explanation might be that there were no additional searches actually conducted from September and that rises in *reported* searches were simply a result of more accurate recording of unproductive searches. As discussed above, there is no doubt that recording practices had an influence on the figures. However, it also seems likely that there was additional search activity, particularly as a result of proactive policing operations, the Service's current emphasis on targeting repeat offenders and education and training initiatives.

- 5.53 Another explanation for so few of the additional searches resulting in the finding of knives might be that fewer people are carrying knives, so there are fewer knives to find. If this were the case, police would need to conduct more and more searches as the public's propensity to carry knives falls, simply to maintain the number of productive searches. However, this suggests a remarkably direct link between particular policing activity and knife carrying behaviour.³⁰
- 5.54 A more likely explanation is that few of the additional searches are directed at people carrying knives. This might be the case, for instance:
- if the Service's emphasis on targeting repeat offenders has resulted in the same people being searched over and over. As there are very few instances of fines or charges for repeat knife offences,³¹ any searching of the same people again and again could be inflating the number of unproductive searches; or
 - if many of the additional searches from proactive policing programs are directed at young people. As the data in the next section shows, around one in seven searches of 16 or 17 year olds results in a knife being found, whereas about one in three searches of people aged in their 30s leads to a find. Additional searches of young people inflate the total number of unproductive searches; or
 - if fewer people are carrying knives.

Ages of persons searched

- 5.55 In considering the fairness of police stop and search practices, it is important to acknowledge that police interventions must discriminate in some way. As one commentator notes, elderly females are less likely to carry illegal drugs than young men, so any 'policy which demanded that both were equally likely to be stopped and searched would be unrealistic. So policing must discriminate. The challenge is to ensure that such discrimination is legitimate.'³²
- 5.56 Graph 5.2 shows the ages (where known) of people that police stopped and searched for knives during the review period.
- 5.57 The data indicates that people from 15 to 19 years of age are much more likely to be stopped and searched for knives than any other age group. In fact, the data indicates that 17 year olds (the most commonly searched group, with 2173 persons searched), are six times more likely to be searched than 27 year olds (353 searched), and 23 times more likely to be searched than 37 year olds (94 searched).

³⁰ The difficulty in documenting a causal connection between policing activity and behavioural changes by members of the public, is well documented. One notable exception is the dramatic impact of mobile random breath testing in helping to reduce the incidence of deaths and injuries from car accidents in NSW in the 1980s — see R. Homel 'Preventing Alcohol-Related Injuries', in P. O'Malley & A. Sutton (eds) *Crime Prevention in Australia: Issues in Policy and Research*, Federation Press, 1997 at pp. 217-237.

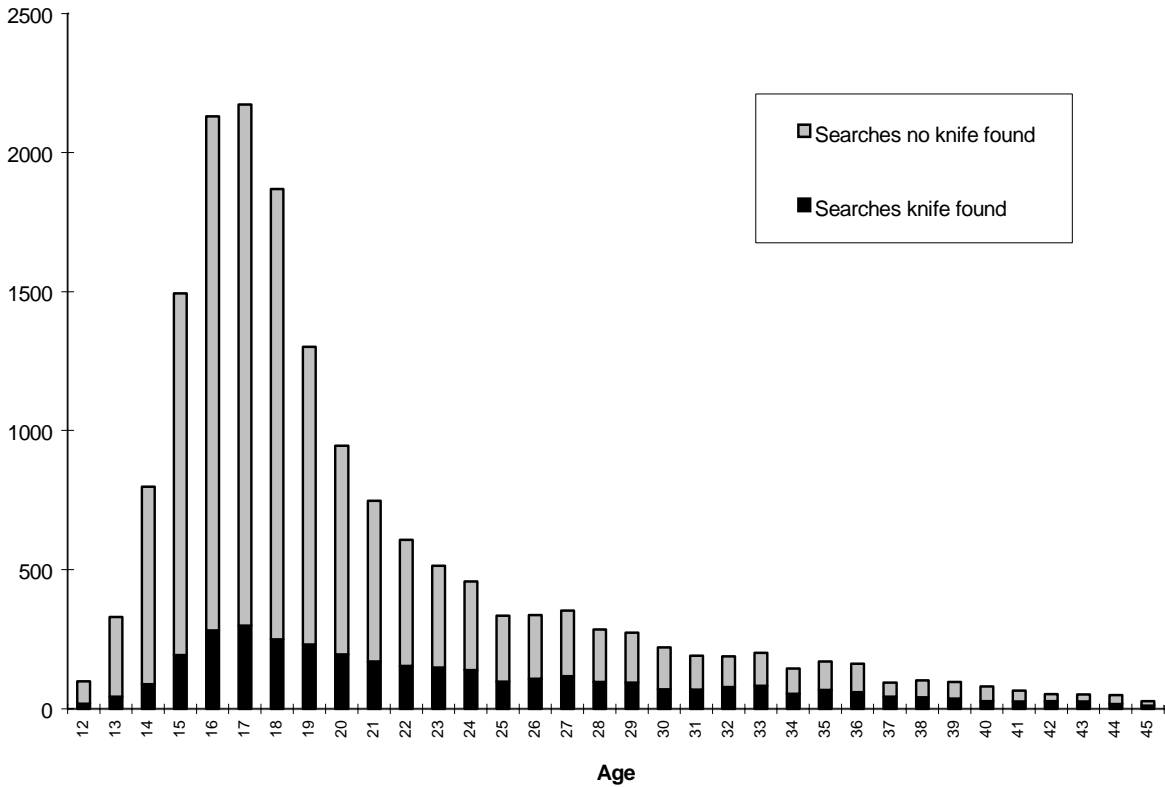
³¹ A Police Service review of charge management data showed action taken against eight people during the review period for second or subsequent custody of knife offences (two were charged, two were summonsed, two were issued with court attendance notices, and two were issued with field court attendance notices).

³² L Maher, D Dixon, W Swift and T Nguyen (1997) *Anh Hai: Young Indo-Chinese People's Perceptions and Experiences of Policing* (Sydney: UNSW Law Faculty), at p. 55.

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5.58 Summary search data provided by the Bureau of Crime Statistics and Research for the 12 month review period, shows that 42% were aged 17 or younger, 38% were aged 18 to 25, 19% were aged 26 or over, and 2% were classified 'age unknown'.

Graph 5.2: Ages of people searched for knives

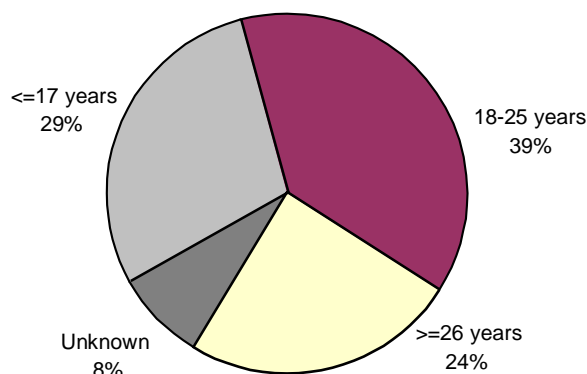


Source: Summary data from NSW Police Service on ages of persons searched for knives 1.7.98 to 30.6.99. Note, the data does not include records of people searched whose age was not known, and 306 people searched who fall outside the age range.

5.59 One measure of the legitimacy of searching so many young people for knives might be that police are more likely to find knives on them. The data on productive searches shows that there were more knives found on 17 year olds than on anyone else, but it is important to note the high number of people being searched. As the graph above shows, the proportion of productive searches is comparatively low for teenage suspects, but is much higher with older suspects. A comparison of the ratio of productive and unproductive searches indicates that about one in seven people aged 17 were found with knives (299 productive searches out of a total 2130 searches). The ratio for 27 year olds was around one in three (117:353) and almost one in two 37 year olds (44:94) were found with knives.

5.60 Another indicator of whether it might be legitimate to direct so many knife searches at young people is to consider the likelihood that they might become involved in knife-related crime. Graph 5.3 shows 1998-99 data on all recorded incidents against the person in NSW involving a knife as a weapon (non- residential locations).

Graph 5.3: Person involved in incidents against person: knife as weapon, non-residential



Source: NSW Bureau of Crime Statistics and Research – police records of persons of interest involved in recorded incidents where a knife was involved as a weapon, non-residential locations, 1.7.98 to 30.6.99.

- 5.61 The data indicates that a significant proportion of the 1743 knife-related incidents recorded by police involved young people: 29% (511) involved persons of interest aged 17 years or younger, and 39% (668) involved persons aged 18 to 25 years. This might suggest that there could be justification for police searching a greater proportion of young people.
- 5.62 On the other hand, it is important to note that the sample data for each category is relatively small. Modest shifts in the reported incidents could easily influence the outcomes. A broader indicator of the likely involvement of young people in street offences is the 1998-99 NSW data for all recorded incidents against the person in places other than residential locations. The data shows that 22% (7982) of the 35,518 incidents recorded involved persons of interest aged 17 years or younger, and 32% (11,273) involved persons aged 18 to 25 years. Significantly, 40% (14,110) are aged 26 years or older.
- 5.63 In assessing the fairness of police search practices, it is important to acknowledge the comparatively high proportion of young people involved in knife-related crime. Of concern, however, is why so many knife searches of young people lead to no knife being found, whereas the ratio of productive searches is much higher for searches of suspects aged in their 20s and 30s. One factor might be differences in the way that young people make use of public space, including a propensity for groups of young people to ‘hang out’ at busy commercial precincts and transport interchanges. This issue was highlighted by one local commander whose command includes a busy retail area adjacent to a major suburban transport interchange. The area is easy to access and designed to encourage people to congregate. He noted that retailers went to considerable effort to attract people, yet expected police to disperse young people attracted to these public areas.

- 5.64 The Police Service already monitors the ratio of productive to unproductive searches in each local area command, as an indicator of compliance with recording requirements. It should extend these reviews to carefully monitor the ages of persons searched without warrant. Increases in the proportion of unproductive searches in relation to young people should be reviewed. The Service's regular OCR briefings may provide a useful forum to engage local commanders in constructive discussions regarding factors affecting the policing of young people in each command.

Recommendations

1. That the Police Service continue its monitoring of the ratio of 'productive' to 'unproductive' searches in each local area command.
2. That the Police Service monitor the proportion of Aboriginal people and young people searched and seek explanations for the rate of searches, at Operations and Crime Review briefings.
3. That each local area command actively seek the views of sections of the community likely to be affected by police use of search powers regarding concerns they might have about police, particularly Aboriginal people and young people where relevant.

Gender and Aboriginality

- 5.65 The records of searches under the Police and Public Safety Act show 7.1% (1288) of persons searched were female and 92.3% (16,825) were male.³³ Of those persons involved in searches where knives or other implements were found, 10% (379) were female and 89.3% (3391) were male.
- 5.66 As with other COPS records, police were also required to note (where known) whether the person searched was from an indigenous background. Of the 18,224 persons searched under the Act, 6.6% (1211) were identified as Aboriginal or Torres Strait Islanders. Of those persons involved in searches where knives or other implements were found, 5.7% (216) were Aboriginal or a Torres Strait Islander.
- 5.67 The data on productive searches indicates that the police targeting of individuals from these groups would not appear to be disproportionate to the likelihood of finding knives.

³³ There was no gender recorded for the remaining 111 search records.

Location of searches

- 5.68 Table 5.2 links local commands' recorded use of the Police and Public Safety Act search powers during the review period with the number of residents in each command. The commands are ranked in descending order of recorded knife searches per 1000 residents.
- 5.69 In addition to listing 'searches per 1000 residents', Table 5.2 also details the number of productive searches in each command, and productive searches as a percentage of total searches. This provides a rough indicator of the willingness of each command to record searches in which no knives were found. As discussed earlier in this chapter, high proportions of productive searches may indicate an unwillingness or inability to make a record of police searches which do not result in the discovery of a dangerous implement. This point was emphasised by the Police Service executive in OCR briefings that we observed in January and May 1999.
- 5.70 The 'searches per 1000 residents' data shows Fairfield, Campsie and Wollongong were among the commands to make extensive use of the search powers during the 12 month review period. It is important to note that their relatively low '% productive' figures indicates that they appear to have been reasonably thorough in recording searches. On the other hand, Tweed/Byron local command's records showing that 41 of the 43 knife searches it recorded during the 12 month review period resulted in a knife or implement being found, should be viewed with caution.
- 5.71 Similarly, figures from adjoining local commands make for some interesting comparisons. For instance, Fairfield's 1054 searches represents 17 searches per 1000 residents, while Cabramatta's 397 searches represent 7.3 searches per 1000 residents. It is difficult to see why Cabramatta would conduct far fewer knife searches than its neighbouring command. Cabramatta's records showing that 58% (230) of the 397 knife searches it conducted resulted in a knife or implement being found, should be viewed accordingly. Unless there are particular factors to explain its relative success in finding knives, then it seems likely that there is significant under-recording of unproductive searches in Cabramatta and other commands with high 'success' rates.
- 5.72 Map 5.1 of Sydney and Map 5.2 of NSW illustrate information from Table 5.2 showing total Police and Public Safety searches per 1000 residents in each local area command. It illustrates the geographic distribution of recorded uses of the knife search powers.

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Table 5.2: Police and Public Safety recorded searches per 1000 residents

Local Area Command	Population	Total searches	Productive searches	% productive	Search/1000 residents
Fairfield	62158	1054	100	9%	17.0
Campsie	90375	1256	70	6%	13.9
Wollongong	106681	1460	112	8%	13.7
Macquarie Fields	75827	755	64	8%	10.0
Monaro	69308	686	50	7%	9.9
Marrickville	51796	456	69	15%	8.8
Manning/Great Lakes	70068	561	56	10%	8.0
Barrier	24980	196	30	15%	7.8
Castlereagh	14221	105	48	46%	7.4
Cabramatta	54186	397	230	58%	7.3
Darling River	17956	130	18	14%	7.2
Ku-Ring-Gai	149455	926	119	13%	6.2
Newtown	31364	192	42	22%	6.1
Lachlan	33384	180	20	11%	5.4
Parramatta	58962	272	59	22%	4.6
Lake Illawarra	140114	634	62	10%	4.5
Kings Cross	27693	125	96	77%	4.5
Quakers Hill	62726	280	44	16%	4.5
Campbelltown	69472	292	55	19%	4.2
Northern Beaches	117712	494	34	7%	4.2
Botany Bay	44710	171	23	13%	3.8
Newcastle	48232	183	72	39%	3.8
Redfern	28249	105	48	46%	3.7
Chifley	63674	231	23	10%	3.6
Kogarah	91192	326	73	22%	3.6
Barwon	38686	135	23	17%	3.5
Hurstville	113168	361	77	21%	3.2
Liverpool	72658	212	51	24%	2.9
Burwood	67988	190	26	14%	2.8
Waratah	80589	222	40	18%	2.8
Hawkesbury	57017	155	42	27%	2.7
North Shore	105267	257	61	24%	2.4
Rosehill	93440	219	81	37%	2.3
Eastwood	110283	239	77	32%	2.2
Bankstown	158356	343	136	40%	2.2
St Marys	98727	213	34	16%	2.2
Miranda	74359	148	31	21%	2.0
Ashfield	74604	136	21	15%	1.8
Penrith	69164	126	57	45%	1.8
Gladesville	68769	125	17	14%	1.8
Albury	68241	121	34	28%	1.8

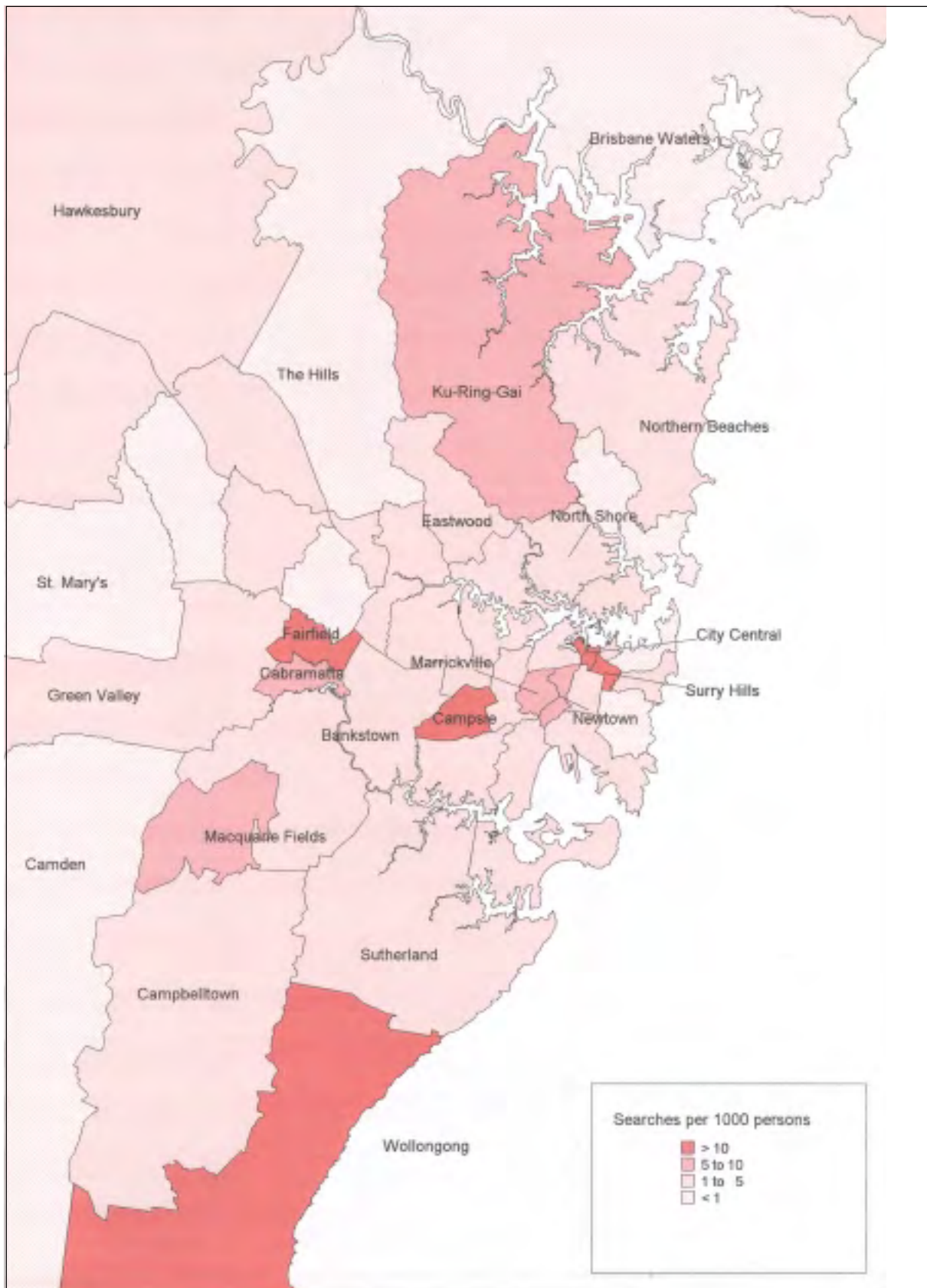
Local Area Command	Population	Total searches	Productive searches	% productive	Search/1000 residents
Shoalhaven	76726	135	49	36%	1.8
Orana	57112	93	36	39%	1.6
Leichhardt	58600	92	24	26%	1.6
Blacktown	85665	132	48	36%	1.5
Eastern Suburbs	60506	92	38	41%	1.5
New England	63543	91	31	34%	1.4
Flemington	94416	132	66	50%	1.4
Oxley	71644	96	34	35%	1.3
Richmond	110137	142	101	71%	1.3
Green Valley	113458	139	29	21%	1.2
Griffith	52896	58	18	31%	1.1
Tuggerah Lakes	115345	124	45	36%	1.1
Sutherland	119745	126	36	29%	1.1
Harbourside	79258	83	55	66%	1.0
Canobolas	56245	58	19	33%	1.0
Mid North Coast	102419	104	33	32%	1.0
Far South Coast	59292	60	28	47%	1.0
Goulburn	42507	40	26	65%	0.9
Coffs/Clarence	117803	107	56	52%	0.9
Holroyd	80470	73	41	56%	0.9
Deniliquin	44211	38	10	26%	0.9
Cootamundra	43686	36	12	33%	0.8
Mt Druitt	86902	70	32	46%	0.8
Brisbane Waters	145494	115	51	44%	0.8
Eastern Beaches	105610	77	34	44%	0.7
Blue Mountains	72988	47	29	62%	0.6
Mudgee	31876	20	7	35%	0.6
Camden	95890	52	33	63%	0.5
Wagga Wagga	73408	37	17	46%	0.5
Lower Hunter	159193	79	54	68%	0.5
Manly/Davidson	94302	45	8	18%	0.5
Hunter Valley	53750	25	8	32%	0.5
Tweed/Byron	94430	43	41	95%	0.5
Rose Bay	55411	20	17	85%	0.4
The Hills	93714	27	13	48%	0.3
Lake Macquarie	170495	41	19	46%	0.2
The Rocks*	7193	260	45	17%	36.1
City Central*	14058	276	88	32%	19.6
Surry Hills*	19843	263	77	29%	13.3

Source: NSW Bureau of Crime Statistics and Research – police records of searches 1.7.98 to 30.6.99.

* It is not possible to use population based rates to compare The Rocks and City Central with other local area commands. As both are in Sydney's central business district, they have few residents and attract large numbers of people from other areas. Surry Hills, which is adjacent to the Sydney CBD and includes Central railway station, is also affected by this factor.

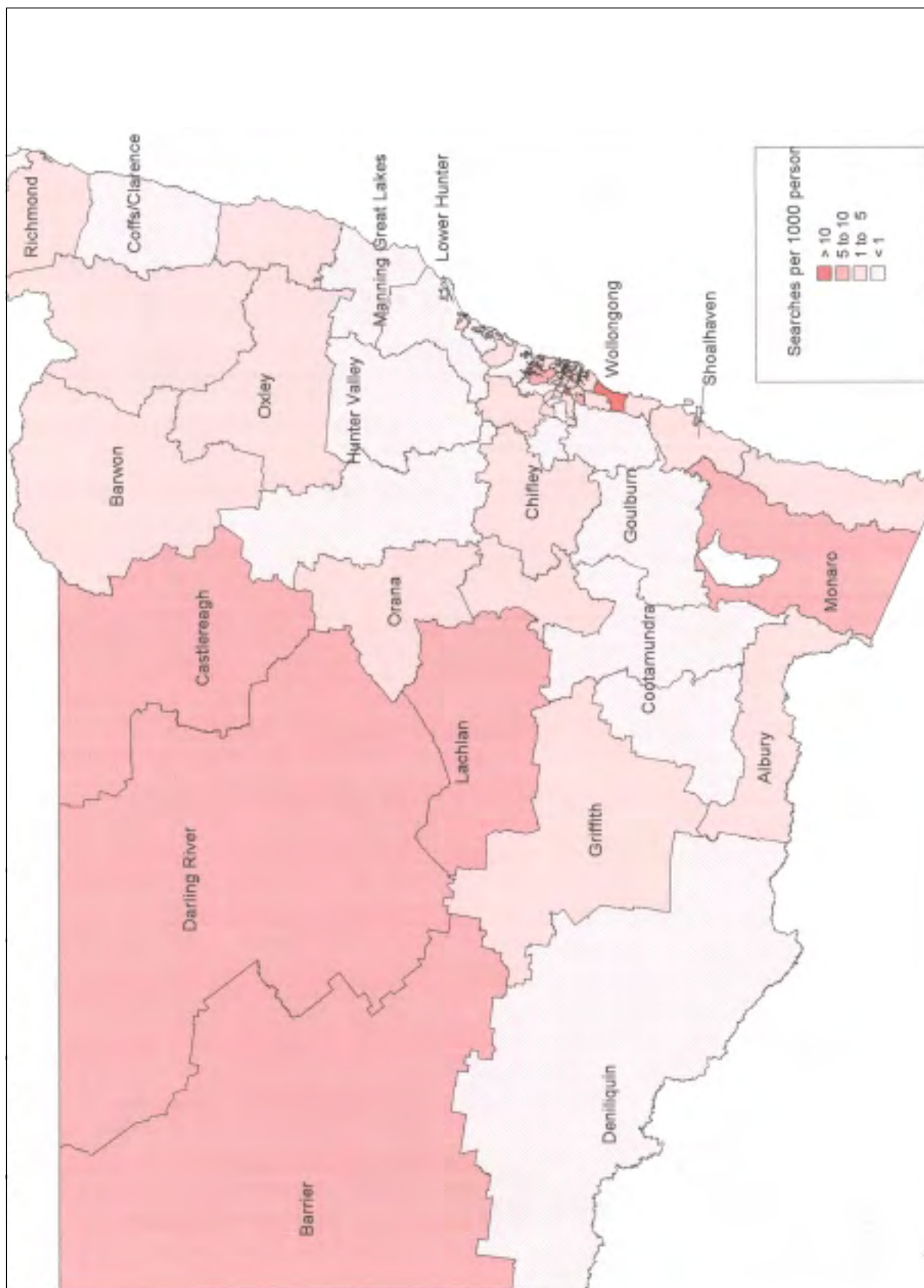
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Map 5.1: Searches per 1000 persons (Sydney)



Source: Table 5.2

Map 5.2: Searches per 1000 persons (NSW)



Source: Table 5.2

5B. Search procedures

5.73 Unlike other general stop and search provisions, the Police and Public Safety legislation codifies a certain procedure to be undertaken by police prior to a search. They must:

- provide evidence that they are a police officer;³⁴
- give their name and station;
- give the reason for the search;
- warn that failure to comply is an offence;

Then, and only then, may they carry out the search.³⁵

5.74 If the person refuses to comply, the officer must again warn it is an offence not to comply, and then repeat the request. Then, if the person complies, police may conduct the search. People who fail to comply might be arrested, potentially providing police with additional grounds to search.³⁶

5.75 The legislative codification of procedures for such searches is unprecedented in NSW. Although the Police Service introduced a code of practice in February 1998³⁷ that included guidance on the use of general stop and search powers,³⁸ this code is advisory in nature. It does not regulate the powers or provide for closer scrutiny of police searches. Unlike the code, police *must* comply with the statutory requirements set out in the Police and Public Safety Act when using the knife search powers.

5.76 The Royal Commission into the NSW Police Service recommended legislative consolidation and codification of all police powers, and for the revised legislation to include ‘a procedural code regulating the manner in which police powers are exercised’.³⁹ The Commission found that unregulated powers foster poor practice and create opportunities for process corruption. It argued that codification can provide a bulwark against corruption.

5.77 In introducing the Police and Public Safety Act, the government noted that the legislation is part of a broader reform agenda:

It is the first stage of the review and consolidation of police powers into a single Act ...⁴⁰

³⁴ Wearing a uniform is sufficient to establish that they are a police officer.

³⁵ Section 28A(4) *Summary Offences Act*.

³⁶ Under common law, searches of an arrested person might be justified if there is a need to preserve evidence of offences, or if there are particular concerns about the safety of persons (the arrested person or the arresting officers): *Leigh v Cole* (1853) 6 Cox CC 329; *Clarke v Bailey* (1933) 33 SR (NSW) 303 at 310; *Cloutier v Langlois* (1990) 74 CR (3d) 316; see also B Schurr *Criminal Procedure (NSW)* LBC, Sydney (looseleaf services) at [9.380]; M Aronson and J Hunter, *Litigation Evidence and Procedure*, Butterworths, Sydney 1995 at 306. Section 353A of the *Crimes Act* also permits a search of a person in custody on a charge in circumstances where there are reasonable grounds to believe that it will reveal evidence as to the commission of the crime.

³⁷ NSW Police Service *Code of Practice for Custody, Rights, Investigation, Management and Evidence (CRIME)*, February 1998.

³⁸ Notably s. 357E of the *Crimes Act* and s. 37 of the *Drug Misuse and Trafficking Act*.

³⁹ Royal Commission into the NSW Police Service *Final Report*, May 1997, Recommendation 114. See also discussion in *Final Report — Volume II* at [7.19].

⁴⁰ The Minister for Police, and the Attorney General, Second Reading Speech, 28 April 1998.

- 5.78 The codification of procedures in the Police and Public Safety Act represents an important step towards achieving better regulated police powers ‘to ensure that the rights of citizens and the powers of police are balanced and plainly articulated’.⁴¹
- 5.79 As with any new procedures, the responsibility for educating officers on the correct use of the Police and Public Safety powers lies with the Police Service. Attempting to introduce new practices and ensure its 13,000 officers comply with the statutory requirements, was always likely to take time. In addition to the logistical challenges of dealing with so many officers, the nature of policing is such that most searches are conducted by younger and less experienced officers, often in situations which afford little opportunity for effective supervision or scrutiny.
- 5.80 The challenge of putting these new principles into practice was no doubt compounded by the fact that different rules apply to different kinds of searches, and that the statutory provisions governing knife searches came into effect just a few months after the Service introduced the code of practice for general searches without warrant.
- 5.81 Several submissions echoed the Royal Commission’s concerns about the need to better regulate discretionary police powers. There was strong support for the argument that the statutory procedures are crucial safeguards, and any practical difficulties in applying the new procedures should not excuse poor or unprofessional practice.
- In setting out the procedures to be followed before a search can be carried out, the legislature has recognised the potential for these new powers to be abused and has attempted to safeguard the populace against unreasonable interference by police. To be anything other than vigilant in requiring the police to comply with the procedures outlined would be to undermine these important safeguards.⁴²
- 5.82 In reviewing this aspect of the Police and Public Safety legislation, we have considered both police compliance with the legislative requirements, and whether compliance with the procedures could be expected to adequately safeguard the interests of citizens being searched. The ability of these legislative safeguards to achieve the even-handed and plainly articulated standards advocated by the Royal Commission must be considered.

Officers must provide evidence they are police

- 5.83 A police officer may request a person to submit to a search only if the police officer: provides evidence to the person that he or she is a police officer (unless the police officer is in uniform).⁴³
- 5.84 This is an issue for plain clothes police, particularly those working in specialist street crime units. In practice, they can expect resistance if the person being searched is unaware that they are police officers, raising the risk of injury to both the police and the person being searched.

⁴¹ RCPS *Final Report* — Volume II at 466.

⁴² Submission, Youth Action and Policy Association NSW and the Youth Justice Coalition, Sydney, July 1999, p. 65.

⁴³ *Summary Offences Acts*, 28A(4)(a).

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- 5.85 One incident witnessed during the CitySafe observational research involved plain clothes police who saw a man approach three others and something (not identified) change hands. Police approached the first man but he ran before they could speak to him. Three officers chased, detained, handcuffed and searched him. They stated that they were police officers and gave their names and place of duty *during* the search. They found \$660 in the man's wallet, but nothing to indicate an offence. He was then released. The man said he ran because he did not realise they were police and thought he was going to be bashed. He was evidently distressed and the event was described by the observer as physically conflictual.
- 5.86 Youth workers at a forum organised by the Youth Action and Policy Association reported several instances of plain clothes officers failing to identify themselves when approaching young people.⁴⁴ They said that in these circumstances, it was common for young people to resist contact and for the situation to escalate. On the other hand, police working in regional NSW said the requirement was unnecessary in small towns, as everyone knows their local officers: '... kids, whether [police] are in plain clothes or in uniform, they know who these fellows are'.⁴⁵
- 5.87 The utility of this requirement will be considered in the context of other procedural requirements.

Name and place of duty

- 5.88 A police officer may request a person to submit to a search only if the police officer: provides his or her name and place of duty.⁴⁶
- 5.89 Our observers accompanying police during the CitySafe observational research were required to note whether police provided their name and place of duty for any search, regardless of the object of, or basis for, the search. Although members of the public were routinely asked their names and addresses, police rarely provided their own name and station before commencing a search. Whether this was a breach of the Police and Public Safety Act requirements depends on whether it was a search under the Act. Often the legal basis of the search was unclear. Even when police did appear to be searching for offensive implements, most searches occurred in situations where broader stop and search powers could be used and less stringent procedures might apply.
- 5.90 In most cases it was unclear why officers failed to comply with this requirement. However, a few officers in metropolitan areas indicated they were reluctant to give their name and place of duty to people searched. This concern appeared to be more immediate among police working in areas experiencing difficult relations between police and the local community, particularly in locations where officers or their families had received threats.

⁴⁴ YAPA youth worker forum at Parramatta, Sydney, on 20 April 1999.

⁴⁵ Focus Group 2.

⁴⁶ *Summary Offences Act* s. 28A(4)(b).

- 5.91 For instance, there were serious threats against police stationed at Bankstown in late 1998. The threats arose in the context of escalating tensions both within the local community and between police and those groups in the community which felt they were being unfairly blamed for the perceived deterioration in public order in the area. The local commander advised us that there were ‘hundreds’ of anonymous death threats and other forms of intimidation directed at his officers at that time. Officers’ private mobile phone services were tampered with, and emergency communication services were sabotaged for a short period. Although police-community relations have improved considerably, officers who experienced these threats or harassment may still be reluctant to give their names to people they search.
- 5.92 By contrast, country police in focus groups said that there was often no need for police to state their name and place of duty, particularly in small communities. The Police Association submission summarised their concerns:⁴⁷
- In country areas, members have highlighted the impractical nature of supplying people whom they know and who know them with their names and station. The formality of such a requirement is not necessary and the use of such language can often aggravate situations. Compliance with this procedure is often difficult and non-compliance by police may result in matters being dismissed at court ...⁴⁸
- 5.93 It recommended that this procedure be modified to excuse officers from this requirement where compliance is not practicable, and added:
- The Association also recognises that persons of interest need to be informed of why and what action police are taking. From an enforcement perspective it is often blatantly obvious what is happening and any such information can be conveyed informally.⁴⁹
- 5.94 Unless urgent circumstances make compliance impracticable, best practice would suggest that officers should introduce themselves either by name or (where they have legitimate concerns) number. However, where it is apparent that the person to be searched knows the officer, there may be no need. Questions about the utility of retaining this as a legislative requirement will be discussed below.

Reason for the search and warnings about failing to comply

- 5.95 The most substantive protections in the search provisions require police to give reasons for the search and to warn people of the potential consequences of failing to cooperate. A police officer may request a person to submit to a search only if the police officer:
- informs the person of the reason for the search,⁵⁰ and warns the person that failure to submit to the search may be an offence.⁵¹

⁴⁷ Focus groups for this inquiry were jointly facilitated by representatives from both the Police Association and the Ombudsman’s Office.

⁴⁸ Submission, Police Association of NSW, p. 3.

⁴⁹ Submission, Police Association of NSW, p. 4.

⁵⁰ *Summary Offences Act* s. 28A(4)(c).

⁵¹ *Summary Offences Act* s. 28A(4)(d).

5.96 If the person initially refuses to submit to a search:

... the police officer may again request the person to submit to the search and, in that case, must again warn the person that failure to submit to the search may be an offence.⁵²

5.97 Police participating in focus groups were invited to explain their view of these requirements. Most felt that it was important to state reasons as people were more likely to cooperate if they knew why they were being searched:

As long as you tell people what you are going to do it's usually all right with them. If you give someone a reason, most people will comply.⁵³

5.98 Another officer said:

If the mums and dads have an explanation why we're searching their kids, they are more than happy.⁵⁴

5.99 Similarly, the need to warn people about the consequences of not complying was seen as a common sense requirement, as was the requirement to repeat the warning if people initially refused to submit to the search.

... what's wrong with giving people a couple of warnings ... I don't think I have any problem with that, most people do that anyway ... in your private life you ask people to do things a couple of times before you get up them, why wouldn't you do it here?⁵⁵

5.100 Another officer, who described many searches he had conducted, expressed some surprise that he was required to repeat the warning before penalising someone for not complying:

I didn't know about the two warnings. Any half decent person would do that anyway.⁵⁶

5.101 Although police recognised the importance of giving reasons and warning people about the consequences of failure to comply, in practice there were recurring concerns about the adequacy and clarity of explanations and warnings provided by police.

5.102 Our observations of police practice during Operation CitySafe found that police would usually seek the cooperation of people about to be searched. Sometimes police cited a legislative authority for their search ('I'm searching you under the Police and Public Safety Act'), but they rarely explained what they were looking for or the reasons why they were searching someone (such as observations, behaviour, reports or other factors giving rise to a reasonable suspicion). Having the power to search and having a reason to search are two very different things — although the former is a precondition for the latter. Merely stating that there is a legislative power to search for knives or that police hope to find a knife, does not give the person about to be searched any indication as to the reasons why he or she was singled out in the first place.

⁵² *Summary Offences Act s. 28A(5)*.

⁵³ Focus group 2.

⁵⁴ Focus group 2.

⁵⁵ Focus group 3.

⁵⁶ Focus group 3.

- 5.103 By saying that police often gave no indication of reasons for searching individuals, this does not necessarily mean that the searches were arbitrary or groundless. On some occasions at least, observers accompanying police on Operation CitySafe noted factors that may have contributed to police decisions to search. However, on many occasions the reasons for the search were not apparent to our observers. Unless people stopped by police are told why they are to be searched, they may assume that they came to police attention because of their age, racial appearance or some other arbitrary factor.
- 5.104 The requirement that police explain the reasons for their search raises questions as to what constitutes valid reasons and how they should explain these reasons to persons being searched. For instance, is it enough for police to say they are searching for a knife, drugs, stolen goods etc, or should they also be required to indicate why they believe the person searched might be in custody of these things? There is a difference between the purpose of a search and the justification or reasons for a search. Telling someone *what* you are doing is different from telling them *why* you are doing it.
- 5.105 Several submissions emphasised the importance of the ‘reason’ and ‘warning’ requirements as procedural safeguards. The Aboriginal Justice Advisory Council argued that for the safeguards to be effective, they need to be clearly communicated:
- It is clear that a person’s willingness to submit to a search may depend on their knowledge of the reasons why they are being searched and the possible consequences for failing to submit to a search. The council is concerned that police may not be fully stating the reasons for a search and consequences for failing to submit, and is also concerned [to ensure] that when this is explained that it is explained in a manner that is clear and understood.⁵⁷
- 5.106 Another submission argued that its survey of young people who had been searched indicated that these requirements were routinely ignored.⁵⁸
- 5.107 An obvious difficulty in reviewing this area of police practice is that often the only witnesses to searches are the police conducting the search and the people being searched. Even when one of our researchers accompanied a youth worker and actually watched as two young men were searched by police, it was difficult for our researcher to get close enough to hear what police were saying to either ‘suspect’. As the young men were searched, one officer kept our researcher (who was not identified as working for our office) a discreet distance from the searches.
- 5.108 Similarly, our review of footage from the Sydney City Council’s closed circuit street cameras showed that searches in the George Street area were not unusual, but provided little useful information about the nature of the exchange between police and the people they were searching.
- 5.109 In accompanying officers to observe police practices during Operation CitySafe, it was assumed that our presence might make police more likely to comply with the procedures. Despite our presence, officers rarely indicated to persons searched why they were being searched or warned that failure to comply may be an offence.

⁵⁷ Submission, Aboriginal Justice Advisory Council.

⁵⁸ Submission, Youth Action and Policy Association NSW and the Youth Justice Coalition, July 1999, p. 64.

5.110 Although police may become more familiar with the statutory requirements over time, one submission highlighted the importance of proper procedures in circumstances where the laws permit invasive procedures or are being used to impose penalties:

... given the extremely low levels of police compliance with procedural requirements ... the Ombudsman should be very wary of excusing police from complying with the statutory requirements. There is no evidence to suggest that anyone else has been excused from complying with the legislation just because it is 'new'.⁵⁹

5.111 A submission from the NSW Young Lawyers suggested that one way to encourage police to use the procedures might be to make it easier to invalidate the search when procedures were not followed, and to penalise police who do not comply:

Section 28A(4) sets out four conditions that must be fulfilled by police before they undertake a search. It is submitted police exercising the search power regularly do not comply with the section ... It is requested that if the legislation is retained the following amendments be considered:

1. a declaration that failure to comply with the legislation is prima facie an illegal search;
2. a presumption in favour of the exclusion of items found during an illegal search;
3. the imposition of a penalty to the officer undertaking the search for failing to comply with the legislation.

... the power to search is an intrusive power ... Any increase in search powers must be accompanied by a concurrent increase in penalties if those powers are abused.⁶⁰

5.112 It is important to note that failure to comply with the procedures already provides grounds to exclude evidence. One plain clothes officer described how he stopped two men walking from an area where there had been many assaults. He noticed one man fiddling with something in his pocket and asked to see what it was. The man produced a stolen jewellery case and key ring. The officer said the matter was thrown out of court because he had not given reasons for the 'search'.⁶¹ A number of legal representatives also advised our inquiry that they had successfully defended clients on similar technical grounds. This raises questions as to whether it is appropriate that evidence should be excluded where the officer's procedural breach is technical in nature, or where the officer might have a reasonable excuse for failing to comply.

5.113 With respect to the suggestion that officers be penalised for not complying with legislative requirements, it is important that any action in response to an officer's failure to observe procedural requirements be directed at encouraging future compliance. Arbitrary punishments for technical or procedural breaches are unlikely to enhance the practical protections afforded to people being searched. Where failed prosecutions or complaints bring an officer's poor or unprofessional practices to light, police managers and supervisors must seek ways to remedy the officer's performance. If the breach represented a deliberate and serious abuse of power, then a more serious intervention would be required. This is consistent with the current approach to dealing with complaints about police.⁶²

⁵⁹ Submission, Youth Action and Policy Association NSW and the Youth Justice Coalition, July 1999, p. 65.

⁶⁰ Submission, NSW Young Lawyers (Criminal Law Committee), the Law Society of NSW, Sydney, 12 July 1999.

⁶¹ Focus Group 1.

⁶² See Part 8A of the *Police Service Act*.

5.114 More generally, it is essential that police officers turn their minds to the reasons for a search, and that the people being searched understand that police are not searching on a whim. Suggestions on how this might be achieved will be considered below.

Conducting searches

5.115 The other key procedures in the Police and Public Safety legislation provide guidance on the conduct of a search. Police may either use a metal detector⁶³ or search by ‘quickly running the hands over the person’s outer garments’.⁶⁴ In conducting a search, police officers must not request the person to remove clothing other than certain outer garments,⁶⁵ and should (where possible) examine bags ‘by allowing the person to hold the bag open and move the contents so they can be more easily viewed’.⁶⁶

5.116 If something is found, police may require the person to produce the object, but must warn ‘... that failure to produce any thing detected or seen by the police officer during the search may be an offence’.⁶⁷ The police data for the whole of NSW in 1998-99 shows just seven people involved in incidents where someone refused to produce something when required to do so.⁶⁸

5.117 As with other protections created by the Act, there is no legislative requirement for police to comply with these procedures when searching under another power or if the person ‘consents’ to being searched. The multiplicity of general stop and search provisions significantly undermines the potential for the Police and Public Safety legislation to influence police search practices.

5.118 Another concern is the impracticality of provisions prescribing how a search should be conducted. For instance, the requirement that police should quickly run their hands over the person’s outer garments is at odds with actual practice. Many searches we observed during CitySafe involved people emptying their pockets or moving clothing about as requested. If a pat search was conducted, it was more likely to be a series of grabs. Generally the officers we accompanied were calm, and acted with great restraint. Often, however, they conducted searches in full view of passers-by and seemed to have little regard for any embarrassment caused to the persons searched.

5.119 The introduction of hand-held metal detectors during the review period enabled police to conduct faster, less intimate searches, thus reducing the potential for embarrassment and conflict. Officers in the focus groups said the metal detectors were useful, but personal searches were much more common than electronic scans. One reason for this was that the equipment tended to be carried in police vehicles rather than by foot patrols.⁶⁹

⁶³ *Summary Offences Act* s. 28A(1)(a).

⁶⁴ *Summary Offences Act* s. 28A(1)(b).

⁶⁵ *Summary Offences Act* s. 28A(2)(a).

⁶⁶ *Summary Offences Act* s. 28A(2)(c).

⁶⁷ *Summary Offences Act* s. 28A(6).

⁶⁸ Police Service summary data on use of the Police and Public Safety Act between 1.7.98 and 30.6.99.

⁶⁹ Focus Group 3.

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- 5.120 Less useful was the provision requiring police to examine the contents of bags by getting the owners to hold their bags open and move the contents. Although this is preferable to emptying the contents in view of other members of the public, our observations of bag searches during Operation CitySafe found that it was often impracticable for police to search bags in this way. One observer noted that whenever police suspected the bag might contain drug paraphernalia, the owner was usually asked to turn out the contents. Police focus groups cited 'officer safety' and 'practicality' as reasons why there was a continuing reluctance to ask owners to assist with bag searches.
- 5.121 Of concern was the potential for searches to embarrass or intimidate the people being searched. A submission from a youth legal service criticised the 'invasive and aggressive manner' in which young people were often searched.⁷⁰
- 5.122 Young men introduced to our researchers by a youth worker in suburban Sydney claimed that it was common for police conducting searches during a local 'blitz' on street offences to 'look down your back' or 'grab your balls' as they searched. Another young man also claimed his testicles were grabbed when he was searched.
- 5.123 While accompanying the youth worker, our researcher observed searches of two young men adjacent to a railway and bus interchange. The researcher noted:
- ... we observed four police officers walking down from the station. The youth worker sensed that something was up and we walked behind the police. They ended up searching a young man in a blue top. They asked him to put his hands up against the bus shelter and they searched him closely between and along his legs. I was struck by how intimate a search outside someone's clothes could be. They told him that they had information from someone at the railway station that someone in a blue top had a knife. They also searched another young man who was wearing a white shirt. The two searches happened at about the same time.⁷¹
- 5.124 This observation highlights the potential intrusiveness of pat searches. However, it is important to note that the intimacy of these searches may be necessary for the search to be effective.
- 5.125 A recurring issue for many of the young people searched was not the fact they were searched, but the manner in which they were treated by police. One young man commented that occasionally he would encounter 'a good copper'. When asked what he considered to be a good copper, he replied:
- ... If you're not going to give us respect, we don't give you respect back ... if you walk up to me and go 'fucking wog', 'fucking something', I'm not going to respect you. If you come up to me, 'I'm a constable, my name is this, I would like to search you', and you be nice to us — you can go and search me, I don't carry knives, I don't carry nothing.⁷²

⁷⁰ Submission, The Shopfront Youth Legal Centre, 7 July 1999, p. 5.

⁷¹ Researcher's notes, 4 March 1999.

⁷² Street interview, 4 March 1999.

Discussion

- 5.126 Significantly, the new legislative requirements seem to have had very little influence on actual policing practice. Perhaps their main impact is to occasionally invalidate prosecutions arising from an otherwise valid search if the officer who conducted the search is found to have overlooked a requirement.
- 5.127 In many cases it is not clear whether police searched for knives under s. 28A of the *Summary Offences Act*, or under some other power such as s. 357E of the *Crimes Act*. Both provisions give police broad discretion to search in circumstances where they have a 'reasonable suspicion'. Unless the police themselves state that they searched under s. 28A, then it may be assumed that the less stringent procedural requirements for s. 357E stop and search powers governed the conduct of the search. Hence, the more comprehensive practical protections afforded by s. 28A of the *Summary Offences Act* will often only apply where police themselves state that they relied on s. 28A to conduct the search.
- 5.128 A preferable approach would be to consolidate the various stop and search provisions into a single legislative instrument, and for the use of those powers to be regulated by a single set of principles governing all such searches. Both the community and police would benefit from the creation of a code of practice (made pursuant to a Regulation) that clearly articulates the rights of citizens as well as the powers of police.
- 5.129 Such a code should establish the basic principles that officers *must* consider before conducting any search without warrant. In doing so, care should be taken to avoid putting form before substance. For instance, rather than relying on formulaic procedures to try to ensure that officers adequately explain the consequences of not submitting to a search (such as the current two-step warning procedure), the requirement might simply be for officers to make a reasonable attempt to make the possible consequences abundantly clear at the outset.
- 5.130 In its simplest form, such a code could require police exercising the powers to:
- establish that they are police officers (whether by uniform or by showing some form of identification);
 - have reasonable grounds to exercise the powers (based on the legislative requirements);
 - explain the reasonable grounds for the search to the person and advise the person of the consequences of failing to comply; and
 - observe any provisions regarding the responsible use of those powers (such as any special provisions relating to the conduct of a strip search), unless it is impracticable to do so.
- 5.131 The code need not be prescriptive about technique. It should define and regulate the limits on police practice rather than try to describe the practices. Officers would be required to make every effort to comply with the code, unless there was a reasonable excuse for not complying. Minor or technical errors should not invalidate an otherwise valid search, provided that officers can demonstrate that they made reasonable attempts to uphold the principles or provide a reasonable excuse for the breach or omission.
- 5.132 Guidance relating to responsible use of the search powers could emphasise the need to minimise the intrusiveness of all searches. There may be some value in including a

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provision similar to cl.6 of Queensland's *Police Powers and Responsibilities Regulation 1998*, which instructs police to ensure the way that the person is searched causes minimal embarrassment, and that they take reasonable care to protect a person's dignity. More invasive searches may need to be regulated more carefully.

- 5.133 For the code to effectively influence police practices, it must be drafted in a way that affords a degree of certainty in the use of these powers and ensures that they are not used inappropriately.
- 5.134 The code must be supported by appropriate training and supervision.

Recommendations

4. That the various provisions empowering police to conduct searches without warrant be consolidated into a single legislative instrument.
5. That the use of the police powers, including powers to search and issue reasonable directions, be governed by codes of practice (made pursuant to a Regulation) which clearly articulate the rights of citizens as well as the powers of police.

5C. Reasons for search

- 5.135 Where a police officer has *reasonable grounds to suspect* that a person has unlawful custody of a dangerous implement,⁷³ including a knife, then the officer may carry out an electronic⁷⁴ or frisk search⁷⁵ of the person, and may examine any bag or other personal effect that the person has with them.⁷⁶
- 5.136 In determining whether there are reasonable grounds to carry out the search, an officer must take into account all the relevant circumstances.⁷⁷ While the Act does not nominate what may constitute reasonable grounds, it does state that an officer may take into account the fact that the person is in a location with a high incidence of violent crime.⁷⁸

Discussion

- 5.137 A recent House of Lords case noted that it was now common for Parliaments to legislate for the exercise of powers, without warrant, which may interfere with the liberty of the person. Such powers were to be exercised only when the officer had reasonable grounds for suspecting that a person had committed or was committing an offence. The judgment went on to say:
- The protection of the subject lies in the nature of the test which has to be applied in order to determine whether the requirement that there be reasonable grounds for the suspicion is satisfied.⁷⁹
- 5.138 The restriction of the search powers to situations where police have ‘reasonable grounds to suspect’ that someone is carrying a knife or dangerous implement has at least two functions: namely, to nominate the circumstances in which police should consider conducting a search, and to protect people from unnecessary or gratuitous incursions against their person and privacy.
- 5.139 In the discussion paper, we stated that ‘the most difficult question in relation to section 28A is that of determining what are reasonable grounds for suspecting that the person is carrying a knife.’⁸⁰ This view was reinforced by the submissions received and observations conducted over the past 12 months.

⁷³ A ‘dangerous implement’ is defined by the legislation as a knife, a firearm, prohibited weapon or prohibited article, or an offensive implement (which is further defined as anything made or adapted to cause injury to a person, or intended to be used to injure or menace a person or damage property). See *Summary Offences Act* s. 28.

⁷⁴ *Summary Offences Act* s. 28A (1) (a).

⁷⁵ *Summary Offences Act* s. 28A (1) (b).

⁷⁶ *Summary Offences Act* s. 28A (1) (c).

⁷⁷ *Summary Offences Act* s. 28A (1).

⁷⁸ *Summary Offences Act* s. 28A (3).

⁷⁹ Lord Hope in *O’Hara v Chief Constable of the Royal Ulster Constabulary* [1997] 2 WLR 1.

⁸⁰ NSW Ombudsman, *Policing Public Safety: Discussion Paper on the Crimes Legislation Amendment (Police and Public Safety) Act*, December 1998.

- 5.140 The Police Association acknowledged that ‘it is evident from discussions with police that there is not a clear understanding of what circumstances may constitute reasonable grounds to suspect.’⁸¹ The Association also noted the comment in the discussion paper that the education material provided to police did not provide guidance in this area.
- 5.141 It considered that these two factors indicated that ‘the Police Service had not provided appropriate training that would allow police to carry out their duties with the requisite knowledge. A lack of training may lead to inappropriate use of the legislation to the detriment of the police officer and members of the community, but through no fault of the officer.’⁸²
- 5.142 In February 1998, the Police Service issued the ‘Code of Practice for CRIME (Custody, Rights, Investigation Management and Evidence)’, setting out the powers of police officers with respect to searches, arrest, detention and investigation of crime, as well as the procedures officers were advised to follow.
- 5.143 In relation to stop and search provisions generally, the Code advises officers that:
- ... in determining whether you have reasonable suspicion consider all the circumstances of each situation including:
- the nature of the article
 - the time and location
 - the behaviour and actions of who you want to search
 - antecedents — if known (do not use this as the sole grounds).
- Your decision must be objective, and not based solely on one of the above.⁸³
- 5.144 An advising on the subject of ‘reasonable suspicion’ was made by the General Manager, Legal Services to the Deputy Commissioner, Operations. The General Manager advised:
- The power to search for knives in the Summary Offences Act is dependent upon the police officer suspecting on reasonable grounds that a person has a dangerous implement. Whether an officer in fact has the necessary suspicion and whether it is based on reasonable grounds can only be decided after analysing the circumstances of each individual case.
- There is case law to the effect that suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to a ‘slight opinion, but without sufficient evidence’ (Queensland Bacon Pty Ltd v Rees (1966) 115 CLR 266).
- In order to exercise the power in section 28A of the Summary Offences Act, I think there must be grounds which would create in the mind of a reasonable person an apprehension that a person has a dangerous implement in his or her custody.⁸⁴

⁸¹ Police Association of NSW ‘Response to the NSW Ombudsman: ‘Policing Public Safety’: Discussion Paper’ July 1999, p. 2.

⁸² Ibid.

⁸³ ‘Code of Practice for CRIME (Custody, Rights, Investigation Management and Evidence)’, NSW Police Service, 1998, p. 39.

⁸⁴ Legal advising from F. Hutchison, General Manager, Legal Services, to Deputy Commissioner, Operations, undated.

- 5.145 No reference to this advice was made in the education materials made available to police officers during the implementation of the legislation. It should be noted that since the release of our discussion paper, the Police Association has provided further advice to its members on some of the issues associated with determining what constitutes reasonable grounds for suspecting that a person is carrying a knife. The *Policing Issues and Practice Journal*⁸⁵ also dealt with this subject in its April 1999 issue.
- 5.146 In an article in the November edition of its journal, the Police Association advised members that ‘suspicion has been said to constitute something more than speculation but something less than belief’. It noted commentary that a foundation had to exist for the exercise of the power, and that an officer had to act on more than a hunch. The foundation for reasonable suspicion could be information passed on from a witness, from the radio operator or from information recorded on a COPS entry.
- 5.147 The Association referred to an unreported 1998 decision by the NSW Supreme Court⁸⁶ which cited Lord Hope in a House of Lords judgment⁸⁷ regarding the grounds that might create a reasonable suspicion. The test for reasonable suspicion was said to relate:
- ... entirely to what is in the mind of the arresting officer when the power is exercised. In part it is a subjective test, because he must have formed a genuine suspicion in his own mind ... In part also it is an objective one, because there must also be reasonable grounds for the suspicion ...
- All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised.
- This means that the point does not depend on whether the ... officer himself thought at that time that they were reasonable. The question is whether a reasonable man would be of that opinion, having regard to the information which was in the mind of the arresting officer ...⁸⁸
- 5.148 According to this reasoning, reasonable grounds can only be determined by *objectively* judging the reasonableness of the facts *subjectively* identified and assessed by the police officer prior to conducting a search in light of all of the circumstances in play at the time. In combination with the elements of the search power under examination, which are discussed later, this is not an insignificant test to pass before a search should be commenced.
- 5.149 Basically, an officer should not only be able to articulate the grounds he or she had for conducting a search, but should be confident that these grounds would be considered reasonable by someone else examining the situation objectively.
- 5.150 The NSW case related to the refusal of a driver and a passenger to submit to a search in circumstances where the main basis for police stopping them was ‘intelligence’ via police

⁸⁵ The *Policing Issues and Practice Journal*, published by the Police Service’s Centre for Curriculum and Continuing Education, aims to further the education of police on subjects related to their work, and is a significant component of the ongoing on-the-job training provided by the Police Service.

⁸⁶ Smart J. in *Streat v Bauer: Streat v Blanco* NSWSC, Common Law Division (Unreported), 16 March 1998.

⁸⁷ *O’Hara v Chief Constable of the Royal Ulster Constabulary* [1997] 2 WLR 1.

⁸⁸ Lord Hope in *O’Hara v Chief Constable of the Royal Ulster Constabulary* [1997] 2 WLR 1, cited by Smart J. in *Streat v Bauer*, p. 10–11.

radio that the car they were driving ‘was a suspect vehicle that may be used for break and enter offences and that it was not reported stolen’.⁸⁹ The court criticised the ‘nebulous nature’ of this intelligence, as police conducting the search had no details of why the vehicle was a ‘suspect vehicle’ or the way in which it was suspect. Nor could police infer that resisting a search and refusing to give names and addresses was suspicious. It found that the driver’s and passenger’s ‘robust insistence’ on their rights may be ‘bold and irritating’, but this ‘must be distinguished from conduct which might be characterised as suspicious.’⁹⁰

5.151 The Association noted that decisions of the courts offer little in the way of definitive guidance for officers, and that as a result ‘police can never be certain that their suspicions at the time of the incident were in fact sufficient and therefore the actions lawful. It is impossible to say what will constitute suspicion based upon reasonable grounds ... On each occasion the court will ultimately decide.’⁹¹

5.152 The April 1999 edition of the *Policing Issues and Practice Journal* examined the topic of ‘Police Discretion — Searching Persons’.⁹² It commenced addressing the question of what is needed to establish ‘reasonable suspicion’ by stating that:

It is extremely difficult to explain what is meant by the term ‘reasonable suspicion’ beyond that the suspicion must be reasonable in all the circumstances of the particular case.⁹³

5.153 The article noted that police officers should be prepared to explain the basis of their suspicion, and suggested a number of points that might form the basis of such an explanation, including:

- observations;
- details of any conversation with the person under suspicion;
- aspects of the person’s behaviour;
- knowledge of the person, including a check of the various police databases; and
- other officers’ knowledge of the person.⁹⁴

5.154 In a similar vein, the Police Service and our Office were said to have ‘expressed the view that it is unreasonable for police officers to stop, detain and search pedestrians ... merely because of their presence in the vicinity of an offence.’

5.155 The Journal article also advised officers not to search people just as a matter of routine⁹⁵, and not to use special legislative search powers opportunistically (‘don’t use your power to search for knives to carry out a search when your suspicion relates to drugs.’⁹⁶)

⁸⁹ Smart J, in *Streat v Bauer: Streat v Blanco* NSWSC, Common Law Division (Unreported), 16 March 1998, p. 12.

⁹⁰ Smart J, *ibid.*, p. 13.

⁹¹ K. Mannita, ‘More Power or Not: Review of the Crimes Legislation Act’ in *Police News*. November 1998. pp. 23–5.

⁹² M. Enders & B. McMahon (1999) ‘Police Discretion — Searching Persons’ in *Policing Issues and Practice Journal*. Vol 7, No. 2. April 1999, pp. 43–8.

⁹³ *Ibid.* p. 44.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.* p. 45.

Police practice

- 5.156 An examination was made of the COPS entries for searches in the five local area commands being studied to determine the reasons nominated by officers for conducting searches. Relying on COPS records for determining the grounds on which an officer based a search of a person is problematic. Such records are based on notes made by officers in a notebook, or on recollection, and as such represent a summary of the material held by an officer that would be drawn on, if necessary, for any proceedings arising from the matters.
- 5.157 Earlier in the report, we noted the difficulties that officers have with entering information into COPS. Often, only the most cursory record may be made of a particular matter, particularly where a search was unproductive. However, the examination made of the COPS records has resulted in the identification of a number of useful and suitable records for the purpose of this discussion.
- 5.158 The records reviewed relate to searches conducted over the month of June 1999. Based on all the reasons given, we developed broad categories of reasons, and sorted the records accordingly. These categories are described in further detail below.
- 5.159 Where a number of reasons have been given for any one search, each reason has been counted, so the total number of reasons will exceed the total number of searches:

Table 5.3A: Audit of reasons stated in COPS search narratives

	Lake Illawarra	Wollongong	Orana	City Central	Bankstown
Number of searches:					
Unproductive searches	84	231	9	42	19
Productive searches	6	12	2	7	20
Reasons given:					
Knife/implement observed	1	8	0	2	1
Other offence suspected/detected	18	49	1	7	16
Complaint/ info from public	9	25	2	4	4
Arrest/report to police	9	12	0	0	0
Intelligence	6	99	1	7	0
Observed behaviour	12	68	6	18	13
Present in location with high incidence of violent crime	0	12	0	7	0
In location with a high incidence of non-violent crime	0	34	1	0	0
Time of day	0	4	0	0	0
Clothing	2	40	0	0	0
Consent	7	13	0	14	2
Admissions	2	4	0	5	0
No reason documented	24	8	0	1	12

Source: COPS narratives of Police and Public Safety Act searches in selected local commands 1.6.99 to 30.6.99.

5.160 The reasons nominated by police in their COPS records have been categorised as follows:

Knife/implement observed: This occurs where a knife or some other object has been observed by police. It usually occurred when a car was pulled over.

Whilst waiting for the ambulance the defendant wanted to locate his alleged \$50.00 from with the vehicle. He was then allowed to lean into the vehicle. Detectives then observed the defendant push his right hand down in the vicinity of the right side of his waist and whilst the defendant was leaning in the vehicle police observed him take hold of a small silver knife. The knife was removed from his possession. Shortly after two crews of Ambulance officers arrived. He was then offered a shot of nardanne by the ambulance officers which he declined. A search of the defendant located a small cap of white substance on the inside of his trousers. [Excerpt from COPS record].⁹⁷

Other offence suspected/observed/detected: In a number of instances, where a person has been observed or detected committing some other offence, police have taken the opportunity to search the person.

Whilst at Wollongong [Railway Station] the POI⁹⁸ was overheard talking to others on the opposite platform. He said 'come over here and I'll sell you a half'. When spoken to on the train, he was asked to produce the contents of his pockets. When informed of the reasons, the POI became very aggressive toward police. He stated he had merely been offering the people 'half a cigarette'. The POI was not in possession of drugs or sharp implements.

5.161 In a number of instances, it is difficult to make a connection between the other offence observed or detected and reasonable grounds for suspecting that a person is carrying a knife or other dangerous implement. For example, of the searches for knives during June that we examined in the Wollongong LAC, 14 searches (6%) were as a result of people being stopped on a train or at a railway station for fare evasion or other transit offences. Some of these searches were based on a number of other factors as well, but some of the searches were apparently conducted on this basis alone:

On 19.6.99 at 12.35 am Police were patrolling the south bound train to Bellambi. Police located the POI on a train. The POI did not have a valid ticket to travel on the train. The POI was searched for knives and other objects. No knives were found upon the POI.

On the 25.6.99 at 11.35 am the POI was spoken to on a north bound train from Dapto to Wollongong. The POI did not have a valid train ticket to travel on the train. He stated he had money to buy a ticket but did not bother. He was asked if he carried any knives and stated no. The POI was then searched in relation to knives. No knives or similar items found.

⁹⁷ In this discussion, any COPS record referred to is reproduced in its entirety, unless otherwise indicated. Excerpts will only be made where a record is particularly lengthy, and the remainder of that record deals with other unrelated matters. Names of police officers and persons of interest have been deleted, as well as any other material that might identify particular officers or particular places of business. As COPS records are often prepared in some haste, typographical and other similar errors occur frequently. For ease of reading, these errors have been corrected where it does not affect the meaning of the records (for example, 'teh 4th of June' will be corrected to read 'the 4th of June'). It is not possible to correct some of these errors, so they have been left unamended. Again, for ease of reading it has been decided not to indicate the literal transcription of these errors with [*sic*].

⁹⁸ Person of Interest.

Complaint/ information from public: Where a member of the public has made a complaint to police or passed on information regarding a possible offence.

About 12.30 pm, Wednesday 23.6.99, police spoke to both POI's at Unanderra railway station after they were seen acting suspicious outside the [financial institution], Unanderra. They were searched in relation to knives after police received information one of the POI had something, possibly a knife, under his jacket. Nil property located.

Arrest/Report to police: Where a person has been arrested for another offence, or is reporting to police as part of bail conditions.

The POI was presented at Warilla Police Station about 1.10 pm 15.06.99 for a custody matter. He was then searched for knife/weapons with a negative result.

Intelligence: Where the person is known to individual officers, or information held on the police database about the person is obtained over the radio. For the purposes of this discussion, intelligence includes information about a particular person known by individual officers, as well as information held on police databases. Intelligence is often cited as the basis for conducting a search. In many cases, the person is known to individual officers or information is held in relation to them on COPS. The use of such intelligence featured as the basis of their grounds in a significant number of searches we examined. For instance, intelligence was an element in nearly 41% of the searches we examined in the Wollongong LAC during June 1999.

- 5.162 The use of intelligence can be appropriate in determining when to conduct a search, particularly when associated with other elements, such as suspicious behaviour:

About 3.00 pm Tuesday 8 June, 1999, the 2 POI's were seen to run east across Kembla St and jump a wall into the [retirement complex]. The 2 POIs were stopped and details obtained. A CNI check revealed [name] had warnings re carry knife. Both POI's were then searched with nil found. Both POI's wearing dark baggy track pants, dark shirts with KISS wearing a black beanie.

- 5.163 However, there may be risks when it forms the sole basis for a search:

The POI was seen walking east in Crown Street, Wollongong. Known to carrying implements. Stopped and spoken to. Search conducted. Nil find.

- 5.164 Police data must be used intelligently to be of value as 'intelligence'. Police in the field must be given an indication of the quality of any information they rely on. Acting on poor, nebulous or dated information can infringe the rights of persons searched and undermine confidence in the fairness and integrity of police.

- 5.165 The importance of intelligence to police officers in determining whether to search was reinforced by comments made during the focus groups. One officer said that 'sometimes we probably have noted up that we've taken a knife off him before — he'd be a prime target and be searched every time'.⁹⁹

- 5.166 A police officer acknowledged that particular individuals would be targeted, stating that: 'I think the Commissioner called it lawful harassment and straight out now that's what we do.'¹⁰⁰ This might be legitimate if the intelligence relied on is sound. Where information is found wanting, there may be no lawful basis for to search.

⁹⁹ Focus Group 2.

¹⁰⁰ Focus Group 2.

Observed behaviour: Where police observe particular behaviour that gives cause for concern.

On the 9.6.99 at 2.40 pm Police came across the POI in the car park of [a shopping centre]. The POI was standing outside a white coloured Holden Commodore acting suspiciously. He supplied police with his details and stated he was waiting for his mate to return. The POI was thoroughly searched for knives. No knives were found. The vehicle was thoroughly searched and a police scanner was located under the front seat. The POI stated that the car was not his and he had borrowed the car from a friend.

About 11.05 pm on 13/6/99 both POIs were seen walking through [a convenience store/service station]. Both stopped and spoken to, and told that they were both out for a walk. Both smelt of intoxicating liquor, their demeanour appeared to be of the hoodlum element, both searched and told to move on.

Presence in a location with a high incidence of violent crime: Where police have identified the area in which the person was present as a location well known for violent crime, usually assaults. This factor is referred to specifically in the legislation, and is discussed in further detail later in this section.

The Wollongong CBD area Police observed a number of youths in the [a park] area. At the time the area is not lit with any lights and POI were wearing dark clothing. The area is known for high crime relating to drugs, assaults and steal from motor vehicles. Police approached the POI and conducted a search of such persons. Nil items found.

- 5.167 While this factor is supposed to be only an element of the grounds for reasonably suspecting that a person is carrying a knife, on occasions, the COPS records indicate that it was often the major or only element taken into account:

At 11.25 pm on Friday the 4th June, the POI was stopped and spoken to in [a street], Wollongong. A knife search was carried out with negative result. The area in which the POI was is known area through information reports that serious assaults have taken place.

- 5.168 Our observational research indicated that police used this reasoning as an explanation to people being searched. In a number of instances, police advised people that it was an area with a high number of robberies and/or assaults, and that this was the reason they were being searched.¹⁰¹

Presence in a location with a high incidence of non-violent crime: Where police have identified the area in which the person was present as a location well known for non-violent crime, usually motor vehicle break in and thefts.

At 12.25 am on Saturday 26-6-1999, the child was with 3 other males on the eastern platform of Woonona Railway Station. When Police approached them they began to leave the area. They were spoken to, said that they were waiting for a friend who should be on the next train. The railway station has been targeted by vandals over the last few months i.e. graffiti and malicious damage. The child was advised that a knife search would be carried out upon and he had no objection to it. After speaking with the male he left the area with his friends. They did not wait for the next train to arrive.

¹⁰¹ For example, Observation Record No. 1, 4, and 73.

Time of day: Usually cited in conjunction with other reasons, where behaviour or presence in a particular location at a particular time, usually late at night or early morning, gives rise to police suspicion.

About 4.10 am on Friday the 18/06/99 both POI's were stopped and spoken to near the [a store], Auburn Street, Wollongong. Both indicated they were going for a walk as they could not sleep. Due to the early hours of the morning and as a result of numerous Break and Enters occurring throughout the area a subsequent knife/implement search was conducted, with a negative find.

Clothing/accessories: Where a search is conducted on the basis of the clothing worn or accessories carried by the person being searched.

About 12.25 am 14/6/99, the above persons were seen walking in a northerly direction on Flinders Street Wollongong. At the time the POI was wearing a balaclava. Both were stopped and spoken with the POI stating he was wearing the balaclava as a beanie as he was cold. Both were searched by consent and the POI warned re the balaclava.

Both POI's were search with nil find. POI 2 is well known to police is known for carrying a knife. POI 1 was with POI 2 at the time of search and was wearing a large overcoat.

Location – outside [a hotel] POI about 8 am on 29.06.99 the POI was searched with nil find. At the time of search, the POI was in the possession of a large handbag.

Using particular clothing as the basis of searches was also referred to in the focus groups:

The stereotypes comes in because the kids see wearing what they wear is trendy. Like what our persons who we arrest are actually wearing, some of the good kids are wearing the same shit as well. And you try explain to them well, you wear the gear, we can't differentiate so to speak. There are certain styles they will wear. Baggy pants etcetera. You know, the idea of wearing all the baggy gear is so they can go out and start stealing, you know, shoplifting etcetera so it goes down the front of the pants etcetera. That becomes a trend. So that these other kids so they can become accepted, they have to conform and they have to wear the same shit.¹⁰²

Consent: Where the person agrees to be searched by police.

On Monday the 21st of June, 1999, about 7.35 pm the POI was spoken to outside the [shops] regarding bicycle offences. The POI was asked if he had any objections to a knife search being conducted on him which he didn't. A search was then conducted on the POI and nothing untoward was located.

Trouble with police before. Both POI's were asked if they minded being search and supply details to police and they both agreed. A search was conducted with nil result.

- 5.169 Our observations of policing practice during Operation CitySafe found that police should — and generally do — seek the cooperation of individuals they intend to search. In circumstances where there are proper grounds for a search, seeking the cooperation of individuals is good practice. However, in circumstances where there is no lawful and justifiable basis for conducting a search, police should not be making their 'request' in the first place.

¹⁰² Focus Group 3.

5.170 Any police officer who relies solely on consent to conduct a search rather than clearly basing it on the requirements laid out by the law leaves that officer open to suggestions that the search was unjustified. Even when a search is well-founded, a person's consent should not be used as an excuse to ignore or override the procedural protections laid out in the legislation and the code of practice. It is incumbent on police officers to ensure they are exercising such powers responsibly. Officers' decisions on whether there are sufficient grounds to search should not depend on whether or not that person minds being searched.

Admissions: Where the person talking to police offered up the fact that they are carrying a knife, or admitted some other offence.

Well known to police. About 5.05 pm on Saturday the 5th of June 1999, police were approached by a staff from [a bus terminal] located on Eddy Avenue, Sydney, in relation to a male person sleeping outside their doorway ... A small knife was found to be on the POI's neck chain and when questioned in relation to any other knives the POI produced a yellow handled double bladed knife with a 5cm and 3.5cm blade. POI was taken back to the City East Transit Police Station where a further search was conducted. Police located another knife with a silver handle and 5cm blade.¹⁰³

No reasons documented: Reasons were not documented in 45 searches we examined. While this may be attributable to a variety of factors, such as truncated record keeping, it may be of concern in some instances, particularly where it reflects the absence of any legitimate reason for conducting a search. For example, seven searches conducted at the one time recorded in the Bankstown LAC were recorded as follows:

At listed time¹⁰⁴ police attended [an amusement centre] Chester Hill Road, Chester Hill. All the POIs were present at the time and playing video games. All POIs were searched for knives and other weapons. Nil found.

5.171 In two searches we observed in an amusement centre in the City of Sydney, the reasons given by the officer concerned were 'we just want to know who is hanging around here',¹⁰⁵ and 'we like to know who is hanging around here — we've not seen you here before.'¹⁰⁶

5.172 This style of policing was referred to by one officer in a focus group who stated:

a lot of people, we are just getting in their face and turning them over ... we are doing it for no reason than they are loitering in the area ... they could be sitting down waiting for a friend — but we just say, have you got some ID on you, we do a search and everything and I guess we're not entitled to do it unless, as the Act states, that we are suspicious that they might have a knife.¹⁰⁷

5.173 The Shopfront Legal Centre submitted that 'the search power is too broad and needs to be limited and better defined. Ideally more guidance or limitations should be placed on the grounds for 'reasonable suspicion'.¹⁰⁸

¹⁰³ This narrative constitutes an excerpt from the whole record.

¹⁰⁴ Our copy of the record does not state the listed time.

¹⁰⁵ Observation 13.

¹⁰⁶ Observation 14.

¹⁰⁷ Focus Group 3.

¹⁰⁸ Submission, Shopfront Legal Centre to NSW Ombudsman, dated July 7, 1999.

- 5.174 Here it may be useful to make the distinction between the breadth of the power and the extent of its application. The search power essentially has two elements: firstly, reasonable suspicion, and secondly, suspicion that the person is carrying a knife or dangerous implement. In combination with the legal approach to justifying the reasonableness of the grounds, this is not an insignificant hurdle to jump before being able to legally conduct a search. An officer has to suspect that a person is in custody of a knife or other dangerous implement, and that suspicion has to be based on objectively reasonable grounds.
- 5.175 It is difficult to discern from a significant number of the COPS records that police had any grounds for suspecting that the person was *carrying a knife or other dangerous implement*. Often these records show that police had reasonable grounds for suspecting that the person was 'up to no good', as it were, but there is insufficient evidence in the records that would justify forming a suspicion that the person may be carrying a knife or other dangerous implement.
- 5.176 As much was acknowledged in the focus groups. One officer said that searches were conducted under powers other than s. 28A, because 'basically you have to have a reasonable suspicion that they've actually got a knife on them ... except in a few circumstances, that wouldn't be the case.'¹⁰⁹ On being asked why searches were carried out, the officer replied:
- It's just generally being an idiot, being a dickhead, you search them, and if you find a knife, well and good ... but there's a lot of searches going on — but you look for a lot of things, not just knives.¹¹⁰
- 5.177 NSW Young Lawyers submitted that 'the current discretion to search is open to abuse as there is insufficient definition of the term 'reasonable grounds'.¹¹¹ The UTS Community Law and Legal Research Centre echoed this view, saying that the test of 'reasonable suspicion' was 'fraught with problems as police commonly form suspicion for a search unreasonably on the basis of race and age'.¹¹²
- 5.178 It is important for police to understand that to legally conduct a search under the Police and Public Safety Act, they must suspect (on reasonable grounds) that the person is carrying a knife or other dangerous implement; not merely that a person is known to have committed similar offences in the past or that the police decision to stop and search is 'just a routine check'.¹¹³ To legally conduct a search the officer must suspect that at the time and place of the encounter with a particular person, that person has a knife or other dangerous implement in their custody. If Parliament believes the power should be applied more broadly, then it should consider what kind of behaviour that might warrant a search.

¹⁰⁹ Focus Group 3.

¹¹⁰ Focus Group 3.

¹¹¹ Submission, NSW Young Lawyers (Criminal Law Committee).

¹¹² Submission, University of Technology Sydney Community Law Centre.

¹¹³ *R v Armstrong* (1989) 53 SASR 25, p. 27.

- 5.179 On the other hand, it would be unhelpful and, in all likelihood, impossible to clearly articulate what should inform the basis of reasonable suspicion. This responsibility, in the end, lies with individual officers, who are required to address all the circumstances of a particular situation. No assistance would be offered by establishing rules which dictated the specific circumstances in which a search could be conducted.
- 5.180 Of greater merit is the suggestion that police be provided with advice as to what does *not* constitute reasonable grounds for suspicion. This is the approach of the *Police and Criminal Evidence Act 1984* in the United Kingdom which addresses the question of 'reasonable suspicion' by nominating the sorts of considerations that *cannot* form the basis of reasonable suspicion. The '*Code of Practice for the Exercise by Police Officers of Statutory powers of Stop and Search*' sets out the following:
- Reasonable suspicion can never be supported on the basis of personal factors alone. For example, a person's colour, age, hair style or manner of dress, or the fact that he is known to have a previous conviction for possession of an unlawful article, cannot be used alone or in combination with each other as the sole basis on which to search that person. Nor may it be founded on the basis of stereotyped images of certain persons or groups as more likely to be committing offences.¹¹⁴
- 5.181 In light of the practice of the search powers, consideration should be given to the merits of developing a similar provision in NSW. Such a provision may well be of assistance in ensuring the validity of searches and protecting people from unjustified and unwarranted searches. If the recommendation to codify the search powers into a single instrument is implemented, advice on what does not constitute reasonable grounds for forming a suspicion should form part of the code.
- 5.182 Legislative or regulatory provisions setting out what can *not* form the basis of reasonable suspicion, should be complemented by the Police Service providing instruction setting out case examples of what might constitute reasonable grounds.
- 5.183 Without more detailed guidance, both in legislation and training materials, the evidence indicates that police will continue to conduct searches that may be ruled illegal if tested before a court of law.

Recommendations

6. That, in addition to requiring the search to be based on reasonable suspicion, the code of practice set out those factors (such as age, racial appearance, manner of dress and antecedents) that can not form the basis of a search in the absence of other factors.
7. That the Police Service complement the code of practice with instructional materials setting out case examples regarding what might constitute reasonable grounds to search.
8. That any changes to police powers be adequately communicated to both the community and police officers, and that the powers and procedures to be used are supported by ongoing training and supervision for police.

¹¹⁴ Article 1.7 of '*A Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search*', pursuant to the *Police and Criminal Evidence Act 1984* (UK).

Location with a high incidence of violent crime

5.184 The recent focus on the locational aspects of crime and disorder can be traced back to the release in 1997 of a Bureau of Crime Statistics and Research report.¹¹⁵ As a result of the analysis of assault and robbery incidents recorded in the Sydney Police District between July 1995 and June 1996, and a victim survey conducted between March 1996 and January 1997, this report concluded that ‘the distribution of assault and robbery incidents in Sydney was not random’.

5.185 It identified five locations as ‘major Hot Spot Zones’:

- Darlinghurst Road, Kings Cross;
- Oxford Street, Darlinghurst;
- George Street, CBD (particularly outside Town Hall Railway Station and the George Street cinema complex);
- George Street, Wynyard/The Rocks; and
- Redfern Station.

5.186 On releasing the report, the Director of the Bureau, Dr Don Weatherburn, said that:

identifying and tracking the ‘hot spots’ and ‘hot times’ for crime would allow police to mobilize both their own and the community’s resources more effectively in fighting crime.¹¹⁶

5.187 Following the fatal stabbing of Constable Forsyth in February 1998, the media gave considerable coverage to crime, particularly violent crime, in the City of Sydney. After one weekend in March 1998, the media reported the stabbing of a young man in the entertainment precinct of George Street,¹¹⁷ and noted that robberies and assaults had occurred at the intersection of George and Bathurst Street, Town Hall station, Pymont Bridge, and Pymont.¹¹⁸

5.188 When the Premier announced the new search provisions on 31 March 1998, in reply to a question without notice, he said that the legislation would provide that:

Being in a known knife crime hot spot may *itself* constitute reasonable suspicion.¹¹⁹

5.189 When the legislation was introduced in the following month, such presence was no longer sufficient to form reasonable grounds but rather could only be taken as a factor in determining whether there were reasonable grounds to conduct a search:

For the purposes of this section, the fact that a person is present in a location with a high incidence of violent crime may be taken into account in determining whether there are reasonable grounds to suspect that the person has a dangerous implement in his or her custody.¹²⁰

¹¹⁵ R Jochelson (1997), *Crime and Place: An Analysis of Assaults and Robberies in Inner Sydney*, Bureau of Crime Statistics and Research, Sydney.

¹¹⁶ Media Release ‘Assaults and Robberies in Inner Sydney’ by Bureau of Crime Statistics and Research on release of *Crime and Place*, 27 November 1997.

¹¹⁷ This area is the segment of George Street between Bathurst Street and Liverpool Street.

¹¹⁸ Coverage in the Sydney Morning Herald and The Daily Telegraph, 10 March 1998.

¹¹⁹ The Hon. R Carr, NSWPD, 31 March 1998, p. 3440. Emphasis added.

¹²⁰ *Summary Offences Act* s. 28A (3).

5.190 The Government noted that this provision:

specifically provides that the fact that a person is in an area with a high incidence of violent crime may be taken into account by police when deciding whether to search a person. This will ensure police are able to conduct searches for knives and other dangerous implements in crime hot spots.¹²¹

5.191 During the Parliamentary debate on the Police and Public Safety Bill, considerable attention was given to this issue. One member quoted a submission from the Law Society of New South Wales:

...mere presence in a location with a high incidence of violent crime (for example, the movie theatre precinct of George Street, Hyde Park or Kings Cross), which is also heavily frequented by law abiding citizens and tourists should not be a sufficient ground to initiate a 'stop and search'. It will exacerbate the current complaint that young people pursuing normal social activities are constantly under police surveillance, increase the alienation from mainstream community and lead to further erosion of confidence in the Police Service.¹²²

5.192 The Council for Civil Liberties stated its concerns in a letter to the Premier dated 4 May 1998, saying that the Police and Public Safety Bill:

... seeks to maintain the established 'reasonable suspicion' principle, but then subverts it by suggesting that a person's mere presence in a particular location ... may help create a 'reasonable suspicion' that a person is carrying a weapon. This is clearly an abuse of the notion of 'reasonable suspicion'.¹²³

5.193 In replying to the various amendments, aimed at either restricting or defining the application of the provision,¹²⁴ the Attorney General said:

The Government takes the view that the bill has struck the appropriate balance. It will enable a police officer to lawfully consider the location — as to whether it is a high crime area — as a factor in determining whether he or she has a reasonable suspicion in relation to the search. The Government does not accept the amendments. The bill is satisfactory in its current form.¹²⁵

5.194 NSW Young Lawyers stated that it was:

offensive that a person's right not to be subjected to arbitrary search is undermined by the location in which they encounter a police officer. The mere fact that a person finds oneself in a location in which there has historically been a high incidence of violent crime, is not a fact that is related to the criminality of the individual. It is a factor which should not be taken into account to arbitrarily validate what would otherwise be an illegal search founded on no or little suspicion.¹²⁶

¹²¹ Second Reading Speeches of The Hon. P Whelan, NSWPD, 28 April 1998, p. 3969 and The Hon. J Shaw, NSWPD, 5 May 1998, p. 4276.

¹²² Letter quoted by The Hon. R Jones, NSWPD, 6 May 1998, p 4413.

¹²³ Letter quoted in Submission, Council for Civil Liberties to NSW Ombudsman, 12 June 1999.

¹²⁴ See amendments by The Hon. J Tingle NSWPD, 20 May 1998, pp. 4824-5; The Hon. A Corbett NSWPD, 20 May 1998, pp. 4831-2; The Hon. I Cohen, NSWPD, 20 May 1998, pp 4832-3.

¹²⁵ The Hon. J Shaw, NSWPD, 20 May 1998, p. 4833.

¹²⁶ Submission, NSW Young Lawyers (Criminal Law Committee).

5.195 In relation to the hot spot provision, the Police Association submitted that:

the legislation does not provide any guidelines as to what constitutes this type of area and because of this, police are required to determine such locations. Members raised questions such as ‘what types of violent crime need be carried out there?’ ‘Does the violent crime have to relate to knives?’

Uncertainty of this nature may result in police determining a location to fall within this category, however the courts or another police officer may not. Even though the officer acted with all good intention, oversighting bodies and investigators may view the actions as being contrary to the legislation.¹²⁷

5.196 Police officers expressed confusion about the definition of violent crime:

To some people a minor assault is a violent crime, a murder obviously ... but there’s no definition of violent crime ...¹²⁸

If it was me as a person going to court for it, I’d be arguing, well OK it might be an area with a high incidence of violent crime but how much of it involves knives? ... When the blokes get involved in a fight does that therefore give me a right to search for a knife? When two blokes go for fisticuffs every now and again?¹²⁹

A very high area for assaults and robs, is that an area of violent crime? How many makes it an area of violent crime?¹³⁰

We have specific areas where we target where we have trouble, commonly known as our hot spots.¹³¹

But you still have to specifically have a belief that they have a knife. Now, they’re sitting there. They’re a shitbag in a high crime area. They can’t give you reasonable cause to suspect they have a knife, so basically it’s a useless power in that regard.¹³²

When you target someone, why are you targeting someone in a high crime area? Because he’s a shit bag? Because he’s Asian? ... if you have 3 or 4 Asians sticking together, what’s the possibilities? OK, they could be part of a gang, or they could just be four blokes from the North Shore come down to have a couple of games in Timezone. All of a sudden you’re turning them over saying they’re Asians, they’re in a high crime area. We’re searching you for knives.¹³³

5.197 In the records of searches we examined, hot spots were specifically cited in only a relatively small number of searches: 19 of the 432 search records reviewed noted that presence in a location with a high incidence of violent crime was used as a factor, while 35 records noted that presence in a location with a high incidence of non-violent crime was a factor. It is not possible to make too much of these figures: generally, police will give special attention to areas regarded as having a high incidence of crime, and may not necessarily note this aspect when writing up a record of the event. Similarly, particular

¹²⁷ Police Association of NSW ‘Response to the NSW Ombudsman: ‘Policing Public Safety’: Discussion Paper’ July 1999. p. 2.

¹²⁸ Focus Group 2.

¹²⁹ Focus Group 2.

¹³⁰ Focus Group 2.

¹³¹ Focus Group 3.

¹³² Focus Group 3.

¹³³ Focus Group 3.

areas may be well known to police as crime hot spots, and this feature of an area may not be referred to in police records because this knowledge is understood to be generally known amongst police.

5.198 It is interesting to note, however, that nearly twice as many searches were justified on the basis of presence in a location with a high incidence of *non-violent* crime, which is not a factor mentioned in the legislation, as were justified on the basis of presence in a location with a high incidence of *violent* crime. While it may be appropriate for either factor to be taken into account in reaching a reasonable suspicion that a person is carrying a knife or dangerous implement, there is a risk that these factors may be given greater credence than they merit.

5.199 There is uncertainty about the extent to which the ‘hot spots’ provision can be relied upon to form the basis of the search. Some have interpreted it to mean that it may be the only grounds for a search: that a person’s presence in such a location is *of itself* sufficient to justify a search under s. 28A. Some of the records that we looked at indicated that people were being searched solely because of their presence in a particular area. The fact is that the Act does not permit this, but it is possible that such use is encouraged by singling out the hot spot element in legislative form.

5.200 The hot spots provisions applies only to the search power created by the Police and Public Safety Act, but there is evidence of the use of hot spots as the justification for the use of the ‘reasonable directions’ power.¹³⁴ While it is discussed in further detail in Chapter 10, for now it should be noted that the ‘reasonable directions’ power is able to be used only when an individual’s presence or behaviour is intimidating, obstructing, harassing, or causing fear. There is no capacity to use the power to move someone on from a particular location because of the overall level of criminal activity in that area, nor is it permitted to use the power to assist in the prevention of an offence.

5.201 Again, we looked at the use of the ‘reasonable direction’ power in five local area commands for the month of June:

Table 5.3B: ‘Reasonable directions’ in selected LACs

	Lake Illawarra	Wollongong	Orana	City Central	Bankstown
Total directions obeyed	2	77	27	89	18
Total directions refused	4	6	1	3	2
Total directions based on presence in a particular location	0	15	2	16	0

Source: COPS narratives of Police and Public Safety Act searches in selected local commands 1.6.99 to 30.6.99.

5.202 Other concerns were expressed that ‘area with a high incidence of violent crime’ was being interpreted broadly. One submission stated that police were using the location grounds to justify searches ‘in areas as innocuous as Springwood, Riverstone and Richmond’.¹³⁵

¹³⁴ See Chapter 10.

¹³⁵ Submission, Blue Mountains Community Legal Centre.

- 5.203 From the evidence considered in the course of this review there is confusion as to:
- the extent to which the hot spots provision can be relied upon;
 - what determines and defines a location with a high incidence of violent crime; and
 - the powers in the Police and Public Safety Act that can rely on it as an element.
- 5.204 The value of identifying ‘hot spots’ is to encourage police to use local crime data and focus their resources on areas where crime is taking place. However, the inclusion of the hot spots provision as a ground for determining whether there are reasonable grounds to suspect that a person is carrying a knife or dangerous implement is problematic in at least two aspects.
- 5.205 Firstly, the locations with a high incidence of violent crime are often places frequented by large numbers of law abiding citizens — that is partly what makes them attractive to people with criminal intent. The five top hot spots identified by the Bureau of Crime Statistics and Research in 1997¹³⁶ are all places which attract significant numbers of people conducting lawful business or pursuits. The mere presence of such people in these areas does not justify their being searched. To allow a practice where people are searched purely or largely on the basis of their presence in such a location effectively establishes a random or arbitrary search power.
- 5.206 Secondly, the ‘hot spots’ provision may help determine where police should be deployed, but it provides little practical assistance in determining who should be searched. Other factors will always need to be taken into account. Essentially, if a person’s demeanour or behaviour or criminal history gives rise to an officer’s suspicion, does it matter that the person is present in a location with a high incidence of violent crime or even a location with a low incidence of violent crime?
- 5.207 The difficulty in interpreting the current provision was neatly established in interviews we conducted at one local area command. The local area commander said that he left it up to individual officers to determine what the provision meant. One constable said that it meant the whole of the town, while another officer said that he would be ‘scratching for a place round here with a high level of violent crime’, while a third officer nominated two specific locations. Such uncertainty about the practical effect of the provision has the potential to impede the proper use of the powers.
- 5.208 If presence in a crime hot spot is to be retained as a factor police may take into account in determining whether there are reasonable grounds to conduct a search, then the provision should be amended to make it clear that this factor can only be used in combination with other factors.
- 5.209 Furthermore, local commanders should be required to analyse their data on violent crime and define the locations in their command where this provision would have effect, and advise officers accordingly. This should eliminate confusion among some officers regarding what constitutes an area with a high incidence of violent crime.

¹³⁶ R Jochelson (1997), *Crime and Place: An Analysis of Assaults and Robberies in Inner Sydney*, Bureau of Crime Statistics and Research, Sydney.

Recommendation

9. If presence in a location with a high incidence of violent crime is to be retained as a factor police may take into account in determining whether to search for knives and other implements:
- section 28A(3) should be amended to make it clear that this factor can only be used in combination with other factors; and
 - based on their analysis of violent crime, local commanders should be required to define and document locations in their command where this provision would have effect, and advise officers accordingly.

Custody of a knife

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6. Custody of a knife

- 6.1 Section 11C of the *Summary Offences Act* establishes the offence of custody of a knife in a public place or school without a reasonable excuse.¹ The Act defines a knife to include a knife blade, a razor blade or any other blade.²
- 6.2 The legislation states that a person has a 'reasonable excuse' when the custody is reasonably necessary in all the circumstances for:
- (i) the lawful pursuit of the person's occupation,
 - (ii) the preparation or consumption of food or drink,
 - (iii) participation in a lawful entertainment, recreation or sport,
 - (iv) the exhibition of knives for retail or other trade purposes,
 - (v) an organised exhibition by knife collectors,
 - (vi) the wearing of an official uniform,
 - (vii) genuine religious purposes.³
- 6.3 A reasonable excuse can also be established if custody was necessary to travel to or from, or incidental to, the activities listed above.⁴ This does not preclude any other reasonable excuse being offered and accepted. Self defence or the defence of another person is not a reasonable excuse for custody of a knife.⁵
- 6.4 The penalty for having custody of a knife in a public place or school is a fine of up to \$550 for a first offence or a fine of up to \$1100 and/or up to 12 months imprisonment if the person has previously been dealt with for a 'knife-related' offence.⁶ The circumstances in which a person is taken to have 'been dealt with' for such an offence include the issue and payment of a notice under s. 29A, and conviction for the offence.⁷ Knife-related offences are not limited to offences under s. 11C but may extend to any other prior offences involving a knife.⁸

¹ *Summary Offences Act*, s. 11C(1).

² *Summary Offences Act*, s. 3 (1).

³ *Summary Offences Act*, s. 11C (2) (a).

⁴ *Summary Offences Act*, s. 11C (2) (b).

⁵ *Summary Offences Act*, s. 11C (3).

⁶ *Summary Offences Act*, s. 11C(1).

⁷ See *Summary Offences Act*, s. 11C (4).

⁸ See *Summary Offences Act*, s. 11C (5).

Detection of knives

6.5 The information we received from the COPS data base classified the objects detected as a result of a search as either knives, sharp implements or other implements. An audit showed there was no meaningful distinction between the classifications 'knife' and 'sharp implement' and revealed that:

- The 'knife' classification consisted mostly of knives, but also included many other objects such as razors and scissors.
- 'Sharp implements' consisted mostly of a mix of knives, scissors and pen knives and a small number of other implements such as syringes which would be unlikely to fit the legislative definition of 'knife'. Otherwise, there was no clear distinction between the 'knife' and 'sharp implement' categories.
- 'Other implements' covered items that were not covered by s. 11C, such as baseball bats and firearms, which police may be entitled to confiscate as a result of other legislative provisions.

6.6 While, the number of recorded searches increased dramatically from 176 in July 1998 to 2997 in June 1999, the number of knives found remained comparatively stable. The number of knives detected each month, as a result of searches under the Police and Public Safety legislation, ranged from 131 in July 1998 (the first month after the introduction of the legislation) to a high of 284 in December 1998. On the other hand, the number of sharp implements found rose throughout the review period. By the end of the 12 month review period a total of 3787 knives and sharp implements had been detected.

Table 6.1: 'Knives' and 'Sharp Implements' detected

	Knives	Sharp Implements	Total
July 1998	131	37	168
August	182	30	212
September	216	57	273
October	220	92	312
November	204	80	284
December	284	99	383
January 1999	271	79	350
February	224	78	302
March	252	119	371
April	206	132	338
May	236	143	379
June	247	168	415
Total	2673	1114	3787

Source: Summary data from the NSW Police Service on the use of the powers from 1.7.98 to 30.6.99

- 6.7 As stated earlier in this report, police have a power to search for and confiscate dangerous implements under s. 28A of the Act. The definition of dangerous implements includes, but is not limited to, knives.⁹ Knives and sharp implements represented 92% (3787) of all implements (4111) found as a result of searches under the Act.
- 6.8 Table 6.2 shows the number of searches performed and *knives* found in each Region of the Police Service for the period 1 July 1998 to 2 June 1999.

Table 6.2: Searches and Knives found by Police Region

	Searches for implement	Knives found
Greater Hume	2688	420
South Eastern	2442	193
Endeavour	2366	189
North Metropolitan	1703	207
Macquarie	1229	245
City East	1221	305
Georges River	1169	245
Western	969	142
Hunter	967	197
Northern	520	203
Southern Rivers	283	84
Total	15584	2430

Source: NSW Police Service, Deputy Commissioner's Office, for period 1.7.98 — 2.6.99

- 6.9 Prior to the introduction of the legislation in July 1998, it was not generally an offence to have custody of a knife in a public place unless the knife was classified as a prohibited weapon¹⁰ or was used in an offence, and/or there was an element of criminal intent on the part of the person carrying the knife¹¹.

Carry cutting weapon

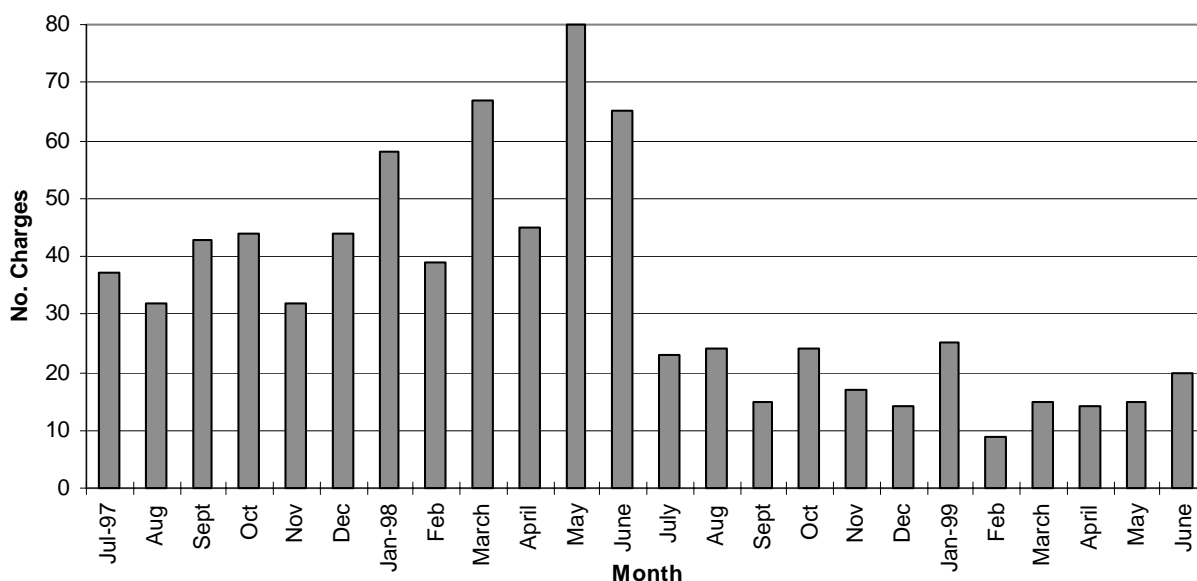
- 6.10 Section 353B of the *Crimes Act* creates an offence, commonly referred to as 'carry cutting weapon', where a person in custody charged with any crime or offence is found with a 'razor, razor blade or other cutting weapon' without lawful purpose. There is now some overlap in what is covered by s. 353B and by the offence created under s. 11C of the *Summary Offences Act*. Interestingly, the number of charges under s. 353B has dropped significantly from 586 in the 1997–98 financial year to 215 in the 1998–99 financial year, as illustrated in Graph 6.1.

⁹ See *Summary Offences Act*, s. 28 definitions.

¹⁰ *Prohibited Weapons Act*, 1989.

¹¹ See also chapter 2 'Background'.

Graph 6.1: Carry cutting weapon offences



Source: Charge management data from NSW Police Service, 1.7.1998 to 30.6.1999

- 6.11 It appears likely that the marked fall in carry cutting weapon charges from July 1998 is attributable to the introduction of the new legislation. That is, a number of offenders who would have previously been charged with ‘carry cutting weapon’ are now being dealt with under the Police and Public Safety legislation.
- 6.12 If this is the case, then at least some of the knife confiscations which occurred as a result of people being brought into police custody and which were recorded under the Police and Public Safety legislation, would still have been detected prior to the introduction of the Act.

Types of knives confiscated

- 6.13 As stated above, the definition of ‘knife’ in the Act encompasses a knife blade, razor blade or any other blade. In practice police are detecting, and in the majority of cases confiscating, a range of items as a result of a search for dangerous implements.
- 6.14 The range of items dealt with under the Act is well illustrated by police descriptions of items in COPS narratives. An audit of narratives from May and June 1999 in the four focus areas¹² found the items listed below recorded as detected after a search.¹³ The words used to describe the items are verbatim from the narratives. (The action taken by police in regard to the implements is not always recorded in COPS narratives and has not been referred to in this exercise.)

¹² Bankstown, City Central, Lake Illawarra and Wollongong, Orana (Dubbo) — see Chapter 3.

¹³ Each dot point represents one event on COPS. Where the exact same wording has been used in more than one event to describe an implement, the number of events in which this description appears is in brackets next to the item. Drug paraphernalia and other items seized have not been included in the list.

- knife (12 records)
- small grey coloured pocket knife
- orange handled knife with silver blade (fishing style) ... Swiss army knives of different styles. Both red with silver blades
- yellow safety knife ..a pair of foldable scissors ... black Swiss Army knife
- pocket knife (2)
- bread knife with a 15 cm blade
- steel centre punch, about 10 cm long with a black biro lid on top ... a leatherman tool
- pocket knife located attached to his key ring
- a set of keys with a folding knife attached
- a small key ring in the shape of a miniature pistol. A 4 cm blade was attached to the pistol that could be retracted back into the pistol
- key ring attached to a pair of Snip N Snip brand scissors
- 'Old Timer' brand pocket knife
- Swiss Army knife
- a blade approximately 6 cm in length
- a black handled Stanley type knife. This knife had a 6 cm locking blade
- 27 cm knife
- a plastic toy gun which had been covered with black tape
- a pair of scissors (3)
- a small silver knife
- a black handled folding knife with a 10 cm blade
- small knife
- a small knife ... on the POI's neck chain .. a yellow handled double bladed knife with a 5 cm and a 3.5 cm blade .. knife with a silver handle and a 5 cm blade ... and a further small knife
- 20 cm butter knife
- 20 cm kitchen knife
- black handled 'Wusthof' brand knife ... the blade of this knife being about 5 cm long
- a bone coloured pocket knife
- 10 cm folded blade knife
- a 20 cm knife
- screw driver
- fold out lock-knife
- 32 cm black handle bladed knife
- a small pair of scissors which was attached to a long key chain containing further items .. included was retractable pocket knife, red in colour, which was 10 cm in length when extended
- small retractable razor blade in black plastic casing which was attached to his key ring
- knife and cork screw implement
- 10 cm bladed pocket knife with a locking mechanism
- 1 x 7 cm blade with black and red handled knife (ornamental print)
- two 26 inch base ball bats
- Stanley knife
- yellow handled flat head screw driver
- Victorinox Swiss Card containing a knife, a pair of scissors, tweezers and pin
- 1 x set of pliers that included a retractable knife blade ... 1 x razor blade with a handle ... 25 cm Lock Knife ... 1 x 25 cm pointed scissors
- a black handled knife with a broken blade ... A second black handle knife (smaller) with a broken blade ..this knife had a pair of scissors and nail file attached
- two pair of scissors (3)
- a black handled knife with a 12 cm silver blade
- pair of silver pointed scissors
- one silver pocket knife approximately 20 cm long
- a large pair of black handled scissors ... a pair of small silver folding scissors ... and a Kubotan (a martial arts weapon about the size and shape of a pen) on the defendants key ring
- a small pair of scissors and another two pairs of small scissors
- a small pair of scissors ... another pair of scissors
- 30 cm dagger with a sheath ... a 63 cm silver chain ... 18 cm knife ... a 63 cm dull silver coloured chain
- a black handled folding knife
- a knife ... a small folding scissors was located attached to his belt on a key ring
- a brown and silver folding pocket knife
- a very small silver bladed folding knife

6.15 While the extracts from COPS narratives above indicates the range of implements being seized, it is useful to compare police descriptions with that used by the owners. The following table lists descriptions used by owners in representations to the Infringement Processing Bureau, alongside descriptions extracted from infringement notices.

CUSTODY OF A KNIFE

Table 6.3: Descriptions of knives – Infringement Processing Bureau

Representation (by member of the public)	Infringement Notice (by police officer)
eating knife, two cooking knives _____	pen knife, small knife, large kitchen knife
key ring pocket knife _____	brass expandable knife with a steel sharpened blade about 2 inches long
utility knife (screwdrivers, can opener, bottle opener, hoof pick ... cork screw, 1 x 6cm & 1 x 3.5cm blade) __	small Swiss army knife
Swiss army pocket knife _____	Swiss army knife
small Swiss army knife _____	Swiss army knife
key ring accessory and only about four cm long _____	(illegible copy)
fishing knife, camping knife _____	silver & black pocket knife, black handled bladed knife
knife _____	folding knife with black handle
little pocket knife _____	knife
scissors _____	scissors .. 1 x PR grey plastic handle
pocket knife _____	brown wooden handled folding knife 8cm handle 8cm blade
a knife and a pair of scissors _____	knife and scissors
knife ... very small ... it was a key ring _____	knife located on key ring
knife with a compass on its end _____	black knife with compass on end (15cm blade) in black leather holder ¹⁴
a small knife on my key ring _____	black plastic car security style cover with push button which releases knife with 4cm blade & 5cm handle
pocket knife _____	knife had a 3in blade with a brass & wooden handle
small knife _____	21 cm knife
pair of scissors _____	pair of yellow scissors
a small knife which is a novelty key chain & the blade is only 1 to 1.5 inches long _____	silver butterfly knife about 5cm long
a pair of pink handled school scissors _____	scissors
knife from camping _____	red Swiss army knife
part of the key ring is a small 3 to 4cm knife _____	knife: blade 2cm, white handle, pen knife
knife _____	brown and gold coloured knife
pocket knife ... being a limited edition Harley Davidson authorised Franklin Mint collectors item _____	knife
small embroidery scissors _____	black handled scissors 10cm in length
Swiss army knife _____	red Swiss Army knife
knife _____	large scissors (blue handle)
knife ... for fishing _____	brown handled knife with three inch blade
bread and butter knife, fishing knife _____	(illegible copy)
black puma knife _____	knife
knife was a combined nail clipper — bottle opener — can piercer and small knife _____	pocket knife
putty knife _____	spatula
key ring nail scissors with nail file & small blade (not measuring more than 0.4cm wide & 3.0cm long)	small silver knife

Source: Infringement Processing Bureau — Representations and Infringement Notices between 1.5.99 and 30.6.99.

¹⁴ This description is from the police recording in the Miscellaneous Property Book.

- 6.16 It has not been within the scope of this review to analyse the type of knives used as weapons in criminal offences. Information of this nature may assist in analysing whether the knives detected are of a similar description to the knives used in crimes, and hence whether their confiscation might be expected to impact on knife-related crime.
- 6.17 The survey we conducted of legal practitioners found that common examples of items confiscated under the legislation were pen knives, fishing knives, scissors, and Swiss army knives. Unusual items mentioned included a ring which had been shaped into a blade and a camping knife, fork and spoon set. A submission from the National Children's and Youth Law Centre expressed concern about the nature of the knives being dealt with under the Act, citing two examples about which their organisation had received complaints, one involving small nail scissors and another involving a \$550 fine for possession of a pocket knife used to 'cut seeds off plants'. The centre commented:
- It seems that there is a tendency for the police to use their discretionary powers to issue the maximum fine in all cases. In order to remedy this situation, there needs to be appropriate guidelines which differentiate between less and more dangerous weapons.
- 6.18 Many of the complaints to this office and representations to the Infringement Processing Bureau expressed concern about the nature of the item, the custody of which constituted a breach of the Act. Commonly, the size of the implement, the type of implement and a lack of awareness that such an implement could not lawfully be carried in a public place or school were raised in correspondence questioning police actions.¹⁵ One man who wrote to the Infringement Processing Bureau after receiving a penalty notice for custody of a 'key ring knife' wrote:
- It wasn't obvious from the billboard advertisements that all kinds of knife are banned as it was showing pictures of dozens of examples of dangerously [*sic*] looking knives.
- 6.19 One boy, aged 15 years when he received a \$550 fine for a pair of scissors in his bag, was interviewed as part of this review. He stated that he knew about the knife laws and that officers had spoken at his school about them. However, he said he did not realise that his school scissors were prohibited. He stated:
- I'm totally for the laws and I'm totally for searching. And I think it should remain ... But I think if you are going to make a law like this ... A huge law. The knife law won't affect as many children ... but scissors I think will affect a greater percentage and I think that they should definitely be notified. I don't know if it's through schools, ... newspapers. ... But I think they definitely should be told. Everyone should know now that scissors are not permitted. They are a description of a knife.
- 6.20 The Police Service conducted an extensive public education campaign prior to and at the commencement of the Police and Public Safety legislation. The campaign featured graphic images of various knives, and in particular used the image of a double bladed dagger. While effective in communicating the existence of the new law, it was perhaps less effective in communicating the extent of its application.

¹⁵ The Infringement Processing Bureau had made a final determination about 23 of the 33 representations we reviewed. In all but one of the 23 finalised matters, the infringement notice was upheld by the Bureau.

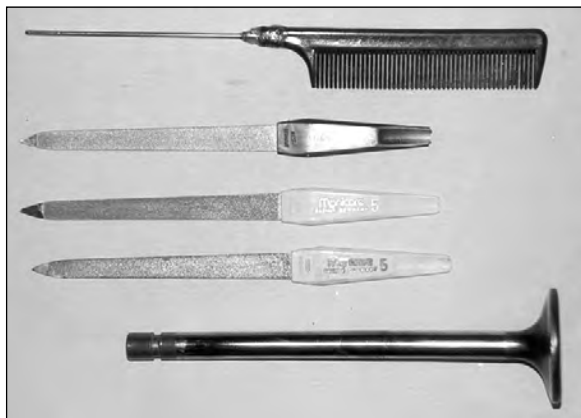
CUSTODY OF A KNIFE

- 6.21 Another person issued with a notice for a 'key ring knife' was surprised to find it was an offence to carry it, and wrote:

I didn't think a key ring like that would be illegal especially since you could just go out to the shop and buy one.

- 6.22 Police in focus groups indicated that they would use their judgement to assess whether to take action in regard to a particular knife or implement. Some officers were satisfied with the need to use judgement while others felt that they would like the legislation to be more specific about what was considered to be a knife. One officer described an incident where he used his discretion not to confiscate a knife:

... he had a pair of little fold out Swiss army type scissors on him that day and I put it upon myself that although it could be used to stab someone it's not an offensive implement. That was my judgement. But the next day he was picked up in [urban location] and charged for those scissors.¹⁶



Implements collected from persons entering the Family Court of Australia's Sydney registry in early 1999.

Nail files

- 6.23 During interviews undertaken as part of this review, comments were made about police confiscating nail files under the Act including one legal practitioner surveyed who reported an incident where a young woman was searched and a nail file confiscated.
- 6.24 An audit of all COPS narratives¹⁷ for the review period found a small number of instances (15) where nail files were recorded as found after a search under the Act. In most (10) of these events, the nail file was found in addition to a knife. In one event, the nail file was found in addition to scissors, and on one occasion in addition to a metal strip. In only two events was the nail file the only item mentioned in the narrative. A number of events related to possible shoplifting, stealing, or break and enter offences.
- 6.25 One officer interviewed commented that common sense would prevail when less serious items were found, such as nail files. He said that whether such items were confiscated would depend on the response of the person.

¹⁶ Focus group 3.

¹⁷ The key words 'nail' and 'file' were used to locate relevant narratives. It is possible that some relevant entries may have been overlooked using this method.

Scissors

6.26 In contrast to nail files, scissors were more commonly mentioned in narratives where a 'productive' knife search was recorded on COPS. Opinion from the Legal Services Branch of the Police Service states:

In my opinion scissors and letter openers are capable of being knives within the meaning of the Act. The Shorter Oxford English Dictionary gives as one of the meanings of 'blade', 'the thin cutting part of an edged tool or weapon'. Most scissors and letter openers would have blades and to my mind could fall within paragraph (c) of the definition. Of course, whether a particular pair of scissors or letter opener was a 'knife' within the definition could only be determined by examining that particular article.¹⁸

6.27 The submission from the NSW Young Lawyers (Criminal Law Committee) recommends that the definition of a 'knife' be clarified with respect to scissors. The Committee submitted that:

A number of people have been charged for being in possession of scissors ... It is argued by police that the legislation extends to scissors on the basis that there are two 'blades'. In contrast defence lawyers argue that scissors are clearly not knives and fall out side the legislation.¹⁹

6.28 A review of all COPS narratives²⁰ for the review period in Bankstown, Eastwood, North Shore and Ku-Ring-Gai local area commands²¹ found 130 events with references to scissors. Of these:

- drug issues were associated in some way with 51 narratives;²²
- in 50 events the scissors were found in a vehicle rather than on a person;²³
- in 22 events a knife was found along with the scissors.

6.29 Several respondents to our survey of legal practitioners also mentioned incidents where their clients were apprehended allegedly carrying scissors to cut up marijuana.

6.30 Some of the telephone inquiries and complaints to this office were in regard to scissors being classified as 'knives' under the legislation. In most of these cases the scissors in question were located in a vehicle. The following are some examples of complaints and inquiries received in relation to scissors:

- Inquiry: The caller alleged that police stopped and searched a young man and his car and fined him for having scissors in the glove box of his car.

¹⁸ IMR Duncan, Inspector, Legal Service, 1 April, 1999.

¹⁹ NSW Young Lawyers (Criminal Law Committee), submission, 12 July 1999.

²⁰ The key word scissor was used to locate relevant narratives. It is possible that some relevant entries may have been overlooked using this method.

²¹ The initial review pertained only to Bankstown LAC. When a large number of events was found to be associated with drugs, the additional three LACs, with a lower incidence of known drug-related activity, were examined to ascertain whether this phenomenon was a localised one only. We found that the data from the other LACs was similar to that in Bankstown.

²² Police may have found drugs (usually marijuana) or drug paraphernalia during the search, and/or the person may have given as the reason for possession of the scissors, 'to cut up marijuana' or similar.

²³ Events where scissors were found on a person after they stepped out of a car were not included among these 50, because they were not technically found in the car.

- Inquiry: A young man at a skate board complex was allegedly searched and asked to give identification. The police found nothing. The young man subsequently offered to let the officers search his car and a small pair of scissors were found in his glovebox. He was issued with an infringement notice for \$550.
- Inquiry: Two young men were issued fines under the legislation for custody of scissors. A pair was found in a pencil case in the car of one man, another in a first aid kit belonging to the second man.
- Complaint: Police allegedly charged a man with possession of plastic scissors.

6.31 Seven of the 33 representations to the Infringement Processing Bureau involved the custody of scissors. According to police comments on the infringement notice, in one case the scissors were located in a car next to a 'bong', and in another instance the scissors had been used to cut up marijuana. Another young man admitted in his letter to the Bureau that he used the scissors to cut up marijuana. One representation referred to a fine for 'small embroidery scissors'. Another representation described key ring nail scissors, with a nail file and 3 cm blade attached.

6.32 During the observational research conducted as part of the review, an incident was observed where two young men were drinking in a park and were approached by police officers. The two men were asked to turn out their pockets and did so. A pair of fold up scissors with a 2 — 3 cm blade was located and the person in custody of the scissors claimed that they were for 'cutting up mull'. The scissors were confiscated and an infringement notice issued. The incident was described by the observer as initially calm and cooperative, however once the young man realised the size (\$550) of the fine he became withdrawn and his friend became verbally aggressive with the police. The two men were then asked by police to 'move on', which they did.

6.33 A wide range of implements are being dealt with under the new legislation. It is unclear whether in its choice of a broad definition of the term 'knife' Parliament intended all such implements to be covered by the legislation. Recommendations are made below which allow for further consideration of the use of regulations or amendments to the legislation, to regulate the law's application to certain types of knives. In any event, it would seem advisable that the range of implements affected by the new laws be better communicated to members of the public.

Recommendation

10. That future public education campaigns in regard to street safety or related issues, address the range of implements considered to be 'knives' under the Police and Public Safety legislation.

Knives located in vehicles

Public place

- 6.34 Custody of a knife in a *public place or school* is an offence under s. 11C of the Act. The *Summary Offences Act* defines a public place as being a place open to the public, or used by the public whether or not for payment of money, whether or not it is ordinarily open to the public and whether or not it is open only to a limited class of persons.²⁴ ‘School’ is also defined in the Act.
- 6.35 One question which arose during the review period was whether a person or implement in a vehicle was considered to be in a public place for the purposes of the Act. The *Summary Offences Act* states: ‘For the purposes of this Act, a person who is in a vehicle in any place shall be taken to be in that place.’²⁵ Accordingly, it would appear that a knife in a vehicle, or on a person in a vehicle, would constitute a knife in a public place for the purposes of the Act.
- 6.36 If that is the case, then because the definition of ‘vehicle’ in the Act includes a caravan, this provision may effectively make an offence of custody of a knife in a caravan (if the caravan is in a public place).²⁶ While we found no instances of this during the review period, clarification of the legal status of knives present in caravans may be prudent. It would seem likely that members of the public would not anticipate that carrying a knife in a caravan could constitute an offence. Clarification of this issue may assist in avoiding future complaints.

Custody

- 6.37 The other issue that was commonly raised in regard to knives found in vehicles, relates to establishing ‘custody’ of the knife. If the knife is not found on the person then it is necessary to establish custody of the knife in order to constitute an offence under s. 11C. For example, it may be difficult to establish custody where a knife is found on the floor of a vehicle and there are several passengers. It is understood that similar difficulties are encountered by police in relation to drug offences in such circumstances.

Discussion

- 6.38 Consultations with police officers revealed a range of interpretations, and some confusion, about the operation of the Act with respect to vehicles. Some officers were confident that a vehicle constituted a public place while others believed that a car did not constitute a public place. Many officers commented on the need to establish custody or possession of the knife. An examination of the training materials used by police revealed that there was no instruction on the interpretation of the legislation with regard to vehicles.

²⁴ *Summary Offences Act*, s. 3(1).

²⁵ *Summary Offences Act*, s. 3(2).

²⁶ *Summary Offences Act*, s. 3(1).

- 6.39 When asked: 'Do you consider that the Police and Public Safety Act makes it an offence to have a knife in a car?', 17 of the 25 commanders surveyed made comments in relation to establishing possession of the knife.

Location of knife is important. Had one example recently — the knife was strapped to the steering column therefore possession could be determined and it was readily accessible. Had it been in the glove box [or] under the passenger seat or elsewhere — no charges.²⁷

It doesn't but it certainly should be. The Act specifically says on the person though. It should be changed to possession.²⁸

Short answer 'no'. If a person was searched they wouldn't be in the vehicle therefore [the] vehicle can't be searched under this.²⁹

- 6.40 Of the 33 representations to the Infringement Processing Bureau that were audited for this review, 12 related to knives found in vehicles. The circumstances in which these knives were found included cases where the knife was found on the person who had been in the car, so that possession was not at issue; knives or scissors found near marijuana or associated in some way with drug use; and fishing and work related knives left in cars. In one case, police wrote on the infringement notice that a 21 cm knife was found in a car and that the alleged offender said: 'I use it as a screw driver'. The relevant representation from the person fined stated:

I am aware of the reasons for the new anti-knife laws but feel that my case is an example of this law not working ... I understand that the knife laws were introduced to reduce, and stop, the violent crimes being committed with knives, however the knife that I was fined for having was a small knife and it was clear that I did not intend to attack someone with it. I had the knife in my car, it was not showing, it was under the mess on the floor in front of the passenger seat, because I was using it that afternoon to repair and install my car stereo.

- 6.41 One commander³⁰ also commented on the purpose of the legislation in relation to knives in cars, stating that he did not think that it was 'in the spirit of the legislation' and that he would 'have a problem' with it.

- 6.42 A number of events recorded on COPS which were examined during the review also involved knives found in vehicles. A number of these narratives were in relation to scissors and many also involved drugs, mostly marijuana. Knives were located on the floor, in the glove box, on a seat, on the instrument panel and in the boot of cars. On other occasions a person in a car was searched and found in possession of a knife.

- 6.43 There are also questions about whether the personal searches permitted under the Police and Public Safety legislation permit a search of a vehicle. The Act clearly confers a power on police to search the person and their personal effects. However, it is doubtful that a vehicle would constitute a 'personal effect'.³¹

²⁷ Commander 9, Ombudsman survey of local commanders.

²⁸ Commander 25, Ombudsman survey of local commanders.

²⁹ Commander 20, Ombudsman survey of local commanders.

³⁰ Commander 6, Ombudsman survey of local commanders.

³¹ *Summary Offences Act*, s. 28A(1).

- 6.44 The application of the ‘custody of knife’ provisions to vehicles, as evidenced in the discussion above, may not have been anticipated at the time of the introduction of the new laws. While in legal terms a knife present in a car would be considered to be in a public place, police and members of the public appear to be less clear about the effect of the legislation in this regard.
- 6.45 The legislation appears to focus on reducing the number of people carrying knives on their person in public places. If limiting the likelihood of easy access to a knife was of primary concern, then it may be that knives in car boots, for example, were not anticipated to be a target of the legislation. It would be advisable for the Parliament to consider whether the application of the powers in this way effectively assists in reducing knife related crime.
- 6.46 One option might be to provide for a blanket exemption for custody of a knife in a vehicle. However, this may have undesirable consequences. For example, anecdotal evidence suggests that knives are sometimes kept in taxis for protection or self defence, and discouraging this practice would seem consistent with the objects of the legislation. Nor would it be desirable to make those carrying knives in ‘vehicles’ such as trains or buses immune from the laws.
- 6.47 On the other hand, it may not be in the public interest to penalise people with implements in their cars which, in the circumstances, are unlikely to be used in offences against the person. The law provides that custody of a knife in a vehicle in a public place and without a reasonable excuse, is an offence. The issue of the proper treatment of knives in vehicles may be best managed by appropriate use by police of the reasonable excuse provisions in the Act. This may be achieved through more detailed training and supervision on the use of discretion and the proper consideration of reasonable excuses. The type of knife and the nature of the custody might reasonably contribute to a finding that custody is reasonable in all the circumstances. (This is further canvassed in the ‘reasonable excuse’ section below.) In any event, the scope of the laws should be clearly communicated to the public and police.

Reasonable excuses

- 6.48 As noted above, the legislation states that there is a defence of ‘reasonable excuse’. Without limiting what might constitute a ‘reasonable excuse’ it nominates several ‘reasonable excuses’. Police have the discretion to accept other explanations, and indeed would be required to consider the reasonableness of *any* explanation offered for the custody of a knife or other dangerous implement.
- 6.49 We asked legal practitioners (see Appendix C) about the use of the ‘reasonable excuse’ provisions for custody of knives in the legislation. Of the 11 respondents who stated that their clients had offered an excuse to police, two indicated that they felt police tended to leave the question of the reasonableness of the excuse to be determined by the magistrate, even where the excuse seemed plausible and was confirmed by other evidence. One example described by a solicitor, was of a person who had been camping in a logging protest. When charged with possession of the knife, the person explained that he had used it to prepare food while camping. Although this excuse was not accepted by the police, the magistrate accepted the excuse and dismissed the charge.

6.50 Our review of COPS narratives showed examples of police accepting excuses, taking further action to determine the veracity of excuses and not accepting excuses. The following extracts from the narratives provide some examples of reasonable excuses accepted by police:³²

- A search of POI [Person of Interest] 1's bag revealed two pairs of small scissors. POI stated that they were for school ... Bag had other school items such as pens and pencils.
- A search of [the vehicle] located a pair of scissors belonging to the POI. When questioned why he had the scissors, the POI stated that he had them to cut the wires for the car stereo in the rear of the car. The circumstances made this reason probable. POI was cautioned. Scissors seized.
- The POI stated that he was employed as a butcher ... showed police clothing and ID that supported this. The two knives the POI had in his person were a steak knife and a boning knife. He stated that he was taking them home as he had a few days off and he did not like leaving them at work. Police were satisfied with the POI's excuse for carrying the knife.
- A search of the vehicle did not locate any drugs, however a knife was located in the console of the vehicle. Police took no further action in relation to the knife as the POI lives in his car and requires this to consume food.

6.51 One constable interviewed in a large regional town commented that farmers had good reasons to carry knives on their belts and that in most cases he would respond by telling them to put such knives in their glove box. Police in Focus Groups 1 and 2 expressed similar views, and commented that most farmers and country people carried knives around as a standard piece of working equipment. Police in one focus group indicated that they would not be inclined to take action against farmers with knives:

You've got pig chasers, you've got fishermen, farmers ... you've got so many cockies wandering around and they've got the little knife pouches on ... most of them use them to pick their teeth or peel an apple.³³

6.52 Police in this focus group also related a story of one police officer they considered to have been somewhat overzealous in his application of the laws to farmers.

... you can go overboard like [small regional NSW town] did. Remember that twit, highway patrol fella, went out and stopped at the saleyards and went right through all the cockies because they were carrying their pocket knives, and came back with a bucket full, and of course there was outcry over that.³⁴

6.53 The COPS narratives also provide numerous examples of circumstances in which police have not accepted excuses. There is evidence in these narratives that police are looking to the reasonableness of the excuse in all the circumstances and that simply stating an excuse listed in the legislation may not be considered reasonable. For example, the excuse of participation in a lawful recreation or sport was not accepted in the following incident:

At this time the person of interest reached into the centre console of the car and produced a pocket knife with numerous folding blades. When questioned the person of

³² Due to the number of incidents and data retrieval limitations a systematic review of reasonable excuses using COPS data was not able to be performed as part of the review. These examples should not be taken as representative of excuses in general.

³³ Focus group 2.

³⁴ Focus group 3.



Implements collected from persons entering the Family Court of Australia's Sydney registry in early 1999.

interest stated the knife was his and that he uses it to go fishing. The person of interest further stated it had been weeks since he had gone fishing and he was on his way home ... The knife was seized and the person ... was informed he would receive an infringement notice.

- 6.54 No specific guidance is provided by the legislation as to what may be considered by police in assessing the reasonableness of an excuse in the circumstances. An interesting comparison can be made with the equivalent Queensland legislation, the *Weapons Act 1990*, which prohibits the custody of a knife in a public place without reasonable excuse. Section 51(4) of the *Weapons Act* states:

In deciding what is a reasonable excuse for subsection (1), regard may be had, among other things, to whether the way the knife is held in possession, or when and where it is held in possession, would cause a reasonable person concern that he or she, or someone else in the vicinity, may be threatened or harmed.

An express provision of this nature may provide guidance to police who detect, for example, a pair of scissors in a car boot or glove box.

Recommendations

11. That the code of practice emphasise that police officers are to ask for, consider and record any explanation by a person found to have custody of a knife.
12. That the code of practice provide guidance to police for assessing the reasonableness of a person's explanation for custody of a knife in a public place or school, as well as advice on addressing 'all the circumstances', and illustrate their application through appropriate case studies.

- 6.55 A number of the representations to the Infringement Processing Bureau indicated that the person fined felt that they had a reasonable excuse for carrying the implement. These included a 19 year old man who had a pocket knife in his pocket while driving, and complained that he had explained to police that the pocket knife had been given to him as a birthday present 30 minutes earlier. He could prove that his birthday was a few days ago but his excuse was not accepted.

- 6.56 Another man, after purchasing a collectable pen knife and visiting his girlfriend, was being driven home by her when they were stopped by police for a Random Breath Test. When asked, he showed police the knife and when he gave his excuse:
- ... the officers replied that it did not make any difference to them why I had the knife.
- 6.57 The provision for a reasonable excuse was criticised in one submission which argued that it would 'discriminate against people whose English language skills are poor'.³⁵ This was the case for one man who wrote to the Bureau and explained that his language difficulties hindered his ability to explain:
- Because English is very broken I couldn't explain why I carried the small knife. I tried to explain to him that this knife was only for peeling fruit as I have just come back from work.
- 6.58 Some complaints and inquiries to this Office also concerned the reasonableness of an excuse offered to police. One person stated that his scissors were for his work as a dress maker, which he tried to explain to the police officer, but the excuse was apparently not accepted.
- 6.59 The submission from the Youth Action and Policy Association and the Youth Justice Coalition described the reasons given to police by the young people they surveyed for custody of a weapon found after a search. Of the 135 young people who indicated that they had been searched by police, eight stated that an implement had been found. Of these, three said they gave no reason to police for possessing the implement, two had stated that they possessed the implement for protection or because they were scared, one stated that it had been in the car boot for ages, and one said the implement was a fork which was used to start a car.

Legitimate educational purposes

- 6.60 One submission, from the Department of Education and Training's Legal and Executive Services, recommended that a reasonable excuse for custody of a knife for 'legitimate educational or instructional purposes' be included in s. 11C. The submission pointed out that there are many courses in schools, Adult Community Education Institutions and TAFE that require students to use knives and other blades.
- While in some instances the knives are supplied by the school or institute and only used during lessons on site, this is not always possible and there are many students who provide their own knives. There are also many instances where students [such as apprentices] are required to use knives away from the school ... This by necessity requires the students to carry knives on their person in public places.³⁶
- 6.61 A similar request was made of the Ministry for Police by the Department in July 1998.³⁷ However, at that stage the Ministry responded by acknowledging that the list of excuses

³⁵ Submission from Kingsford Legal Centre, June 1999.

³⁶ Submission from Department of Education, Executive and Legal Service.

³⁷ Correspondence from Executive and Legal Service, Department of Education and Training to the Ministry for Police, sent 8 July 1998.

in s. 11C(2)(a) did not cover all situations where a person might carry a knife for educational or training purposes, and highlighted the use of police discretion to determine whether an excuse were reasonable. The response from the Ministry went on to say:

It may be appropriate, at some future time, to make a regulation under s11(c)(2)(c) of the Act to specifically recognise custody of a knife for educational or training purposes as a reasonable excuse. In the meantime the Minister and the Ombudsman will closely monitor the Act's operation.³⁸

- 6.62 During our review of the legislation we found a number of incidents where a young person's reasonable excuse related to using the knife (usually scissors) for educational purposes. In some cases police accepted this excuse and in others the excuse was not accepted.
- 6.63 To include an excuse to the effect of that suggested by the Department of Education may provide police with useful guidance in their consideration of excuses. Given that:
- there is evidence that such excuses *are* being considered by police, and
 - custody must still be *reasonably necessary in all the circumstances* for the excuses listed in s. 11(2)(a) of the Act to apply,
- amending s. 11(2)(a) to include such an excuse, or providing for such an excuse in regulations, may be appropriate.

Recommendation

13. That s. 11(2)(a)(i) of the *Summary Offences Act* be amended to provide: 'lawful pursuit of a person's occupation, education or training'.

Utility knives

- 6.64 The audit of COPS narratives, the implement descriptions from the Infringement Processing Bureau, and references to pen knives, pocket knives and Swiss army knives from other sources indicate that these types of knives are commonly dealt with under the legislation. It could be argued that these implements are designed to be carried *not* for any specific purpose, but just in case the need to use them arises. Without a reasonable excuse, however, a police officer may confiscate such knives and issue infringement notices for them under the legislation. This is amply evidenced by the Infringement Processing Bureau materials described above.
- 6.65 In this context, it is interesting to note the Queensland approach to pen knives and Swiss army knives in its *Weapons Act*.³⁹ The Act makes possession, without reasonable excuse, of a knife in a public place an offence. One reasonable excuse listed in the legislation is 'for use for a lawful purpose'.⁴⁰ The Queensland Act provides examples of what might be

³⁸ Correspondence from Mr Les Tree, Director General, Ministry of Police to Executive and Legal Service, Department of Education and Training, received by the latter on 28 July 1998.

³⁹ *Weapons Act 1990*.

⁴⁰ *Weapons Act 1990*, s. 51(1)(d), see discussion in Chapter 4 in this report.



Implements collected from persons entering the Family Court of Australia's Sydney registry in early 1999.

included as such an excuse. One example is 'A person may carry a pen knife or Swiss army knife for use for its normal utility'.⁴¹

6.66 It may be argued in response to the inclusion of such a reasonable excuse, that these knives are still capable of causing harm. Certainly the issue at hand is one of finding the appropriate balance between protecting the community from the risk posed by individuals routinely carrying this type of knife, and protecting the interests and liberty of those who choose to carry utility knives because they have an occasional use for them.

6.67 In this context, it is important to note that excuses for custody of a knife are not limited to those listed at s. 11C(2). It may be that additional guidance provided to police through a code of practice may be sufficient to moderate the routine confiscation of pen knives, Swiss army knives and other utility type implements. To achieve this, police officers must consider whether 'the custody is reasonably necessary in all the circumstances' (s. 11C(2)(a)).

Children (Criminal Proceedings) Act 1987

6.68 Another issue raised during the review was whether a child's answers to the interview conducted by police to establish whether there was a reasonable excuse for custody of the knife, amounted to a 'statement, confession, admission or information' for the purposes of the s. 13(1) of the *Children (Criminal Proceedings) Act*. In brief, this section provides that a statement given to a police officer by a child who is a party to criminal proceedings shall not be admitted in evidence unless:

- an adult other than a police officer is present while the statement is made, or
- the person acting judicially in the criminal proceedings is satisfied that there was good reason for the absence of such an adult.⁴²

⁴¹ *Weapons Act 1990*, s. 51 (1) 'Examples for subsection (2)(d)' no. 2.

⁴² See s. 13 (a) and (b) for the full details of this provision.

6.69 If an offence under s. 11C is detected by police, the matter may be either brought before the court or dealt with by way of infringement notice.⁴³ Where police issue an infringement notice, the infringement notice may be challenged in court. Where the matter is heard by the court, it may be that s. 13(1) of the *Children (Criminal Proceedings) Act* excludes inculpatory statements made by the child at the time of the offence. However, even if s. 13(1) does apply to such statements, s. 13(1)(b) provides a discretion to admit the statement, confession, admission or information if there ‘was proper and sufficient reason for the absence of such an adult’. As it would be neither desirable nor appropriate for police to take a child into custody simply to ensure an appropriate adult can be present at the interview, it may be that there is always a sufficient reason for the absence of such an adult.

6.70 In the context of police having to rely on a child’s statement in the field to determine whether all elements of the offence exist (ie. custody of a knife *without reasonable excuse*) before issuing a fine, it is doubtful that a provision such as s. 13(1) can provide any practical protection for the child being fined. One example of the nature of police questioning to determine whether there is a reasonable excuse was found in police comments on a \$550 infringement notice issued to a 15 year old boy. The officer wrote:

Spoken to on train. Search conducted of person. Unable to produce I.D. Search of backpack. Red Swiss army knife located in front pocket.

Q. What is this for?

A. Fishing.

No other fishing gear in possession.

Q. When was the last time you went fishing?

A. About three weeks ago.

Q. Where did you get it?

A. [Discount Store] at Newcastle.

Q. How much

A. Two bucks.

Q. How long ago?

A. Twelve months or so.

Q. When are you going fishing again?

A. Don’t know.

6.71 Another example is taken from a COPS narrative from Bankstown LAC, where a 17 year old was questioned on a train and issued a \$550 infringement notice:

He was asked to produce a rail ticket and he failed to do so. The POI was asked if he had anything on him he should not have. The POI on his own accord opened his bum bag and showed the police the contents of his bag. In the bag the police could see the Stanley knife. The POI was asked why he was carrying this on his person. He stated that he used it to sharpen his pencils at school. He was asked to produce his pencil case and pencils. He stated that he did not have either in his bag. He was asked to show police his note pad. When observed police only saw all writing on his notepads in blue ink. The POI

⁴³ Informal warnings and actions under the *Young Offenders Act* are also options but they are utilised less frequently by police. See Chapter 12 for a discussion of these issues.

was asked when he last attended school. He stated that it had been a couple of weeks. The POI was then asked if at school he undertook any manual arts or subjects involved in arts or craft. He stated that he didn't. With all the answers the POI gave to police, police were not convinced he had a reasonable cause to possess the knife.

- 6.72 Consideration should be given to the appropriateness of police issuing fines based on statements by children when questioned by police in the field (in the absence of an appropriate adult) regarding their 'reasonable excuse' for possessing a knife, refusing to obey a direction or failing to provide their name and address. As discussed in Chapter 12, there are significant reasons why penalty notices should be retained. Implicit in Parliament's decision to include them in this legislation was an expectation that offences should be dealt with as expeditiously as possible. It is essential that the benefits of using penalty notices to deal with young offenders are not diminished by potentially unjust outcomes.

Case study

- 6.73 One incident reported to us during the review illustrates a number of the issues raised in regard to interventions involving young people.

A 15 year old boy (whom we call Michael—not his actual name) was searched by police. A pair of scissors was located, and a \$550 'on the spot' fine was issued. The penalty notice, which was issued, is to be challenged in court.

The police narrative in relation to the event states that the persons of interest (POI) were seen loitering outside a shop and attempted to walk away when they saw the police. According to the police record the area was frequented by teenagers carrying knives. This and the fact that the POI walked away from police, were the stated reasons for searching all the POI. The young men willingly submitted to the searches. No items of interest were found on all but one POI who handed the police a pair of scissors from his bum bag. The POI was issued an infringement notice for custody of a knife in a public place.

We interviewed Michael, about his experience. According to Michael, the incident occurred during school holidays when he, his cousin and a friend were walking to a take away food outlet. The police drove over to them and asked them for their names. One officer told them that the police were going to conduct a 'random search'. Michael thought that this was fine. He gave identification details and asked the officers if they would like to look in his 'bum bag' which he had been using as a pencil case. He unzipped the compartments of the bag and '... in [the] second zip was a pair of scissors with pens and economics notes and that was my school things'. According to Michael the scissors were small fabric scissors with curved ends.

During our interview he commented: 'I knew that there were knife laws, which I'm totally fine with, but at that stage I never knew that scissors would come into it ... I said these are just for a school assignment.' Michael said that the police officer then removed the scissors from the bag and after speaking on the police radio, issued him with a \$550 fine for custody of a knife. Michael told us:

I was very disappointed but I didn't know what to do ... I didn't know who to tell. I didn't know what my parents would do. They are very old fashioned, my parents. I didn't know what to do. I just needed some advice.

Michael went to the police station to find out what to do and to see if he could pay the fine in instalments with money he earned from a part-time job. He said he was advised at the station that he could take the matter to court or write to the address on the penalty notice.

When we asked Michael if the police officer who searched him had given him reasons for the search, he commented:

He said it was just a random search ... Actually, he had a conversation with my ... cousin's friend ... He asked us a question. He goes: 'Have you ever been in trouble with the police before?', and we all answered 'no' and then [the friend] said 'I've been searched a few times' and the police officer stated 'It must be the mo', referring to his facial hair.'

We asked Michael why he thought the police had searched him, and he said:

I don't want to bring in any racial, or anything like that discrimination but I was with a Lebanese boy and myself Italian and my cousin Italian ... I wouldn't have minded if he had wanted to search everyone — and there was a lot of people with skateboards and people walking around in groups of a lot more than 3 — but it was the fact that we walked up and it was almost as though he drove his car away from where he was just to come and get us, honestly I think it was because he suspected that we were, or my friend [name] in particular, was, I couldn't tell you. I think it was that he thought that maybe [the friend] was in a gang ... because he had his hat on backwards, he had a big jacket, he had that [moustache] ...

Michael told us that he had agreed to be searched. He explained that he had been held at knife point on a couple of occasions and that he felt that police *should* be searching people for knives. We asked him if he felt that he could have refused the search and he told us:

No. Definitely not. I couldn't. At that stage ... I thought ... , what choice can you give me you know? If I said 'no' [I'd] be under ... suspicion even greater.

Immediately after he received the penalty notice Michael said he was distressed. He told us:

I was almost in a state of tears ... I didn't know who to tell, where to go, what to do. I didn't know anything. I walked off away from my cousin and my friend and I was so angry that I didn't want them to see me like this ... Disappointed. Like, I don't know, I was really upset and that's why I just needed to speak to that officer [at the police station].

Since telling his family and receiving their support Michael reported feeling better but he was still concerned that he was on police records as having been in possession of a 'knife' and that he now had 'something against [his] name'.

6.74 This event:

- highlights the importance of appropriate use of police discretion;
- provides a practical example of 'consent' policing;
- indicates that in this case a failure by police to provide cogent reasons for the search allowed speculation that racial appearance formed part of their reason for the search; and
- shows the impact that receiving a \$550 fine had on a 15 year old.

- 6.75 After seeking legal advice, Michael elected to have the matter reviewed by a court and written representations were made on his behalf. In November 1999, the Police Service indicated that the action against Michael will be withdrawn and dismissed when it goes to court in February 2000. As our discussion in Chapter 12 shows, it is rare for people who receive Police and Public Safety Act infringement notices to either pay or elect to have the matter heard at court. It seems that most notices are simply ignored.
- 6.76 If 'on the spot' fines are retained as an option for police in dealing with young people, it may be useful to consider amending the legislation to include a provision similar to s. 24(2)(g) of the *Young Offenders Act*, which requires police arranging to formally caution a young offender to provide information regarding 'the right of the child to obtain legal advice and where that advice may be obtained'. In practice, young people are often given the toll free number of the Legal Aid Commission's 'Hotline for Under 18s'. Hotline solicitors would be well placed to advise children who have been fined as to the reasonableness of their excuse and explain the process for electing to have the matter reviewed by a court.
- 6.77 This issue would be best dealt with in the context of the review of fines and penalties being conducted by the Criminal Law Review Division of the Attorney-General's Department.

Recommendation

14. That where an infringement notice is issued to a child, the child be advised of their right to obtain legal advice and where that advice may be obtained, consistent with the protections afforded by the *Young Offenders Act*.

Characteristics of persons found with dangerous implements

- 6.78 Of all those searched and found with dangerous implements, 379 (10%) were female and 3391 (89%) were male.⁴⁴ Other characteristics of persons searched and found with dangerous implements are set out in the following table.

Table 6.4: Persons searched and found with knife or implement

	Age unknown	< = 17 yrs	18-25 yrs	>= 26 yrs	Total
Aboriginal or Torres Strait Islander	1	75	61	79	216 6%
Other*	54	918	1378	1231	3581 94%
Total	55 1%	993 26%	1439 38%	1310 35%	3797

Source: NSW Bureau of Crime Statistics and Research extract of NSW Police Service records of persons found with dangerous implements 1.7.1998 to 30.6.1999

* The category 'Other' consists of non-Aboriginal and unknown.

⁴⁴ Figures do not add up to 100% because the gender of some persons was recorded as unknown.

6.79 The table below shows the characteristics of persons involved in offences where a knife was used as a weapon between June 1998 and July 1999.

Table 6.5: Persons involved in offences where a knife was used as a weapon

	Age unknown	< = 17 yrs	18-25 yrs	>= 26 yrs	Total
Aboriginal or Torres Strait Islander	3	73	67	41	184 10.6%
Other*	138	438	602	383	1561 89.4%
Total	141 8%	511 29%	669 38%	424 24%	1745

Source: NSW Bureau of Crime Statistics and Research extract of NSW Police Service records of persons involved in offences where a knife was used as a weapon 1.7.1998 to 30.6.1999

*The category 'Other' consists of all non-Aboriginal and all 'unknown'.

6.80 The two tables show some parallels in the characteristics of the people found in custody of a knife under the Police and Public Safety legislation and the characteristics of people involved in offences where a knife was used as a weapon. The greatest disparity is in the 26 years and over age cohort who accounted for 35% of persons found with knives under the legislation compared to 24% of persons involved in crimes where a knife was used as a weapon.

6.81 The figures appear to indicate that knives are being confiscated from groups of persons in reasonable proportion to the likelihood of those groups being involved in knife related crime. It is worth noting, however, that the total number of searches performed in order to detect these persons carrying knives differs dramatically for different age groups. The ratio of 'unproductive' searches to 'productive' searches by age is discussed in chapter 5 of this report.

Knife related crime and knife carrying behaviour

6.82 Two important measures of the effectiveness of the legislation are its impact on knife related crime in public places and its effect on the 'knife carrying' behaviour of members of the public. Although it is probably too early to assess whether the legislation has had an impact on knife related crime, we have briefly examined the available data.

6.83 The information provided by the Family Court of Australia gave some insight into the types of implements that people carry in public places. We chose to examine the Family Court's statistics because of the court's practice of scanning *all* people entering the Sydney registry⁴⁵ and because the people scanned would not have any necessary connection or contact with the criminal justice system, criminal activity or the police. Although the people scanned are not representative of society as a whole, the registry's figures gave some indication of the propensity of (a sample of) the public to carry knives. The detailed

⁴⁵ Court staff, legal practitioners, members of the judiciary and occasionally other persons at the Court for special purposes, are not required to be scanned.

collection of statistics and the thorough and consistent approach to scanning and recording of implements detected made the information provided by the court particularly useful.

6.84 In addition to examining the implement detection and scanning statistics, we were able to view approximately four months (late March 1999 to early July 1999) worth of knives confiscated from people entering the registry. Scissors constituted the largest group of implements viewed at the court. A number of Swiss army utility type knives, waiter’s friends,⁴⁶ foldable knives, craft knives, cutlery knives and forks, and a small number of larger knives, nail files and other weapons were also viewed.

6.85 The table below shows the number of persons who were scanned upon entry to the Sydney Family Court Registry in the financial years from 1995–96 to 1998–99 and the number and length of knives, scissors and screwdrivers confiscated or handed over. The majority (57%) of implements confiscated in the 1998-99 period were knives between 10 and 15 cm in length. The next most common implement was scissors, representing 35% of all implements, followed by the smaller knives (11%), screwdrivers, and then the larger knives.

Table 6.6: Implements detected at the Family Court Sydney Registry

Year	People scanned ⁴⁷	Knives				Scissors	Screw-drivers	Ratio knives to people
		<100mm	100-150mm	150-200mm	>200mm			
1995-96	194,798	4	1110	241	38	672	194	1:140
1996-97	164,147	12	1008	312	38	653	103	1:120
1997-98	171,082	11	1171	225	21	586	107	1:120
1998-99	176,967	184	945	107	9	574	125	1:142
Total	706,994	211	4,234	885	106	2485	529	1:130

Source: Family Court of Australia, Sydney Registry.

6.86 The number of knives and other implements being brought into the Sydney registry provide one rough indicator of changes in knife carrying behaviour in the community. The figures show that knives and scissors continue to be carried in large numbers. The documented number of knives with shorter blades being brought into the court’s Sydney registry dramatically increased from 11 to 184 between 1997–98 and 1998–99.

6.87 The number of knives with blade lengths between 15 cm and 20 cm decreased significantly after the enactment of the new laws. Knives with blades of length between 10 cm and 15 cm also slightly decreased in occurrence in 1998–99. However, large numbers of scissors were found each year, with a fairly steady decrease in numbers each year since 1995–96.

⁴⁶ Implement with a cork screw, small blade and bottle opener designed for opening wine and other bottles.

⁴⁷ Incomplete scanning over the period from February 1999 to May 1999 inclusive has required estimates to be made in their place. These have been formulated by finding the mean headcount for the same months in the previous three years.

- 6.88 The number of people entering the court for each knife found (knife to persons ratio) is identical in 1996–97 and 1997–98. It is also very similar in both 1995–96 and 1998–99. Although the 1998–99 period shows that knives are appearing less regularly than in the previous two years, the fact that there was a similar change between 1995–96 and subsequent years means that factors other than the legislation may be affecting knife-carrying behaviour.
- 6.89 We were also able to examine data kept by the Department of Education and Training in regard to knife incidents at public schools in NSW. We looked at the number and type of incidents which occurred between 1997–98 and 1998–99 and found that the number of incidents had risen from 100 in 1997–98 to 131 in 1998–99. This information and the operation of the Police and Public Safety legislation in schools is discussed in more detail in Chapter 8.

Parents who allow children to carry knives

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7. Parents who allow children to carry knives

- 7.1 If a child¹ is found to have custody of a knife in a public place or school, and if the parent of that child knowingly authorised or permitted the child to carry the knife, then the parent is guilty of an offence.² The penalty is a fine of up to \$550.³
- 7.2 Proceedings may be taken against the parent even though their child is not dealt with under s. 11C.⁴ Any proceedings taken against the parent have no effect on the liability of the child for an offence committed under s. 11C.⁵
- 7.3 If the act or omission of the parent constitutes an offence under s. 11D of the *Summary Offences Act*, and also under s. 11 of the *Children (Protection and Parental Responsibility) Act 1997*⁶, then the parent cannot be punished twice in respect of the act or omission.⁷
- 7.4 The definition of parent, for the purposes of s. 11D, is the same as the definition of parent in the *Children (Protection and Parental Responsibility) Act 1997*.⁸ That Act defines 'parent' as including the guardian or person who is in custody of the child, but does not include the Minister for Community Services or the Director General of the Department of Community Services, nor does it include the father or mother of the child if the father or mother has neither guardianship nor custody of the child.

Discussion

- 7.5 According to information made available by the Police Service, there has not been a single instance of the use of this provision in the first 12 months of operation of the Act,⁹ nor was this issue particularly significant for the majority of those commenting or making submissions on the operation of the Act.
- 7.6 Several submissions dealt with various issues related to this section. One submission made reference to the issue of non-custodial parents raised in the discussion paper. This submission, from Mr P X Whelan, General Manager, Executive and Legal Services, NSW Department of Education and Training, dated 9 February 1999, is dealt with later in this chapter.

¹ Being a person under the age of 18 years. See *Summary Offences Act*, s. 11D (1) (a).

² *Summary Offences Act*, s. 11D (1).

³ *Summary Offences Act*, s. 11D (1).

⁴ *Summary Offences Act*, s. 11D (2).

⁵ *Summary Offences Act*, s. 11D (3).

⁶ Section 11 of the *Children (Protection and Parental Responsibility) Act 1997*, makes it an offence for a parent, by wilful default, to contribute directly, or in a material respect, to the commission of an offence for which the child has been found guilty.

⁷ *Summary Offences Act*, s. 11D (4).

⁸ *Summary Offences Act*, s. 11D (5).

⁹ Correspondence from Sen Constable G. Lill, Hunter Region, dated September 7, 1999.

- 7.7 In its submission, Burnside noted that this provision established additional responsibilities for its workers. It said that:
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- 7.10 The definition of 'parent' in the Police and Public Safety Act and the *Children (Protection and Parental Responsibility) Act*, essentially relies on legal, rather than social, relationships to determine whether legal responsibility falls on a particular person for a crime committed by a child in their care. It is questionable whether there is any merit in extending the definition of parent to encompass the range of social relationships and arrangements that might provide for the care of children.
- 7.11 The Police Association advised this Office that its members 'indicated that this offence is difficult to prove'. The difficulty in establishing parental responsibility had been flagged in the Parliamentary debate on the legislation.¹² The Association suggested that further clarification may be needed to provide police with guidance on this aspect of the legislation.
- 7.12 Our discussion paper, *Policing Public Safety*, flagged a number of other questions and issues relating to this matter. As there has been no practical experience of the operation of this provision, it is not possible to provide any definitive response to those issues. For the sake of completeness, however, these issues will be stated again, and examined further.

¹⁰ Submission, Burnside, dated February 1999.

¹¹ Submission, Kingsford Legal Centre, dated June 11, 1999.

¹² The Hon. E Kirkby, NSWPD, May 20, 1998, p. 4822; The Hon. J Tingle, NSWPD, May 20, 1998, p. 4822; The Hon. Rev. F Nile, NSWPD, May 20, 1998, p. 4822; The Hon. R Jones, NSWPD, May 20, 1998, p. 4822-3; 4824; and The Hon. M Gallacher, NSWPD, May 20, 1998, p. 4823.

Non-custodial parents

- 7.13 Section 11D of the Police and Public Safety Act, which makes a parent liable for an offence if he or she knowingly authorises or permits their child to carry a knife in a public place, relies on the *Children (Protection and Parental Responsibility) Act* for the definition of parent. That Act defines parents to include parents who have custody of a child. One submission noted,¹³ and it is acknowledged, that the term ‘custody’ no longer has a statutory meaning in family law, following the commencement of the amendments to the *Family Law Act 1975 (Commonwealth)* by the *Family Law Reform Act 1995*. The *Family Law Act* now deals with these issues in terms of ‘parental responsibility’, whilst the arrangements for the day to day care of the child are the subject of ‘parenting plans’.
- 7.14 The *Children (Protection and Parental Responsibility) Act* (‘the 1997 Act’) replaced the *Children (Parental Responsibility) Act* (‘the 1994 Act’). At the time of the passage of the 1994 Act, family law still used the term ‘custody’ to indicate differing levels of parental responsibility for a child. The definition of ‘parent’ in the 1994 Act included a parent who had custody of a child as well as a guardian of a child (which would include most parents whether or not they had ‘custody’ of the child), but would not include a parent who had lost guardianship, either through giving a child up for adoption or by order of the Children’s Court.
- 7.15 The definition of ‘parent’ in the 1994 Act was reproduced in its entirety in the 1997 Act, notwithstanding that the *Family Law Act* had dispensed with the notion of ‘custody’ in the intervening years. In essence, the 1997 Act’s definition of parent fails to reflect the relevant changes to family law, and because the Police and Public Safety Act relies on the definition contained in that Act, it shares this same characteristic.
- 7.16 It may be that ‘custody’ can now be read more broadly than the meaning previously conferred on it by the *Family Law Act*, but it is unclear whether this is the intention of the legislation, given that exactly the same definition was used both before and after the changes to the *Family Law Act*.
- 7.17 If ‘custody’ is thought to be a particular form of parental responsibility, arising from one parent having the day to day care of a child, it would appear that the current definition of ‘parent’ in the Police and Public Safety Act confers equal responsibility on the parent who does not have the day to day care for the child, by virtue of that parent’s status as one of the child’s guardians. The question of parental responsibility would then have to be determined by the extent to which that parent ‘knowingly authorised or permitted’ the carrying of a knife in breach of s. 11C of the *Summary Offences Act*.
- 7.18 This situation extends to the scheme of the *Children (Protection and Parental Responsibility) Act* where, for example, a parent who has no contact whatsoever with their child still falls within the definition of ‘parent’ because they continue to be the child’s ‘guardian’, unless that legal status has been removed by a court. Any liability for their child’s criminal activity would then have to be judged against the extent of their ‘responsibility’.

¹³ Correspondence from Mr P X Whelan, General Manager, Executive and Legal Services, NSW Department of Education and Training, dated February 9, 1999.

Differing penalties

- 7.19 There is a difference between the penalties for an offence under s. 11D (where the penalty is a maximum fine of \$550) and an offence under s. 11 of the *Children (Protection and Parental Responsibility) Act* (where the penalty is a fine of up to \$1100).
- 7.20 A parent who is dealt with for an offence under s. 11 of the *Children (Protection and Parental Responsibility) Act* cannot be dealt with for the same offence under s. 11D of the *Summary Offences Act*, and vice versa. Consideration should be given as to whether these two provisions merely duplicate one another in relation to the offence created under s. 11C of the *Summary Offences Act*, and if so, whether s. 11D should be removed in favour of s. 11 of the *Children (Protection and Parental Responsibility) Act*.
- 7.21 It may be argued that the differing penalties is ample reason for the retention of the separate provision. In response, it could also be argued that the lesser penalty for the offence of authorising or permitting the child to carry a knife deals with the seriousness of the offence rather than the question of parental involvement. If legislative changes were made, it would still be possible for a court to impose a penalty on a parent less than the maximum penalty provided for in the *Children (Protection and Parental Responsibility) Act*, and one which reflects the relative gravity of the offence.

What is meant by ‘permitted’?

- 7.22 The use of the word ‘permitted’, as in permitting a child to carry a knife, was raised as an issue during the Parliamentary debate on the Act.¹⁴ The difficulty arises in determining whether permitting is taken to mean ‘granting permission’, or whether it goes further and applies to a parent who has not taken all legal means available to them to prevent their child from carrying a knife.
- 7.23 If the parent was aware that their child was carrying a knife, but was unable to prevent them from doing so, whether through incapacity, fear or some other cause, would this be deemed as ‘permitting’ the child to carry the knife? In the discussion paper, it was suggested that this point may need to be further clarified and developed to provide adequate guidance to police, courts and parents. If clarification was needed at that time, that need remains.
- 7.24 It is useful to compare the differing tests employed in this section and s. 11 of the *Children (Protection and Parental Responsibility) Act*. The *Summary Offences Act* holds a parent responsible if ‘the parent knowingly authorised or permitted the child’ to carry a knife in a public place. The *Children (Protection and Parental Responsibility) Act* establishes parental responsibility for an offence by reference to ‘wilful default’ contributing directly or in a material respect to the commission of an offence of which the child has been found guilty.

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- 7.25 A test of 'wilful default' may address those concerns that 'permitted' is too vague, and may result in parents being unfairly or harshly dealt with as a result of situations and circumstances beyond their control. If such a test were thought to be suitable, it gives further grounds for considering the streamlining of the parental responsibility provisions in the *Children (Protection and Parental Responsibility) Act* and the *Summary Offences Act*.

Further review

- 7.26 Most of the issues identified with respect to parental responsibility under s. 11D are related to aspects of the *Children (Protection and Parental Responsibility) Act*. It should be noted that the *Children (Protection and Parental Responsibility) Act* is required to be reviewed as soon as possible after 10 July 2000.¹⁵ Given the lack of instances of offences dealt with under the Police and Public Safety Act at this time, it is recommended that the review of the *Children (Protection and Parental Responsibility) Act 1997* be extended to examine the relationship between that Act and s. 11D of the *Summary Offences Act*, relating to parental responsibility for children who are found to have unlawful custody of a knife or other dangerous implement, and address the issues identified here.

Recommendation

15. That the review of the *Children (Protection and Parental Responsibility) Act 1997*, due to commence after 10 July 2000, give consideration to the issues identified in this review, including whether there is a need for or merit in greater consistency between s. 11D of the *Summary Offences Act* and the *Children (Protection and Parental Responsibility) Act*.

¹⁵ Section 50 of the *Children (Protection and Parental Responsibility) Act* requires a review of the Act to be conducted as soon as possible after the period of three years from the date of assent to the Act.

Parents who allow children to carry knives

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7. Parents who allow children to carry knives

- 7.1 If a child¹ is found to have custody of a knife in a public place or school, and if the parent of that child knowingly authorised or permitted the child to carry the knife, then the parent is guilty of an offence.² The penalty is a fine of up to \$550.³
- 7.2 Proceedings may be taken against the parent even though their child is not dealt with under s. 11C.⁴ Any proceedings taken against the parent have no effect on the liability of the child for an offence committed under s. 11C.⁵
- 7.3 If the act or omission of the parent constitutes an offence under s. 11D of the *Summary Offences Act*, and also under s. 11 of the *Children (Protection and Parental Responsibility) Act 1997*⁶, then the parent cannot be punished twice in respect of the act or omission.⁷
- 7.4 The definition of parent, for the purposes of s. 11D, is the same as the definition of parent in the *Children (Protection and Parental Responsibility) Act 1997*.⁸ That Act defines 'parent' as including the guardian or person who is in custody of the child, but does not include the Minister for Community Services or the Director General of the Department of Community Services, nor does it include the father or mother of the child if the father or mother has neither guardianship nor custody of the child.

Discussion

- 7.5 According to information made available by the Police Service, there has not been a single instance of the use of this provision in the first 12 months of operation of the Act,⁹ nor was this issue particularly significant for the majority of those commenting or making submissions on the operation of the Act.
- 7.6 Several submissions dealt with various issues related to this section. One submission made reference to the issue of non-custodial parents raised in the discussion paper. This submission, from Mr P X Whelan, General Manager, Executive and Legal Services, NSW Department of Education and Training, dated 9 February 1999, is dealt with later in this chapter.

¹ Being a person under the age of 18 years. See *Summary Offences Act*, s. 11D (1) (a).

² *Summary Offences Act*, s. 11D (1).

³ *Summary Offences Act*, s. 11D (1).

⁴ *Summary Offences Act*, s. 11D (2).

⁵ *Summary Offences Act*, s. 11D (3).

⁶ Section 11 of the *Children (Protection and Parental Responsibility) Act 1997*, makes it an offence for a parent, by wilful default, to contribute directly, or in a material respect, to the commission of an offence for which the child has been found guilty.

⁷ *Summary Offences Act*, s. 11D (4).

⁸ *Summary Offences Act*, s. 11D (5).

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- 7.7 In its submission, Burnside noted that this provision established additional responsibilities for its workers. It said that:
- it will be of interest to see the frequency with which carers in out-of-home placements are fined for 'allowing' their charges to carry knives. The young people dealt with in these situations are less controllable than the general population, and the potential for fining therefore higher. Should this occur, there will need to be further discussion on the logic of using government funding to pay government fines.¹⁰
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Recommendation

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¹⁵ Section 50 of the *Children (Protection and Parental Responsibility) Act* requires a review of the Act to be conducted as soon as possible after the period of three years from the date of assent to the Act.

Schools

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8. Schools

- 8.1 The Police and Public Safety legislation makes it an offence to have custody, without reasonable excuse, of a knife in a public place or school.¹ The legislation also confers a power on police to search a person in a public place or school.²
- 8.2 When searching a student at a school a police officer must, if reasonably possible, allow the student to nominate an adult who is on school premises, to be present during the search.
- 8.3 Section 28A of the *Summary Offences Act* also confers a power on police to search a student's locker at a school and examine any bag or other personal effect within the locker.³ Locker is defined in s. 28A(9) to mean a 'facility for the storage of a student's personal effects at a school.'
- 8.4 'School' is defined in the *Summary Offences Act*, and includes Government and registered non-Government schools, pre-schools, infants schools, primary and secondary schools, and child minding centres.⁴ However, schools are excluded from the Act's definition of 'public place'. For any *Summary Offence Act* provisions to apply to schools, the provision must specifically refer to schools. It appears that the search and custody provisions were extended to schools on this occasion to avoid anomalous situations where offences on school grounds might be treated differently to those in public places.
- 8.5 There is no suggestion that schools are particularly dangerous places. In fact, the school environment may be considered to be safer than most because it is subject to a higher level of supervision and surveillance than many public places.
- 8.6 Prior to the introduction of the Police and Public Safety legislation, the *Summary Offences Act* already contained provisions which made it an offence to:
- visibly carry or use a knife in the presence of any person in a public place or school in a way that would be likely to cause fear.⁵
 - have custody of an offensive implement⁶ in a public place or school.⁷

¹ *Summary Offences Act*, s. 11C.

² *Summary Offences Act*, s. 28A(1).

³ *Summary Offences Act*, s. 28A(1)(d).

⁴ *Summary Offences Act*, s. 3 Definitions.

⁵ See *Summary Offences Act*, s. 11E.

⁶ An offensive implement is defined in s. 11B(3) of the *Summary Offences Act* to be anything made or adapted for use to cause injury or anything intended to injure or menace a person or damage property

⁷ See *Summary Offences Act* s. 11B(1).

- 8.7 The 'Procedures for the Suspension and Expulsion of School Students' produced by the Department of Education and Training state that:

Any student in possession of a prohibited weapon, or using, or threatening to use, any item or instrument as a weapon, is to be suspended immediately. The matter must be reported to the police immediately.⁸

Information about the implementation of the Act in schools

- 8.8 In order to assess the impact of the legislation in schools, agreement was reached with the Department of Education and Training to examine data from the department's 'Serious Incident Data Base'. This data base is used to briefly document serious incidents in NSW government schools.⁹ It includes information about any incident in which police enter school premises, any incident of serious violence on school premises, any death of a student or incidents where a student is injured and requires medical attention, and any incident involving a weapon. A brief description of each event is recorded on the data base. Incidents are documented by school principals who forward information to district superintendents who then send it to the department's head office via the department's electronic mail system.
- 8.9 The data base provides a useful tool in assessing the level of knife-related violence on school premises and allows comparison of relevant incident numbers before and after the introduction of the legislation.
- 8.10 Although district superintendents have been issued with instructions about the circumstances which are to trigger a serious incident report, the final decision whether to forward information to the data base depends on the assessment of how serious a particular incident is.¹⁰ This may affect the consistency of recording of incidents, particularly at the less serious end of the spectrum. In regard to reporting incidents involving weapons, district superintendents are advised:
- A report is required when there has been possession, use or threatened use of a gun or knife. Where another implement is used as a weapon eg bats, sticks, a report might also be made.¹¹
- 8.11 It is noted that possession of a knife was regarded as a serious incident for the purposes of the data base prior to the commencement of the legislation.
- 8.12 In addition to the use of the data base, two group discussions about school related issues were conducted. Principals, a district superintendent and specialist equity and welfare officers were present at each discussion. Principals were encouraged to relate incidents involving the use or possession of knives which occurred in their school and a series of

⁸ *Good Discipline and Effective Learning, Procedures for the Suspension and Expulsion of School Students*, Department of Education and Training.

⁹ According to a memorandum to district superintendents, the data base program was initiated 'to ensure that the Minister and senior officers of the Department of School Education had brought to their attention, as a matter of urgency, matters which were severely impacting on the effective operation of schools or which might attract negative media attention or lead to a significantly raised public profile'. 29.7.96.

¹⁰ Memorandum from the Director-General, Dr Ken Boston to district superintendents 29.7.96.

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questions related to the operation of the Act in schools was also considered by the groups.

- 8.13 Schools were advised of the new laws through memoranda and other departmental media, including the *Legal Issues Bulletin*. Youth information cards providing information about the new laws were also produced by the NSW Police Service. Secondary schools were to distribute these to all students.¹² Principals in one focus group commented that more information could have been provided to primary students and their families about the new laws.

Knives detected at schools

- 8.14 The Serious Incidents Data Base listed reports of 227 incidents involving knives or similar implements between 1 July 1997 and 30 June 1999.¹³ Table 8.1 lists the type of implement involved in the incident.

Table 8.1: Sharp implements detected in schools 1997-98 and 1998-99

Implement Type	1997-98	1998-99	Total
Skewer		1	1
Syringe		1	1
Scissors	5	12	17
Scalpel		1	1
Axe		2	2
Butter knife		1	1
Compass		1	1
Craft knife	1	4	5
Flick knife	5	4	9
Folding knife	1		1
Kitchen knife	1	2	3
Knife	67	75	142
Razor blade	2	3	5
Screwdriver	2	2	4
Machete		2	2
Pen knife	11	7	18
Pocket knife		4	4
Stanley knife	4	8	12
Swiss army knife		1	1
Sword	1		1
Total	100	131	231 ¹⁴

Source: Information extracted from the DET Serious Incidents Database

¹² Memorandum to principals of secondary schools No 98/210, from Dr Ken Boston, Director-General, 13/7/98.

¹³ It was not possible to access the data base for prior years due to a systems failure.

¹⁴ Total does not add up to total number of incidents because in some cases more than one implement type was noted. In two cases no implement was described but the words 'stab' and 'cut', respectively, were used.

8.15 The majority of implements recorded in both years were simply described as 'knives' therefore the particular characteristics cannot be assessed. Principals at the focus groups we conducted said that it would be considered normal for students to bring scissors with them to school as part of their school materials.

Knife incidents

- 8.16 On reading the brief descriptions of incidents it was possible to group them into a number of incident types:
- 105 or almost half (46%) the number of recorded incidents over the two year period involved a threat with the knife or other sharp object. Of these, 40 occurred in the 1997-98 period and 65 in 1998-99.
 - Possession of a knife, sometimes in the context of another incident, accounted for 71 (31%) incidents, with 33 occurring in 1997-98 and 38 in 1998-99.
 - In 23 (10%) incidents a person was cut or stabbed, 11 occurring in 1997-98 and 12 in 1998-99.
 - 16 incidents involved *allegations* of the possession of or threat with a knife.
 - 11 incidents involved actual or threatened self harm, sometimes in the context of threatening another student. Eight of the 11 self harm incidents involved female students.
 - Most incidents (198) involved students as the alleged knife offender, while 34¹⁵ incidents involved 'intruders' entering school grounds.
 - Of the student offenders, 146 (73%) were boys and 34 (17%) were girls.¹⁶
 - Of those incidents involving students as offenders and where the age or school year of the student was recorded (174 records), 4 were in year 12 (or aged 17), most (138) were between year 6 (or aged 11) and year 11 (or aged 16)¹⁷ and the remaining 32 were in year 5 (or aged 10) or below.
- 8.17 The Department of Education and Training divides NSW into 40 districts. Most districts (36) had between zero and 10 recorded incidents involving knives over the two years. The other four districts had between 11 and 17 incidents each over the two year period.
- 8.18 The total number of incidents involving knives or similar implements rose from 99 in the 1997-98 financial year to 128 in 1998-99. One reason for this may be that the Police and Public Safety legislation has led to increased vigilance in regard to reporting of incidents. Publicity around the legislation may have increased the likelihood of teachers and students reporting more minor incidents to principals, who in turn may have been more likely to forward information to the data base. If this were the case it might be expected that the increase would have occurred in the less serious incident groups, such as possession of a knife with no other associated factors. Possession of an implement, not in the context of another incident (such as a fight or other disturbance), did increase over

¹⁵ One incident involved both intruders and a student.

¹⁶ In some cases the record did not specify whether the offender was male or female.

¹⁷ In some cases the school year of the student was referred to and in other cases the age of the student. The age and years have been grouped together according to the most common ages of students in each year, for example, 79% of students in year 6 in July 1998 were 11 years old so these two groups have been put together.

the two year period from 13 incidents in 1997-98 to 28 incidents in 1998-98. However, the number of incidents involving a threat with a knife also increased.

- 8.19 In the context of the small number of events in each district, it is probably not meaningful to speculate about the cause of the increase over the two years. In the four districts where the largest number of incidents were reported, two showed an increase on 1997-98 figures and two a decrease. It does not appear, however, that the new laws have led to any reduction in the number of knife-related incidents in schools.
- 8.20 It is also important to note that, in comparison to the number of students in the school system, the occurrence of knife related incidents is rare. One superintendent commented that in his district there were 62 schools and 24 000 students, and that when considered from this perspective, knife incidents were not a big issue. Our examination of the data base found 10 incidents in this area over the two year period. While on a per student basis, the occurrence of such incidents is relatively rare, and the more serious events, where a person is threatened or injured, less common still, it is nevertheless the case that any serious event involving a knife in school grounds is likely to be of significant community concern.

Knife searches at schools

No search conducted

- 8.21 Most incidents recorded on the data base did not involve a search. In the majority of cases, the knife was either handed to a member of staff by the student concerned or handed in by another student. This finding was confirmed by principals' descriptions of incidents involving knives. Examples provided by principals included:
- An incident in which two girls were arguing and one reportedly had a pocket knife. There was no indication that a threat had been made with the knife. A student informed a staff member. The girl brought the knife to the principal's office and was given a long suspension. The police were informed. The principal stated that he did not believe this incident would have been handled any differently prior to the introduction of the legislation.
 - In another incident a teacher saw a boy with a knife at school. At first he attempted to hide it but eventually he admitted to having it because he felt threatened. It was explained to the boy that the police had to be called as well as his parents. The boy was suspended and also fined by police.

Searches by police and/or school staff

- 8.22 In 11 'knife-related' incidents on the Serious Incidents Data Base the record indicated that a search had been performed. However, only three of these searches were performed by police, the others being undertaken by either teachers or principals. Police appeared to be looking for a knife in only one of these searches. One of the other police searches was a search for drugs in which two knives were found in a student's bag. In the third search police were looking for a bomb on school premises when they found knives in a student's bag.

- 8.23 We audited COPS narratives for search incidents occurring at schools¹⁸ in the four focus areas for the review period. Sixteen incidents were found that occurred on school premises, however, eight of these incidents did not occur in school hours. Of those events that did occur in school hours only two clearly involved searches. The narratives for these two incidents are as follows:

The YLO [police Youth Liaison Officer] and CSO [police Community Safety Officer] attended [a] High School in relation to a fight which had broken out on the school grounds the week before. Information was received that the two POIs were in possession of a knife. A search of the POIs and their school bags was conducted in the principals office. The search revealed nil find.

The young person is a student at the ... High School. On the 8-9-98 he was behaving in a disruptive manner in the class rooms and was sent home around 12md from the school kitchen as a result. Police were alerted by staff of the ... Primary School at 1.45 pm that the young person had been at the school with a knife and was on his way to the high school to allegedly stab another student. Police attended the high school locating the young person where he was searched at 2 pm. A Chef brand 26 cm carving knife was located on the young person, which was secreted in the front of his track pants. The knife had dark blue paint on the butt of the handle and was immediately identified by ... the school principal as being school property, removed from the school's kitchen ...

- 8.24 In neither of these situations is it clear that the young person was allowed to nominate an adult to be present during the search, as permitted by the Act where it is reasonably possible.¹⁹ Concerns were expressed in a submission by the National Children's and Youth Law Centre, that the provisions which allow a student to nominate an adult to observe a search on school premises were:

problematic in that where the support person is the teacher who has made the initial complaint, this may present a conflict of interest for the teacher.²⁰

The submission went on to recommend that:

... no searches be conducted on the school grounds or where such a search is necessary for the immediate safety and well-being of the school community, that the child's parents or guardians be called to attend the search.

- 8.25 The issue of who is best placed to search students at schools was the subject of debate during the legislation's passage through Parliament. One member of the Legislative Assembly commented:

It must be made abundantly clear that police officers are the ones who should conduct searches for dangerous implements in schools. There are few circumstances, other than imminent danger to a student or other persons, where it is desirable for a teacher to undertake a search when it is suspected that a student is in possession of a dangerous implement.²¹

The Attorney General noted during this debate that:

... when a teacher has reasonable grounds to suspect that there is a danger to the safety of students he (*sic*) is empowered to act to protect the students. This would include the

¹⁸ The audit was conducted using the key words 'school' and 'student', respectively. It is possible that some relevant records may have been overlooked using this method.

¹⁹ *Summary Offences Act*, s. 28A(2)(d).

²⁰ National Children's and Youth Law Centre, submission, 30 June 1999.

²¹ The Hon. A. G. Corbett, 20 May 1998, NSWPD, p 28.

searching of a student's bag if it was suspected that a knife or something else likely to create danger was present in the bag.²²

- 8.26 Given the small number of recorded incidents involving police searches conducted at schools, there is too little information at this stage upon which to base any findings about the nature of police searches at schools.
- 8.27 In a number of incidents it was unclear from the COPS narrative whether a search was conducted, and if so by whom. One incident referred to a '55 cm machete' being 'located in the school bag of the young person' but it was unclear whether it was the principal or the police officer who had 'located' it. After the knife was located, the school contacted the young person's uncle and he was present during the interview of the young person. In two other instances a knife had been taken from a student at school prior to the arrival of police, however it was unclear whether a search had been performed in order to obtain the knife.
- 8.28 In another incident a teacher noticed a knife in a boy's pencil case during class. The police were called and the young person was 'cautioned' in the presence of the principal. According to the COPS narrative the young person stated 'he had accidentally put the knife in his pencil case, after cutting cardboard at home the night before'. A further narrative stated that a knife was detected after children at the school told the deputy principal that a fellow student had a knife. The knife was eventually handed over in the principal's office.
- 8.29 It appears to be more common for teachers or principals to conduct a search at a school than for police to do so. A number of incidents where searches were conducted by school staff at school were described during the focus groups. These included:
- An incident in which a station master from a nearby railway station contacted the principal to inform him of his suspicion that a student was carrying a replica pistol. When the student arrived at school he was asked, in the principal's office, to open his bag. He was reluctant to do so and the proposition was put to him by the principal, 'either you do it or I do it'. He agreed to open his bag and the deputy principal was called in to witness the incident. In the bag, a bomb, a gun, and three knives (one 30 cm, one foldable and another small knife) were found. The boy's parents and the police were called. The principal was unsure what action was taken by the police as the boy did not return to the school.
 - In another incident at a primary school, there had been reports that a student had taken pornographic material to school. The principal asked to look in the student's bag and when she did so she found a large knife. The principal was later informed that the student had been waving the knife at other students. The police were contacted and the knife was handed to them. The parents were informed and retrieved the knife from the police. The parents were upset that their child's bag had been searched.²³

²² The Hon. J. W. Shaw (Attorney General, Minister for Industrial Relations and (*then*) Minister for Fair Trading) 20 May 1998, Legislative Council, NSWPD, p 29.

²³ The Department of Education and Training has advised schools that searches are permitted in the following circumstances: 'If school or institute staff consider that the safety of any person is at risk, they may search students' bags which they reasonably suspect contain knives, knife blades or other offensive implements.' *Legal Services Bulletin*, 30 April 1998, No. 2.

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- 8.30 In practice it appears that searches in schools, are relatively rare and occur mostly by way of the teacher or principal searching a student or their belongings.
- 8.31 One principal stated that his approach to conducting a search would be to invite into his office the student suspected of carrying a knife, and explain the power of the police to search for knives. He said he would then offer the student the choice of being searched by the police or by the principal.
- 8.32 A principal of a boys high school in another district stated that the procedure for searches at his school, where there was a strong suspicion that there was weapon, was to ask the student to empty their bag. If there was nothing in the bag, the student would then be asked to run his hands over his own body, to lift up the leg on his pants and to pull his shirt tight across his chest. In situations where there is a strong suspicion that a student has a weapon it would seem essential that a search is conducted effectively and thoroughly. In such cases it would seem that police would be in the best position to conduct such searches, given their training in, and experience of, search procedures. To fail to locate a well hidden knife in these circumstances could have serious consequences.

Lockers

- 8.33 No instances of police searching students' lockers or bags were reported by either of the focus groups that were conducted with principals and district superintendents.
- 8.34 Particular concern has been expressed about the provisions in the Act²⁴ that allow police to search a student's locker. It has been said that:
- Lockers are the personal space of students, the one small area where they should be able to enjoy some privacy.²⁵
- 8.35 Anecdotal evidence suggests that lockers are no longer a common feature of schools.²⁶ Nor was there evidence in the COPS narratives we examined, or the Serious Incidents Data Base to indicate that lockers had been searched pursuant to the new legislation.

Effect on school practice

- 8.36 The submission from the Executive and Legal Service Branch of the Department of Education and Training states:
- While teachers have always had the power to search for knives when the safety of students was at risk, the provisions of the legislation are a more than useful adjunct to those powers. I agree that where practicable police should be utilised to conduct searches at school for knives that may be in the possession of students and the legislation provides greater certainty as to the role and powers of police in conducting those searches at the request of principals.

²⁴ *Summary Offences Act*, s. 28A(1)(d).

²⁵ Michael Antrum, 'Frisky Business — Police, Search Powers and Young People', in *Current Issues in Criminal Justice*, Vol 10, No 2, p.197–201, p.199.

²⁶ None of the schools represented at the focus groups conducted during the review had lockers and the view was expressed that due to shortage of space and problems with mice most schools had removed lockers.

- 8.37 Unless impractical, it would be preferable that where searches at schools are necessary, they be conducted by police officers. Searches conducted by trained and experienced police offer a greater assurance that any concealed knives or other implements will be located during the search. This, in turn, provides a greater guarantee of safety within school communities. It minimises the immediate risk to school staff, and minimises any civil liability that might eventuate from the conduct of a search.

Recommendation

16. That, unless impractical, police conduct any necessary searches for dangerous implements on school premises.

- 8.38 It is recognised, however, that it may be a matter of urgency and necessity that a member of staff conduct a search for a knife. It is also recognised that the Government has, on a number of occasions, plainly stated that school staff have the legal authority to conduct searches as required. It is recommended, however, that the Department of Education and Training and the Police Service enter into an agreement to govern the arrangements between the two agencies as to when police shall be called upon to conduct searches, and the procedures to be adopted by school staff when they are required to conduct a search without the involvement of the police. Such an arrangement should emphasise that it is desirable for police to be involved in any searches for dangerous implements, but recognise that it may be necessary for school staff to conduct such a search in the absence of police.

Recommendation

17. That the Department of Education and Training and the Police Service enter into an agreement to govern the arrangements between the two agencies as to:
- when police shall be called upon to conduct searches;
 - the procedures to be adopted by school staff when they are required to conduct a search without the involvement of the police; and
 - the responsibilities of both agencies in the event of the discovery of a dangerous and/or prohibited article.

- 8.39 The assessment of those principals and district superintendents that we spoke to was that the legislation was generally beneficial because:
- it had provided the context for clarification of teachers' powers to search students;
 - the media attention on the legislation had made it easier to confiscate knives at school and to get the school community to take the issue seriously;
 - students were more likely to report the presence of a knife at school to a teacher since the introduction of the legislation (although principals of some primary schools felt that their students were afraid of knives and would always have reported a knife at school regardless of the laws);
 - it was useful to be able to say to a student suspected of carrying a knife that it was now against the law.

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- 8.40 In practice the legislation had led to little change in school procedures around searches but had some influence over how sharp implements used at school are dealt with. In August 1998, in a bulletin informing schools of the new laws, the department advised schools to 'review their procedures regarding the provision of knives to students where knives or knife blades are an essential requirement of a course.'²⁷ Schools were also advised to make arrangements for the return of knives used in class and only to use knives on excursions where this was 'considered essential for the purpose of the activity.'²⁸
- 8.41 In our discussions with schools, one principal stated that all scissors were removed from classrooms when not in use, as a result of the legislation. However, the district superintendent at that focus group pointed out that Occupational Health and Safety procedures meant that knives had always been dealt with appropriately at schools. Another district superintendent stated that schools in her district now had strict procedures to keep track of knives used in class. Scissors were counted prior to being handed out to students and no student was allowed to leave the class until all scissors had been returned. A designated area was set aside for school bags during these classes to make it more difficult to take scissors from the classroom. Another principal mentioned that a letter had been sent to parents at his school asking that students bring scissors with 'curved' rather than 'pointy' ends to school.

²⁷ *Legal Services Bulletin*, No 2a, Department of Education and Training, 28 August 1998.

²⁸ *Ibid.*

Confiscated knives & other dangerous implements

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9. Confiscated knives & other dangerous implements

Statutory provisions

- 9.1 A police officer has the power to confiscate from a person any thing that the officer reasonably suspects to be a dangerous implement for which the person has no reasonable excuse to be carrying.¹
- 9.2 Following confiscation, the item is dealt with under the relevant law, such as the *Firearms Act 1996*, the *Weapons Prohibition Act 1998* or the *Summary Offences Act*.² If there is no other legislation covering the item, as would be the case with most confiscated knives, then the item is dealt with under ss. 28C — 28E of the *Summary Offences Act*.³
- 9.3 Section 28C provides that a person who has had something confiscated from them may, within 28 days, make a written application to the Local Area Commander for the return of the item.⁴ If the person is under 18 years of age, the application must be made by the person's parent, guardian, or legal carer.⁵
- 9.4 Section 28D provides that if the Local Area Commander refuses or fails to return the confiscated item within the 28 days allowed by s. 28C, then the person has a further 28 days to appeal to the Local Court.⁶ After hearing the appeal, the Local Court may order that the item be forfeited to the Crown, or be returned to the applicant or some other appropriate person.⁷
- 9.5 Section 28E provides that the item is also forfeited to the Crown if no application is made for its return within the permitted time-frame,⁸ or if no appeal is made within the permitted time-frame to the Local Court after an application has been refused.⁹ The Local Area Commander may then dispose of the item in accordance with directions issued by the Commissioner of Police.¹⁰ In disposing of the item, the Local Area Commander may destroy the item.¹¹

¹ *Summary Offences Act*, s. 28B (1).

² *Summary Offences Act*, s. 28B (2)(a).

³ *Summary Offences Act*, s. 28B (2)(b).

⁴ *Summary Offences Act*, s. 28C (1) and (2).

⁵ *Summary Offences Act*, s. 28C (3).

⁶ *Summary Offences Act*, s. 28D (1).

⁷ *Summary Offences Act*, s. 28D (2).

⁸ *Summary Offences Act*, s. 28E (1) (a).

⁹ *Summary Offences Act*, s. 28E (1) (b).

¹⁰ *Summary Offences Act*, s. 28E (2).

¹¹ *Summary Offences Act*, s. 28E (3).

Discussion

- 9.6 One issue with respect to these provisions relates to the need for any application for the return of a confiscated item to be in writing. Issues of access and equity for persons of non-English speaking background, and those with difficulty reading and writing, were raised in the Parliamentary debate.
- 9.7 These issues are similar to other matters which the Police Service is already obliged to deal with on a daily basis. Although we were not made aware of specific concerns arising from the implementation of the return provisions, it is noted that at least one of the representations made to the Infringement Processing Bureau said that poor English skills had made it difficult to communicate the reasonable excuse to the officer conducting the search for a knife at the time.
- 9.8 The management of confiscated knives is the responsibility of each local area command, in accordance with the procedures laid out in the Police Service Handbook. The Handbook makes no special provision for confiscated knives, but rather, sets out the procedures for the management of property acquired as exhibits. Accordingly, there is no centralised collection of knives or data relating to confiscated knives. Such information can only be obtained from each local area command, as required.
- 9.9 The issue of the handling and destruction of confiscated knives was not raised in any substantive form in any of the debates or the submissions made in relation to the legislation. It has not been brought to our attention as an issue regarding the implementation of the legislation.
- 9.10 The handling of property and exhibits generally has been made the subject of a training module in the Mandatory Continuing Police Education Scheme, for delivery between July 1999 and June 2001. Accordingly, we felt it was too soon to examine this aspect of the implementation of the legislation in detail. For the sake of completeness, however, some aspects of the management of knives following confiscation were examined.

Implementation

- 9.11 We audited the confiscation records for 1999 contained in the miscellaneous property and receipt book (MPRB) of a local area command, as well as the exhibit books of the Sydney Police Centre. The MPRB is used to record the receipt and management of property not intended to be used as an exhibit in action taken against the owner. In addition to confiscated knives for which an infringement notice has been issued, the MPRB records items found by police as well as items surrendered voluntarily to police.
- 9.12 The practice in relation to confiscated knives at the local area command we surveyed is to require officers to complete an entry in the MPRB, as well as an application for the destruction of the item. The application is held until such time as the statutory period for applications for the return of the item has elapsed. At such time, the application is forwarded to the local area commander for approval. Following approval, the item is then destroyed.

9.13 The following table indicates the interval that existed between confiscation of a knife and its destruction:

Table 9.1: Number of days knives held at LAC1 before destruction

	Knife returned	0-28 days	29-56 days	57-84 days	85-112 days	More than 112 days	Not yet destroyed
LAC1	1	5	15	12	6	3	4

9.14 Only one application for the return of a knife was received at this local area command during 1999, and we were advised that this application was made with the assistance of the local Member of Parliament. This knife was returned 19 days after it had been confiscated by police.

9.15 Most of the knives destroyed within the first 28 days following seizure were prohibited weapons, for which no application for return could be made. However, one of the knives destroyed in that period was a multi-tool pocket knife, which was destroyed 27 days after seizure, on a day when a number of other items were lawfully destroyed. Presumably, when other items had been earmarked for destruction, this knife was also thought to be eligible for destruction at the time.

9.16 We also examined the records for 1999 at the Sydney Police Centre exhibit room, where knives are stored if they are to be used as an exhibit in legal proceedings. We examined the records for knives to be used as exhibits in those offences relevant to the Police and Public Safety Act.

9.17 As the record books rely on narrative-style entries, there was little consistency in the recording of offences. Accordingly, we examined those entries recorded as:

- custody (or possession) of a knife in a public place (or Police and Public Safety offences);
- knife offence;
- possess (or carry) cutting implement (or weapon); and
- possess offensive implement.

Table 9.2: Number of days knives held at Sydney Police Centre before destruction

	Knife returned	0-28 days	29-56 days	57-84 days	85-112 days	More than 112 days	Not yet destroyed
Sydney Police Centre	—	—	—	3	4	14	60

9.18 We were not made aware of any applications for the return of a knife which was an exhibit, and the earliest that a knife was destroyed following seizure was 60 days. As no issues came to our attention at this time, it was decided that further inquiries on this aspect of the legislation were not necessary.

Other issues

- 9.19 The issue of confiscated knives and their return was of some note in the debates on the amendments made to the *Crimes Act* in the Australian Capital Territory, following the legislative changes in New South Wales. The ACT legislation was modelled on the Police and Public Safety Act, but differs in a number of respects, including the provision that custody of knife offences must be prosecuted. This is in contrast to the provision in NSW, where most first offences are dealt with by way of infringement notice.
- 9.20 The ACT legislation, however, *entitles* a person to have their knife returned after 60 days if a prosecution for the offence of custody of the knife has not been commenced, or the prosecution for the offence has been completed without the knife being forfeited to the Territory as a result of a decision by the court.¹² The ACT provisions rest on the assumption that, unless a court determines otherwise, a person is entitled to the return of their knife.¹³ These provisions were inserted by way of amendment in the Committee Stage, and were apparently partly aimed at dealing with the question of whether compensation was required to be paid for the confiscation of an item that was not the basis of a subsequent successful prosecution.¹⁴
- 9.21 The ACT legislation has another interesting provision relating to those situations where the knife confiscated from a person does not actually belong to that person. If there are reasonable grounds for believing that a confiscated knife belongs to someone other than the person from whom it was confiscated, then the police must make reasonable attempts to ascertain the whereabouts of the owner of the knife.¹⁵
- 9.22 As the relevant provisions in the New South Wales legislation stand, it is not possible for the owner of a knife to make a claim for its return where he or she was not in custody of the knife at the time of its confiscation. There may be situations where it is not desirable to return a knife to the person from whom it was confiscated, but it is desirable to return it to its rightful owner. Should this be the case, legislative amendment is necessary to enable this to occur.
- 9.23 In those instances where a person has a legitimate reason for owning a particular knife, but does not have a reasonable excuse for carrying it at the time that it is detected by police, it is important that police make it clear that the person is entitled to make an application for the return of the knife, and that any applications for the return of a knife are dealt with as promptly as possible. Two matters were brought to our attention that indicate that this is not always the case.

¹² The knife is forfeited to the Territory if there is either a conviction for a knife offence under s. 495 of the *Crimes Act 1900* (ACT) (Possession of knife in public place or school), or the offence under s. 495 is dealt with under s. 556A of the *Crimes Act* (No conviction recorded). The forfeiture provisions of the ACT *Crimes Act* are contained in s. 349ZZH, while the return provisions are contained in s. 349ZZD (1A).

¹³ See speech of Mr Humphries (Attorney General), *ACT Legislative Assembly Hansard*, June 24, 1998, p. 1000. In the case of a knife seized from a person under the age of 16 years, the knife is required to be returned to the parent or guardian of the child.

¹⁴ See speech of Mr Stanhope (Leader of the Opposition), *ACT Legislative Assembly Hansard*, June 24, 1998, p. 1000.

¹⁵ *Crimes Act 1900* (ACT), s. 349ZZH (3).

- 9.24 One officer we interviewed in the course of the review said that he was not aware of any application for the return of a knife, and in any event, he did not know how people got their knife back. It would seem advisable that officers be informed of the return provisions, so that they can advise people as necessary of the relevant procedures.
- 9.25 Following an inquiry made of our Office, we were also made aware of one situation where police confiscated a kitchen knife from a 17 year old trainee chef. The knife was detected and confiscated during a search of the young man's car following a traffic stop conducted at 12.40 am one morning. On the following day, the young man attended the local police station with a letter from the Head Chef at the restaurant at which he worked. The letter apparently indicated that he was employed at the restaurant and that the knife was required for his work. The knife was not returned.
- 9.26 The mother was then contacted by police to advise her that three infringement notices would be issued in respect of the chef's knife, a Swiss Army knife and a broken scissors blade which were found in the car at the time of the search. She was advised that if she wanted to make a claim for the chef's knife, she should make a written representation to the local area commander, which she did, in a letter dated two days after the knife was confiscated. Approximately three weeks following that letter, the mother was contacted by a police officer to say that the letter had been received, but they could not advise her as to when a response would be provided. The mother made inquiries of our Office about a week later, by which time she had still not yet received a response to her application. This was 37 days after the confiscation of the chef's knife; 36 days since the son had made his own application; and 35 days since the mother had made her application.
- 9.27 On the evidence made available to this Office, a reasonable case has been made for the return of the knife. There would appear to have been no obstacle to returning the knife at any time following the receipt of the various applications for its return. Given the fact that it was required for the young man's employment, it would have been desirable that a determination on the matter one way or the other be made as soon as possible, so that the young man could acquire a new chef's knife if that was indeed necessary.
- 9.28 One of the representations to the Infringement Processing Bureau indicated a potential problem with the return of a knife following confiscation. The person making the representations advised that the knife was a collector's item, and that when the police discovered it, he had been heading home for the first time following the purchase of the knife. He said that 'it did not make any difference to [the officers] as to why I had the knife'. The infringement notice issued merely records that he offered 'no lawful excuse'.
- 9.29 The man went on to say that:
- I wish to regain my property from the police department and am quite happy to have them deliver the knife themselves back to my residence if they consider it necessary if there is no other option as I have no idea how one is to transport such a purchase from the shop to their home.*¹⁶

¹⁶ Infringement Processing Bureau, Representation No. 24

CONFISCATION POWERS

- 9.30 One would assume that custody of a knife for the purpose of taking it home or to another place following its return by a local area commander constitutes a reasonable excuse for its custody. However, where officers fail to properly consider the reasonableness of an excuse offered by someone in possession of a knife, then people are at risk of being unfairly dealt with for being in possession of a knife for the purpose of taking it home following its retrieval from a police station.

Recommendations

18. That a further review of the handling and management of knives confiscated under the Police and Public Safety Act be conducted following the completion of the Mandatory Continuing Police Education Scheme training module on the handling of property and exhibits.
19. That consideration be given to the amendment of s. 28C and s. 28D to permit an application for the return of a knife to be made by the owner of a knife where the owner was not the person from whom the knife was confiscated.
20. That the Police Service recognise the need for the timely adjudication of applications for the return of confiscated knives, and establish appropriate procedures for the timely consideration and determination of such applications.

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10A. Reasonable directions: Use of the powers

- 10.1 The Police and Public Safety Act amended the *Summary Offences Act* by inserting s. 28F, which empowers police to give a reasonable direction to a person in a public place if that person's behaviour or presence obstructs other people or traffic, constitutes harassment or intimidation, or causes or is likely to cause fear to another person (provided that the behaviour or presence would cause fear to a person of reasonable firmness).
- 10.2 Any such directions given by a police officer must be reasonable in the circumstances for the purpose of reducing or eliminating the obstruction, harassment, intimidation or fear.¹

Legislative requirements for issuing directions

- 10.3 Prior to giving a direction under s. 28F of the *Summary Offences Act*, the officers concerned *must*:
- provide evidence that they are police officers;
 - give their name and place of duty;
 - give the reason for the direction; and
 - warn that a failure to comply with the direction may be an offence.²
- 10.4 If a person initially refuses to comply with the direction and continues to engage in the relevant conduct, the officer may again give the direction and must warn that failure to comply may be an offence.³
- 10.5 A person who fails to comply with the direction after the second request and warning may be guilty of an offence, unless they have a reasonable excuse for not complying with the direction.⁴ The penalty is a fine of up to \$220.⁵ A person is not guilty of an offence unless it is established that the person persisted in the conduct the subject of the direction after the second warning and direction were given.⁶
- 10.6 Section 28G states that the power to give directions 'does not authorise a police officer to give directions in relation to an industrial dispute, or an apparently genuine demonstration or protest, or a procession, or an organised assembly.'⁷

Other powers to give directions

- 10.7 Police often *request* members of the public to obey directions or move on in a broad range of situations. Many public disturbances are dealt with quickly and informally in this way,

¹ *Summary Offences Act*, s. 28F (3).

² *Summary Offences Act*, s. 28F (4).

³ *Summary Offences Act*, s. 28F (5).

⁴ *Summary Offences Act*, s. 28F (6).

⁵ *Summary Offences Act*, s. 28F (6).

⁶ *Summary Offences Act*, s. 28F (7).

⁷ *Summary Offences Act*, s. 28G.

without the need for police to resort to formal directions under s. 28F. Our review of COPS entries showed that at least some of these informal interventions were recorded as uses of the Police and Public Safety powers during the 12-month review period.

- 10.8 In practice, it can be difficult to distinguish informal requests from formal directions unless the person fails or refuses to comply with the direction. Before the Police and Public Safety Act amendments, the circumstances in which an individual could be penalised for failing or refusing to obey a police direction were limited. In this respect, s. 28F has considerably enhanced the options available to police. The other main statutory provisions which penalise non-compliance are set out in the legislative survey in Chapter 4.
- 10.9 Before the introduction of s. 28F, police generally had to rely on their powers of persuasion — described by an officer in one focus group as ‘bluff’⁸ — to encourage people who were not under arrest to comply with their directions. Where persuasion failed, requests could often be reinforced with warnings to uncooperative individuals that they risked arrest if they refused to comply. A common ground for police to arrest people in these situations might be to prevent a felony or a breach of the peace:
- At common law every citizen has a right, and every constable the duty to take reasonable steps to prevent a breach occurring in their presence: *Albert v Lavin* [1982] AC 546.⁹
- 10.10 Even with the power to give directions under s. 28F, it is not uncommon for police to arrest members of the public to prevent a breach of the peace. Often the purpose of such an arrest, or a warning that police may arrest, is to remove the person from the area. One commander told our inquiry that there was often a question for officers in his command as to whether they were using s. 28F or using the breach of peace provisions to move people on. He said police have been requesting people to move on for years.¹⁰
- 10.11 It is important to note that people arrested where police apprehend a breach of the peace can be released — and often are released — after being removed from the scene (if there are no longer grounds to apprehend a breach).

Police records of ‘reasonable directions’

- 10.12 The following table shows the total number of incidents where police officers recorded their use of the s. 28F ‘reasonable directions’ power during the review period.

Table 10.1: Recorded incidents involving use of s. 28F ‘reasonable directions’ power

	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun
Obey direction	6	36	201	371	391	502	717	805	1200	1499	1641	1473
Fail/refuse direction	14	24	42	58	70	101	110	122	173	122	126	99

Source: NSW Bureau of Crime Statistics and Research extract of COPS records of s. 28F ‘reasonable directions’ incidents for all NSW 1.7.98 to 30.6.99.

⁸ Focus group 1.

⁹ M Aronson & J Hunter *Litigation Evidence & Procedure*, Butterworths, Sydney 1995 at p.254.

¹⁰ Interview with local area commander, South-Eastern Region.

10.13 There are strong parallels between the recorded use of the knife search powers, and the Police Service’s records on reasonable directions given under s. 28F. As with the data on searches, the reasonable directions records show:

- a steep increase in the reported use of the reasonable directions powers throughout the 12-month review period; and
- significant numbers of teenagers given directions.

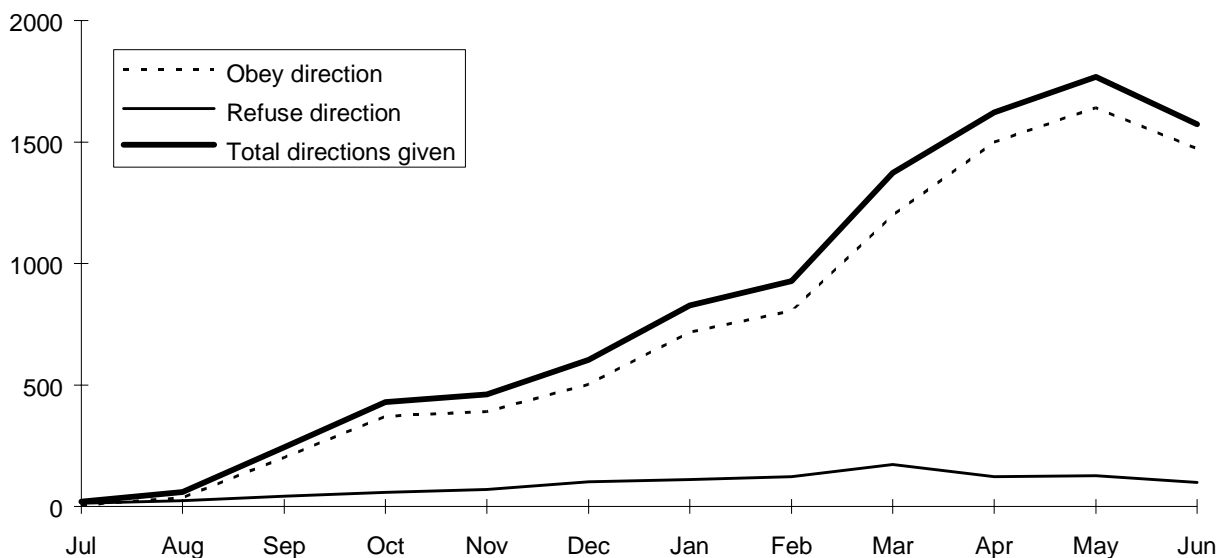
10.14 Other significant factors which are apparent in the data on ‘directions’ are:

- a relatively stable number of actionable offences in the latter half of the review period, ie. failure or refusal to comply with directions;
- a high proportion of those given directions under s. 28F are from Indigenous backgrounds – 3194 (22%) of the 14,455 people¹¹ given directions between 1 July 1998 and 30 June 1999 were Aborigines or Torres Strait Islanders, whereas Aborigines and Torres Strait Islanders constitute less than 2% of the total population of NSW; and
- per capita use of the directions powers in four local commands is many times higher than other areas of the state.

Directions given under the Police and Public Safety Act

10.15 As with the Police and Public Safety search powers, the Police Service’s records show that the total number of recorded directions issued increased steadily throughout the review period. There were 20 directions recorded in July 1998 (the month immediately following the introduction of the powers), 60 in August and 243 in September. The monthly tally peaked in May 1999 when 1367 directions were reported for that month.

Graph 10.1: Police and Public Safety recorded ‘reasonable direction’ incidents



Source: NSW Bureau of Crime Statistics and Research extract of COPS records of ‘reasonable directions’ incidents for all NSW 1.7.1998 to 30.6.1999.

¹¹ The directions given to 14,455 people relates to records of 9903 incidents.

REASONABLE DIRECTIONS

- 10.16 As with the data on searches, the most likely explanation for the continual increases in 'reasonable directions' recorded throughout the 12 month review period is a combination of:
- more frequent use of the powers as police officers became familiar with the legislation through training and other instruction;
 - increases in policing activity; and
 - better compliance with recording requirements.
- 10.17 The Police Service's Operations and Crime Review (OCR) briefings, which encouraged local commanders throughout the 12 month review period to make greater use of the Police and Public Safety powers, has had a significant impact. As discussed earlier in this report, OCRs had considerable influence in promoting proactive policing strategies including using the 'move on' and search powers to target 'hot offenders', 'repeat victimisation' and 'repeat locations'.¹² This influence was mentioned repeatedly by police officers in the interviews and focus groups:
- My boss says as the 'move ons' go up the crime goes down. And I say why? Why do you say this? But it's probably because the boss is putting us out on the street more, they're seeing us more, they're probably a little bit intimidated, they may run into a policeman so they won't do a break and enter. There's lots of reasons. Or because we're seen to have some power instead of being seen as taxi drivers as we used to be.¹³
- 10.18 The influence that OCR briefings have on operational policing is apparent in many aspects of policing practice. For instance, officers are encouraged to note their 'taskings' at the beginning of each shift. An officer at one inner Sydney command summarised (on the police computer system) his instructions for that shift:
1. Between 1000 hours and 1300 hours regularly monitor protest at [nationality] consulate ...
 2. Frequent call-ins to ... business premises re AHU [armed hold up]. Log times, locations, and manager details.
 3. Regular patrols of beats 4, 5, 6 and 9 re OCR offences, with particular attention to move-on legislation. [*emphasis added*]¹⁴
- 10.19 It appears, at least in this instance, that general duties officers were responding directly to issues raised in the OCR context. It also appears that Police and Public Safety powers are being used in the proactive policing response. The influence of OCRs on the use of these powers are considered in detail in Chapter 13.
- 10.20 Improvements in police compliance with recording requirements could also have contributed to the sharp increases in records of directions given. For instance, the analysis of police computer records later in this chapter shows that a number of the incidents recorded as uses of the 'reasonable directions' power actually reflect long standing police practice of giving informal directions to members of the public, including many situations in which the formal s. 28F directions power could not apply. The fact that there were so few directions recorded in the initial months of the review period indicates that neither formal nor informal directions were being recorded, not that no directions were being given.

¹² These terms were repeatedly used by senior police in an OCR briefing we observed on 20.1.1999.

¹³ Focus group 2.

¹⁴ From a COPS entry reviewed as part of an Ombudsman inquiry unrelated to the review of the Police and Public Safety Act.

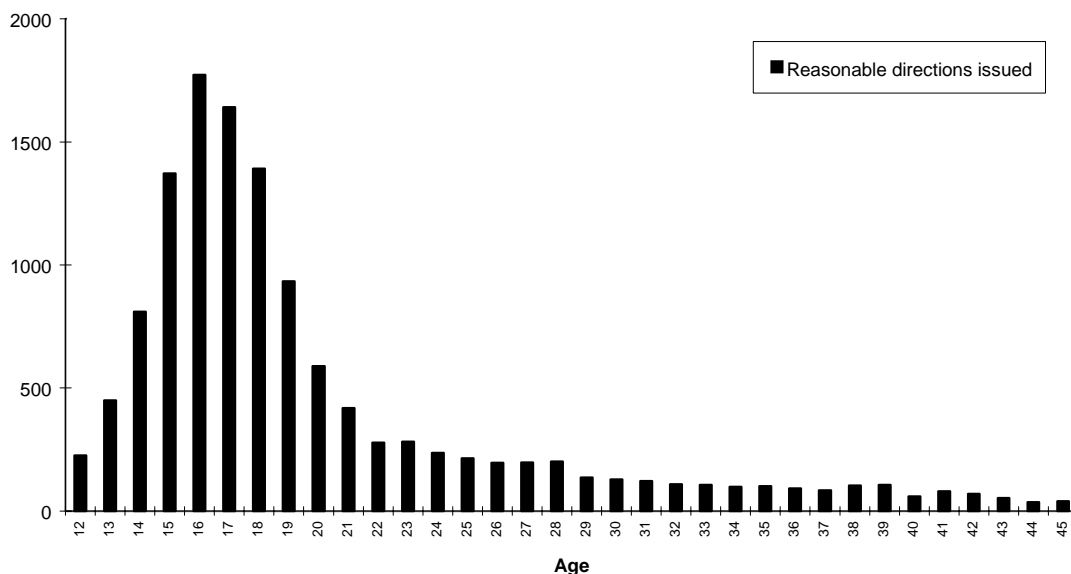
Failure or refusal to comply with directions

- 10.21 The number of actionable offences, that is, incidents in which police took action in relation to failure or refusal to comply with directions, remained relatively stable in the latter half of the review period. From December, the monthly numbers of incidents involving a failure or refusal to comply with a police direction ranged from a low of 99 incidents to a high of 126 incidents. The one exception was March 1999, when failure or refusal to comply with directions rose sharply to 173 incidents.
- 10.22 By contrast, the number of directions being obeyed continued to rise from 502 incidents in December, peaking at 1641 in May 1999. The biggest jumps in monthly tallies of ‘obey direction’ incidents were in January (215 incidents more than in December), March (395 higher than February) and April (299 more than in March).
- 10.23 However, as a *proportion* of all directions issued, the figures indicate that non-compliance decreased throughout the review period. In terms of the proportion of ‘move on’ incidents leading to a failure or refusal by the person to comply with the direction, one in six incidents in December 1998 involved a person refusing or failing to obey. By June 1999, just one in 16 ‘move on’ incidents led to a failure or refusal to obey. However, it is important to note that many of the ‘obey direction’ records include incidents that did not appear to involve a formal use of the s. 28F power. This will be discussed in relation to the analysis of police records later in this chapter.

Ages of persons given directions

- 10.24 Another similarity between the ‘directions’ data and the ‘search’ data is the comparatively high numbers of young people affected by the powers. Graph 10.2 shows the ages (where known) of people that were issued with s. 28F directions during the 12 month review period.

Graph 10.2: Ages of persons given directions



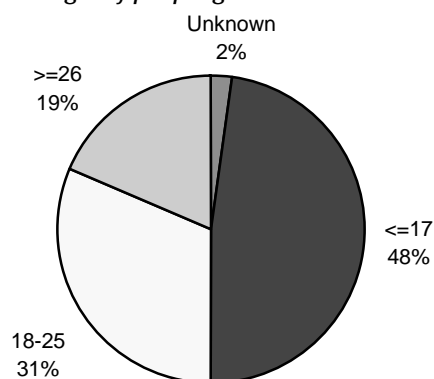
Source: Summary data from NSW Police Service on ages of persons issued with Police and Public Safety directions 1.7.98 to 30.6.99. Note, the data does not include records of people moved on whose age was not known, and 562 people given directions who are younger than 12 years or older than 45.

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10.25 The graph highlights the fact that comparatively high numbers of people aged from 14 to 19 years were issued with directions under s. 28F. According to the Police Service's records, 16 year olds (the group most affected, with 1773 persons issued with directions during the review period) are nine times more likely to be 'moved on' than 26 year olds (196 persons), and 19 times more likely to be 'moved on' than 36 year olds (91 persons).

10.26 Graph 10.3 clearly shows, almost half of the people issued with s. 28F directions were aged 17 years or younger.

Graph 10.3: Ages of people given directions under the Act

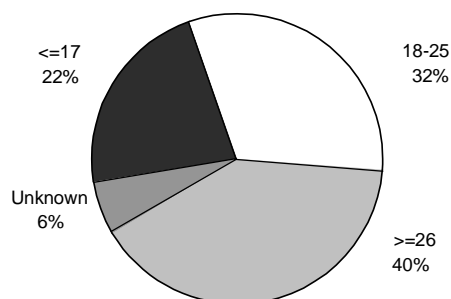


Source: NSW Bureau of Crime Statistics and Research extract of COPS data 1.7.1998 to 30.6.1999.

10.27 It is interesting to note that the proportion of persons aged 17 years or younger affected by the directions power is higher than for the knife searches. The police data indicates that 48% of persons 'moved on' were aged 17 years or younger, while 42% of persons searched were juveniles. The proportion of persons aged 26 or over and the proportion of 'age unknown' are the same for the data on both search and directions given.¹⁵

10.28 If, as was suggested in the parliamentary debates, '[t]he key purpose of this provision is to enable police to disperse persons acting in a disruptive manner before a situation gets out of hand',¹⁶ it might be useful to consider the likely involvement of young people in public incidents which do get out of hand. A rough indicator of disruptive behaviour is offences against the person in public places. Graph 10.4 shows the 1998-99 NSW data for all recorded incidents against the person in places other than residential locations. The 35,518 incidents include assaults and other offences against the person.

Graph 10.4: Persons involved in incidents against person: all incidents, non-residential



Source: NSW Bureau of Crime Statistics and Research – police records of persons of interest involved in all recorded criminal incidents against the person in non-residential locations, 1.7.98 to 30.6.99.

¹⁵ Source: NSW Bureau of Crime Statistics and Research extract of COPS data 1.7.1998 to 30.6.1999. The s. 28A search data provided by the bureau shows that 42% were aged 17 or younger, 38% were aged 18 to 25, 19% were aged 26 or over, and 2% were classified 'age unknown'.

¹⁶ The Hon. P. Whelan, Second Reading Speech, 28.4.98 NSWPD at 3970.

- 10.29 The data shows that 22% (7982) of these incidents involved persons of interest aged 17 years or younger, and 32% (11,273) involved persons aged 18 to 25 years. Significantly, 40% (14,110) are aged 26 years or older.¹⁷
- 10.30 This is not to suggest that the s. 28F directions relate to incidents of the kind referred to in Graph 10.4. Indeed, once an offence has been committed, there are many options available to police. Rather, s. 28F enables police to deal with intimidating or disruptive behaviour that falls short of criminal conduct as groups using public space may cause considerable intimidation without committing a chargeable offence.
- 10.31 In seeking reasons for why so many young people are affected by the Police and Public Safety powers, it is important to bear in mind the discussion in Chapter 2 regarding the way young people use public space. In the context of the s. 28F 'directions' powers, perhaps the most important factor is the propensity of young people to socialise in public places, often in large groups. This factor was apparent in many of the COPS records reviewed as part of this inquiry.
- On the evening of late night shopping at 9:00pm 22nd October 1998, police noticed approximately twenty Islander males ranging from 18 to 25 years of age congregating on the footpath and seated on the [suburb name] Uniting Church's wall. [Named officers] stopped the caged truck in the driveway of this church and approached all. At this stage other [suburb name] units and a police dog with his handler who happened to be patrolling the LAC stopped for back-up. In the presence of all police [officer name] directed all these congregators to depart from this location as their presence may likely frighten members/friends of our local area command. This direction was firm and responsive with all these Islanders quickly dispersing without any persons being argumentative. At the time of this direction, a large amount of elderly's were standing in the carpark area of this church after a mass procession. Police spoke to the elderly and explained of such police action. They were more than pleased that this form of power was given to their Police Service.¹⁸
- 10.32 This incident was recorded as 'street offence — obey direction to move on' and the direction appears to have been issued on the basis that the presence of the young people may cause fear. The narrative indicates that it was the group's presence, and not their behaviour, which brought them to police attention. As discussed later in this chapter, this kind of approach was apparent in a number of the records we reviewed.
- 10.33 One of the more difficult aspects of policing relates to dealing with large groups in public places. During Operation CitySafe, three of our observers watched as police successfully dispersed a large crowd of unruly patrons at a beachside hotel. All three observers commented that judicious use of directions to move on enabled police to deal with a potentially volatile situation without incident.
- 10.34 Another incident during the observational research involved the failure by police to use the directions power. On the night of the Gay and Lesbian Mardi Gras, a group of seven young men saw three plain clothes detectives and our observer leave a police station near

¹⁷ This shows a much more even age distribution of offenders than that indicated by the statistics involving knives: see graph entitled 'Person involved in incidents against person: knife as weapon, non-residential' in the Chapter 5 discussion of 'Ages of persons searched'.

¹⁸ COPS entry from a local area command other than the focus areas.

the parade route. As the detectives tried to pass the group, the young men blocked their path and yelled abuse. The detectives forced their way past, but returned to speak with the most aggressive member of the group. As they were speaking with him, two young women tried to pass. Members of the group blocked their way, and made lewd gestures and offensive remarks. Uniformed officers who ran to assist were told by the detectives to go away. The detectives and the group then walked off in opposite directions. The situation was one in which a s. 28F direction could have been given, but wasn't. In the context of the homophobic violence that often occurs near the parade route after Mardi Gras parades, the aggression displayed by these young men may have warranted a direction to leave the area for a specified period.

- 10.35 With respect to compliance, the records show that most people obeyed the directions given. Of the 14,455 members of the public issued with directions under s. 28F, 13,092 persons (more than 90%) complied. As discussed elsewhere in this report,¹⁹ incidents involving matters which may be brought before a court are more likely to be diligently recorded than incidents where the person complies and no further action is required. There are also constraints on the practicality of recording details of individuals in situations where the power is used to disperse large crowds. For these reasons, the number of times a direction was given and the person complied, is likely to be higher than indicated by the official data.
- 10.36 On the other hand, as our review of COPS entries later in this chapter shows, any under-reporting in this area may be at least partly offset by the fact that some of the records in the reported data do not appear to be uses of s. 28F power.

Gender

- 10.37 The records of directions given under the Police and Public Safety Act show 14.7% (2120) of 14,455 persons given directions to moved on were female and 84.7% (12,237) were male.²⁰ Of the 1363 persons who refused or failed to obey the direction, 13.0% (177) were female and 86.3% (1176) were male.

Aborigines and Torres Strait Islanders

- 10.38 One factor about police use of the s. 28F directions power which was not as apparent in the data on other Police and Public Safety Act powers, is the large numbers of Aboriginal and Torres Strait Islander people subject to directions.
- 10.39 According to the police data, 3194 (or 22%) of the 14,455 people given directions were Aborigines or Torres Strait Islanders. Just over half (1622 or 51%) of the Aboriginal and Torres Strait Islander people given s. 28F directions were aged 17 years or younger.

¹⁹ For instance, see the discussion in Chapter 3 regarding 'Information from the Police Service' and in Chapter 5 relating to 'Searches in which a knife was found'.

²⁰ There was no gender recorded for the remaining 98 'move on' records.

10.40 The following tables distinguish those who obeyed the police directions from those who refused or failed to comply.

Table 10.2A: Obey direction by police

	Age unknown	<=17	18-25	>=26	Total
Aboriginal or Torres Strait Islander	95 (31.1%)	1557 (24.0%)	748 (19.4%)	556 (22.8%)	2956 (22.6%)
Other*	210 (68.9%)	4926 (76.0%)	3115 (80.6%)	1885 (77.2%)	10136 (77.4%)
Total	305	6483	3863	2441	13092

Table 10.2B: Refuse direction by police

	Age unknown	<=17	18-25	>=26	Total
Aboriginal or Torres Strait Islander	3 (15.0%)	65 (16.1%)	95 (13.8%)	75 (29.6%)	238 (17.5%)
Other*	17 (85.0%)	339 (83.9%)	591 (86.2%)	178 (70.4%)	1125 (82.5%)
Total	20	404	686	253	1363

Table 10.2C: Total s. 28F directions issued

	Age unknown	<=17	18-25	>=26	Total
Aboriginal or Torres Strait Islander	98 (30.2%)	1622** (23.6%)	843 (18.5%)	631 (23.4%)	3194 (22.1%)
Other*	227 (69.8%)	5265** (76.4%)	3706 (81.5%)	2063 (76.6%)	11261 (77.9%)
Total	325	6887	4549	2694	14455

Source: NSW Bureau of Crime Statistics and Research extract of COPS records of s. 28F 'reasonable directions' incidents for all NSW 1.7.98 to 30.6.99.

* The category 'Other' includes records of non-Aboriginal and Torres Strait Islander people and any whose Aboriginality was 'Unknown'.

** 1622 (50.8%) of the 3194 Aboriginal people given directions were aged 17 years or younger; 5263 (46.8%) of the 11,261 people classified as 'other' were aged 17 years or younger.

10.41 It is important to note that when police create computer records of their use of the Police and Public Safety powers, there is no way to complete the record without indicating whether or not the person is Aboriginal or a Torres Strait Islander. If police know that a person is Aboriginal, the record should include this fact. If police do not know or are unsure, they may complete the record by entering 'unknown'. Recorded uses of the directions powers show substantial numbers of records were classified 'unknown'. Hence, the category 'other' (which includes persons whose Aboriginality is 'unknown') is likely to include at least some Aboriginal people.

10.42 The figures show that almost one in four (or 24%) of the 6483 children who obeyed the police direction during the review period, were from Aboriginal or Torres Strait Islander backgrounds. Aboriginal young people were not as highly represented among those refusing a direction to move on. One in six children refusing to move on were Aboriginal or Torres Strait Islanders, and one in seven 18 to 25 year olds were Aboriginal.

REASONABLE DIRECTIONS

- 10.43 The tables show that children generally were less likely to resist a police direction to move on. Of the 6887 persons aged 17 years or younger who were given a s. 28F direction, just 404 (5.9%) refused or failed to comply, whereas 686 (15.1%) of the 4549 persons aged 18 to 25 years did not comply with the direction given. Of the 2694 persons aged 26 or older, 253 (9.4%) did not comply.
- 10.44 A similar analysis of the police data for Aboriginal young people shows that most complied with the direction given. The tables show that just 65 (4.0%) of the 1622 Aboriginal children who were given s. 28F directions did not comply, and 95 (11.3%) of the 843 Aboriginal people aged 18 to 25 years did not obey the direction given. Of the 631 Aboriginal people aged 26 or over who were given police directions, 75 (11.9%) refused or failed to obey.
- 10.45 These figures indicate that children, particularly Aboriginal children, are the least likely to dispute a direction given by police officers. The records of s. 28F directions shows that older people, notably 18 to 25 year olds, are much more likely to challenge directions given by police officers.
- 10.46 It is not clear why such high numbers of Aboriginal and Torres Strait Islander people are subject to s. 28F directions. The impact of the 'move on' power was of particular concern to the Western Aboriginal Legal Service, which argued that the power
- ... brings otherwise law abiding persons into contact with the police and the criminal justice system. The evil of this increased contact is highlighted in townships of high Aboriginal populations where relations between police and the community have historically (and justifiably) been very poor.²¹
- The legal service added that any increased contact may further exacerbate the tensions in police relations with Aboriginal communities.
- 10.47 The powers might also be impacting on police relations with other ethnic or cultural groups in the community. However, as explained in the section on 'Information from the Police Service' in Chapter 3, the police computer system offers police the opportunity to enter information on the 'racial appearance' of individuals they come into contact with, but there is no *requirement* to do so. Hence, records on the racial or ethnic background of persons affected is incomplete.

Location of directions issued by police

- 10.48 The information on Aboriginality should also be considered in light of data on where the s. 28F 'directions' powers are being used. Table 10.3 ranks local area commands' per capita use of the directions powers from highest to lowest.
- 10.49 According to police records, four local commands—Darling River, Castlereagh, Barwon and Barrie—were many times more likely to use the powers than other areas of the state. Per capita use (the number of directions per 1000 residents) for the 1998-99 review period is shaded. The right half of the table lists local commands' data on three other commonly used summary offences.

²¹ Western Aboriginal Legal Service, Dubbo, written response to Ombudsman survey of legal practitioners, 7.7.99.

Table 10.3: Recorded directions per 1000 residents 1998-99

Local Area Command	Pop.	Direct'n given	Direct'n per 1000	Offensive conduct offences		Hinder/resist police offences		Offensive language offences	
				97-98	98-99	97-98	98-99	97-98	98-99
Darling River	17956	1319	73.5	55	82	45	84	92	109
Castlereagh	14221	754	53.0	84	121	84	67	91	126
Barwon	38686	887	22.9	72	85	90	92	107	150
Barrier	24980	415	16.6	71	123	75	114	88	149
Parramatta	58962	351	6.0	23	33	50	52	59	66
Fairfield	62158	301	4.8	10	16	39	69	49	70
Mt Druitt	86902	419	4.8	37	37	161	182	92	131
Kings Cross	27693	127	4.6	43	42	66	76	62	70
Liverpool	72658	333	4.6	21	25	59	78	33	82
Blacktown	85665	378	4.4	29	40	66	106	54	76
Mid Nth Coast	102419	436	4.3	116	109	103	138	167	243
Penrith	69164	287	4.1	39	51	93	112	80	119
Richmond	110137	399	3.6	132	231	152	209	223	344
Wagga Wagga	73408	265	3.6	45	129	60	107	77	177
New England	63543	219	3.4	95	126	70	107	182	264
Manning/Lakes	70068	232	3.3	44	61	88	83	81	101
Oxley	71644	231	3.2	50	70	45	55	73	112
Miranda	74359	238	3.2	41	66	56	61	56	69
Griffith	52896	155	2.9	45	69	54	66	90	106
Wollongong	106681	303	2.8	38	44	53	91	55	114
Quakers Hill	62726	174	2.8	17	25	55	65	35	88
Botany Bay	44710	110	2.5	7	9	12	22	7	16
Chifley	63674	156	2.4	27	60	93	80	105	141
Far South Coast	59292	137	2.3	101	79	106	112	135	207
Lachlan	33384	76	2.3	45	87	62	80	130	143
Cabramatta	54186	123	2.3	20	25	100	250	63	99
Eastern Suburbs	60506	137	2.3	20	26	23	48	18	32
Leichhardt	58600	127	2.2	18	25	30	18	23	19
Coffs/Clarence	117803	254	2.2	99	136	117	135	202	270
Orana	57112	121	2.1	83	68	121	124	211	245
Newtown	31364	62	2.0	13	16	33	20	25	22
Cootamundra	43686	86	2.0	53	63	63	59	119	142
Green Valley	113458	219	1.9	5	9	74	57	47	22
Canobolas	56245	105	1.9	48	101	64	74	95	140
Ku Ring Gai	149455	273	1.8	27	37	49	40	57	74
Eastern Beaches	105610	184	1.7	26	22	31	45	25	48
Mudgee	31876	55	1.7	22	35	27	48	43	76
Marrickville	51796	89	1.7	15	12	34	24	21	29
Blue Mountains	72988	122	1.7	21	27	40	68	47	79
Tweed/Byron	94430	157	1.7	63	92	93	90	80	109
Hawkesbury	57017	83	1.5	26	35	31	66	21	57
Redfern	28249	40	1.4	19	26	82	91	40	51

REASONABLE DIRECTIONS

Local Area Command	Pop.	Direct'n given	Direct'n per 1000	Offensive conduct offences		Hinder/resist police offences		Offensive language offences	
				97-98	98-99	97-98	98-99	97-98	98-99
Northern Beaches	117712	160	1.4	31	18	30	40	21	22
Albury	68241	90	1.3	74	78	74	98	95	157
Campbelltown	69472	91	1.3	37	45	78	92	85	108
Shoalhaven	76726	93	1.2	39	67	79	89	108	125
Deniliquin	44211	41	0.9	43	73	65	65	77	89
Macquarie Fields	75827	70	0.9	17	26	72	92	66	95
Eastwood	110283	94	0.9	12	18	24	22	27	26
Brisbane Waters	145494	107	0.7	61	65	86	113	136	147
Sutherland	119745	85	0.7	21	21	41	52	60	57
Burwood	67988	47	0.7	15	15	14	19	8	13
Manly/Davidson	94302	58	0.6	34	33	49	49	36	57
Bankstown	158356	97	0.6	26	26	76	110	77	132
Lake Illawarra	140114	82	0.6	30	37	86	106	43	89
Hunter Valley	53750	31	0.6	33	31	34	26	24	41
Lower Hunter	159193	82	0.5	70	74	136	124	178	200
The Hills	93714	43	0.5	10	4	16	31	21	21
Holroyd	80470	36	0.4	11	12	29	46	34	36
Rose Bay	55411	21	0.4	5	1	7	6	2	6
Gladesville	68769	26	0.4	14	7	9	9	4	13
Tuggerah Lakes	115345	35	0.3	41	27	86	66	87	54
Hurstville	113168	32	0.3	22	21	25	36	27	33
Campsie	90375	24	0.3	2	5	23	43	8	33
Waratah	80589	21	0.3	15	33	33	35	30	43
Monaro	69308	18	0.3	57	67	48	55	63	97
Flemington	94416	24	0.3	19	28	52	49	35	61
Goulburn	42507	10	0.2	53	56	36	39	72	72
Kogarah	91192	20	0.2	10	9	43	55	26	37
Rosehill	93440	19	0.2	13	11	24	37	21	34
Harbourside	79258	16	0.2	49	33	27	32	14	28
Newcastle	48232	7	0.1	32	73	51	66	53	69
North Shore	105267	14	0.1	9	25	27	25	18	22
Ashfield	74604	9	0.1	8	6	16	25	11	14
Lake Macquarie	170495	18	0.1	29	27	52	56	56	38
St Marys	98727	10	0.1	14	25	40	74	38	66
Camden	95890	9	0.1	34	44	56	66	72	81
The Rocks*	7193	823	114.4	18	30	44	46	31	30
City Central*	14058	465	33.1	55	76	85	90	61	100
Surry Hills*	19843	569	28.7	21	40	41	54	28	47

Source: NSW Bureau of Crime Statistics and Research – police records of directions given 1.7.98 to 30.6.99 and nominated offences recorded on the Police Service's charge management system 1.7.97 to 30.6.99.

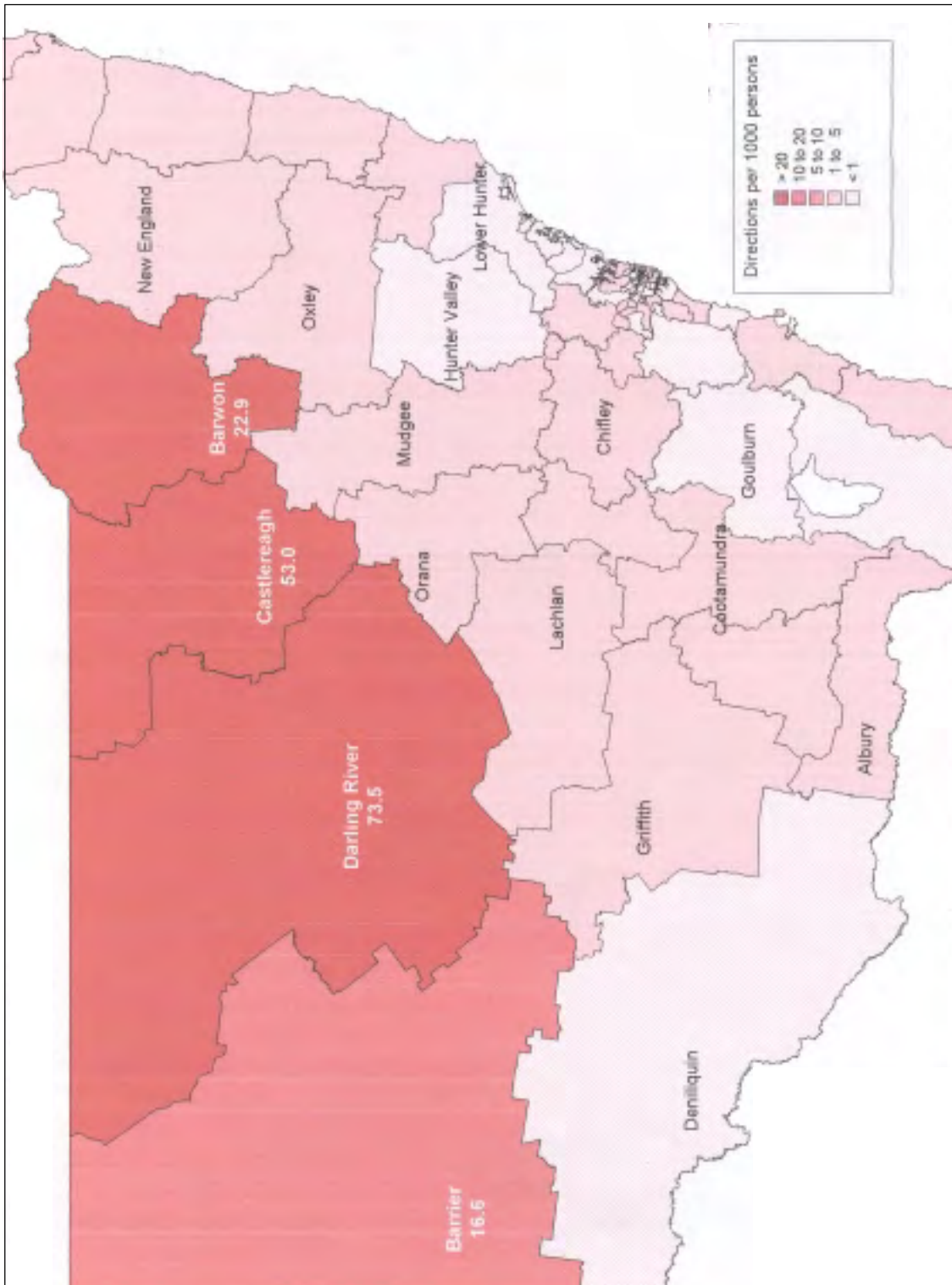
* It is not possible to use population based rates to compare The Rocks and City Central with other local commands. As both are in Sydney's central business district, both have few residents and attract large numbers of people from other areas. Surry Hills, which includes Central station and is adjacent to the CBD, is also affected by this factor.

- 10.50 The highest recorded use of the police directions power was by the Darling River local command, which takes in Bourke, Brewarrina and Cobar in western NSW. Darling River police recorded that they gave directions to 1319 people. On a per capita basis, this equates to 73.5 persons ‘moved on’ for every 1000 residents.
- 10.51 The next highest was the neighbouring local command of Castlereagh, which is centred on the town of Walgett. Directions were given to 754 people, the equivalent of 53 persons moved on per 1000 residents. Other local commands in that area to record large numbers of s. 28F directions were Barwon command (centred on Moree) with 22.9/1000 residents and Barrier (Broken Hill, Wilcannia, Menindee) with 16.6/1000 residents.
- 10.52 As the maps on the following pages show, the use of the ‘move on’ powers in these four commands — Darling River, Castlereagh, Barwon and Barrier — is significantly higher than in other country NSW commands. Most country areas recorded rates of between one and five persons moved on per 1000 residents, and several recorded less than one per 1000.
- 10.53 One feature common to Darling River, Castlereagh, Barwon and Barrier local commands is that all include large numbers of Aboriginal residents. According to 1996 census information provided by the Police Service, Aboriginal people make up 15% of Darling River’s 17,956 residents, 21% of Castlereagh’s 14,221 residents, 10% of Barwon’s 38,686 residents and 6% of Barrier’s 24,980 residents. Other local commands with high concentrations of Aboriginal residents include Orana (9% of the population), Lachlan (6%), Oxley (5%), Deniliquin (4%), Griffith (4%) and Mt Druitt (4%). It is interesting to note that Deniliquin is adjacent to the high-use areas, but has recorded relatively few s. 28F directions. Orana has more Aboriginal and Torres Strait Islander residents (4977) than any other command, yet it too has recorded relatively modest use of the power.
- 10.54 The high use of summary offences, particularly offensive language and offensive conduct charges, in relation to Aboriginal people in NSW has been well documented.²² The remarkably high use of the directions power in some areas with comparatively large numbers of Aboriginal residents, raised questions about whether the new powers had either supplanted or added to other forms of public order policing.
- 10.55 That is, one issue was whether high use of the ‘move on’ powers in those areas might have led to fewer Aboriginal people being charged for summary offences. As most people comply with directions and no further action is taken in those cases, a switch from preferring charges to merely issuing directions may have been a positive development. Conversely, another possibility was that the ‘move on’ powers were used in addition to, rather than instead of, the summary offence charges preferred in those areas. If areas which used the s. 28F directions power extensively also increased their use of other summary offence provisions, this would have increased the numbers of people brought into the criminal justice system. As the discussion below shows, there appears to be no clear relationship between use of the s. 28F directions power and use of summary offences.

²² See for instance, R. Jochelson, *Aborigines and Public Order Legislation in New South Wales*, NSW Bureau of Crime Statistics and Research, B34, 1997.

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Map 10.1: Directions per 1000 persons (NSW)



Source: Table 10.3

Map 10.2: Directions per 1000 persons (Sydney)



Source: Table 10.3

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- 10.56 To obtain a more complete understanding of policing practices in areas which were making frequent use of the s. 28F directions power, Table 10.3 includes information on offensive conduct, offensive language and resist/hinder police offences in each local command. These three summary offences provide rough indicators of public order policing practices, as detection of these offences tends to rely on policing activity rather than reports from 'victims'.
- 10.57 In considering the data on offensive conduct, offensive language and resist/hinder police offences, it is important to note that there were significant rises in the number of all three offences throughout NSW in 1998–99, compared with the previous 12 months. According to police records:
- offensive conduct incidents in NSW increased from 2949 offences in 1997–98, to 3862 in 1998–99, an increase of 30.9%;
 - resist/hinder police incidents increased from 4663 in 1997–98 to 5703 in 1998–99, an increase of 22.3%; and
 - offensive language incidents increased from 5213 (1997–98) to 7180 (1998–99), up by 37.7%.²³
- 10.58 The data on these offences in Table 10.3 indicates:
- Darling River recorded increases in offensive conduct (up 49.1% on the previous 12 months) and hinder police (+86.6%) offences — both increases were above the state average;
 - Castlereagh recorded above average increases in offensive conduct (+49.1%) and offensive language (+38.5%);
 - Barwon recorded an above average increase in offensive language matters (+40.2%); and
 - Barrier recorded above average increases in all three offences — offensive conduct (+73.2%), hinder police (+52.0%) and offensive language (+69.3%).
- 10.59 However, these were by no means the biggest increases in public order offences in NSW. For instance, the number of hinder police offences in Cabramatta rose from 100 matters in 1997–98, to 250 in 1998–99, a 150% increase. Many other increases were from already low numbers, and would need to be considered over the longer term. The table shows that the only local command to record a decrease in all three offences was Tuggerah Lakes.
- 10.60 What is clear is that the figures indicate there has been a significant increase in public order policing activity across NSW in 1998–99. Less clear is the nature of the relationship (if any) between the Police and Public Safety powers and the police use of public order charges. Although areas recording high use of the directions power recorded above average increases in some offences, there were also significant increases in public order offences recorded in areas with low use of the Police and Public Safety directions power.

²³ Source: NSW Bureau of Crime Statistics and Research – police records of nominated offences recorded 1.7.97 to 30.6.99.

Managing relations with the community

- 10.61 The Police Service's COPS data clearly shows that of the people being 'moved on' by police using s. 28F, a substantial proportion are young people and Aboriginal people. Whether this is appropriate depends on the circumstances of each incident, but it appears that there is a need for the Police Service to closely monitor the situations in which each local command uses the 'reasonable directions' powers.
- 10.62 Frequent use of s. 28F and other police powers does not necessarily show that police in those areas are abusing the powers. Many other factors must be taken into account, including the number and nature of offences in each area, the ways particular groups in the community use public space and broader indicators of the state of police-community relations.
- 10.63 For instance, one commander advised our inquiry that the main shopping centre in his area attracted large groups of young people because it was adjacent to a busy transportation hub.²⁴ By contrast, another commander told an OCR briefing we attended in January that he had little use for the Police and Public Safety Act as there were few locations to congregate in his command. He also noted the very large numbers of Aboriginal and young residents in his area. With respect to young people, he said there were no 'gangs' in his command and that his Youth Liaison Officer had successfully dealt with a truancy problem through extensive use of 'cautioning'. Of the 150 truants cautioned, there were only eight repeat offenders. He said his Aboriginal Community Liaison Officer had helped resolve concerns about Aboriginal use of public space without police having to resort to the 'move on' powers.
- 10.64 This kind of analysis requires careful scrutiny of the strategies employed in each area to ensure that policing activity is targeted appropriately. The Service's fortnightly OCRs already compare the use of Police and Public Safety Act powers with local crime trends. This enables commanders in areas making extensive use of the powers to discuss any impact this policing activity might be having on crime and its impact on the community generally.
- 10.65 However, even where the Police Service can demonstrate that the 'move on' powers are being used appropriately, it should still be trying to address any adverse impact this activity might have on its relations with the community in general, or sections of the community the subject of such activity. In light of the comparatively high numbers of young people and Aboriginal people affected by these powers, the Service must seek to address concerns expressed by those particular groups, as well as any other group likely to be targeted. The onus is on the Service to build and maintain strong links with key representatives in these communities, so that police and the community are working towards common objectives.
- 10.66 In this context, it is important to recognise the Service's attempts to improve its relations with young people, particularly through its development and use of youth liaison officers and other key initiatives associated with its implementation of the *Young Offenders Act*. Similarly, there are many within the Service who are working to strengthen the Service's ties with Aboriginal communities.

²⁴ Interview, local commander in suburban Sydney.

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10.67 What is needed is an integrated approach that accommodates community feedback as part of any proactive policing initiative. The aim is that intensive use of policing powers be used fairly, so as to avoid undermining community confidence in the integrity of police. The danger for police is that any injudicious use of police powers may erode community confidence in their police, and possibly undermine the Police Service's capacity to address crime and disorder in those communities. Other measures to keep these issues under scrutiny will be discussed in Chapter 13.

Recommendations

21. That the Police Service continue its monitoring of the use of 'reasonable directions' in each local area command, including directions which are obeyed.
22. That the Police Service monitor the proportion of Aboriginal people and young people given 'reasonable directions' and seek explanations for the rate of directions, at Operations and Crime Review briefings.
23. That each local command actively seek the views of sections of the community likely to be affected by police use of 'reasonable directions' powers regarding concerns they might have about police, particularly Aboriginal people and young people where relevant.

10B. Reasonable directions: Police practice

- 10.68 It is apparent that the practice of police issuing reasonable directions has long been occurring without benefit of statutory authority. Achieving compliance with directions has depended on the ability of police to obtain the consent and cooperation of members of the public, whether or not the consent and cooperation may have been given entirely freely.
- 10.69 The *Youth Street Rights* review noted that ‘it is clear that the police practice of asking young people to move on ... has been going on for many years’.²⁵
- 10.70 In our focus groups, police echoed this saying that they had always given directions to members of the public (*‘Requesting people to move on has been going on for years’*²⁶), but they had previously lacked the statutory authority to insist on the direction should someone challenge it. After asking one focus group what had changed as a result of the introduction of s. 28F, we were told:
- Nothing. You’ve formalised what was being done anyway. You’ve given legislation, you’ve actually given police the power to do what they were doing anyway.²⁷
- 10.71 One officer said that they had moved people on prior to the introduction of the Police and Public Safety Act, but that they had largely relied on ‘bluff’²⁸ to give effect to the direction in some instances.
- 10.72 Another focus group noted that:
- We used to have a big problem on the beats with the kids sitting on the steps and just causing obstruction ... most people standing around think there’s no drama with them but a lot of elderly people were getting intimidated by them and we never had any specific power to deal with them cause where they were sitting wasn’t private property ... and 9 times out of 10 you just go up to the kids and say ‘listen, what’s happening kids? Do you mind leaving?’, and they’d go ‘yeah, sure’ and away they’d go.²⁹
- 10.73 Where the power was seen by police to have been beneficial, it often related to improvements on what had been police practice prior to the introduction of the legislation. For instance, whenever people queried the authority of police to provide reasonable directions, officers were now able to point to the legislation as the basis for their authority:
- Prior to the legislation, people would argue the point, now when you explain about the legislation, they go.³⁰
- You could tell them to go home before but what if they don’t. Now you’re seen to have power, and when we haven’t got power we’re seen as a joke.³¹

²⁵ Anderson, Campbell, and Turner. *Youth Street Rights: A Policy and Legislation Review*. UTS Community Law and Legal Research Centre and Youth Justice Coalition, Sydney, 1999. p. 89.

²⁶ Interview.

²⁷ Focus group 3.

²⁸ Interview.

²⁹ Focus group 1.

³⁰ Focus group 3.

³¹ Focus group 2.

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10.74 Police also believed there was now scope to be more confident in the directions that were provided. Some officers saw the statutory power as a ‘back-up power’ for situations where someone failed to respond to an informal direction, and used it to define zones in which people were not permitted to remain:

‘Usually when you give an official direction you are setting boundaries. You can say, well, get the hell out of the city, but then if they are pulled up again an hour later they can say, you didn’t tell me where to go. So you usually say well, I’m giving you a direction from a boundary to, you might put it on the whole area of the patrol — you can’t go from Market Street through to Central. They usually know when it’s an official one because you put a boundary on where you don’t want them to be.’³²

10.75 It is also apparent from the number of recorded instances of people refusing to comply with a direction that police are using the penalties established by the legislation. While police may have routinely been giving directions for some time, these particular sanctions were not available to them prior to the introduction of the Act.

10.76 The distinction between the directions that can be made under s. 28F and previous police practice in this area largely rests on the legal requirements imposed on police when they give directions under s. 28F, as well as their capacity to impose sanctions in those situations where a person fails to comply with the direction. The legal requirements consist of procedures to be followed and thresholds to be met in relation to the exercise of the power. Accordingly there are situations where police would not be entitled to exercise the power, meaning that police are more likely to regard, and record, these situations as ‘requests’ rather than ‘directions’.

10.77 Police practice seems to often involve issuing informal directions in the first instance, and resorting to the formal legislative authority only when it is apparent that the person is not going to comply with the request. When we asked police in the focus groups about how they saw an informal request to move on from an area, the response was summed up by the following officer:

‘Well see, that isn’t a direction to move on then. It doesn’t fall within the legislation ... that is my interpretation. [The move on power] is an actual direction, that you are telling a group of people: ‘Listen, you are causing an obstruction in traffic, you are scaring people here, get the hell out.’³³

10.78 When commencing with an informal request, an officer may not explain why a direction is being issued, or the person may not have the opportunity to offer an explanation for their presence or behaviour. Both are important safeguards established in the legislative scheme.

10.79 As with the other aspects of police practice we have observed during this review, it is important not to discourage police from working cooperatively with, or seeking the informed consent and compliance from, members of the public. There are, however, procedural requirements that need to be observed.

³² Focus group 3.

³³ Focus group 3.

- 10.80 The reasonable direction power represents a significant departure from previous police practice in a number of respects. While it may formalise long standing practice, it is a genuinely new power. Those police who previously relied on bluff to give effect to directions appear to recognise this. The benefit to police largely derives from the certainty and authority that comes from a statutory power as well as the penalties for non-compliance, whilst the community may benefit from the regulation of police practice in this area.
- 10.81 Yet this regulated practice applies only to a limited set of circumstances. If police wish to issue a direction in response to behaviour they consider to be constituting or causing an obstruction, harassment, intimidation or fear, then they are obliged to follow a particular set of procedures. This is appropriate as failure to comply with the direction may result in a significant penalty. Where the exercise of police powers may result in sanctions, then it is particularly important that these be appropriately regulated with suitable safeguards established and applied.

Procedural requirements

- 10.82 Section 28F(4) permits a police officer to give a direction only if before giving the direction the police officer:
- a) provides evidence to the person that he or she is a police officer (unless the police officer is in uniform); and
 - b) provides his or her name and place of duty; and
 - c) informs the person of the reason for the direction; and
 - d) warns the person that failure to comply with the direction may be an offence.
- 10.83 Following on from the examination of the procedures to be followed when conducting searches,³⁴ this section will focus on the extent of compliance with the procedural requirements established in s. 28F(4), as well as the consequences of observing or failing to observe the procedural requirements.
- 10.84 We found from our observational research that police seldom complied with all the procedural requirements before giving directions to people in public places. Consistent with our observations of the search procedures, officers rarely provided their name and place of duty, gave reasons, or provided a formal warning regarding the consequences of failing to comply with the direction.
- 10.85 This was reinforced by our survey of legal practitioners, where 10 respondents indicated that in their experience police were not complying with the procedures established by s. 28F(4).
- 10.86 Three respondents emphasised that the problem was not so much that the procedures were not being followed as whether the police had a legitimate reason for exercising the 'reasonable directions' power. One respondent noted that this issue was not followed up by many young people because most were 'sufficiently intimidated by the presence of police to move on without further incident'.

³⁴ See Chapter 5B 'Search Procedures'.

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- 10.87 One respondent noted that *'with respect to the "refusal to move on" charges that our [legal service] has had contact with, the officers have failed almost completely to follow the required procedure'*. Another respondent indicated that at least one charge of 'refusal to move on' had not succeeded at court because of the failure of police to follow the necessary procedure.
- 10.88 Officers told us that they followed some of the procedures some of the time. One officer noted that he found the powers useful for moving young people on when they were on the main street at 3 am. He said that he would approach the young people and say 'Do you want to go?', giving as a reason the number of break and enters in the area or the fact that nothing was open for business. He said that he would not always give his name and station because the young people knew who he was.³⁵
- 10.89 As for warnings regarding the consequences of failing to comply with the direction, we were told that:
- Very rarely do you have to say 'if you don't move along you are going to get a ticket'. You've just got to say 'Move along fella. Move along girls.' Whatever. And they'll go.³⁶
- 10.90 While it was apparent that the procedural requirements were not being universally observed, some police acknowledged the rationale and possible benefits of adhering to the requirements. As one focus group participant said:
- At least you've got to tell people what's going to happen to them if they don't move on. That's common sense.³⁷
- 10.91 There are situations where it simply is not practical for officers to comply with the procedures in their entirety. For instance, it was apparent that police rarely follow all the procedural requirements when the 'reasonable directions' power is used to deal with a large number of people. As one focus group participant said:
- if there's 200 [people to move on] you're not going to say it to all of them.³⁸
- 10.92 A local area commander said that it was important to judge the mood of a crowd, particularly those crowds formed when a number of licensed premises close for the night. He noted that aggressive behaviour from police might cause unnecessary tension. In these circumstances, his officers might give a general direction for people to move on. If that were refused then they might resort to 'full use' of the legislation. The commander thought it debatable whether, in these circumstances, it was the 'reasonable directions' power being used or whether the officers were trying to avoid a breach of the peace.
- 10.93 In fact, in some situations, the procedural requirements were seen as too cumbersome, with 'breach of peace' powers being used in preference to the power to give 'reasonable directions'. This was apparent in at least one incident that we observed.

³⁵ Interview.

³⁶ Focus group 2.

³⁷ Focus group 1.

³⁸ Focus group 2.

- 10.94 Following an alleged assault in one of the side streets off Oxford Street on the night of the Gay and Lesbian Mardi Gras Parade, police acted to keep several groups of people apart. One group of young males, suspected of involvement in the assault, were apprehended apparently for breach of the peace, and were taken away in a police vehicle.
- 10.95 In an attempt to minimise further conflict, police issued a direction to another group, consisting of friends and associates of those taken away, to move away from the area. This group ran down a side street with the apparent intention of returning to Oxford Street from another direction. At this point, our observer was advised by the officer in charge that he was dealing with the situation as a potential breach of the peace because the crowd was too large and fractious to be managed using the reasonable directions power. Using a number of officers at the scene, the officer in charge cordoned off an area to detain the group when they returned to the scene. Upon their return, the officer advised the group that they would be arrested for a breach of the peace if they did not leave the area. Following this warning, the group moved away without further incident.
- 10.96 Another incident witnessed by our observers, this time during Operation CitySafe, involved breaking up and dispersing a large crowd in a beachside entertainment area and adjoining park area. The incident was observed between approximately 2.30 am and 4 am on a Sunday morning. According to our observers, a crowd of in excess of 100 people had gathered in the area. A significant proportion of the crowd appeared to be affected or impaired by alcohol.
- 10.97 Prior to their arrival, police were briefed that there had been an incident where police had been assaulted/abused by a large group of young people in the area. Bottles had reportedly been thrown at officers from an upper floor of a building. There was concern that there may be problems when the licensed premises in the area began to close and more people affected by alcohol converged on the area. Approximately 35 police travelled out to the suburb and were supported in the operation by several police 'caged' vehicles, each crewed by two officers.
- 10.98 Police moved through the crowd requesting that people move along. On some occasions observers believed police to be formally exercising their powers, however, in the majority of instances requests to move on appeared to be more informal. One of our observers stated:
- ... the behaviour was more boisterous with this alcohol-fuelled crowd, however I saw no incidents of aggression. The remaining police ... moved around the crowd generally in twos and requested them to leave the area. Although people were reluctant to leave [they] complied and I saw no formal directions being given.
- I didn't observe the police identifying themselves or their place of duty. Given their uniforms it was obvious that they were police officers and given the numbers involved, it wasn't practical to identify themselves in this situation. It was a case of continually asking them to move along.
- 10.99 Another of our observers noted that:
- In the main, police used a general order for all persons to move on. Not an official announcement of names and giving a direction as per the Act. In circumstances such as were occurring, bearing in mind that the majority of police were clearly identifiable as such (wearing uniforms) it seemed totally impractical for the formal demands to be put on persons.

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- 10.100 From our observational research, it is also apparent that there are many instances where police issue directions without resorting to any particular statutory authority. For example, during the Gay and Lesbian Mardi Gras Parade, one of our observers noted that around 85 people were instructed at various times to climb down from the top of bus shelters, trees, and street signs along the parade route. These were not situations that met the requirements of s. 28F, but nevertheless police were issuing directions.
- 10.101 Not one of these directions was carried out in accordance with the procedures laid out in the Act. In all but a small number of instances, however, people complied with the direction immediately. In those few instances where people decided to remain in their vantage point, police then indicated that the sanctions under s. 28F would apply, but did not follow all the procedures laid out in the Act.
- 10.102 In such situations it can be argued that it is unnecessary, and indeed unhelpful, to insist on the strict adherence to the provisions laid out in the legislation. The officers involved in giving the directions in this situation did so professionally, and often with good humour, which assisted in obtaining the compliance of those in receipt of the direction. There is a question of balance: as we have seen, the procedural requirements can assist in obtaining cooperation from the person given the direction, however there are also situations where it is neither practical nor desirable to require police to strictly adhere to the requirements. There are, however, some significant safeguards inherent in the procedures which warrant their retention in appropriate circumstances.
- 10.103 Perhaps the most important safeguard contained in the procedures concerns the giving of reasons for the direction. Under s. 28F(7), it is not an offence for a person to fail to comply with a direction if that person ceased the conduct which was the subject of the direction. It is therefore essential that police communicate the reason for giving the direction to give the person an opportunity to cease the relevant conduct.
- 10.104 It is important to note the effect of s. 28F(7), relating to the defence against a charge of refusing to comply with a direction. The effect of that section is to establish an offence only when a person continues to engage in the relevant conduct that is the subject of a direction; that is, failure to carry out a direction does not constitute an offence provided that the person does not persist in their conduct. So, if a person or group of persons were to cease or alter their conduct, whether it relates to their behaviour or presence,³⁹ so that it no longer constitutes the relevant conduct that was the subject of the direction, then it is not an offence to fail to comply with the direction. While the COPS narratives we examined are not conclusive on this point, there may be instances of police treating a refusal to move on as a refusal to obey the direction, yet the person has ceased the conduct that led to the move on direction being given in the first place. In such circumstances, the person may not be guilty of an offence. Again, this needs to be addressed by way of further education and training on the issue.

³⁹ If it were the person's presence that constituted the obstruction, harassment or intimidation or caused fear, then it is likely that the direction will be to 'move on' or 'move away'. Failure to comply with this type of direction, when it was a person's 'presence' that was of concern, may constitute an offence.

- 10.105 It should also be noted that, notwithstanding the widespread reference to this power as a ‘move on’ power, it is more accurate to describe it as a power to give reasonable directions for the purpose of putting an end to certain conduct in public places, that is, behaviour that constitutes obstruction, harassment, intimidation or causes fear. To achieve this, the direction given must be ‘reasonable in the circumstances for the purpose of reducing or eliminating the obstruction, harassment, intimidation, or fear.’⁴⁰ The direction may, but does not have to, consist of people moving on from a particular place.
- 10.106 For instance, a group of people may be engaged in behaviour that is intimidating or harassing. If they are issued with a direction to move on, it is not an offence for them to remain in the same area provided they cease their intimidating or harassing conduct. In order to be able to exercise this option, the people concerned should be advised what it is about their behaviour that is of concern. It is possible that this advice will be sufficient to put an end to the particular misconduct without the people having to leave the area. In fact, given the requirement that the direction be reasonable for the purpose of reducing or ceasing the offending behaviour, the most appropriate direction in such circumstances may be one aimed at putting an end to the particular conduct, rather than merely moving the persons elsewhere. This is an issue that needs to be followed up in further education and training provided to police on the application of these powers.
- 10.107 One officer in a focus group noted:
- If they cease to behave in a manner that is offensive or intimidating or whatever then you can’t take any action and people say OK what do we do if they’re standing in a group and they’re like a little gang and they’re doing their little gang thing, do we say that they have to move 50 metres up the street? And how long? Can they go up the street, turn around and walk back? If they sit down and they stop being offensive and we leave and they get back up again — do we have to go through the warning process again? ... It’s really vague from a teaching perspective and a doing perspective.⁴¹
- 10.108 In this situation, it may be helpful for police to outline the reasons for giving the direction, so that the persons are clear about the consequences of persisting in that behaviour. If they cease the behaviour, then they should no longer be of concern to police. If they persist in the behaviour, notwithstanding being advised that it has resulted in the direction, then police have recourse to the sanctions provided for in the legislation.
- 10.109 Providing reasons also assists in a number of other ways. It requires the officer to be clear about why a direction is being given, and may also make it clear to people that they have been given a direction as a result of their conduct not because they have been unfairly targeted because of their age, gender, ethnicity or other factors.
- 10.110 The giving of reasons for the direction is perhaps the most significant element of the procedures, and it should certainly be retained in any scheme regulating police practice in this area.

⁴⁰ See *Summary Offences Act*, s. 28F(3).

⁴¹ Focus group 1.

10C. Conduct warranting issuing of a direction

- 10.111 This section discusses the type of circumstances in which police issue directions to members of the public and is largely based on an audit of police records of the use of the power to give 'reasonable directions'.
- 10.112 It is clear that many of the recorded directions do not relate to the provisions of the legislation. As discussed earlier in this report, this is not necessarily an indication of any misuse of the legislation, but rather reflects the widespread police practice of obtaining the 'consent' of members of the public to directions or requests.
- 10.113 The Police and Public Safety legislation amends the *Summary Offences Act* to provide police with a power to give a direction to a person in a public place if the person's 'behaviour or presence':
- (a) is obstructing another person or persons or traffic, or
 - (b) constitutes harassment or intimidation of another person or persons, or
 - (c) is causing or likely to cause fear to another person or persons, so long as the relevant conduct would be such as to cause fear to a person of reasonable firmness.⁴²
- 10.114 Behaviour or presence which meets any or all of the criteria set out in (a), (b) or (c) above, is referred to in the Act as the 'relevant conduct'.
- 10.115 The persons obstructed, harassed, intimidated or made fearful need not be in the public place but must be near that place at the time the 'relevant conduct' occurs.⁴³ The 'person of reasonable firmness' referred to in (c) above need not be present at the scene.⁴⁴
- 10.116 Section 28F(3) states:
- Such a direction must be reasonable in the circumstances for the purpose of reducing or eliminating the obstruction, harassment, intimidation or fear.⁴⁵
- 10.117 A person who fails to comply with the direction, without reasonable excuse, and persists in the 'relevant conduct'⁴⁶ may be penalised.

⁴² *Summary Offences Act*, s. 28F(1).

⁴³ *Summary Offences Act*, s. 28F(2).

⁴⁴ *Summary Offences Act*, s. 28F(8).

⁴⁵ *Summary Offences Act*, s. 28F(3).

⁴⁶ *Summary Offences Act*, s. 28F(6), (7).

Objectives of the power to give reasonable directions

10.118 The Police and Public Safety legislation was introduced to ‘tackle gang and knife crime’ and ‘to equip police with the laws and powers that they need to make our streets safer.’⁴⁷ In particular, the power to give reasonable directions was aimed at dealing with gangs and anti-social behaviour in public places. Foreshadowing the introduction of the legislation, the Premier told Parliament in March 1998:

... to break up gangs in public places, police will be given the power to give a direction to any person who is obstructing, harassing, intimidating or causing fear to others.⁴⁸

10.119 Perceptions of ‘gang’-related crime periodically feature in media and community debate. While this debate may reflect a real fear of violence, there may be a number of misconceptions about the prevalence of such crime and the nature of ‘gangs’ in NSW.

10.120 A report by the Standing Committee on Social Issues commented that the number and prevalence of ‘gangs’ of young people was ‘greatly exaggerated by the media’.⁴⁹ The committee also stated:

The Committee believes that the term ‘gang’ is often used erroneously to denote any group of young people, and that caution should be exercised in the usage of the term.⁵⁰

A 1994 study conducted for the NSW Police Service settled on the following definition of ‘gang’:

several people who regularly act together in an illegal or threatening manner. A gang has some form of ongoing organisation.⁵¹

10.121 One commander⁵² we spoke to expressed similar views about the term ‘gang’, commenting that it is often used in a misleading and inflammatory way to refer to *any* group of young people. His view was that ‘gangs’ should only be used to describe more traditional notions of structured groups of organised criminals. His command has made a concerted effort to discourage use of the term because of its impact on police relations with young people in his area.

10.122 Of the 24 local commanders that we surveyed, only two indicated that there was a problem with gangs in their commands. Six commanders made comments to the effect that the community perceived that there was a gang problem but that this did not reflect the situation in their commands. When asked if there was a gang problem in their command comments included:

Not from my position but the community ... the local daily paper ... tends to sensationalise crime⁵³

⁴⁷ The Hon. Paul Whelan, MP, Minister for Police, NSWPD, 28 April 1998.

⁴⁸ The Hon. Bob Carr, Premier, NSWPD, 31 March 1998.

⁴⁹ *A report into youth violence in New South Wales*, Standing Committee on Social Issues, Legislative Council, Parliament of New South Wales, Report No. 8, September 1995, p56.

⁵⁰ *Ibid*, p52.

⁵¹ ‘Street Gangs’ Pulse Consultants, 1994, p1, in *A report into youth violence in New South Wales*, Standing Committee on Social Issues, Legislative Council, Parliament of New South Wales, Report No. 8, September 1995, p 52.

⁵² Discussion with Commander and officers from a suburban local area command, 21/5/99.

⁵³ Commander 21.

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[The community] would consider the Vienna Boys Choir a gang if they were in jeans, T-shirts, and standing outside the shopping area.⁵⁴

- 10.123 When asked to nominate what were the major crime issues in their command, most commanders nominated break and enter and steal offences. Robbery, assault and motor vehicle theft were also commonly mentioned. Drugs were said to be a key problem in five commands. One commander mentioned anti-social behaviour and one mentioned street offences, in the context of assaults.
- 10.124 All commanders indicated that they were using the reasonable directions power in their commands: a significant number indicating that it was very useful. Four commanders indicated that the powers were useful in dealing with groups gathering outside licensed premises after closing, with one commander stating, 'With licensed premises we could take action against the publicans under the Liquor Act, though this wasn't as effective. Now we have the definite power to disperse.'⁵⁵ Six commanders indicated that the power was used primarily in shopping areas against persons who intimidate others, and in the main street, mall and complexes. Three commanders stated that the powers were useful in dealing with trouble at large parties or discos.

Police reasons for giving directions

- 10.125 The power to give reasonable directions under the legislation, is limited to directions given to eliminate or reduce conduct that obstructs, harasses, intimidates or causes fear. Our review of the implementation of the legislation has provided ample evidence that, in practice, police give directions for a range of reasons in a range of circumstances.
- 10.126 The purpose of this chapter is to provide some insight into how police are using the power to give directions. From COPS narratives and information from observational research, complaints and submissions we can paint a picture of those circumstances in which police are directing members of the public to 'move on'. It is intended that painting a picture of police practice at the coal face in this area will assist Parliament in deciding, in consultation with the community, whether and to what extent police powers in this area should be limited, broadened or clarified.
- 10.127 We have also included comments from submissions to the review to give some flavour of the range of opinions and level of understanding of the new legislation that exists in certain quarters of the community.
- 10.128 The issue of whether police are giving 'directions' or making 'requests' imposes an additional layer of complexity to this debate. Police were instructed by senior management to record all uses of the power, not only those uses which resulted in an *offence* arising from a refusal or failure to comply with a direction. Most recorded incidents indicate that the police direction or request was complied with. In many of these events it is not clear whether a formal direction was issued or whether police simply made an informal request to the person to 'move on' without exercising or purporting to exercise any formal legislative authority.

⁵⁴ Commander 17, survey of local area commanders.

⁵⁵ Commander 14, survey of local area commanders.

- 10.129 However, some of the case studies we discuss certainly indicate a purported exercise of the power on somewhat shaky legal grounds. Other instances have been highlighted because they illustrate the breadth of the powers. A whole range of examples of the manner in which police are seeking to use the new powers has been included. This will encourage an informed debate, within the community, the Police Service and the Parliament, about the extent of the powers to give directions under the Act and their fair and effective use in the context of practical issues which arise.
- 10.130 Viewed from this perspective, questions of the legality or otherwise of police actions may be less significant than the opportunity these case studies provide to consider police practice as officers wrestle with the new legislation in the context of the community's desire for 'safety', balanced against the need to protect against the erosion of particular civil liberties.
- 10.131 In seeking to understand how police are using these powers we examined COPS entries for reasonable directions in five local area commands to determine the reasons nominated by officers for 'moving people on'. As previously noted,⁵⁶ we acknowledge the limitations of relying on COPS records to determine the grounds on which an officer based a direction.
- 10.132 The directions examined were given over the months of May and June 1999, by which time police should have been familiar with the requirements of the Police and Public Safety Act relating to giving reasonable directions, including the necessity for 'relevant conduct'⁵⁷ as prescribed by the Act. Based on all the reasons given, broad categories of reasons were determined, and the records sorted accordingly.⁵⁸ These categories are described in further detail later in this section.
- 10.133 Our discussion has been divided into two sections. The first relates to those COPS narratives where the reasons for the direction appear to meet the 'relevant conduct' requirements as set out in s. 28F(1). The second part of our discussion relates to other common factors which appear to have formed all or part of the basis for a direction.

'Relevant conduct'

- 10.134 In many cases, whether the behaviour described in these narratives is sufficient to meet the description of the 'relevant conduct' in the Act cannot be confidently assessed from the narratives alone. The fact that in most cases the person obeyed the direction makes it difficult to determine whether the police were in fact exercising a particular power.
- 10.135 From the audit of the grounds for giving a reasonable direction, we were able to match the reasons given in police narratives with the descriptions of the 'relevant conduct' in by the Act, with the following results:

⁵⁶ See discussion of COPS narratives under 'Reasonable suspicion to search', Chapter 5.

⁵⁷ *Summary Offences Act*, s. 28F (1) describes the behaviour or presence which obstructs, harasses, intimidates or causes, or is likely to cause, fear, as the 'relevant conduct'.

⁵⁸ Where a number of reasons have been given for any one direction, each reason has been counted, so the total number of reasons will exceed the total number of directions.

Table 10.4A: Audit of COPS narratives: police directions

	Lake Illawarra	Wollongong	Orana	City Central	Bankstown
s. 28F direction events (number not obeyed)	19 (6)	133 (11)	22 (2)	111 (7)	8 (2)
• Obstructing persons or traffic	2	6	3	16	1
• Intimidating or harassing	5	33	10	37	4
• Causing or likely to cause fear	0	1	0	2	0

Source: All COPS narratives for the five nominated LACs for the period 1.5.99 to 30.6.99

10.136 The following describes incidents where the police direction appeared to be based on ‘relevant conduct’:⁵⁹

Obstructing persons/traffic

Section 28F(1)(a) permits police to give a person a direction where the person’s behaviour or presence ‘is obstructing another person or persons or traffic’. In the reviewed events, this conduct was often associated with begging. In a number of records persons blocking the entrance to entertainment venues, shops and transport ticket offices were ‘moved on’. This category also includes narratives which referred to individuals or groups sitting or standing on the footpath or roadway. Examples include:

- ... Between 4.35 pm and 4.40 pm on 5/06.99, police were patrolling the vicinity of [street name]. Police were walking north on [street name] when they observed the POI sitting on the footpath and begging for money. Police approached the POI and had a conversation with her. At the time the POI had a cardboard sign in front of her which read ‘Please help, came to Sydney to look for work. I am now stranded here with no money or food. Thank you.’ The POI was informed that begging was an offence. The POI was given a warning regarding begging. Due to the fact the POI was sitting on the footpath and blocking other persons as they walked by the POI was issued with the move on legislation. The POI moved on as requested. NFPA⁶⁰
- The POI was sitting on the footpath out the front of [a shop] after getting off the bus. She was given the form of demand to move on and became abusive to the police. The manager of [the shop] came and spoke to her with the help of a Salvation Army officer convinced the POI to move on ...

10.137 Interviews with a Sydney street policing unit confirmed that the powers were often employed to ‘move along’ intoxicated persons who were, for example, asleep on a footpath and obstructing the thoroughfare.

10.138 There may be merit in clarifying the meaning of ‘obstruction’ in circumstances such as those raised above. To what extent are persons begging, collecting for charities, busking, or sleeping in public areas to be considered to be ‘obstructing’ under the Act? This issue was discussed during the passage of the bill through Parliament⁶¹ and was also raised in the submission from the Criminal Law Committee of the NSW Young Lawyers.

⁵⁹ In some cases the persons may have engaged in more than one form of the ‘relevant conduct’.

⁶⁰ NFPA: No further police action.

⁶¹ The Hon. M. J. Gallacher MLC, NSWPD, 5 May 1998, pp 4280.

The submission stated:

It could be argued that the presence of a person in any public place is a potential obstruction of persons or traffic. It is submitted therefore that this definition is too wide.

Intimidating/harassing

s. 28F(1)(b) confers a power on police to give a person a reasonable direction where their behaviour or presence constitutes harassment or intimidation of another person or persons. We adopted a broad definition of intimidation and harassment for this category. Police comments about persons 'causing trouble' or behaving 'offensively' or 'yelling' and the like, were included. Incidents which involved large disturbances, brawls and assaults have been categorised separately but may also meet the relevant conduct requirements in this category.

- On 5 June, 1999, at about 1.20am, police were patrolling the vicinity of [locality]. At this time, police noted there was a large group of Aboriginal youths of mixed sex, congregating near the ... hotel. Police could see some of the youths were scuffling amongst themselves, an act considered intimidating to members of the public leaving the hotel. Police then approached the group and announced their office, prior to issuing the group with a direction to 'move along'. The direction was obeyed by most, with only one person from the group being arrested by other police for offensive language while leaving the area.
- Location: [street name], [restaurant name] POIs: 7 Lebanese males, ... Between 9.35pm and 9.40 pm on 4/6/99, police were walking south on [street name]. Police approached and had a conversation with them. The POIs informed police that they were out in the city for a good night. When spoken to, the POIs were intoxicated. Because of the number of POIs in the group police issued all POIs the move along legislation. All POIs moved on. NFPA.⁶²
- On 21 May, 1999 plain clothes police were performing duties on Operation Centurion 1. This operation is designed to target offenders committing robbery offences. About 8.10pm police were conducting a general foot patrol of [railway station] when they saw the POIs arguing and fighting among themselves. Police identified themselves and spoke to the POIs about their childish behaviour. Due to a number of members of the public being present which could be deemed as intimidating, the POIs were issued a 'Move On Direction' from the location to which they complied. The POIs are a mixture of warbs⁶³ and street kids.
- About 11am on 20/5/1999 a group of young males and females were in the [City] mall. They were reported to police as swearing and being unruly. They were told to move on and did so without incident.

10.139 Another example of the practical use of this section was provided by a street policing team in Sydney. Officers from this unit stated that they would commonly use this provision on Friday and Saturday nights to disperse groups of intoxicated men who hang around and harass women passing by.

⁶² NFPA: no further police action.

⁶³ The Macquarie Dictionary defines 'warb' as 'a dirty or unkempt person'.

Causing or likely to cause fear

Section 28F(1)(c) permits police to give a direction to a person whose behaviour or presence 'is causing or likely to cause fear to another person or persons, so long as the relevant conduct would be such as to cause fear to a person of reasonable firmness'.⁶⁴ It was rare for police to make explicit comment in their record that the relevant conduct was likely to cause fear. Only three instances appeared to fit in this category, two of which are extracted below:

The POIs were sighted loitering outside the [business] on [street name], Wollongong near the intersection with [street name]. Police from the bicycle unit have suspected that the premises are being used for the sale of drugs or another unlawful purpose. The persons sighted have intel relating to vehicle and property theft and have had numerous encounters with police. The POI [name] has been charged numerous times for having custody of knives and vehicle theft. As police approached the group other persons have dispersed. The remainder were searched with nothing untoward located. A direction to move on was given and obeyed. Police feared the group were in the process or about to commit an offence. The presence of the group could also have caused fear in the mind of a reasonable person, due to the behaviour and appearance of the persons.

At about 6.30pm on 11 May 1999 the male was observed outside Town Hall shopfront police station. The male was in possession of one long neck of Victorian Bitter. The male was moderately affected. At this time the male has approached a female and has started a one way conversation. It appeared to police that this female was obviously concerned by this male and was quite frightened. Police have then spoken to this male where his alcohol was poured out in the gutter and was told to move on. The male was informed of why and what would happen if he did not comply. The male has then left without further incident. Female spoken to who was relieved of [sic] police presence.

10.140 An objective test was explicitly included in s. 28F(1)(c) to ameliorate concerns that behaviour causing fear might vary widely according to the constitution or 'firmness' of the 'victim'. The requirement that the relevant conduct must be 'such as to cause fear to a person of reasonable firmness'⁶⁵ was intended as a safeguard against particularly fearful people determining the kind of behaviour thought to be capable of causing fear.

10.141 The 'reasonable firmness' test was discussed during the Committee stage of the passage of the Bill through Parliament. In response to a proposal to remove s. 28F(1)(c) because it was seen as too subjective⁶⁶ the Attorney General stated:

The fallacy in the argument for the amendments is essentially that it is asserted that the test in proposed section 28F (1)(c) is subjective. In fact, it is an objective test because it requires the behaviour to be such that it causes or is likely to cause fear in another person ... Where fear is caused in a person which is irrational or not such as would cause

⁶⁴ A number of individuals and organisations expressed the view that *no* person need be present to satisfy the requirements of s. 28F(1)(c). This appears to be a misunderstanding of the provisions of the Act. Section 28F(2) requires that the person or persons obstructed, intimidated, harassed *or made fearful* 'must be near that place at the time the relevant conduct is being engaged in'. Section 28F (8) provides that no 'person of reasonable firmness' need actually be present at the scene of the relevant conduct. A person is still required to be present, however, that person need not be a 'person of reasonable firmness'.

⁶⁵ s. 28F(1)(c) requires that the relevant conduct 'would be such as to cause fear to a person of reasonable firmness'.

⁶⁶ The Hon R.S.L. Jones, for example, comments 'Of most concern is that a person may be moved on for causing or likely to cause fear in another person. On what basis will police officers make a judgement in this instance? There is no attempt to clearly define or limit the interpretation of "fear".' NSWPD, 20 May 1998, p 4861.

fear in an ordinary citizen, there would not be the requisite conduct which gives rise to the power of the police to give a direction. The provision is qualified by an objective test, a reasonable person test. That is an appropriate safeguard.⁶⁷

10.142 Notwithstanding the inclusion of the ‘objective test’, a number of submissions to our inquiry expressed concern that s. 28F(1)(c) put the onus on police to judge what conduct might reasonably cause fear. The Blue Mountains Community Legal Centre contrasted behaviour causing or likely to cause fear with the other forms of conduct in the section, which it stated were based on ‘the policing of particular positive conduct, eg. obstruction of footpaths or harassment.’⁶⁸ The centre concluded:

The decision of police officers to move young people on is often not linked to any wrong doing or incivility of young people but to the stereotypes and prejudices held by police officers. This subjective ‘reasonable fear’ criteria in section 28F(8) is an unacceptably loose definition of a coercive power.

10.143 One officer present in a focus group conducted during the review, confirmed that this section of the legislation could be subject to different interpretations:

Reasonable firmness — what it might mean to one person, not to another. This is the new ‘serious alarm and affront’ — you remember that? No one could decide what ‘serious’ is.⁶⁹

10.144 A recently published report by the UTS Community Law and Legal Research Centre argues that ‘[w]hile parts of the new ‘move on’ law apply to those obstructing or harassing others, other parts are more arbitrary, and rely on the subjectivity of third parties, rather than any real conduct ...’⁷⁰

10.145 The submission from the Shopfront Legal Centre expressed concerns that a person of ‘reasonable firmness’ might hold ‘unreasonable fears’. The centre commented:

The move-on power is too broad and should be limited and better defined. The problem with acting on the basis of the hypothetical fear of a ‘person of reasonable firmness’ is that many citizens probably do hold an unreasonable fear of congregations of young people. This fear is in part a result of the ‘law and order’ crisis perception held by the community which the new laws have fuelled. This problem should be solved by better education and community awareness. It cannot and should not be solved by providing police with powers to sweep the streets of young people who are committing no offence.

10.146 The Aboriginal Justice Advisory Council took issue with the ‘reasonable firmness’ provisions in the Act because of the way in which police are required to adjudicate whether an individual’s behaviour meets this criteria. According to the council, the ‘reasonable firmness test’ is inconsistent with the issuing of penalty notices. Unless a matter is brought before a court, there is no opportunity for an independent person to scrutinise the appropriateness of the police decision that the relevant behaviour would have caused fear to ‘a person of reasonable firmness’.⁷¹

⁶⁷ The Hon J.W. Shaw, Attorney General, NSWPD, 20 May 1998, p 4862.

⁶⁸ Submission by Blue Mountains Community Legal Centre Inc. July 1999.

⁶⁹ Focus group 3.

⁷⁰ Tim Anderson, Steve Campbell, Sheree Turner, *Youth Street Rights — A Policy and Legislation Review*, University of Technology Sydney Community Law and Research Centre and the Youth Justice Coalition, Sydney, March 1999, p 77.

⁷¹ Submission from Aboriginal Justice Advisory Committee.

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10.147 The objective test is intended to provide police and the courts with additional guidance as to whether a person's behaviour or presence was really capable of causing fear. It appears, however, that both police and some legal practitioners are finding the meaning of the provisions and their proper application, less than clear. In order to properly and responsibly exercise these powers, police must be fully cognisant of their meaning and purpose.

10.148 There may be value in re-visiting these provisions to clarify their meaning and proper application. How clarification of this complex issue is best achieved, whether through appropriate police training or legislative amendment, is a matter for the Parliament and/or the Police Service. If the first option is chosen, the Police Service should now be better equipped to provide officers with case studies highlighting good police practice.

Other factors associated with police directions

10.149 When conducting the audit of COPS narratives it was apparent that, in addition to behaviour or presence which met the 'relevant conduct' requirements of s. 28F(1), many of the narratives indicated that other factors were taken into account by police when issuing a direction. In some cases these factors were in addition to the 'relevant conduct' and in others they appeared to be the sole reason for the direction. The records illustrate a range of circumstances in which police are making 'requests' or giving 'directions' and provide a basis for community and Parliamentary debate about both the scope and limitations of the legislation and police practice in this area.

Table 10.4B: Audit of COPS narratives: police directions

	Lake Illawarra	Wollongong	Orana	City Central	Bankstown
s. 28F directions events (number not obeyed)	19 (6)	133 (11)	22 (2)	111 (7)	8 (2)
• High crime area	2	10	2	10	1
• Disturbance, brawl or assault	3	8	2	5	1
• Complaint/information from public	6	29	3	10	1
• Begging	0	1	0	29	0
• Other offence observed	1	8	2	15	0
• Suspicious behaviour	3	9	2	6	0
• Known to police	1	18	1	30	0
• Aggression/rudeness to police	3	9	1	7	0
• Intoxicated/ alcohol related	10	41	7	20	1
• Search conducted	7	29	2	30	1
• No reason for being there	0	7	4	8	2
• Loitering	8	10	2	4	2
• Other	0	10	2	4	1
• Unknown	3	7	2	7	0

Source: All COPS narratives for the five LACs for the period 1.5.99 to 30.6.99

High crime area

In a number of events reference was made to the fact that the person was in a high crime area.⁷² In some events this was the *only* factor referred to, whilst other events included additional elements:

- Police approached the crowd and they were directed to leave the area as there had been a number of break and enters in the area. All persons complied with direction.
- About 8.35pm on 01.05.99 the POI was observed by police to be loitering around the Eddy Avenue entrance to Central Railway. The area is well known for property, drug and robbery offences. The POI was observed for some time to walk back and forth as if waiting for someone. The POI was spoken to and could not supply any reason for being in the area. POI searched and details obtained. POI moved on without incident.

10.150 The fact that an area is known for drug related or other crime was also a factor in a number of the directions we witnessed during the observational research. Police in focus groups also described situations in which they use the power to give directions. Some confusion was apparent in these groups as to the relevance of an area with a 'high incidence of violent crime' with regard to the 'move on' powers. The powers under s. 28F do not provide for this to be the sole factor considered in determining whether to give a direction. The emphasis in the section is on the 'relevant conduct' of the person and whether it would constitute harassment, intimidation, obstruction or cause or be likely to cause fear. However, police in the focus groups stated that the nature of the area the person was in might be the rationale for asking them to 'move on'. An officer in one focus group commented:

We have specific areas ... we target where we have trouble, commonly known as our hot spots, and if they're in that area, we'll move them away from that area and it may be that we move them into a residential area where there's not a great deal of problems ... if they're around an area where we have shops where they can easily break into — that's one of our problems, juveniles doing busts, break and enters — we try to move them away from that area ... we're happy just to get them away ... ideally you'd like them to go home to a warm family environment but the chances of that happening are zilch.⁷³

10.151 Police interviewed during the review expressed similar views as to the relevance of crime 'hot spots' in the giving of directions. One constable said that the 'move on' legislation was great for problems with young people on the street at 3am. Typically he would approach the young people and ask them 'if they wanted to go'. He would then explain to them that there were a large number of break and enters in the area and that nothing was open and that therefore they should move on. A street policing unit in Sydney also explained their practice of approaching and questioning people in areas with a high incidence of violent crime. The officers would ask people why they were in the area and if they had no reason the police would move them on.

10.152 The legislation does not specifically confer a power to give a direction to a person solely because they are in an area with a high incidence of crime. However, it may be that the location of a person is a relevant factor in determining whether their presence is likely to cause fear.

⁷² Where the reference to a 'high crime area' appeared to relate only to a search rather than a direction it has not been counted in this category.

⁷³ Focus group 2.

Disturbance/brawl/assault

A number of narratives indicated that a direction was given as a result of a disturbance, brawl or assault. In most cases these events have also been categorised under 'intimidation or harassment' above. They may also have been capable of causing fear to other persons present at or near the scene.

About 10pm 10/06/99 police attended the [name] Car Park, [street name, city] in relation to a large number of car enthusiasts causing a disturbance. A move on order was issued to all people and vehicles who did not intend parking for the intention of attending the ... complex. The order was obeyed.

About 9.25pm on Saturday 26.06.99 police were performing an RBT⁷⁴ on [road name, location], when we were approached by the victim ... He made a complaint of being punched to the left cheek area. He stated that the offender was of Asian appearance and was currently in [park name] with a group of males. He ... was visibly shaken ... He was escorted to [park name] where police identified a group of males sitting on some swings ... The victim then identified a male as being the one who hit him. He was spoken to by police and admitted that he had hit the victim after the victim spat at the group. [The victim] then stated to police that he did not want to make a complaint ... The group was then issued a move on direction to which they complied.

Complaint/information from the public

This category indicates that the police were responding to a complaint or other information from the public. Some complaints appeared to refer to conduct described in the Act, while other complaints acted upon by police were to do with other unrelated matters:

The POI was sleeping in a shed at the caravan park. Had been asked to leave by management but had returned. Police attended and informed the POI to move on to which he obeyed.

About 1.40am 05.06.99, police observed the mentioned POI to be laying across a park bench at the mentioned location. At the time, there were a number of persons who were passing by and commenting on the odour and appearance of the POI. A member of the public then approached police and stated that he was offended by her actions. Police then approached the POI and had a conversation with her. She was then directed to leave the area, to which she complied.

10.153 Where the presence of a person has caused offence but is not such as to meet the 'relevant conduct' requirements, the legislation does not confer a power to issue a direction.

Begging

Begging was a factor in a number of events and was often reported as constituting harassment, intimidation or obstruction.⁷⁵

About 11.20am on June 4, 1999, the two persons of interest were on [street name], Sydney, outside the cinema complex, harassing pedestrians, begging for money. The two were spoken to by police and moved along.

⁷⁴ Random Breath Test: conducted to identify drivers potentially above the prescribed alcohol level.

⁷⁵ Where this was the case the records were also counted under the 'intimidation or harassment' category.

In other cases the act of begging was all that appeared in the narrative.

About 3.00pm on Monday the 24/05/99 the POI approached police begging for money. Police then stopped and searched the POI. He was then given a lawful direction to move on.

- 10.154 A street policing team in inner Sydney described moving along ‘beggars’ approaching others for money in an intimidating fashion as a typical use of the power to give reasonable directions. However, these officers stated that they would be unlikely to move along someone who was sitting on the ground collecting coins.
- 10.155 On the other hand, an officer in one of the focus groups commented that the use of the power to give reasonable directions was effective in regard to persons begging:
- ... if people are begging for money, we give them directions. We’re getting good results — they’re moving out of the area because they’re getting tickets now, and they can’t afford to beg in the area.⁷⁶
- 10.156 There may be circumstances in which a person begging is harassing or intimidating other persons or otherwise exhibiting the ‘relevant conduct’ under the Act. However, there will also be instances where begging on its own is not sufficient to justify a police officer issuing a direction under the Act. Under the current legislation, police officers need to consider whether the ‘relevant conduct’ has been displayed in each situation.

Other offence observed

This category includes incidents where police gave a direction after observing another offence being committed. This most often included begging on State Rail Authority premises or drinking alcohol contrary to council signs or other laws.

... About 8pm on 01.05.99 a group of young persons were located in the park with alcohol. The young persons were under 14 yrs and were asked to move on. The group did so with no further problems.

- 10.157 It is possible that directions issued on the basis of young persons found drinking in a park after dark were issued because police believed the young persons were likely to cause fear to a ‘person of reasonable firmness’. However, if the behaviour was not such as to meet the ‘relevant conduct’ requirements, the police direction to move along would technically not be within the bounds of the legislation simply because another offence was detected. In these situations the police may *request* persons to ‘move on’ and the sanction of taking official action on the offence originally detected remains an option if the person does not co-operate.

Suspicious behaviour

In a number of instances the police record states that a person was acting suspiciously or that the officer suspected that the person was about to commit an offence.

... Location [amusement parlour, street name, city]. The above POIs were observed by plain clothes police for a period of about thirty minutes at the above location. It was

⁷⁶ Focus group 3.

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suspected they may be involved in trying to steal property however no offence was detected while police watched the POIs. All POIs were spoken to and it was decided by police to issue a direction for the POIs to move on due to POI 2 being known to police for related intell. POI complied with direction, no further police action necessary.

10.158 In discussing situations where the 'move on' powers might be used, one officer in a country focus group mentioned that the powers were useful to move on 'cockatoos'⁷⁷ as part of his command's anti-theft initiatives. When asked if they would move these people on under the Police and Public Safety legislation he stated: 'What other legislation have you got?'. When asked to clarify, the officer confirmed that the behaviour of the cockatoos was just to be standing: 'Yeah. All they do is stand and wait.' Unless the presence of the person could be said to constitute the 'relevant conduct' this type of situation would not fall within the scope of the legislation.

10.159 A street policing team in inner Sydney said that prior to the introduction of the legislation, police would need to spend more time with a person to convince them to 'move on'. If the person refused, the police would need to wait until an offence was committed before they could act.

Known to police

In several narratives the fact that the person was known to police appeared to be a factor in their decision to give the person a direction.

About 8.40pm Tues 18/5/99 POIs sighted at location seated together speaking to each other. POIs details obtained. Both POIs known to police for street crime and drug offences. Searched with neg result. Directed to move on and notebook signed. NFPA.⁷⁸

10.160 Police in focus groups confirmed that the fact that someone was known to police could form the basis for a decision to move them on:

... everyone knows them so if you see those kids they're the ones that you really want to move on, because you know that they're going to ... as soon as there's wallet left in the car they're going to be diving onto that, or someone leaves their push bike out the front of the shop they'll be stripping it. That's why you target [that] lot.⁷⁹

10.161 In the absence of the 'relevant conduct' the legislation does not confer a power on police to give directions because the person is known to them.

Aggression/rudeness to police

Aggression or rudeness to police that occurred *prior* to the direction was a factor in 20 narratives. In some cases it is possible that the aggression towards the police may have been sufficient to cause fear. In a number of incidents police appeared to be the only

⁷⁷ 'Cockatoo' is a term used by some police to refer to persons who assist in break and enters by standing out the front of premises and alerting the persons unlawfully on premises of the approach of police.

⁷⁸ NFPA: no further police action.

⁷⁹ Focus group 2.

persons present when the conduct occurred. The issue of whether the presence of police, in the absence of other members of the public, is sufficient to meet the requirements of the legislation⁸⁰ is further discussed below.

At 4.30pm 21.5.99 [name of police officer] stopped a large group of well known juveniles. One member was arrested due to an outstanding warrant. The remainder of the group became aggressive towards police. Police then attended and searched all members and then gave them a direction to move on. No items were located on the POI, and she obeyed the move on direction.

Alcohol related

Alcohol was a factor in many of the incidents. In some cases the intoxication of the 'person of interest' or the presence of alcohol appear to be the only reason for the direction.

Whilst performing a general patrol of the [locality] area attended the car park of [a store] ... There saw four male persons sitting in the car park on the ground and talking. All persons moderately effected by alcohol. Asked to move on which they did without incident.

- 10.162 There may be situations where the presence of a person or group of persons affected by alcohol may be sufficient to cause fear to a 'person of reasonable firmness'. However, the fact that persons have consumed alcohol and are present in a public place would not necessarily be sufficient to meet the 'relevant conduct' requirements.

Search

In a large proportion of events, persons were searched prior to being moved on. It may be that the suspicion that led to the search was also the reason for the direction, although in some cases little else was specified other than that the search was conducted and the direction given.

About 2.15 pm on the 18/5/99 police spoke to the POIs in the western car park of [a railway station] . The POIs were searched and syringes located. They were asked to leave the area and did so without incident.

No reason for being there

Police sometimes referred in their entry to a person having no reason to be in a place or no reasonable excuse to be present. In some cases this was a comment in addition to other factors and in some cases it was the only factor recorded in relation to the direction.

At 11.15pm on 12.6.99 whilst patrolling the Wollongong CBD area police observed POI in company with another male. POI was spoken to by police re purpose for being at this location. POI did not have a purpose for being there and thus was asked to move along. POI complied with police direction.

⁸⁰ *Summary Offences Act*, s. 28F(2) requires that the persons affected by the relevant conduct be in or near the public place at the time of the conduct.

10.163 While there is a defence for failing to obey a direction where a person has a reasonable excuse,⁸¹ there is no requirement that a person need have a reason to be in an area in order to avoid being 'moved on'. Police may regard a failure to provide a reason, sometimes in combination with the time of the event and location of the persons, to be suspicious. However, unless the presence of the persons in these circumstances would be sufficient to meet the relevant conduct requirements, there would not be grounds under the legislation for police to issue a direction.

Loitering

In some narratives the 'person of interest' was described as 'loitering' prior to being given the direction.

At the stated time date and location the three POI were seen loitering at the location. All three were spoken to and had no reason for being at the location and were directed to leave and complied.

10.164 In other events, it appears that council signs prohibiting 'loitering' were either the sole basis for the direction or used in combination with the Police and Public Safety legislation.

At 11pm on Sunday the 9th of May, the POI [name] was again seen in [street name, locality] ... He was approached by police and spoken to. He stated that he was getting something to eat and then would go and visit a friend. POI nominated the person called [first name] but could not give police a surname or address. He was informed that he would be issued a TIN [infringement notice] for 'not comply with notice in public place'. The POI then got into vehicle [registration number] and drove off.

10.165 Under the Police and Public Safety legislation, merely loitering in an area would not be sufficient to constitute the relevant conduct. However, police in some commands are enforcing council erected 'no loitering' signage. The legal basis for the erection of these signs is uncertain. This issue will be discussed in more detail later in this chapter.

Other

Incidents where the police appeared to be making directions for an identifiable reason which could not be categorised into any of the other categories were grouped together as 'other'.

At the stated time, the POI ... was seen by police to be on the first level of [an amusement parlour] situated on George Street, Sydney. At the time, [the POI] was seen to be alone and walking around ... other persons playing games in the area. Police approached [the POI] and asked him if he was supposed to be in school to which he replied, 'my mum let me have the day off'. Enquiries revealed the [the POI] was in fact enrolled at [a school] late last year and has not attended since. At the time [the POI] was spoken to he had no identification or money in his possession however stated that he had just finished playing video games. [POI] was directed from the area and told to return to his home address as he is currently not enrolled in a public school. NFPA

⁸¹ *Summary Offences Act*, s. 28F(6).

Unknown

In some records the police comments were too brief to ascertain anything about their reason for giving a direction. For example, one record simply contained the word 'obey'. In other records, though more detailed, no reason was recorded.

Spoke to the 5 Islander youths aged between 16 and 20 yrs old. Sitting in the darkness in the park. Stated they were just talking. Direction given to move on — obeyed.

- 10.166 From this audit of police narratives it seems that police are giving directions in a range of circumstances which do not fit within the ambit of the Police and Public Safety legislation. Fewer than half the incidents we examined would appear to meet even a broad definition of behaviour which might correspond to that described in s. 28F(1). Some confusion seems to have resulted from the fact that the legislation has codified one element of long standing police practice to give directions in *a range of situations*. Only a portion of the reasons recorded for justifying a direction would fit the legislative requirements set out in s. 28F(1).
- 10.167 This finding corresponds with information from our observational research and with the comments made by police in interviews and focus groups.

Observational research

- 10.168 During our observational research, observers witnessed the issuing of numerous police directions. The majority of the directions witnessed during Operation CitySafe were issued in situations where either drugs or alcohol were a factor. Commonly these situations involved persons who were found consuming alcohol in alcohol-free zones or persons in areas with high rates of drug-related crime. In some of these instances the persons directed were obstructing or abusing other persons. On other occasions they were described as sitting, sleeping or standing. Anti-social behaviour was also a factor in some directions unrelated to alcohol or drugs.
- 10.169 Suspicious behaviour or suspicion that the person was about to commit an offence, such as soliciting for the purposes of prostitution, appeared to be the reason for a number of 'move on' directions. On one occasion the direction appeared to be made due to concern for the welfare of a 14 year old girl. The young person was out early in the morning and found sleeping on a park bench in the company of older persons who were requested to move on and take the young person home.
- 10.170 On one occasion our observers witnessed a large scale 'move on' of in excess of 100 people outside licensed premises at closing time. According to the observers, the event had the potential to escalate but the police actions in requesting and directing persons to 'move on' were effective in defusing the situation.
- 10.171 Most directions observed during the Gay and Lesbian Mardi Gras Parade were issued to move persons off bus shelters, trees or other structures.

Discussion

10.172 It is clear from our examination of the COPS narratives and the observational research we conducted that police continue to give people 'directions' in a wider range of circumstances than those prescribed by the Police and Public Safety legislation. This does not necessarily mean that these requests will be unlawful, especially if they have been 'consented' to. Obtaining a person's consent to a direction may in many cases be an example of fair and effective policing. This is likely to be the case where reasons are given for the direction and the person agrees to comply.

10.173 However, as explained earlier in this report⁸² the notion of 'consent' is used to describe a *range* of situations in which compliance is achieved. This issue was highlighted by a student who complained to this office during the review.

Case study

10.174 According to the complainant, he and a friend were on a busy city street and were approached by two police officers. One officer asked them to provide 'ID'. The complainant was not carrying any. The complainant's friend asked him whether he needed to show the officer his driver's licence. The complainant advised him that he did not unless the officer gave him a reason. The constable told the complainant not to interfere and requested to see his friend's licence. The complainant repeated his advice to his friend. The constable said that the police had new powers to require identification under the 'move along' laws.

10.175 The complainant's friend complied with the request and the officer noted his details. The friend was then directed to move away. After questioning the constable as to the reason, and receiving no reply, he did so. The constable then asked the complainant for his name and address, which he 'grudgingly'⁸³ gave. The officer also implied that the complainant had 'something to hide'⁸⁴ because he did not have any identification on him. He was then directed to move away and complied with the direction.

10.176 The two officers' statements describing the event were substantially the same as the version described above. In addition, the complainant alleged that the officer who gave the direction was aggressive. He complained that the use of the powers was unjustified. According to the other officer present, both officers had explained that they were speaking to the complainant 'under the authority of the 'Police and Public Safety Act''⁸⁵.

⁸² See Chapter 3 'Methodology'.

⁸³ Complainant letter.

⁸⁴ Ibid.

⁸⁵ Written statement by colleague of officer who issued the direction.

10.177 The officer who issued the direction stated his reasons for requesting the persons to ‘move on’ in the following terms:

I informed [the complainant] that the new legislation commonly known as the ‘Move Along’ legislation, gives Police the power to move along persons whose behaviour or presence is obstructing another person. [The complainant] stated that he was not obstructing anybody. I informed [him] that he was standing in the middle of the footpath, thus creating an obstruction for pedestrians walking along the footpath in [street name].

Furthermore I explained to [the complainant] that the area where he was standing was a well known area for stealing, robbery, assaults, and intimidation, and that his presence in that area due to his size is likely to cause fear in the predominantly Asian people around at the time. [The complainant] is Caucasian, over 6 foot tall and well built.⁸⁶

10.178 The police investigator’s report in regard to this matter, included the following comments:

It is my view that the position occupied by [the complainant and friend], on the footpath would not have caused any major obstruction to pedestrians at that time of night, or more correctly the early hours of the morning. Indeed in the intelligence information report, ... [the constable] indicates that [the street] was reasonably quiet. The atmosphere was calm and people appeared to be enjoying themselves just hanging around.

I also hold the view that a person’s physical stature is of no consequence in this matter. If Asian people might be intimidated by a person’s build, so be it. We do not discriminate on ethnicity or size.

For obvious reasons it would be prudent to carry identification. The fact that one chooses not to, does not in itself create an offence.⁸⁷

10.179 It appears that the complainant had little choice other than to ‘consent’ to the officer’s direction. Where police have a proper basis for issuing directions this is unproblematic. However, consent gained through misrepresenting the law in circumstances where the direction may not meet the requirements of the legislation, may have negative consequences. While there may be no intention on the behalf of officers to subvert the intended use of the laws, such action may lead to complaints, to a misunderstanding in the community of the nature and extent of the laws, and may also undermine public confidence in police.

10.180 The complainant highlighted the importance of officers having an accurate understanding of the law:

It would be an absurd reversal of responsibility if every citizen had to inform officers about the lawful discharge of their duties. The average person does not have the requisite knowledge to assert their rights in such cases. They rely ultimately on the diligence of individual police officers to not overstep the mark. It is incumbent upon each officer to understand the nature of the statutory powers vested in them.⁸⁸

⁸⁶ Written statement by officer who issued the direction.

⁸⁷ Investigator’s report, 28 July 1999.

⁸⁸ Complainant letter.

Directions which were *not* complied with

- 10.181 A key feature of the directions power lies in s. 28F(6) which allows police to penalise persons who refuse or fail to obey directions, without a reasonable excuse. While police may have been issuing 'directions' prior to the introduction of the legislation, there was no power to penalise persons who refused or failed to comply with a direction.
- 10.182 When persons are penalised for non-compliance, it is essential that the direction is one which meets the requirements of the legislation. While it may be proper and effective policing to make requests of members of the public in a range of circumstances outside the scope of this legislation, penalties can only be applied to directions given in accordance with the law.
- 10.183 Our audit of 293 records in which police gave directions,⁸⁹ found only 27 directions which were not obeyed. Most of these directions appeared to be in response to conduct which would meet the requirements of the legislation. However, in just over a third of the records, the behaviour of the persons directed (as described in the narrative) appears to fall outside the legislative requirements. These are more fully discussed at 'Appendix D'.

Persons affected by the 'relevant conduct'

- 10.184 Section 28F(2) states that the persons affected by the conduct described in s. 28F(1) 'need not be in the public place but must be near that place at the time the relevant conduct is being engaged in'. A lawful direction under the legislation therefore requires that the person affected by the 'relevant conduct' be present either in or near the particular public place. Once again it is valuable to examine how police apply this provision in practice.
- 10.185 It was often unclear from the COPS narratives we examined whether other persons were present when the 'relevant conduct' took place and, if they were, it was sometimes unclear where they were. There were some incidents where it *seemed* that no other person was present in the public place or near the 'persons of interest' at the time of the event.
- 10.186 Our examination of COPS narratives did reveal showed some examples of the use of the legislation in situations where the person intimidated or harassed was *near* rather than *in* the public place at the time the relevant conduct occurred. A number of the complaints to police in regard to street prostitution appeared to be made by people in their homes at the time of the conduct.
- 10.187 One inquiry to this office related to police directions given in response to a complaint from a person on private property at the time of the conduct. The COPS narrative for the event states:

About 11am on the 8th of March 1999, police attended [road name] in relation to a complaint received by a security guard, employed by a VIP. The informant stated that both POIs had been loitering in the vicinity attempting to take photos of the VIP and family. The POIs were behaving in an intimidating manner, constantly walking up and down the street and peering into the house. As a result of this complaint, police approached the POI and obtained their identity. They stated that they were freelance

⁸⁹ Audit of 5 nominated local area commands between 1.5.99 and 30.6.99.

photographers attempting to get photos of the VIP. Police informed the POIs that they received a complaint about their behaviour and consequently were asking them to move from the area. After a short discussion the POIs moved on without incident. They were informed that if they returned they could be arrested and charged.

10.188 One of the two photographers involved in this incident contacted our office. He explained that when approached by police he was waiting outside the VIP's home with the intention of taking photographs of the VIP when he emerged. In an interview we conducted with the constable who gave the direction, he stated that the two photographers were blocking the footpath, using an adjacent block of land to leave their belongings, and attempting to take photographs of the VIP whenever the blinds were drawn or the garage opened. The constable also stated that he believed that the presence of the photographers would be intimidating because their appearance was 'ominous' and 'threatening'.

10.189 Many of the COPS narratives we reviewed in regard to reasonable directions indicated that the 'relevant conduct' was directed towards police or occurred in the presence of the police. In some of these situations it appeared that no other persons were present or aware of the conduct. It would appear that police are interpreting the requirement for 'presence' of other persons as being satisfied if the other persons are the police themselves. Officers may, for example, experience harassing or intimidating behaviour by a person in a police station. Or, as described in the narrative below, officers may attract unprovoked aggression while patrolling an empty street:

About 4.45am on Sunday the 27/06/99 whilst police were patrolling [street name, locality], the POI ... was observed wandering on to the roadway as he walked west up [street name]. As police passed the POI with his fist clenched and finger pointed upward, he swung his arm up at police. He was subsequently spoken to regarding his actions. At this point he was verbally aggressive, however, choosing his words carefully. Due to the location and time of event a subsequent knife implement search was conducted with a negative find. Due to the POI's intoxication and manner a direction was issued to move on, with the POI complying with such direction.

10.190 While s. 28F(2) specifies that 'other persons' must be in or near the public place it does not place restrictions on *who* these persons might be. In some cases it may be appropriate that these 'other persons' are police officers. However, given that police will always be present when a direction is issued, it may be useful for the legislature to clarify whether, and in what circumstances, the presence of police alone would satisfy the requirements of s. 28F(2).

Behaviour or presence

10.191 Section 28F(1) states that an officer may give a direction if the officer has reasonable grounds to believe a 'person's behaviour or presence in the place' obstructs, harasses, intimidates or causes (or is likely to cause) fear to another person. There was some debate in the Parliament as to the consequences of allowing a person's *presence* in a place, as opposed to their behaviour, to provide the basis for a direction.⁹⁰ A central concern related to the possibility that the mere *presence* of a person may cause fear to a person of reasonable firmness.

⁹⁰ Legislative Council, 20 May 1998.

10.192 One Member of Parliament expressed concern that the style of dress of a group of young people congregating in a park could be sufficient to cause fear in a group of elderly people passing by and hence form the basis of a 'move on' direction:

... these elderly people may have recently listened to horror stories on television about young people in leather jackets going around in groups committing bag robberies. These young people may be totally unconnected with the bag snatching group, yet the elderly people fear them all the same just because they are present in the park.⁹¹

The Attorney General responded:

It is not presence as such, in isolation, which can lead to the offence; it has to be presence which obstructs, or constitutes harassment or intimidation, or is causing or likely to cause fear and the like. So it is not simply the concept of presence; it has to be associated with one of those other concepts.⁹²

The 'presence provision' and street sex workers

10.193 An example of the use of the 'presence provisions' brought to our attention in the course of the review related to the use of s. 28F to direct a sex worker to 'move on'. The matter is of particular interest because it has been heard at the local court level and a decision reached.

10.194 The COPS entry in regard to the incident included:

About 1.45 on Saturday 19 December, 1998, police responded to several complaints from local residents regarding the behaviour and position of prostitutes working in the [defined] area, [locality]. This area is well known to police as being used by local prostitutes to engage in prostitution. Police regularly receive complaints by many persons regarding the violent behaviour, loud and intimidating manner and acts of prostitution in the area by persons involved in this trade. Police saw the defendant standing outside an entrance to the [name of school] underneath a balcony. Police approached the defendant where she was informed that a number of complaints had been received by police concerning prostitutes in the area and was asked to move on from the area. The defendant refused to comply, stating that police had no powers to ask her to leave the area and that she was only in the area to stand out of the rain. The defendant was then given the opportunity on at least seven further occasions to move away from the area where she continually refused to comply, stating that police had no powers or rights to make her move and that she was not in that position to engage in acts of prostitution. During this time the defendant was informed on several occasions that it was an offence to refuse the reasonable direction and the reason being that her presence was likely to cause fear, harassment, or intimidation to local residents or passersby. ... It is believed by police that the defendant was in the outlined area to engage in acts of prostitution and her presence was likely to cause fear, intimidation and harassment to local residents and passersby.

⁹¹ The Hon. I Cohen, MLC, NSWPD, 20 May 1998.

⁹² The Hon. J. W. Shaw MP, Attorney General, NSWPD, 20 May 1998.

- 10.195 While the case deals with a single incident, an audit of COPS narratives revealed that the incident broadly reflects police practice in a number of areas. Our audit of the COPS data base for all local area commands in NSW over the 12 month review period located 44 events where directions were given in circumstances involving street sex workers.⁹³ There is evidence in these narratives that the police are moving on persons suspected of soliciting as well as suspected prospective clients. Police may be acting within the scope of the legislation if the presence of these sex workers constitutes harassment, intimidation or is likely to cause fear. These narratives are discussed in more detail in the appendices at the end of this report.
- 10.196 The person was charged with ‘refuse direction to move on’.⁹⁴ The police version of the facts differed to the defendant’s in some respects and the magistrate found both the defendant and one of the police officers to be equally credible witnesses. The prosecution case failed because the police version of events was not proved beyond reasonable doubt. However, the magistrate’s finding on the application of the *law* was that if the event had occurred in full accordance with the police version of events, then an offence would have been made out under s. 28F, that is, a *prima facie* case was established.
- 10.197 The magistrate made a written statement of her findings in regard to the law. According to this statement, the defence case rested essentially on the contention that:
- ... there had to be a specific identification of a person as at least one of the agents of the conduct giving rise to complaint such as to justify a reasonable belief in a police officer that that person’s mere presence constitutes harassment or causes fear.⁹⁵
- 10.198 The defence proposition was that the person directed to move on would need to have been *personally* engaged in the conduct which was the subject of the complaints in order to constitute the ‘relevant conduct’ under the Act.
- 10.199 The police did not seek to prove that the defendant was responsible for the complaints and the magistrate found that this was not necessary to meet the requirement of the legislation.
- 10.200 The magistrate said that when the police attended the scene, shortly after receiving ‘an anonymous complaint by a resident “of prostitutes working in the area and causing trouble”, the defendant was merely standing under the awning, there were no other persons in the vicinity, it was drizzling, and there were ... no visible signs of sex workers, pimps, or persons apparently being or wanting to be solicited’. The police case also included evidence from residents of the area that behaviour ‘ranging from the mildly irritating’ to ‘intimidatory, abusive, assaultative’⁹⁶ regularly resulted from street soliciting by prostitutes in the area.

The magistrate concluded:

I am therefore of the view that [s. 28F(1)] is designed to cover, in addition to actual conduct or behaviour, mere presence of a person X in particular circumstances, whose

⁹³ This audit was conducted using the key words ‘prostitute’ ‘prostitution’ ‘solicit’ and ‘sex’. It is possible that relevant records may have been missed using this method.

⁹⁴ Brief of evidence covering sheet, 30 April 1999.

⁹⁵ Magistrate’s written statement.

⁹⁶ *Ibid.*

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presence by reason of prior experience of another person Y of events commencing with a similar presence in similar circumstances in the same place, whether of X or another similar person can be objectively regarded as constituting harassment or intimidation or relevant conduct causing or likely to cause fear. [*emphasis added*]

10.201 Police from this command indicated that they were treating this case as a test of the validity of their approach of using the legislation to move suspected street sex workers from particular areas irrespective of their behaviour. Certainly the police involved regarded this statement as a finding 'in the police's favour'⁹⁷ even though the case was not proved on the facts.

10.202 The decision provides an interpretation of s. 28F(1) as to how a person's *presence* might constitute the 'relevant conduct' under the Act. A significant feature of the magistrate's formulation of the law is that a person may lawfully be given a direction because a *similar* person's behaviour or presence met the 'relevant conduct' requirements. On the facts of the case: sex workers in a particular street were allegedly intimidating residents therefore *any* sex worker in the relevant area could be given a direction, irrespective of their own conduct.

10.203 When Parliament considered the 'presence' provisions reference was made to the possibility of persons grouped around an Automatic Teller Machine constituting an intimidating presence:

... as I understand it, there are problems with automatic teller machines. People grouping around an ATM can be intimidating, but it might not be said that the people who are present there would necessarily be involved in a particular conduct or behaviour, apart from the fact of presence.⁹⁸

10.204 In determining the kinds of factors that police may take into account when assessing whether a person's *presence* would meet the relevant conduct requirements, it is essential that police avoid relying on stereotypes based on age, race, manner of dress etc in determining who should be 'moved on'. This aspect of the law needs to be applied sensitively. The application of these provisions also needs to be in balance with the legitimate expectation of members of the community that they will not be penalised where they have behaved in a lawful and appropriate manner in a public place.

10.205 COPS narratives indicate that police are taking into account the location, height, build, style of dress of persons, as well as the number of persons in a group when determining whether their presence might constitute the 'relevant conduct' under the Act.⁹⁹

About 8.15 to 8.45pm 20/5/99 a number of youths were gathering around the [locality] library situated on [street name, locality]. Police considered the youth's presence in such a large group of about 15 — 20 to be intimidating to reasonable people of the public. Police took details of the youths and directed them to move on, as per legislation ...

⁹⁷ Submission from a senior detective constable in regard to this case.

⁹⁸ The Hon. JW Shaw, Attorney General, NSWPD, 20 May 1999.

⁹⁹ See also comments by the police investigator in relation to a complaint earlier in this chapter, and COPS narratives in relation to sex workers quoted below.

10.206 Police in focus groups said that they were able to distinguish between ordinary citizens and trouble makers largely from a person's appearance:

I could put you in a car here, and I don't know [this town], we could drive down the main street, and I could pick you out 20 people — just looking at them.¹⁰⁰

It's not a matter of race, colour, sex or creed ... I mean you're not going to have any 80 year olds likely to cop it, but it's just the 'feel' of them. You can drive past and 'feel' them.¹⁰¹

10.207 In chapter 5 we discussed the PACE *Code of Practice for the Exercise by Police Officers of Statutory powers of Stop and Search*, (UK), in relation to the kinds of factors it suggests would not justify 'reasonable suspicion' to conduct a stop and search. The Code states that personal factors, such as a person's age, hair style or manner of dress, cannot be used alone or in combination with each other as the sole basis on which to search that person. The code also proscribes basing a search on stereotyped images of certain persons or groups as more likely to be committing offences. While forming the necessary suspicion for a search is not the same as determining, for example, whether a person's presence might cause fear, these principles indicate that reliance on such factors should, at the least, be treated with care and sensitivity.

10.208 It may be useful for Parliament to consider providing guidance regarding the situations in which a person's *presence* may warrant police intervention. In doing so:

It is important to acknowledge that police interventions should not be indiscriminate: a young male may well be more likely to be carrying illegal drugs than an elderly female. A policy which demanded that both were equally likely to be stopped and searched would be unrealistic. So policing must discriminate. The challenge is to ensure that such discrimination is legitimate. Discrimination based on stereotypes, general categories and statistical probabilities would not achieve this. More is needed, including training and education to shape attitudes and practices.¹⁰²

Presence – a comparison with the use of council 'No loitering' signage

Local Government Act 1993, s. 632

10.209 Section 632(1) of the *Local Government Act* creates an offence of failing to comply with the terms of a notice erected by a council. Section 632 (2) states:

The terms of any such notice may relate to any one or more of the following:

- (a) the payment of a fee for entry to or the use of the public place,
- (b) the use of a vehicle in the place,
- (c) the taking of any animal or thing into the place,
- (d) the use of any animal or thing in the place,

¹⁰⁰ Focus group 2.

¹⁰¹ Ibid.

¹⁰² Maher L, Dixon D, Swift W, and Nguyen T, Anh Hai: *Young Asian People's Perceptions and Experiences of Policing*, Sydney, 1997, p 55.

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- (e) the doing of any thing in the place, *[emphasis added]*
- (f) the use of the place or any part of the place.

10.210 Some councils have used s. 632(2)(e) as authority to erect signs which prohibit loitering and/or disorderly behaviour. We were unable to locate a comprehensive list of councils making use of such notices. However, our investigations found at least ten councils had erected 'no loitering' signs. These council notices are of interest to this review because, like the power to give reasonable directions under the Police and Public Safety laws, they represent an attempt to deal with anti-social behaviour in public places.

Legal status of 'no loitering' notices

10.211 Legal opinion is divided as to whether s. 632 of the *Local Government Act* permits local councils to prohibit 'loitering'. Crown Solicitor advice to the Police Service in 1995 concludes that s. 632 can be used in this way.

10.212 A contrary opinion was expressed by a private law firm in advice to Tamworth Council. This legal advice concluded that, when read in context, s. 632 did not extend to erecting 'No loitering/Disorderly Behaviour' signs.

10.213 The Minister for Local Government has also been recently reported as stating that 'there may be some legal uncertainty'¹⁰³ about putting up signs to stop loitering.

Police Service assessment of 'no loitering' notices

10.214 In some instances local police have initiated requests to councils to erect notices to prohibit loitering in particular areas within their commands. In other areas, the local council has erected the signs of its own volition and requested police support to enforce the notices. There are a range of views as to the role and effectiveness of these notices both within local government and within the Police Service.

10.215 In March 1997, police from Taree requested that the Greater Taree City Council erect 'no loitering' and other signage in certain areas. The submission stated that the laws at the time were not sufficient to deal with anti-social behaviour:

These provisions do not allow police to move people on, prevent them from behaving in a rowdy and unsociable manner or crowd control behaviour.¹⁰⁴

10.216 During the review period, another council conducted a trial to compare the use of 'no loitering' signs with the use of the new Police and Public Safety powers. Prior to the introduction of the Police and Public Safety laws, police officers in the Lake Illawarra command asked Wollongong City Council to erect signs in Port Kembla. Their submission to council argued that 'loitering and disorderly behaviour notices' would help police deal with drug offences, public drunkenness, and street prostitution in the Port Kembla area. The police submission stated:

¹⁰³ Sydney Morning Herald, 24/9/99.

¹⁰⁴ Submission to Greater Taree City Council by Taree Police, 12 March 1997.

We want it clearly understood that if Council sees fit to erect such signs, it will not be the innocent members of the public who will be affected — rather undesirables such as druggies and prostitutes, hoodlums, rebel rousers [*sic*] and the like. These are the undesirables that have to be moved on, not the citizens who go to the shopping centre, buy something, pay a bill, post mail or whatever, then stop and talk to friends and go home. They will not be affected.¹⁰⁵

10.217 Council agreed to erect the notices in the Port Kembla CBD for a trial period (1 March 1999 to 1 September 1999) and to then evaluate their impact.¹⁰⁶ One officer¹⁰⁷ involved with the trial expressed his support for the signs to deal with drugs and prostitution in the area. When questioned about why he felt the signs were necessary in light of the new Police and Public Safety legislation, he gave the following reasons:

- that the Police and Public Safety Act was difficult to use because of the need to establish that a person of reasonable firmness would have been affected by the conduct;
- that the concept of ‘a person of reasonable firmness’ was too vague; and
- that under the Police and public Safety legislation it was only possible to ask persons to ‘move on’ and it was not possible to specify a particular area and timeframe in a direction.

10.218 Initially, a neighbouring command was also to be involved in the loitering trial. However, when the new Police and Public Safety laws were introduced, this command decided against the use of signage because the Police and Public Safety laws *were* judged sufficient to deal with street safety issues. In addition, the following issues were raised with respect to the use of ‘no loitering’ notices:

- concern about the legal status of the signs;
- the lack of clarity as to what was meant by ‘loitering’;
- that using ‘no loitering’ signs in a large mall would be inappropriate because a mall environment provided seating and other facilities designed to encourage people to spend time in the area;
- that ‘no loitering’ signs may create a perception in the community that an area was unsafe; and
- that a person affected by alcohol would be likely to ignore signs.¹⁰⁸

10.219 The preference in this command was to increase police patrols in trouble spots and utilise ‘No Alcohol Zones’.¹⁰⁹ The commander was also able to point to a range of other crime prevention and community liaison strategies in progress in his command. Many of these programs were the responsibility of the youth liaison officer.¹¹⁰

¹⁰⁵ ‘Loitering and Disorderly Behaviour Notices’ submission to Wollongong Council by Sergeant J G Crowley, Lake Illawarra local area command, 11 May 1998.

¹⁰⁶ The council’s evaluation was incomplete at the time of finalising our report.

¹⁰⁷ Telephone interview 30 March 1999.

¹⁰⁸ Discussion with community safety officer and local commander, 28 May 1999.

¹⁰⁹ According to the commander, these zones are different to ‘Alcohol Free Zones’ because they prohibit possession as well as consumption of alcohol. ‘Alcohol Free Zones’ only prohibit the latter.

¹¹⁰ This officer was also singled out for praise during an independent consultation with school principals.

10.220 Another commander, working in suburban Sydney, commented on the use of ‘no loitering’ signs in his command. In this case the signs were erected by the council around the transport interchange and along a particular road known for street sex work and associated criminal activity. As a result of representations to council by this command and other agencies,¹¹¹ the signs erected in the area of street sex work were removed. The commander felt that the signs did little to contribute to a resolution of the crime associated with the street prostitution and nominated the following reasons for the removal of the signage:

- that moving sex workers away from the area would disrupt pro-active policing initiatives targeting drug and other criminal activity associated with the sex trade;
- the signs were anomalous with other State Government laws and at odds with public policy in relation to regulation of the sex trade and drug use harm minimisation;
- that moving sex workers down the road or into side streets increase the dangers to street sex workers; and
- the signs were of dubious legality.

Local Government assessment of ‘no loitering’ signage

10.221 The decision to erect ‘no loitering’ notices rests with individual councils.¹¹² According to the Department of Local Government the applicability of s. 632 of the *Local Government Act* to the erection of ‘no loitering’ signs is ‘not beyond legal doubt’¹¹³. The department has also stated:

... a range of offences and other measures relating to the maintenance of public order are already provided for in legislation independently of section 632 of the Local Government Act. The additional powers to the police, contained in section 28F of the Summary Offences Act, makes it unnecessary for the Council itself to attempt to regulate behaviour of this nature in public places by use of section 632 notices.¹¹⁴

10.222 The Local Government and Shires Associations has advised councils ‘to exercise caution in the use of s. 632 of the *Local Government Act* to justify erection of ‘no loitering’ signs’. The Associations have also stated that the anti-social behaviour which police and councils seek to manage by the erection of such signs ‘is better dealt with under powers to keep public order available to the [Police] Service under other legislation ...’¹¹⁵

10.223 Tamworth Council decided against the signage after receiving legal advice that there was ‘significant doubt’ as to council’s authority to erect ‘no loitering’ signs. The council was

¹¹¹ According to the ‘Report of the General Manager’ to Council on 27.4.99, the Community Safety Task Force put a resolution to council that the signs be removed. The task force membership includes local community representatives, local police and council staff.

¹¹² Letter to a Council General Manager, from Mr Garry Payne, Director General, Department of Local Government, April, 1999.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Local Government and Shires Associations Weekly Circular 11/99, 19 March 1999.

also of the opinion that ‘the new Section 28F of the *Summary Offences Act* make[s] it unnecessary and inappropriate for Council itself to attempt to regulate loitering and other forms of anti-social behaviour in public places by use of Section 632 of the Act.’¹¹⁶

10.224 On the other hand, in response to a submission from local police, Taree Council decided (before the introduction of the Police and Public Safety Act) to erect various signs to deal with loitering, disorderly behaviour and possession and consumption of alcohol.¹¹⁷ Reports to the council from local police indicated that the signage had contributed to a reduction in street offences. This reported reduction occurred in the context of a range of strategies adopted by council and local police to deal with alcohol related crime and street offences. These strategies included licensing agreements¹¹⁸ and the establishment of a ‘liquor consultative committee’.

Community views

10.225 When Wollongong Council proposed to conduct its ‘loitering trial’ it received an equal number of submissions supporting and opposing the proposal. Those opposing the proposal did so for a range of reasons including:

- concerns about the potential targeting of youth, homeless people, unemployed people, and certain ethnic groups;
- concerns about the interpretation of the term ‘loitering’;
- belief that the Police and Public Safety laws were sufficient to deal with anti-social behaviour and that the signs were therefore unnecessary;
- a belief that additional police presence rather than signage was more effective in deterring anti-social behaviour;
- concerns about the legality of the signs; and
- concern that moving people out of an area would not solve the underlying problems of the area.¹¹⁹

10.226 Other than general statements of support, the information summarising the submissions in support of the proposal documented the following reasons:

- the signs would assist in dealing with persons congregating outside licensed premises; and
- support for the attempt to rectify the ‘rampant anti-social behaviour prevailing’.¹²⁰

¹¹⁶ Correspondence from the Acting General Manager, Tamworth Council, to the Minister for Local Government, The Hon. Harry Woods, MP, 26 May 1999.

¹¹⁷ Extract from minutes of ordinary meeting, Greater Taree City Council, 16.7.97.

¹¹⁸ The ‘Taree Central Business District Licensed Premises Code of Conduct’ came into force on 18 July 1997.

¹¹⁹ *No Loitering/Disorderly Behaviour Draft Policy Public Exhibition Comments*, in Wollongong Council Administrative, Works and Community Services Committee Submission to Council, 9.11.98.

¹²⁰ *Ibid.*

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10.227 COPS narratives from the Lake Illawarra local area command and information from local outreach workers indicated that police were utilising the ‘no loitering’ signs in Port Kembla to ‘move on’ sex workers. We interviewed sex workers in the area and many of them indicated that they had been asked to ‘move on’ by police enforcing the signs.

10.228 The main concerns of these sex workers were:¹²¹

- that they were trying to earn a living and were not behaving offensively

... I do it in decent hours. I’m not around when the school kids are out ... I can’t stress that enough — the point that we are working. We’re not loitering. We don’t swear and we’re not drunk ...
- that it would be unsafe for them to move out of the area where the ‘no loitering’ signs were posted:

Where would they rather us? Down some little back alley [where] when we do disappear we don’t know who’s disappeared ... I’d rather the girls be out where we can see them ... taking number plates ... knowing that they are going to come back ...
- that they received confusing messages from police about what behaviour was prohibited by the signs:

Some police, they interpret [loitering] how they see it ... some, if you’re just standing they’ll tell you, ‘if you’re walking it doesn’t matter’. Others, if you are standing and walking they ‘do’ you ... they don’t seem to have an actual guideline to it ... Some say that we can walk up and down and some say that we can’t ...

Discussion

10.229 The main difference between the approach in the Police and Public Safety Act and that of council signage is in the type of conduct proscribed. The Police and Public Safety legislation allows police to give directions to reduce or eliminate conduct which is obstructing, harassing, intimidating or which is likely to cause fear. The relevant council notices prohibit loitering and sometimes also disorderly conduct or behaviour. The Standing Operational Procedure drafted by police for use in the Wollongong City Council trial defined loitering and disorderly behaviour as:

Loitering: means ‘lingering idly or aimlessly in or about a place’ — to ‘hang about’

Disorderly Behaviour: means to be ‘unruly’, ‘lawless’, ‘stubborn and disobedient’ or simply ‘creating a public disturbance’¹²²

10.230 It has been argued that the conduct proscribed by the notices is very wide¹²³ and provides police with unduly broad discretionary powers. According to the procedures quoted above, merely ‘hanging out’ in an area may be sufficient to constitute loitering.

¹²¹ Interviews with Street Sex Workers — Port Kembla 29 May 1999.

¹²² Reported in Wollongong Council Administrative, Works and Community Services Committee Council Submission 9.11.98, p. 14.

¹²³ Wollongong Council Administrative, Works and Community Services Committee Council Submission 9.11.98 reports that one neighbourhood committee opposed loitering signs because the definition of loitering was ‘too wide’, p. 3.

- 10.231 During the review we were advised that a number of loitering offences are to be challenged in court. However, at the time of finalising this report it appears that despite conflicting legal opinion about the validity of the notices, no cases resulting from the enforcement of the signs had been heard.¹²⁴
- 10.232 The inherent difficulty in proscribing activity that constitutes loitering was considered by the Supreme Court of the United States when it struck down a Chicago City Council ordinance which prohibited ‘criminal street gang members’ from ‘loitering’ in a public place. The Court affirmed that ‘the definition of ‘loitering’ ... drew no distinction between innocent conduct and conduct calculated to cause harm’.¹²⁵
- 10.233 It appears that the type of conduct that councils and police are attempting to control through the use of ‘no loitering’ notices, is largely able to be dealt with under s. 28F of Police and Public Safety laws. However, the nature of the conduct proscribed is more clearly defined in s. 28F than it is in the council notices. The Royal Commission commended regulation of police conduct which would ‘ensure that the rights of citizens and the powers of police are balanced and plainly articulated’.¹²⁶ It would seem that this balance is more likely to occur where:
- the law provides clear direction to police as to the scope and nature of their powers; and
 - the law is sufficiently well defined that members of the community can understand what the law requires of them.
- 10.234 Leaving aside questions of legality, councils are well advised to carefully consider any proposal for the use ‘no loitering’ notices to deal with anti-social behaviour in public places. The utility of these notices may need to be re-assessed in the light of the new powers to give directions in s. 28F of the *Summary Offences Act*.

Scope of ‘reasonable direction’

- 10.235 The legislation leaves police a broad discretion as to the kind of directions that may lawfully be given in response to the ‘relevant conduct’. The Act provides that the direction:
- ... must be reasonable in the circumstances for the purpose of reducing or eliminating the obstruction, harassment intimidation or fear.¹²⁷
- 10.236 By far the most common direction reported in the narratives was a direction to ‘move on’ with no further detail. In the police narratives we examined for the four focus areas there were also examples of police directions to:
- leave the park and go home;
 - move off the roadway;
 - not to be in the city;

¹²⁴ Letter to a Council General Manager, from Mr Garry Payne, Director General, Department of Local Government, April, 1999.

¹²⁵ *City of Chicago v. Jesus Morales et al*, Supreme Court of the United States, June 10, 1999.

¹²⁶ Royal Commission into the New South Wales Police Service, *Final Report*, Volume II, May 1997, p. 556.

¹²⁷ *Summary Offences Act*, s. 28F(3).

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- not to be in the vicinity of a particular street;
- move away from the police station;
- ‘*move on under new move on legislation and not to return whilst in that state nor begging for money*’¹²⁸ [to a drug affected person seated on a footpath];
- move on and lower your noise;
- leave the entertainment area;
- ‘*either go back to the party or move along and go home*’¹²⁹ [to young people gathered on street who said they had been at a party];
- move away from a ‘fast food’ restaurant;
- leave a ‘fast food’ restaurant and not return that day.

10.237 The breadth of this power has been somewhat obscured by the tendency to refer to the power to give reasonable directions as the ‘move on’ power. This tendency is reinforced by police recording procedures which refer to the power to give reasonable directions in this more limited way. For example, the relevant ‘incident type’ on the COPS data base, is titled ‘Street offence — obey direction to *move on*’. [emphasis added]

10.238 Questions were raised in focus groups as to the kind of directions allowed by the legislation. For example, one officer stated:

We can’t really direct them to go home. That’s not fair.¹³⁰

10.239 Although some officers expressed similar views, other officers clearly believed a direction to ‘go home’ was acceptable. The range of concerns expressed by officers were summarised in the Police Association’s submission:

The implementation of this power has also highlighted some practical problems. The legislation is silent as to what a reasonable direction is. Is it appropriate for a person of interest to move 10 metres down the road or is it appropriate for a police officer to tell the person to go home? As this legislation is only in its infancy, precedence (*sic*) has not been set and police are on a daily basis faced with the dilemma of determining what is reasonable.

10.240 While the most common direction was a general direction for the person or persons to ‘move on’, in some narratives the direction was quite specific, for example:

... The POIs were intoxicated to varying degrees. They were harassing passers by and intimidating school children and transport users. The POIs were informed that they were intimidating members of the community and were directed to move 200 metres south along [street name] to an accompanying grass reserve. The POIs obeyed this direction ...

10.241 It was common practice in one of the focus areas, City Central, to define the area the person of interest was required to leave. Sometimes this area was quite extensive. The following extract relates to a young person who had been performing skateboarding tricks on a busy city footpath. His skateboard had narrowly missed some people after a failed trick:

¹²⁸ Quoted from a COPS narrative.

¹²⁹ Ibid.

¹³⁰ Focus group 1.

A passer by said something to the POI, with this the POI turned around, (obviously embarrassed) and raised his fists to his head and gestured to the passer by, as if to threaten punching him (even though the passer by was about 1 foot taller and 30 Kg's heavier) [The POI was called back by police but ran away. When eventually caught he said] he only ran because he didn't want his skateboard confiscated. The POI was spoken to in regards to his behaviour and was directed not to be South of Market street/North of Central railway/East of the Anzac Bridge and West of College before 12 am 17/06/1999. He was also searched with nil find.

- 10.242 It is important that police are aware that the legislation permits directions other than a direction to 'move a person on'. While in some cases a 'move on' direction may be effective, in others police may need to be more specific in order to eliminate or reduce the relevant conduct. In some situations issuing a 'move on' direction on its own may simply displace the conduct to another location. Given the range of conduct that may be involved and the need to consider the circumstances of each situation, it is appropriate that police use their discretion to tailor directions to solving the particular problem at hand. This aspect of the legislation may need to be reinforced in future police training due to the narrow emphasis that has been placed on directions to 'move on', and the confusion as to the scope of the power that was expressed by police in focus groups and interviews conducted during the review.

Recommendations

24. That s. 28F of the *Summary Offences Act* be amended to enable an officer to dispense with any or all of the procedural requirements of s. 28F(4) provided that the officer does so only where the officer has a reasonable excuse in all the circumstances.
25. That the code of practice for the 'reasonable directions' power provide guidance on those situations where it is reasonably necessary to dispense with the procedural requirements before giving 'reasonable directions' in a public place.
26. That the Police Service obtain legal advice and provide guidance to police as to the meaning and application of:
 - 'obstruction', to determine how it relates to such activities as begging, collecting for charities, busking, or sleeping in public areas;
 - s. 28F(1)(c), to address confusion and uncertainty regarding the proper application of this provision;
 - s. 28F(2), as it applies to police officers being the person affected by the 'relevant conduct'.
27. That the use of 'reasonable directions' powers be governed by a code of practice (made pursuant to a Regulation) which clearly articulates the rights of citizens as well as the powers of police. Such a code should:
 - emphasise that the 'reasonable directions' power is not limited to directions to 'move on';
 - set out those factors (such as age, racial appearance, manner of dress and antecedents) that can not form the basis of a direction in the absence of other factors;
 - provide guidance to police regarding the situations in which a person's presence alone may warrant police intervention.

10D. Activities exempted from reasonable directions power

10.243 The Police and Public Safety Act amended the *Summary Offences Act* to include s. 28G, which states:

This Division [Division 4, relating to the police power to issue reasonable directions in public places] *does not authorise a police officer to give directions in relation to:*

- a) an industrial dispute;
- b) an apparently genuine demonstration or protest;
- c) a procession; or
- d) an organised assembly.

10.244 This provision generated significant interest during the Parliamentary debate on the legislation. Debate on this section in the Legislative Council extended over three sitting days.¹³¹ The main point of contention was obtaining agreement on a suitable form of words that did not permit police to use the power in respect of protests, processions and assemblies that were otherwise lawfully conducted or assembled for the purpose of promoting a particular cause. In agreeing on a form of words, the Government was insistent on ensuring that the provision was not worded so as to adversely affect or diminish the intended application of the power.

10.245 The arguments for preventing such activities from being dealt with under the reasonable directions power related mostly to ensuring that 'reasonable directions' were not used to prevent, prohibit or otherwise nullify genuine expressions of dissent and protest.

10.246 It was further argued that many of the activities dealt with in s. 28G were able to be authorised under other provisions of the *Summary Offences Act*, relating to public assemblies.¹³² In the event that such activities got out of hand, they could be dealt with under other legislative provisions, and so there was no need to disperse or otherwise direct the persons involved using the 'reasonable directions' power.

10.247 In practice, this provision was not a significant issue during the review period. We examined the COPS database for all the local area commands for the entire period of 1 July 1998 to 30 June 1999 to determine whether any records related to activities proscribed by this section.¹³³

¹³¹ See NSWPD, 20 May 1998, pp. 4866–71; 21 May 1998, pp. 5021–30; 27 May 1998, pp. 5208–12, 5232–37.

¹³² See Part 4 (ss. 22–27), *Summary Offences Act*.

¹³³ Searches were made of the COPS database using the words: 'assemble' (which would have also found 'assembled'), 'assembly', 'demonstrate' ('demonstrates', 'demonstrated'), 'demonstration' ('demonstrations'), 'dispute' ('disputed', 'disputes'), 'gathering' ('gatherings'), 'industrial', 'organise' ('organised', 'organises'), 'procession' ('processions'), and 'protest' ('protested', 'protesting', 'protector', 'protectors', 'protests').

10.248 Our search of the COPS database is obviously not conclusive in determining how many directions may have been issued in breach of s. 28G, as officers aware that they are not permitted to issue directions to people engaged in the activities listed in the section are unlikely to create official records of any such breaches on the police database. However, the search resulted in the retrieval of two records that indicated that police had issued directions in breach of s. 28G.

10.249 Both events related to demonstrations and protests that give every indication of meeting the ‘apparently genuine’ test established by s. 28G (b), but were recorded as uses of the Police and Public Safety Act powers, specifically as ‘Street Offence — Obey Direction to Move On’:

Incident 1: POI [Name, Age, Office held in Community organisation]: About 1 pm on Tuesday the 13/4/99, I attended the [Name of financial institution], Wollongong Mall. Outside of these premises there were approximately 12 persons, both male and female. These persons had placards and banners including a ‘loud hailer’ and were protesting about the [financial institution’s] involvement with the Jabiluka Mine. This is a Uranium Mine proposal for Kakadu, Queensland [sic]. The above POI was spoken to, then all persons were informed by myself that they had to leave the area. All persons then obeyed my direction.

Incident 2: On Sunday the 2nd May 1999, at 3.45 pm at cnr of Castlereagh St and Martin Place Sydney, the POI was observed loitering about after Serbian demonstration. Police observed the POI previously in the demonstration protesting peacefully. However at the intersection of Macquarie St and St James St Sydney, the POI was seen by police to get into a minor confrontation with police when they requested the POI to stop marching. The POI came under police attention at Martin Place. When questioned why he was standing around, he stated, ‘Ah I am just waiting on my sister’. I said ‘I am [Officer’s name and place of duty]. In relation to the illegal march you just participated in I am giving you a direction to move on, you fail to do so you may be committing an offence, do you understand that?’. He said ‘yes’. Subsequently the POI was given a CNI¹³⁴ check. Police informed the POI that they had suspicion to believe he was carrying a bladed instrument. Police informed the POI, under the Police and Public Safety Act 1998, section 28A of the Summary Offences Act that he would be subject to a search and failure to do he may be committing an offence. The POI was searched with nil find. The POI was given a direction to move on and did so.

10.250 Having regard to s. 28G, the officers involved in these matters were not permitted to issue a direction under the Act in relation to the involvement or participation of these people in the various demonstrations, regardless of whether or not those demonstrations were legally authorised.¹³⁵ While we are aware only of these two records, the possibility that directions may have been issued in relation to other protests, demonstrations, processions or industrial disputes cannot be discounted. As we acknowledged earlier, it is unlikely that such directions would be recorded if an officer was aware that the direction was in breach of s. 28G.

¹³⁴ CNI refers to the Police Service’s ‘Central Names Index’.

¹³⁵ Authorised public assemblies are dealt with under Part 4 of the *Summary Offences Act*. The prohibition on giving directions to organised assemblies extends, but is not limited, to those public assemblies authorised under Part 4 of the Act.

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- 10.251 We are aware of at least one inquiry made of our Office in relation to the possible use of the reasonable directions power with respect to a protest. This involved a protest against proposed earthworks and development in bushland in Sydney's northern suburbs. Police attended the scene and apparently instructed the protesters to move on, without stating the basis on which the protesters were being so directed. Again, if such a direction was based on s. 28F, then that direction was not permitted by reason of s. 28G.
- 10.252 In expending as much time and effort as it did in settling on the wording of this provision, the Parliament clearly expressed its intention that the 'reasonable directions' power was not to be used against industrial disputes, demonstrations and protests, processions and organised assemblies. While there is no evidence that there have been any contraventions other than those described, it is evident that there is not universal appreciation of the circumstances in which the power cannot be applied. Accordingly, suitable efforts should be made to ensure that all officers are aware of the specific circumstances in which they are expressly not permitted to issue such directions. In this regard, where a briefing for police officers is organised prior to an activity of the type proscribed by s. 28G, the officers involved in policing the event should be advised that they are not able to issue directions under s. 28F in respect of the event.

Recommendations

28. That the Police Service give consideration to further education and training specifically regarding s. 28G of the *Summary Offences Act*, including advice through Police Service publications.
29. That where a briefing is provided to officers prior to police activity in respect of an industrial dispute, demonstration, protest, procession or assembly, officers be advised that the 'reasonable directions' power can not be used in respect of participants in that event.

Demand name and address

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11. Demand name and address

Power to demand name and address

11.1 The Police and Public Safety Act amended the *Crimes Act* by inserting s. 563, which enables a police officer to request the name and address of a person if the officer believes on reasonable grounds that the person may be able to assist in the investigation of an alleged indictable offence because the person was at or near the place around the time that the offence was committed.¹

11.2 Prior to making the request under s. 563, the officer concerned must:

- provide evidence that they are a police officer to the person;
- give their name and place of duty;
- give the reason for the request; and
- warn that a failure to comply with the request may be an offence.²

11.3 The person must not fail to comply with the request, give a false name, or fail to give their correct address in full, unless they have a reasonable excuse.³ The penalty for a breach of s. 563 is a fine of up to \$220.⁴

A police officer may request proof of the person's name and address.⁵ The penalty for failing to comply without a reasonable excuse is also a fine of up to \$220.⁶

The legislation makes it clear that nothing in s. 563 limits any other powers, authorities, duties or functions that police officers may have apart from the section.⁷

Discussion

11.4 In explaining the purpose of this provision, the Government noted that:

Police have reported that their inability to demand the name and address of persons in public places has hampered their ability to fight serious crime. There is currently no obligation on persons to provide their name and address to a police officer, even if they have witnessed a serious crime. The lack of power hampers efforts to break through the code of silence that members of serious criminal gangs use to ensure members do not provide information about criminal activities. There have been instances when police have been called to the scenes of serious crimes such as stabbings and although many

¹ *Crimes Act*, s. 563 (1).

² *Crimes Act*, s. 563 (2).

³ *Crimes Act*, s. 563 (3).

⁴ *Crimes Act*, s. 563 (3).

⁵ *Crimes Act*, s. 563 (4).

⁶ *Crimes Act*, s. 563 (3).

⁷ *Crimes Act*, s. 563 (6).

persons obviously witnessed the incident no person present has been willing to provide police with contact details. This prevents police from following up potential witnesses when they are away from their peers and not subject to pressure to remain silent.⁸

- 11.5 The Government intended the provision to be confined to those circumstances where someone may not be willing or able to provide a full statement *at the scene* of an indictable offence. The power, therefore, was to be of assistance in tracking down people away from the scene where they might be more forthcoming about what they may have witnessed. When questioned on the matter during debate on the provision, the Attorney General stated:

Section 563 gives limited power to a police officer to take a name and address where the police officer believes on reasonable grounds that the person may be able to assist in the investigation of an indictable offence ... If a person is a material witness because he or she saw some events immediately after the occurrence of an alleged crime, police ought to be able to ask that person to assist them in their investigations. The same would apply to a person who was present immediately before the commission of the crime and who may be able to give circumstantial evidence of factors that identify the alleged offender or otherwise assist in the inquiry.⁹

- 11.6 In addition to the limited circumstances in which it may be used, s. 563 requires various conditions to be met before a request can be initiated. The police must have reasonable grounds to believe that the person can assist with the investigation of an indictable offence, because they were at or near the scene of the offence around the time it occurred. The section requires both temporal and spatial proximity to a serious crime, and furthermore, requires a *reasonable belief* that the person can be of assistance to the investigation. These are not insubstantial tests.

Police practice

Offences arising from s. 563

- 11.7 While police recorded instances of people being searched where nothing was found and of people complying with reasonable directions, there were no records made of people complying with a demand made under s. 563. During the implementation period, only those *offences* arising from the use of s. 563 were recorded on COPS by police. That is, police recorded specifically as uses of s. 563 only those instances where people refused to give their name and address, or provided a false name and address.

⁸ Second Reading Speeches of The Hon. P Whelan, NSWPD, 28 April 1998, p. 3971 and The Hon. J Shaw, NSWPD, 5 May 1998, p. 4277.

⁹ The Hon. J Shaw, NSWPD, 20 May 1998, p. 4874.

11.8 The following table sets out the number of offences arising from the use of s. 563 by police during the first 12 months of implementation:

Table 11.1: s. 563 name and address offences

	Refuse name & address		False name & address		Charges etc
	Adults	Juveniles	Adults	Juveniles	
July 1998	1	0	4	0	4
August	0	0	5	1	6
September	0	0	3	0	2
October	3	0	2	0	2
November	1	0	4*	0	3
December	2	1	7	1	9
January 1999	1	1	6	0	7
February	4	0	2	1	6
March	3	0	6	0	6
April	0	0	7**	1	6
May	2	0	4	0	5
June	0	0	4	0	4
Totals	17	2	54	4	60

Source: NSW Police Service 1.7.98 to 30.6.99

* Includes one event marked 'Unknown' where age and/or gender were unknown.

** Includes one event marked 'Unknown' where age and/or gender were unknown

11.9 The table shows that in the whole of New South Wales during the review period there were only 77 recorded instances of people either refusing to provide their name and address, or providing a false name and address, with 60 charges, summons and/or infringement notices issued in connection with those offences.

11.10 Given the small number of recorded instances of offences arising from events where this power has been used, it was possible to examine all the COPS records for the use of this power since the commencement of the Act. The purpose of the examination was to determine the nature of the incident that prompted police to demand the name and address of the person(s) concerned, and upon determination, the incident types were created, and sorted according to the number of incidents for each category.

DEMAND NAME AND ADDRESS

11.11 The following table¹⁰ is a summary of the circumstances in those matters where police took action against people for an alleged breach of s. 563 of the *Crimes Act*:

Table 11.2: Incidents related to use of s. 563 Crimes Act

Reason stated for use of s. 563 (Based on COPS narrative)	Number of Instances
Motor traffic offences	39
Public order/summary offences (including searches and 'reasonable directions')	15
Transit offences	7
Theft	5
Abusive and/or intimidating behaviour	3
Break and enter	3
<i>Police Powers (Vehicles) Act</i> powers	3
Post arrest	3
Loitering	2
Victim of assault	2
Assault	1
Breach of <i>Noise Control Act</i>	1
Drug offences	1
Entry to prison	1
Possible witness to indictable offence	1
Unknown	1

Source: Audit of all NSW Police Service COPS records relating to s. 563 incidents (1.7.98 to 30.6.99).

11.12 Of all the instances examined, only one record substantially reflected usage of the s. 563 power in accordance with its stated purpose of assisting police to get the names and addresses of potential witnesses:

About 10.30 pm on Sunday 21 March 1999, the two victims were standing near the main entrance to [a bar]. A male victim [V1] received a blow to the head with a beer glass causing a severe laceration to the face. The victim has fallen to the floor. The victim's friend [V2] received several blows to the right ear by another glass by a second offender. The impact by the first offender on [V1] was so severe that the glass has embedded in his hand causing a laceration to his hand. The offender was detained by security but upon the victim collapsing and bleeding profusely from the face security went to his aid allowing the offender to escape. The defendant [D1] was seen to assist this offender with the injury in leaving the premises and taking him to the rear of the complex where he left in a vehicle. [Rangers] have confirmed that the vehicle was [registration and description] which had earlier been issued with a parking infringement notice. Upon police arrival the scene was secured and witnesses interviewed. The defendant refused to supply particulars and was warned regarding his obligation under the Police and Public Safety Act to supply particulars following a serious crime. He further refused and was subsequently arrested. Information by witnesses indicate he was with the two offenders causing injury to [V1] and [V2] prior to the incident and assisted their escape. Police

¹⁰ As noted earlier, the number of events on the COPS database in respect of a particular provision does not match the number of offences recorded elsewhere. Furthermore, not all events result in further action taken, but may result in a record being made on COPS. Therefore the number of events recorded in Table 11.2 does not equal the number of offences in Table 11.1.

offered the defendant an opportunity to be interviewed regarding the matter but he declined. When obtaining details at the police station the Defendant continued to be obstructive in supplying personal details to confirm his identity. Police have seized the defendant's clothing as blood stains are present. The defendant has declined to assist police in identifying the offenders.

- 11.13 The remaining records show the power being used in conjunction with, or as a substitute for, other powers to demand name and address, in pre- and post-arrest situations. The most common recorded explanation for the use of s. 563 related to traffic and motor vehicle offences, for which a power to demand name and address from a driver already exists in s. 5 of the *Traffic Act 1909*.¹¹ It is not readily apparent why police are recording these instances as s. 563 offences, when they would be more properly recorded as breaches of s. 5 of the *Traffic Act*.
- 11.14 Since the commencement of the *Police Powers (Vehicles) Act 1998*, police have also had powers under that Act to demand the name and address of passengers and other persons who might have used the vehicle from the driver and/or the owner of the vehicle. There were three instances where the offence would have been more properly recorded as an offence against these provisions.
- 11.15 There were a number of instances where the demand for name and address was made in connection with suspected or detected transit offences. There was one instance where police recorded an incident involving a young male travelling on a train without a ticket. Police asked for identification, which the person was unable to produce. The record notes that following this:
- The young person was asked to state his name and place of abode, and was informed that providing false particulars constituted an offence under the Transport Administration Act.
- 11.16 The young person then provided a false name and address, and police made further enquiries based on additional information, partly provided to them by passengers travelling with the young person.
- 11.17 In this instance the police made it clear that they were relying on the 'demand name and address' provisions arising from the application of the *Transport Administration Act*, not on s. 563. Police officers are authorised by the regulations under that Act to demand the name and address of anyone they suspect of having committed an offence whilst travelling on public transport, or on property belonging to State Rail, State Transit or the Rail Access Corporation.¹² Accordingly, it is more appropriate for police to record a demand for name and address in relation to a transit offence as a use of the various powers created in the Transport Administration regulations.

¹¹ It is noted that since the preparation of the original report, the *Traffic Act 1909* has been superseded by the *Road Transport (General) Act 1999*.

¹² See cl. 31 of the Transport Administration (Bus Offences) Regulation, cl. 35 of the Transport Administration (Ferry Offences) Regulation, and cl. 41 of the Transport Administration (Railway Offences) Regulation. It is noted that since September 1, 1999, the Rail Safety Regulation has replaced the Transport Administration (Railway Offences) Regulation, but the latter regulation was in operation for the period of the review.

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- 11.18 There were some instances where a legal basis for use of the power was not evident from the police record of the incident:

About 12.15 pm on Sunday 19 July 1998 police observed the defendant [Real first name, middle name and surname] standing outside [a shop]. Police then approached the defendant and spoke with him. The defendant was then asked to provide some identification and stated his particulars as [Real first name, False middle name and surname; Date of Birth]. The defendant was then questioned further in relation to his name and a search of his person revealed a NSW Concession Card in the name of [Unrelated third party]. The defendant again provided his details as [False surname]. He further stated that he was holding the concession card for his friend. Police then recognised the defendant as [Real surname] and he was further questioned in relation to his correct name. The defendant admitted to being [Real surname]. The defendant was then returned to [the Police Station] where he was questioned in relation to the concession card. Enquiries made by police revealed that the victim's wallet and personal items (concession card) had been stolen/lost about 1 month previous.

- 11.19 Notwithstanding the fact that the person of interest provided a false name and address in response to the police request, and was in possession of another person's identification, there is no evidence in the record that the initial request by police for the person's name and address was valid, if that request were made under s. 563. There is no suggestion that the person was seen to be a possible witness to an indictable offence, and therefore it is extremely unlikely that a charge arising from the person providing a false name and address, made under s. 563, could be sustained.

- 11.20 There were a significant number of instances where the power was used in connection with a summary offence, or with an incident of public disorder, not involving an indictable offence. One example of where the power appears to have been used in relation to summary offences is contained in the following entry:

[POI 1; POI 2] About 11.05 pm Police were patrolling [Name of Street] when POI 2 was observed by police walking up the middle of roadway. He was with a number of other males. These persons were spoken to and POI 1 refused to comply with a police direction to submit to a search for knife or supply his name and place of abode. POI 1 was requested a number of times to supply his details. He was informed that he was going to be arrested if he did not comply. The POI 1 still refused to supply his details. The POI was informed he was under arrest and I took hold of his arm. POI 1 complained that it was an assault when I took hold of his arm. He was informed that if he did not supply his details he would be conveyed to [police station]. POI 1 then supplied his name and address. He was issued with a TIN for Refusing to comply with a Police direction. POI 2 was issued a TIN for Walk on Roadway.

- 11.21 From the records this appears to be an occasion on which there were insufficient grounds to exercise any of the powers used by the officers concerned. The use of the reasonable directions power to conduct a search for knives is certainly novel, and there is no evidence of an indictable offence as the basis for the demand for the name and address from the various persons of interest. Another matter of interest is that it appears that the person gave his name and address after being warned that he was being taken to the station, but it has been written up in COPS as an incident of 'Demand Name/Address — Refuse to Given Name/Address'.

- 11.22 There were also a number of instances where the police recorded the use of s. 563 in situations where its use was not valid, and where an alternative power may have existed:
- [POI's Name; Age: 16 years at time of incident] was with a large group of other juveniles in [Name of Street] outside [a department store]. When police stopped to talk to the group, some of whom were openly drinking alcohol, the POI continually called police 'fuckin cunts' in a loud voice. When spoken to refused to give her name or any personal details. She was taken into custody and returned to the Police Station where her mother [Name] was contacted by telephone. [Her mother] requested that police take her to the home of her sister [Name, Address]. She was left in the custody of her aunt at 10.35 pm. POI warned re offensive language and not supply name and address.
- 11.23 In this instance, police appear not to have had a valid reason for using s. 563 to demand the young woman's name and address, but may have had reasonable cause to use s. 11 of the *Summary Offences Act*, which enables a police officer to demand the name and address of a person under the age of 18 years whom they reasonably believe has committed the offence of being a minor in possession of or consuming alcohol in a public place.
- 11.24 The utility of the power was not evident in other cases. There was one incident where the police demanded the name and address of a man who they knew to be the husband of a woman who had called police to their residence to deal with an assault on the husband on the front lawn. The officers were of the view that the husband and wife were not going to assist the police with their inquiries into the alleged assault, but it is not clear what value there was in obtaining the name and address of a man who the officers knew to be standing outside the front of his house, after his wife has called in their details in a '000' call for assistance.
- 11.25 Furthermore, the matter has again been recorded as a 'refuse to give name/address'. The record indicates that the man gave his details when requested to do so, but would not assist police by identifying the alleged assailants or making a further statement. The demand name and address power does not enable police to require statements from potential witnesses; it merely compels those potential witnesses to provide their name and address. As one Member of Parliament noted during the debate on this provision:
- [Under s. 563] the police are not asking these people to sign or provide a statement; they are merely getting the names and addresses of people who may well in the future become witnesses.¹³
- 11.26 While the Police Service made no provision for specific records to be made of those instances where people complied with a police demand for name and address, the evidence available on offences arising from the use of s. 563 gives cause for concern. As noted above, there appears to be only one instance in the records of offences that shows the power to have been used in strict accordance with the intention expressed by Parliament. There were a number of other matters where the power may have assisted police to obtain the names and addresses of people suspected of criminal activity, rather than possible witnesses to it. It may be more appropriate for such demands to be made in accordance with an arrest, where police have common law powers to establish the identity of a suspect.

¹³The Hon. M. Gallacher, NSWPD, 20 May 1998, p. 4875.

11.27 The training materials on this aspect of the Police and Public Safety Act amounted to little more than a reprint of the statutory provision. From the evidence available, it is apparent that greater training is needed on the appropriate uses of s. 563 if it is to be applied properly.

Recommendation

30. That the Police Service give consideration to further advice, education and training, including information in Police Service publications, for officers on the appropriate uses of s. 563 of the *Crimes Act 1900*.

Demand name and address — compliance and consent

11.28 As we have noted, police did not record those instances of people giving their name and address when required to do so. This may be due to a number of factors. For example, the Police Association stated that its members indicated that the power had not been widely used during the past 12 months.¹⁴ Another factor might be that where the power was used to obtain the name and address of potential witnesses to an indictable offence, the resulting information may be entered as part of the record relating to the offence.

11.29 Furthermore, it is possible that obtaining the name and address of people is not so remarkable for police that it warrants recording. Indeed, it is arguable that the value of this provision to police was not the capacity to demand name and address from people, but to have a sanction in the event that a person failed to comply with the demand.

11.30 Police often obtain the name and address of people with whom they come into contact without having to rely on a formal power to do so. In our observational research, we noted that police were often able to obtain the name and address from people simply by asking 'Do you have any identification?'. People would reply by handing over a driver's licence or other similar identification. It is important to note that the question asked by police was often not a request or demand (for example, 'Can I see some identification?'), merely an inquiry; one that usually prompts people to answer by providing some form of identification. In any event, whatever question is asked, names and addresses are often obtained with the consent and co-operation of the person. These details are checked against information held on police databases as well as any information held in respect of the person's driver licence.

11.31 The submission from the Kingsford Legal Centre asserted that 'the young people we spoke to about the legislation believe that police can demand name and addresses under any circumstance. Often young people who have been in trouble with the law have found that if they refuse to give their name and address, the police arrest them on a minor charge.'¹⁵ The 'Youth Street Rights' Review noted that in rural areas *'the police, more often than not, already knew who young people were and did not need any extra power to ask for identification.'*¹⁶

¹⁴ Submission by Police Association of NSW 'Response to the NSW Ombudsman: 'Policing Public Safety': Discussion Paper' July 1999. p. 4.

¹⁵ Submission by Kingsford Legal Centre, June 1999, p. 3.

¹⁶ Anderson, Campbell and Turner. *Youth Street Rights: A Policy and Legislation Review*. UTS Community Law and Legal Research Centre and Youth Justice Coalition, Sydney, 1999, p. 89.

11.32 Police noted that if they had to resort to a statutory power to obtain the name and address of a person, then they were going to find it difficult to obtain any useful additional information beyond that. When we raised the issue in focus groups, a small number of officers said that they had used formal powers to require name and address but, as one officer said:

It gets down to the individual copper doing the investigation. He's got to have the communication skills. If you want to get [the person of interest] off side and demand his name and place, you're going to get him offside. You should be able to convince him that it's in his interests to supply and not get to the demand stage ... but it is a necessary piece of legislation.¹⁷

In another interview, a police officer said that the power would be of no assistance if a potential witness was not willing to cooperate:

this [power] is no good to you in court if they don't want anything to do with you.¹⁸

11.33 It has been argued that the ability to obtain name and addresses from people involved in, associated with or witness to possible criminal activity is important to police, and that without this information, the usefulness of incident records as future intelligence is much diminished. In fact, according to this view, if they are not able to obtain and to record names and addresses of people involved in an event, police will often not make a record of the incident at all.¹⁹ Such considerations were presumably taken into account when making the changes in February 1999 to the Young Offenders Regulation 1997, which now enables police to record the name of a young person to whom a warning has been issued under the *Young Offenders Act*.²⁰

11.34 The Police Association also said that its members had indicated 'that this power could be extended to allow police the power to demand the name and address of a person when police felt that it would be reasonable to do so.'²¹ This proposal is consistent with the earlier submissions by the Association seeking powers similar to those contained in s. 50 of the *Police Act 1892 (WA)*, which permit the police to demand the name and address from *any* individual.²²

11.35 In an article on the Police and Public Safety Act in the November 1998 issue of *Police News*, the Police Association journal, it was submitted that the power established by s. 563 was 'limited'. The article noted that:

The power only relates to the investigation of an alleged indictable offence. Taking into consideration that the vast majority of crimes detected by police are in a strict sense 'indictable' and would include offences such as common assault and stealing, one must remember that there is still a number of offences, including offences under the Summary

¹⁷ Focus Group 3.

¹⁸ Interview, Focus Group 3.

¹⁹ See for example The Hon. M Gallacher, NSWPD, 20 May 1998, p. 4811.

²⁰ See cl. 15(1)(c1) of the Young Offenders Regulation 1997.

²¹ Submission by Police Association of NSW 'Response to the NSW Ombudsman: 'Policing Public Safety': Discussion Paper' July 1999, p. 4.

²² See Chapter 4.

Offences Act that are not covered ... If the police of NSW wanted the power to demand the name and place of abode of any person, they did not get it.²³

- 11.36 We have noted the existing statutory powers for demanding name and address, as well as the common law authorities for police to demand the name and address of persons under arrest. It is not apparent from the evidence available that there is a case for extending the power to demand name and address. In fact, given the apparently improper or inappropriate uses of s. 563, greater attention needs to be given to ensuring the proper use of existing powers.

Power to demand proof of name and address

- 11.37 During the Committee Stage of the legislation's passage through the Legislative Council, s. 563 was amended to permit police to require *proof* of name and address. There has been subsequent confusion as to whether failure or refusal to provide proof of name and address may constitute an offence for the purposes of s. 563.

- 11.38 An article in the *Law Society Journal*, published soon after the commencement of the Act, said that:

While police can ask a person to provide proof of the person's name and address, there is no penalty if that request is refused.²⁴

Schurr's *Criminal Procedure* states that:

While, in a late amendment to the Act, the Act also provides that a police officer 'may request a person to provide proof of a person's name and address' (s. 563(4)), there is no separate penalty for failing to do so.²⁵

- 11.39 A presentation to the NSW Young Lawyer's Continuing Legal Education program in August 1999 said 'it is unclear whether a refusal to supply proof if requested amounts to an offence.'²⁶
- 11.40 While there may be confusion about the provision, the construction of the entire section is such that failure or refusal to provide proof of name and address without reasonable excuse does constitute an offence within the meaning of s. 563.
- 11.41 Section 563(4) provides that 'A police officer may *request* a person to provide proof of a person's name and address.'²⁷ Section 563(3) makes it an offence for a person, without reasonable excuse, to fail or refuse to comply with any request 'under this section'. The

²³ K. Manitta, 'More Power or Not: Review of the Crimes Legislation Act' in *Police News*, November 1998, p. 25

²⁴ S. Currie, 'New amendments affecting police powers of search and seizure' in *Law Society Journal*. September 1998. p. 28.

²⁵ B. Schurr, *Criminal Procedure (NSW)*. Law Book Company (Looseleaf Service). p. 3252.

²⁶ D. Watson, 'Search and Seizure Powers of the Police On the Street, Upon Arrest, and Whilst in Custody, including the Crimes Legislation Amendment (Police and Public Safety) Act 1998', presentation to NSW Young Lawyer's Continuing Legal Education Program, 11 August 1999.

²⁷ Emphasis added.

provision for a reasonable excuse would presumably cover a situation where a person was not in possession of any proof at the time of the request.

- 11.42 It is evident from the Parliamentary debate that the amendments were intended to create an authority for police to seek independent confirmation of a person's name and address without having to resort to arrest. The intention was not to create a further offence in addition to those already established in s. 563.²⁸
- 11.43 We are not aware of any instances of police taking action on an offence of refusing or failing to provide proof of name and address. It may well be that the Police Service does not consider the failure or refusal to provide proof of name and address to be an offence. If this is the case, then to overcome the current confusion and uncertainty, consideration should be given to amending s. 563(3) so that an offence only arises if there is a failure or refusal to comply with the original request for name and address, and not where there is a failure to comply with the subsequent request for *proof* of name and address as well.

Recommendation

31. That s. 563 be amended to clarify that an offence only arises from a failure or refusal to comply with the original request for name and address, and not where there is a failure to comply with the subsequent request for proof of name and address as well.

²⁸ See The Hon. A Corbett, NSWPD. 20 May, 1998. p.4876

Penalties

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12. Penalties

- 12.1 The offences established by the Police and Public Safety Act are accompanied by a number of specific penalty provisions.
- 12.2 The Discussion Paper circulated in December 1998 noted that our inquiry would consider the manner in which the penalties are applied. As with other aspects of the Act, our primary concern is to consider whether the penalties are applied properly, fairly and effectively.

Penalties under the Act

- 12.3 The Police and Public Safety Act provides that:
- custody of a knife without reasonable excuse in a public place or school may incur a maximum penalty of \$550 for a first offence. Where a person has been previously dealt with for a knife-related offence, the maximum penalty for custody of a knife is \$1100 or imprisonment for 12 months, or both (s. 11C *Summary Offences Act*);
 - parents who allow children to carry knives can be fined up to \$550 (s. 11D *Summary Offences Act*);
 - anyone who fails or refuses to:
 - comply with a police request to submit to a search for knives and other dangerous implements; or
 - produce any thing detected or seen on the person when requested to do so, may be fined up to \$550 (s. 28A(7) *Summary Offences Act*);
 - failure or refusal to comply (without reasonable excuse) with a reasonable direction in circumstances specified in s. 28F of the *Summary Offences Act*, may result in a maximum penalty of \$220;
 - if a person who may be able to assist police in the investigation of an alleged indictable offence:
 - fails or refuses to state his or her name and address when requested to do so;
 - states a false name;
 - states an address other than the full and correct address of his or her residence; or
 - fails to provide proof of name and address when requested to do so, may be fined up to \$220 (s. 563(3) *Crimes Act*).

Imposition of penalties

12.4 There are a number of options available to police officers in dealing with offences under the Police and Public Safety Act.

Use of infringement notices

12.5 A significant feature of the penalty provisions is that s. 29A of the *Summary Offences Act* permits police to issue *penalty* or *infringement notices* in relation to offences under s. 11C (custody of a knife without a reasonable excuse) or s. 28F (failure or refusal, without reasonable excuse, to comply with a reasonable direction).

12.6 Police may issue an infringement notice for ‘custody of a knife without a reasonable excuse’ under s. 29A only if the person has not previously been dealt with for a knife-related offence. There is no restriction on the number of occasions that a person can be issued with an infringement notice for an offence of failing or refusing to comply with a reasonable direction under s. 28F.

12.7 A police practice note on s. 29A provides the following advice:

The spirit of the Act is that action should be taken under the provisions of s. 29A, ie. By means of a penalty notice. However, other appropriate proceedings may be instituted against an offender.¹

12.8 The ‘on the spot’ fines issued by police are fixed by Regulation at \$550 (five penalty units) for custody of knife offences and \$220 (two penalty units) for ‘reasonable direction’ offences.² The amounts prescribed for on the spot fines are the same as the *maximum* penalties that a court can impose for these offences.

12.9 If a matter is brought before a court, magistrates have a broad discretion in determining penalties, up to and including the maximum penalty. In fixing a fine, courts must consider the defendant’s means to pay, and ‘such other matters as, in the opinion of the court, are relevant to the fixing of that amount’ (Fines Act s. 6). In circumstances where the offender is young or poor, where the breach is of a minor nature, or where the offender’s record indicates that the breach is out of character, the fines imposed by courts may often be lower than the fines imposed by way of infringement notices.

12.10 A number of submissions criticised police for issuing infringement notices for the maximum penalty available. However, it is important to note that there is currently no discretion for police to issue fines for amounts other than the amounts prescribed.

12.11 In its submission to our review, one Aboriginal legal service commented that on the spot fines in his area were primarily directed at children, and all had been issued penalty notices for the maximum penalty allowable. ‘No court is likely to impose the maximum penalty, particularly for children’, it said. ‘In the case of children, a court would be most likely to deal with the matter by way of a caution.’

¹ NSW Police Service (1998), brochure entitled *Crimes Legislation Amendment (Police and Public Safety) Act*, June 1998.

² Summary Offences (General) Regulation 1995, s. 10B.

- 12.12 Infringement notice provisions for other Acts are often structured in a way that effectively ensure that on the spot fines cannot be used to impose a maximum penalty. This is the case for offences such as breaches of the *Liquor Act*. On the spot fines under the *Liquor Act* are fixed by Regulation at ‘one-tenth of the applicable maximum penalty under the Act for the offence’ (Liquor Regulation cl.87). The scheme also recognises that there are practical limits to the capacity of children to pay fines. Presently, on the spot fines for minors who breach the *Liquor Act* can be no more than \$55 (Liquor Regulation cl.87(b)(i)). Another way of accommodating children’s limited capacity to pay fines is to prescribe separate schedules of fines for adults and children, as is the case for breaches of the Transport Administration Regulation.
- 12.13 From an operational policing perspective, one of the attractions of penalty notices is that they are relatively simple to issue and process. They also reduce the need to arrest and charge for minor offences. There is no requirement for the offender to acknowledge or sign the notice for the notice to be valid, and notices can be served personally or by post. In practice, a police officer can send a notice to a person some days after the alleged offence.
- 12.14 As with other penalty notice schemes, people issued with notices in respect of Police and Public Safety Act offences may pay the fine without going to court, may make representations to the Police Service’s Infringement Processing Bureau to have the fine waived, or challenge the fine in court.

Court processes

- 12.15 The other way that penalties can be imposed under the Act is for the alleged offender to be brought before the local court by way of charge, court attendance notice (CAN), field court attendance notice (FCAN) or summons. If the court finds against the defendant, it can impose a fine, a community service order or some other penalty.
- 12.16 To initiate a *charge*, alleged offenders may be arrested and conveyed to a police station. They are detained, usually searched and fingerprinted, and kept in custody until bail is provided for. The bail process includes setting a date for the defendant to appear in court. Failure to appear for a charge can result in the issuing of a warrant for the person’s arrest.
- 12.17 As the processes for bringing defendants before the court are coercive, they are generally considered to be more serious forms of intervention than initiating penalties through the use of infringement notices. In some ways, the arrest and charge procedure can be regarded as a punishment in itself.³ This is acknowledged by the *Police Service Handbook* which refers to arrest as ‘an extreme action’, and requires officers to ‘keep in mind other means of getting someone to court (eg. summons, CAN)’.⁴
- 12.18 *Court attendance notices* are widely used as an alternative to charges. The alleged offender is taken to the police station, usually under arrest, and is often fingerprinted. The notice must be served in person, and must be acknowledged or signed by the alleged offender. As

³ D Brown, D Farrier, D Neal and D Weisbrot, (1996), *Criminal Laws*, 2nd ed., The Federation Press, Sydney.

⁴ Police Service Handbook, NSW Police Service 1999, A–28.

there is no charge, custody formalities are kept to a minimum and there is no bail requirement. The notice requires the alleged offender to appear in court on a particular date. If the person fails to appear, the offence may be heard in the defendant's absence.

- 12.19 A *field court attendance notice* is a form of court attendance notice that can be issued by police in the field, without requiring the alleged offender to attend a police station. As field CANs are administratively simpler to issue than CANs, they are sometimes used in police stations to minimise the time that arrested suspects spend in police custody.
- 12.20 A *summons* can be issued by a Justice of the Peace at a local court. Police then serve the summons on the defendant, who is required to appear in court to answer the allegations. As the use of summons generally does not involve arrest, custody or fingerprinting, this process is considered to be a more discreet way of bringing an offender before the court. However, in practice, the administrative requirements relating to initiating and serving a summons limits its use.

Warnings and cautions

- 12.21 Police officers have a general discretion not to charge offenders, particularly if the breach is considered to be of a minor nature. When exercising their discretion not to charge, police officers usually informally caution or warn offenders that future breaches may result in their being brought before a court.
- 12.22 For children, cautions and warnings are formally recognised by the *Young Offenders Act*. Both are seen as a means of taking action on offending behaviour without having to resort to the courts. Under the *Young Offenders Act*, less serious offences may result in a *warning*,⁵ usually issued on the spot immediately after the offence was observed or reported. More serious matters can be referred for a *formal caution* or a youth justice *conference*, but only if the young person admits to the offence. These more serious interventions occur some time after the investigation of the offence. All interventions, including warnings, are recorded on the Police Service's criminal information system.
- 12.23 It is important to distinguish formal cautions under the *Young Offenders Act*, from informal cautions or warnings. Formal cautions are a more serious form of intervention than warnings, and can only apply to young offenders. The procedure generally involves the offender, a parent or guardian, the arresting officer and sometimes a respected member of the offender's community. The aim is to impress on the young person the seriousness of their behaviour, and discuss the likely consequences of future breaches.
- 12.24 Although there is no statutory recognition of cautions or warnings for adult offenders, police may accompany a decision not to act on an offence with an on the spot caution or warning. Police participating in interviews and focus groups told our inquiry that although it is common practice to informally caution adult offenders, they were unable to record this on the police information system.⁶

⁵ Although police in interviews and focus groups understood the legal distinction between 'warnings' and 'cautions', the two terms were often used interchangeably in discussions.

⁶ Since the conclusion of the review, the NSW Police Service has instituted a 'Cannabis Cautioning Scheme' as a result of recommendations from the 1999 Drug Summit.

12.25 Some officers in the interviews and focus groups were unsure about whether they could caution or warn offenders for breaches of the Police and Public Safety Act, particularly in relation to offences for which an infringement notice could be issued. One concern was that, in practice, formal cautions for young offenders are often only considered *after* an offender has been taken to a police station. As first-time knife offenders can be fined on the spot rather than taken into custody, formal cautions are rarely employed as an alternative to issuing an infringement notice. By contrast, repeat offenders are more likely to be arrested (because they cannot be dealt with by way of an infringement notice⁷), and are thus more likely to be brought before a custody manager who *must* consider whether a warning or formal caution should be issued. Ironically, this may mean that repeat offenders are more likely to be formally cautioned than first-time offenders.

12.26 This is not to suggest that warnings and cautions are not being used at all. Our review of COPS narratives found some locations where warnings and formal cautions were being applied to first-time offenders. The police youth liaison officer from one of these areas explained the potential educative value of cautions:

There is the problem of \$550 infringement notices versus cautions for first-time knife offences: I try to encourage cautioning as it is an opportunity to discuss [with the young offender] the dangers and reasons behind the knife legislation, whereas the fine does not do the same.⁸

12.27 COPS records from that officer's area included the following instances:

- A warning issued to a 12 year old boy found carrying a small knife in his pocket – according to the COPS record, 'he was sternly spoken to and released with his parents';
- A young girl carrying a bread knife in her backpack 'for protection' agreed to attend a caution with her grandfather;
- A man was found with a 'fold out lock-knife' in his pocket, which he carried 'for protection' — as a check of his criminal history showed he had no prior charges or matters pertaining to knives, he was issued with a warning.

12.28 However, the preference in many other areas appeared to be to issue infringement notices in the first instance.

12.29 Police in focus groups said another impediment to using less formal interventions such as warnings for minor breaches, was pressure from some supervisors and commanders to act on offences. An officer from one group said this supervisory pressure was compounded by difficulties in recording informal cautions on the police information system:

I've cautioned once, but I hit a bit of speed hump because I put it on the system, like 'knife found' and then the supervisor ... resubmits and says 'it's a bloody knife, why didn't you charge him?' ... I put the reasons for why I didn't [in the narrative field of COPS] ... it wasn't seen to be a threat. The person's a homeless person, so there's your reason why obviously I didn't charge, but they sent it back [saying]: 'You know the legislation, charge, charge'.⁹

⁷ *Summary Offences Act*, s29A(6).

⁸ Individual interview of youth liaison officer.

⁹ Focus Group 3.

12.30 Many other officers said they routinely used their discretion to issue informal cautions or warnings, but these were not recorded. One officer described a situation in which he informally cautioned a homeless Aboriginal woman for custody of a cutlery knife:

I've given a caution for a butter knife [carried by] an Aboriginal lady who's well known to the area. But I checked her up — she hadn't had any violent offences so on that judgement I've decided I'm going to confiscate [the knife] ... but I'm not going to write it up or anything ... she was a homeless person. She could have been using that to cut up her oranges or whatever. But I still wouldn't rather she carry it. That's the judgement I made on that one.¹⁰

12.31 He was unsure whether the woman had a reasonable excuse for custody of the knife. Although he assumed that she might have had an excuse, he said she did not object to his decision to confiscate the knife. The same officer added:

But other people like another person I know has had similar knife offences, has been charged before and I have no hesitation ... whatever he's got on him, I'll charge him.¹¹

12.32 Although the issue was not specifically addressed in education and training materials, senior police appear to have assumed cautions and warnings would be applied. One member of the Police Service executive at an OCR that we observed in May 1999, was critical of the low number of reported 'cautions' for Police and Public Safety offences. A local commander assured him that cautions were common, but could not be recorded for adult offenders. The 'cautions' data reported at OCR briefings refer only to formal cautions under the *Young Offenders Act*.

12.33 It is important to note that there is no specific advice in the Police and Public Safety Act on the use of cautions or warnings for either adult or juvenile offenders. Nor do the Police Service's education and training materials specifically address the issue of when it might be appropriate to caution for an offence.

12.34 The issue of whether the legislation should explicitly include warnings and cautions as options for dealing with less serious breaches, was considered during the Committee Stage of the debate when the legislation was introduced. One proposal was to include diversionary options from the *Young Offenders Act* in the text of the Police and Public Safety Act.¹² At the time, this was considered unnecessary and potentially confusing because the *Young Offenders Act* already made it clear that police officers should use their discretion where appropriate to warn or caution young people, or refer them for a youth justice conference.¹³

12.35 As discussed elsewhere in this report, our inquiry found a number of relatively minor breaches resulting in the issuing of penalty notices, including on the spot fines for possession of nail scissors, craft scissors and small utility knives. At least some of these matters could have been effectively dealt with by issuing a warning. In the case of young

¹⁰ Focus Group 3.

¹¹ Focus Group 3.

¹² The Hon I Cohen, NSWPD, 20 May 1998, p. 4815, 4872.

¹³ The Hon J W Shaw, NSWPD, 20 May 1998, p. 4815, 4872; the Hon M Gallacher, NSWPD, 20 May 1998, p. 4873.

offenders, more serious matters could have been referred for a formal caution. In light of these cases, it may be useful to again consider ways that police officers could be encouraged to consider alternatives to issuing infringement notices when circumstances warrant such action.

Processes used during the review period

12.36 The availability of infringement notices appeared to have a significant influence on the manner in which penalties were applied during the review period. Police Service records show that infringement notices make up:

- more than half (55%) of the actions taken in response to custody of knife (s.11C) offences during the review period; and
- more than three-quarters (77%) of the actions taken in response to 'refuse reasonable direction' (s.28F(6)) offences.

Table 12.1: Persons issued with infringement notices or brought before court

	Infringement notice	Charge	CAN, FCAN summons	Formal cautions	Total actions
s.11C Custody of knife	1120	410	441	54	2025
s.11D Allow child carry knife	N/a	0	0	0	0
s.28A Refuse search	N/a	4	15	1	20
s.28A Refuse produce thing	N/a	1	1	0	2
s.28F Refuse direction	742	68	149	8	967
s.563 False name	N/a	23	26	0	49
s.563 Refuse name	N/a	2	8	1	11
	1862	508	640	64	3074

Source: NSW Police Service summary data on use of the powers for the period from 1.7.98 to 30.6.99.

12.37 There are important qualifications in relation to the reported data on actions taken.

12.38 The first relates to limitations of using the Police Service's COPS system to tally information. The table shows records of the number of *people* who were issued with infringement notices or brought before the court, but not the number of infringement notices issued or charges laid.¹⁴ If a person received more than one infringement notice in relation to offences arising from a single incident, only the first notice will be reflected in the reported data. So even if police were using COPS to record 100% of all instances in which action was taken, the actual numbers of infringement notices, charges and other actions would still be higher than indicated by COPS.

12.39 The second qualification is that the 'cautions' category refers only to records of formal cautions issued under the *Young Offenders Act*. As discussed above, informal cautions or warnings for both adult and child offenders are not reflected in the recorded data.

¹⁴ COPS can tally the total number of *incidents* in which action was taken and the total number of *people* who were issued with infringement notices or brought before the court, but not how many infringement notices were issued.

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12.40 Thirdly, there is a need to be wary of the data reported on 'name and address' offences. As discussed in Chapter 11, very few of the COPS records for false name and address offences appear to relate to use of powers under the Police and Public Safety Act. Our audit of individual COPS records for these matters found that most relate to other powers to require name and address; very few refer to questioning of people about indictable offences that they might have witnessed.

12.41 The Police Service provided a separate calculation of the number of warnings issued to young people for Police and Public Safety offences since February 1999:¹⁵

Table 12.2: Warnings issued to young people for Police and Public Safety offences

	Feb 99	Mar	Apr	May	June
Search –knife found	25	37	27	42	44
Refuse to be searched	0	0	1	0	0
Refuse to produce object	0	0	0	0	0
Refuse direction to move on	4	6	8	4	2

Source: NSW Police Service summary data dated 27.9.99 on warnings issued

Infringement Processing Bureau estimates of penalty notices issued

12.42 Another source of data for estimating the number of penalty notices issued for breaches of the Police and Public Safety Act, is the Infringement Processing Bureau. The Bureau calculated that there were 2199 penalty notices issued for custody of knives during the 12 month review period, and 1329 penalty notices for failure or refusal to comply with reasonable directions by police. This is more than double the number reported in relation to each offence in the COPS data.

12.43 One explanation for such a large discrepancy is that, as indicated above, many offenders might have received two or more infringement notices in a single incident. Another is that police officers issuing penalty notices did not create a corresponding COPS record for each notice issued.

12.44 With respect to multiple fines arising from a single incident, it is difficult to envisage many circumstances warranting the issuing of more than one infringement notice for failure or refusal to obey a reasonable direction. In relation to custody of knives, it might be possible for a person carrying more than one implement to receive more than one infringement notice. Our audit of individual COPS narratives found that it was common for police to find more than one implement, particularly when searching cars, yet it appeared that the usual practice was to issue a single fine.¹⁶ A review of representations by members of the public to the Infringement Processing Bureau also indicated that it was relatively common for police to issue a single notice when more than one implement was found.

¹⁵ Although police had a capacity to record warnings under the *Young Offenders Act* before this date, changes to the Young Offenders Regulation which took effect on 8 February 1999 enabled the police to record the names of young offenders issued with warnings. The Police Service advised that records of warnings made before this date were less reliable.

¹⁶ As there is no requirement for this information to be included in the narrative field, this analysis refers only to those records which included specific reference to the infringement notice(s) issued.

- 12.45 On the other hand, one incident reported to our office involved the issuing of three fines arising from a search of a car in Sydney. The fines were issued to a 17 year old trainee cook who works at a café as part of a vocational education program arranged by his school. He had visited friends after work, and was stopped by police as he drove home. Upon searching the young man's car, police found a knife he used for work, a Swiss army knife and a broken pair of scissors. He was fined \$550 for each of the implements, a total of \$1650. According to the man, police told him that he should have taken the work knife straight home after work. The next day he went to the police station with a letter from his employer, but his request for the return of his knife was refused. The man has elected to contest the infringement notices at court.
- 12.46 As discussed earlier in this report, it is not possible to estimate the extent to which police officers fail to record their use of Police and Public Safety powers. One incentive for police to record the details of penalty notices on COPS is to provide a record of the incident in case the person who receives the notice elects to contest the matter at court. Even so, the large discrepancy between the COPS data and the Infringement Processing Bureau figures indicates that no corresponding COPS records were created for a significant number of notices issued. As the integrity of this scheme depends on the accuracy of associated records, it may be useful for the Police Service to conduct regular audits of COPS to ensure that all notices are supported by appropriate documentation.

Processing infringement notices

- 12.47 As with penalty notices for other offences, anyone issued with an infringement notice under the Police and Public Safety Act may:
- pay the fine within the prescribed period without going to court;
 - make representations to the Infringement Processing Bureau to have the fine waived; or
 - elect to challenge the imposition of the fine in court.
- 12.48 If a person does not respond to either the original penalty notice or subsequent warnings requiring payment within 12 weeks of the fine being issued, the Infringement Processing Bureau refers the matter to the State Debt Recovery Office to recover the debt.
- 12.49 An Infringement Processing Bureau audit of penalty notices issued during the review period showed that relatively few Police and Public Safety Act penalty notices are either paid or contested. Most are referred to the SDRO.

Table 12.3: Police and Public Safety infringement notices

	Notices issued	Notices paid	No action	Representations	'Caution' by IPB	Court election	Refer to SDRO
s.11C Knife custody	2199	273	59	70	0	242	1332
s.28F Refuse direction	1329	327	26	42	0	76	724

Source: Summary data from Infringement Processing Bureau on penalty notices issued between 1.7.98 and 30.6.99.

- 12.50 As this audit was conducted on 1 September 1999, the figures on SDRO referrals do not include fines issued in late May and June for which payment was still outstanding.

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- 12.51 In relation to fines for custody of a knife, 12.4% (273) had been paid by the date of the audit. Of the 1329 'reasonable direction' fines issued, 24.6% (327) were paid. By way of comparison, the Bureau advised our inquiry that the overall payment rate for all types of infringement notices issued is presently 71%.
- 12.52 The Bureau also advised that it had adjudicated that 'no action' should be taken in relation to a small number of the Police and Public Safety fines, either because it was clear that no offence was disclosed or the reporting officers had issued an incorrect notice. This is consistent with our audit of anomalous COPS entries, which showed a small number of infringement notices being issued for offences other than s. 11C and s. 28F offences. It is apparent that a small number of police officers are unaware that some Police and Public Safety offences cannot be dealt with by way of infringement notice, but must be brought before a court.
- 12.53 A small number of people made representations directly to the Bureau to have the fine waived. The Bureau estimated that it received 70 representations about custody of knife (s.11C) fines and 42 about fail or refuse reasonable direction (s.28F) fines. None were waived.
- 12.54 The 'court election' figures refer to everyone who elected to challenge the fine at court, including some who initially made representations to the Bureau. It is interesting to note that 11% (242) of the 2199 custody of knife fines were contested at court, whereas only 5.7% (76) of the 1329 fines issued for refuse reasonable direction were contested. There is no comparable 'court election' data for other offences.

Fine defaulters

- 12.55 Few people issued with on the spot fines for breaches of the Police and Public Safety Act pay their fines in the time allowed by the Infringement Processing Bureau. Even after the outstanding fines are referred to the State Debt Recovery Office, very few people paid.
- 12.56 An audit of the \$932,360 in unpaid Police and Public Safety Act infringement notices referred to the SDRO by 5 September 1999, showed that \$881,000 in fines remained outstanding. That is, of the 2153 knife and refuse direction infringement notices referred to the SDRO, just 131 (6.1%) were paid.

Table 12.4: Police and Public Safety infringement notices referred to SDRO

	Notices received	Fines paid	% fines outstanding
s.11C Custody of knife	1390	68	95.1%
s.28F Refuse direction	763	63	91.7%

Source: State Debt Recovery Office audit of Police and Public Safety notices issued between 1.7.98 and 30.6.99, and referred by the Infringement Processing Bureau before 5.9.99.

- 12.57 The information on payment of fines relates mostly to fine enforcement orders under s. 58(1) of the *Fines Act*. This is the first step of the SDRO debt recovery process, in which fine defaulters are given 28 days to pay. The SDRO audit showed that less than 5% of fine enforcement orders for outstanding 'custody of knife' fines were paid within the time

allowed, and 8.3% of orders for outstanding 'refuse reasonable direction' fines were paid. If the fine is not paid within the specified period, the SDRO can initiate steps to have the fine defaulter's driver's licence suspended or vehicle registration cancelled (*Fines Act* s. 58(1)(b)).

- 12.58 The SDRO's debt recovery rates are generally much higher for other offences. There is no comparable figure for the overall payment rate for SDRO fine enforcement orders. However, an audit on 5 September 1999 of the 748,926 matters referred to the SDRO since it began operation in January 1998, showed that 39.9% (299,166) of debts had been recovered. The SDRO advised our inquiry that the most cost-effective debt recovery processes were fine enforcement orders or steps taken to suspend licences or cancel registrations.
- 12.59 If the fine remains unpaid, the next step is to consider civil enforcement, notably through seizure of property, a garnishee order or a charge on land owned by the fine defaulter (*Fines Act* s. 58(1)(c)). If there is still no payment, a community service order can be served on the fine defaulter. Ultimately, the fine default could result in periodic detention (except if the fine defaulter is a child). Civil enforcement measures are costly, time consuming and should only be considered if there is a likelihood of recovering the debt. The audit conducted on 5 September 1999 showed the SDRO was yet to initiate any civil enforcement proceedings in relation to Police and Public Safety debts.
- 12.60 One explanation for the low rates of recovery for Police and Public Safety debts might be the comparatively high fines imposed, especially if they were imposed on people with a limited capacity to pay. Both the Infringement Processing Bureau and SDRO reported higher rates of payment for the \$220 'refuse reasonable direction' fines than for the \$550 fines for custody of a knife, indicating that the size of the fine may affect payment rates.
- 12.61 Related factors might be the age of fine defaulters and their capacity to pay. An SDRO analysis of Police and Public Safety fine defaulters shows that 53.7% (746) of those referred for custody of knife offences and 75% (573) referred for 'refuse reasonable direction' offences, are under the age of 25.

Table 12.5A: Police and Public Safety referrals to SDRO by age of offender

	1-17 years	18-24	25+	Unknown	Total
s.11C Custody of knife	206	540	592	52	1390
s.28F Refuse direction	180	393	156	34	763
Total	386	933	748	86	2153

Source: State Debt Recovery Office audit of Police and Public Safety notices issued between 1.7.98 and 30.6.99, and referred by the Infringement Processing Bureau before 5.9.99.

- 12.62 There are no comparable figures on the general age profile of fine defaulters referred to the SDRO. To obtain an indication of the overall age profile, the SDRO audited a sample of all fine defaulters referred by the Bureau for several days in August 1999 (the Bureau refers more than 2000 matters a day to the SDRO). The SDRO's audit of 10,333 referrals showed that 32.2% (3329) of fine defaulters were under the age of 25. The proportion of fine defaulters in this sample who were aged under 18 years was just 4.4% (453), whereas 17.9% (386) of Police and Public Safety Act fine defaulters were under 18 years.

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Table 12.5B: Proportions of referrals by age of offender

	1-17 years	18-24	25+	Unknown
s.11C Custody of knife	14.8%	38.8%	42.6%	3.7%
s.28F Refuse direction	23.6%	51.5%	20.4%	4.5%
SDRO sample group*	4.4%	27.8%	52.7%	15.1%

Source: State Debt Recovery Office.

* Sample group data relates to 10,333 debt referrals for all offence types in August 1999.

- 12.63 Age may be relevant as young people generally have a limited capacity to pay fines. Their understanding of the legal consequences of failing to pay might also influence payment rates. The SDRO suggested that another factor might be that many young fine defaulters do not have a driver's licence or a car. It said its primary sanctions for fine defaulters – threatening to suspend a licence or cancel a registration – were generally only effective if the fine defaulters were licensed to drive or owned a car.
- 12.64 A postcode analysis of the residential addresses of Police and Public Safety fine defaulters showed geographic concentrations of fine defaulters for both offences. For custody of knife offences, the biggest clusters of fine defaulters were from the Cabramatta-Canley Vale area of south-west Sydney (49 defaulters or 3.5% of the NSW total), and the Mt Druitt area of western Sydney (2.9% (40)). For 'refuse reasonable direction' offences, 4.5% (34) of fine defaulters were from Cabramatta and Canley Vale, and 4.6% (35) were from Broken Hill.
- 12.65 One limitation of using postcodes to identify concentrations of fine defaulters is the differing population densities in each postcode area. On a per capita basis, there may be very little difference between the number of 'refuse reasonable direction' fine defaulters at Broken Hill, and the number at Bourke (14), Moree (18) and Narrandera (17). The figures for each area are too small to provide a valid statistical comparison.
- 12.66 With respect to fines paid after referral to the SDRO, the data shows that few debts were recovered for either offence. There were too few fines paid to enable any meaningful analysis of the age profile of those who paid after referral to the SDRO.

Table 12.6: Fines paid by age of offender

	1-17 years	18-24	25+	Unknown	Total
s.11C Custody of knife	8	30	28	2	68
s.28F Refuse direction	6	42	10	5	63
	14	72	38	7	131

Source: State Debt Recovery Office audit of Police and Public Safety notices issued between 1.7.98 and 30.6.99, and referred by the Infringement Processing Bureau before 5.9.99.

‘Reasonable excuse’ and penalty notices

12.67 Several submissions argued that it was inappropriate to require police officers to assess the reasonableness of a person’s excuse for having custody of an implement or refusing to move on, particularly with respect to decisions on whether or not to issue a penalty notice. A submission from one community legal centre stated:

... a law drafted around a ‘reasonable excuse’ is inconsistent with an on the spot fine. Police are empowered to be the judge in this offence. There is no impartial person to intervene where there is a disagreement about what constitutes a reasonable excuse.¹⁷

12.68 The submission described an instance in which a young person was ‘fined the maximum fine for carrying a small pocket knife which he used at work to open boxes’. According to the young person, police did not consider his excuse, which was that he used the knife for work.

12.69 There were a number of similar instances raised in representations to the Infringement Processing Bureau, or reported to the Ombudsman as inquiries or complaints. A common claim in many of these matters was that police did not consider the person’s excuse, or that they issued an infringement notice for less serious implements such as small scissors, nail files and small pocket knives. Almost half of the 33 representations reviewed involved implements found in vehicles. Many argued that they were unaware that they were committing an offence or that their excuse for carrying the implement should have been considered as reasonable.

12.70 One driver fined \$550 for custody of a pair of scissors found in his car said that he had used them to fix stereo wiring:

I find it ludicrous that someone can be fined such an amount of money for being found with a so called ‘weapon’ ... although I see this new law as beneficial to the community at large, I think that people who have a valid reason for having a pair of scissors in their car should be exempt. Surely, a person who is found walking in the streets with a pair of scissors should be looked at as suspicious, but I think there can be a difference defined between someone out in the street or in the privacy of their own car. (*Representation to Infringement Processing Bureau*).

12.71 Police officers who issue infringement notices are required to write any relevant comments on the notice. The comments in this case noted that the scissors were found on the floor of the car near a bong, and that the driver admitted: ‘They are mine’.

12.72 Police officers in focus groups and interviews commented on the difficulties in achieving consistency in this area. One said he charged a person for custody of a small knife with a 3 to 4cm blade because it was concealed and was ‘good enough to damage someone’. However, there was no action taken in relation to small scissors found on the same person.¹⁸ There were also instances cited in complaints and representations to the Infringement Processing Bureau of fines issued for implements found in first aid kits and tools kits.

¹⁷ Submission, Kingsford Legal Centre, University of NSW.

¹⁸ Focus Group 3.

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- 12.73 A number of police in the groups said there was a need for more specific guidance on what constituted an offence under the Act. However, most also emphasised the importance of flexibility in exercising their discretion to determine whether to act on an offence.
- 12.74 As discussed in earlier chapters relating to each of the offences, some additional guidance may be needed to assist officers considering what constitutes a 'reasonable excuse' in relation to some Police and Public Safety Act offences. However, in order to consider whether a suspected offender's excuse is 'reasonable', it is axiomatic that an excuse be provided in the first place. The current provisions assume that officers will only issue penalty notices when all elements of the offence have been considered, including whether the suspected offender had a reasonable excuse for carrying an implement or refusing to obey a reasonable direction. In practice, this may require police to invite persons suspected of offences to explain their conduct.
- 12.75 Consideration should be given to amending s. 29A of the *Summary Offences Act* to require police:
- to seek and consider a suspected offender's excuse for custody of a knife or refusing or failing to obey a reasonable direction, and
 - to briefly note their response on any infringement notice issued.

Discussion

- 12.76 The most pressing issue arising from the penalty provisions is that such a large proportion of Police and Public Safety matters are dealt with by way of penalty notices, and that so few of these fines are either paid or challenged. By contrast, penalty notices for other offences, such as traffic and parking offences, result in comparatively high rates of payment.
- 12.77 The low rates of payment raise questions about the efficiency and effectiveness of using such large on the spot fines to deal with Police and Public Safety offences. From an operational policing perspective, a key attraction of penalty notices is that they are administratively simple to issue. However, as the number of fine defaulters grows, the administrative complexity and costs of attempting to enforce the penalty notices intensifies. Its effectiveness as a penalty must also be questionable if most notices are simply ignored, as appears to be the case.
- 12.78 A related issue is the high number of young people issued with infringement notices, particularly in relation to failing or refusing to obey directions by police. The over-representation of young people being fined may well be a result of their comparatively high degree of contact with police, rather than discriminatory treatment by police in the issuing of fines. However, questions remain about the utility of issuing penalty notices to young offenders with a limited capacity to pay. This issue will be addressed in a review by the Criminal Law Review Division of the Attorney-General's Department. Any changes to the penalty provisions of the Police and Public Safety Act that affect young people, should be urgently assessed by the Attorney-General's review.

- 12.79 The ease with which penalty notices can be issued may also be impacting upon the willingness of police officers to consider warnings and cautions where appropriate. The fact that at least some officers in the focus groups felt they could not issue warnings or cautions for these offences, or that they felt pressure to act on all breaches, indicates that police could be making greater use of warnings. The paucity of reliable data about police use of warnings or informal cautions for both adult and child offenders, makes it difficult to estimate the extent of this problem. However, the practical impediments currently restricting the use of formal cautions for young offenders, notably the practice of not considering a caution until they are taken to a police station, shows that this is a problem that must be addressed.
- 12.80 During the Committee Stage of the debate on the legislation, there was a clear expectation that warnings and cautions would be routinely considered as options for dealing with less serious breaches, particularly for young offenders. In commenting on the provision that a parent could be fined even if proceedings against the child are not instituted,¹⁹ the Attorney General noted: ‘This will enable proceedings against a parent to be taken when the child is dealt with by a warning or a caution’.²⁰
- 12.81 One way of encouraging police to make more extensive use of warnings and cautions for appropriate cases might be to remove the option of issuing infringement notices for these offences. That is, if the only alternative to warnings and cautions is to bring an offender before a court, the knowledge that magistrates will review all decisions to charge may compel police to consider more carefully whether it might be appropriate to warn or caution offenders. Several submissions argued that the use of infringement notices effectively impedes independent scrutiny of police decisions regarding the reasonableness of a person’s excuse for possessing an implement or refusing to move on. One legal service stated:
- ... dealing with these matters by way of penalty notice rather than bringing them before the courts ... means that police can misuse and abuse these powers with impunity, safe in the knowledge that the recipient of the notice is unlikely to be bothered bringing the matter to court.²¹
- The low number of penalty notices either paid or contested indicates that this concern may be well founded.
- 12.82 Removing penalty notices and increasing judicial scrutiny of police decisions might also address other issues, including the need for:
- consistency in decisions on what constitutes a ‘knife’ for the purposes of s. 11C (custody of knife) offences;
 - clarifying the circumstances in which a person could be fined for carrying various implements, such as when it might be an offence to have a utility knife, screwdriver or scissors in a vehicle;
 - a better understanding of what might constitute a ‘reasonable excuse’ for carrying a knife or failing to obey a reasonable direction; and
 - fairer and more flexible determinations of when the maximum penalty should be imposed which take account of an offender’s capacity to pay and other factors.

¹⁹ *Summary Offences Act*, s. 11D.

²⁰ The Hon J W Shaw, NSWPD, 20 May 1998, p. 4821.

²¹ Submission, Western Aboriginal Legal Service Ltd, Broken Hill.

PENALTIES

12.83 However, despite the problems associated with infringement notices, there are significant reasons why they should be retained. Implicit in the Parliament's decision to include them in this legislation was an expectation that offences should be dealt with as expeditiously as possible. Removing penalty notices as an option could mean that less serious matters are dealt with by way of a warning or caution, but it might also lead to a greater number of matters being before the court. Any significant rise in the number of court prosecutions will further stretch the already limited resources of both the local court and the Police Service.

12.84 Removing penalty notices as an option might also:

- increase the number of people being brought into police custody for summary offences, contrary to reforms introduced following the Royal Commission into Aboriginal Deaths in Custody;
- expose greater numbers of young people to the criminal justice system, which is inconsistent with recent juvenile justice initiatives, notably the *Young Offenders Act*; and
- significantly increase the time required for police to process offenders, removing police from the streets while they complete charge processes. This may potentially hamper the effectiveness of some policing operations which attempt to maximise police presence on the streets.

12.85 Notwithstanding their possible impact on the use of warnings and cautions, infringement notices are desirable for a number of reasons, notably their administrative simplicity, their impact in reducing the numbers of people coming into contact with the criminal justice system, and their effect of reducing the number of people, particularly young people and Aboriginal people taken into custody for minor offences.

12.86 Accordingly, on balance, it is preferable to encourage more judicious use of the infringement notice provisions rather than remove them as an option. The effectiveness of these provisions depends on police not issuing penalty notices unless there is a clear breach of the legislation which is neither trivial nor merely a technical breach.

12.87 Modifications that might help to achieve this include:

- Provision of more detailed guidance on what constitutes an offence under the Act, including practical examples of when use of discretion might be appropriate.
- In the case of minor breaches, police should be encouraged to make greater use of warnings for both child and adult offenders. Opting to warn an offender for custody of a knife without reasonable excuse need not affect police officers' confiscation powers.
- For more serious matters, police should be authorised to formally caution adult offenders for first offences, and that such a caution constitute having been dealt with for the purposes of any subsequent knife-related offences.
- Police should be required to consider making greater use of formal cautions for young offenders. Practical impediments to extending the use of this option may be overcome by giving police the power to issue a directive for a young offender to attend a nominated police station within a specified period to be dealt with under the *Young Offenders Act*. Failure to attend as required may result in the issuing of an infringement notice.

- 12.88 Police would still have the option to issue infringement notices or bring an offender before the court. However, training materials must emphasise that the relevant offences involve custody of a knife *without reasonable excuse*, and failure or refusal to obey a direction *without reasonable excuse*, and that police may not simply issue an infringement notice irrespective of the person's excuse. Police must turn their minds to all elements of the offence before issuing an infringement notice. If they are in any doubt about whether there is a reasonable prospect of conviction or the fine being upheld, they should use their discretion to take no further action, issue a warning or caution, or bring the offender before the court to have the matter determined.
- 12.89 The Infringement Processing Bureau should also take these factors into account in assessing whether a notice has been validly issued. The notice should state not just that a person had custody of an implement or refused to move on, but should also briefly note the person's excuse for possessing the implement or refusing to obey a direction. Where an excuse was sought and none was offered, this should be noted. The Bureau's role would *not* be to review the merits of the excuse offered; rather, it should simply ensure that the issuing officer sought and considered the person's excuse. Provision could be made for infringement notices that do not fully state the offence alleged (including the failure to provide a reasonable excuse), to either be waived or resubmitted back to the issuing officer to complete the documentation.

Recommendations

32. That infringement notices be retained as an option for dealing with offenders under the Act, subject to the following modifications:
- a) That police be provided with more detailed policy guidance on what constitutes an offence under the Act, including practical examples of what might constitute a 'reasonable excuse' and when use of discretion not to take formal action against a person might be appropriate.
 - b) That police be encouraged to issue warnings where appropriate. For more serious breaches by young offenders, consideration be given to whether police should have the power to issue a directive for the young person to attend a nominated police station within a specified period to be dealt with under the *Young Offenders Act*. Failure to attend may result in the issuing of an infringement notice.
 - c) That police be authorised to formally caution adult offenders for first offences where appropriate, and that such a caution constitute having been dealt with for the purposes of any subsequent knife-related offences.
 - d) That consideration be given to amending s. 29A of the *Summary Offences Act* to require police to:
 - seek a suspected offender's excuse for custody of a knife or refusing or failing to obey a reasonable direction before issuing a penalty notice, and
 - briefly note any excuse provide on the notice issued.
 - e) That consideration be given to whether the Infringement Processing Bureau's current role in adjudicating on representations from members of the public be extended to assessing whether notices fully state the offence alleged, including whether the person was given an opportunity to provide an excuse.

continued over

PENALTIES

- f) That the Police Service use audits and other monitoring to encourage officers who issue penalty notices for offences under the Police and Public Safety Act, to create corresponding records on the police computer system.
- g) That the appropriateness of the requirement that infringement notice penalties amount to the maximum penalty that may be imposed by a court, be assessed in the review of fines and penalties being conducted by the Criminal Law Review Division of the Attorney-General's Department.

Crime reduction and operations based policing

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13. *Crime reduction and operations based policing*

Reduction in crime?

- 13.1 One important objective of the Police and Public Safety Act was to bring about a reduction in crime, particularly knife related crime and other violent street offences.¹
- 13.2 Some police we spoke to in focus groups were of the view that the Police and Public Safety legislation had assisted in reducing crime:
- With this legislation, since we've been using it our assault and robs have dropped dramatically.²
- My boss says as the move ons go up the crime goes down.³
- If the system is used appropriately it can be a really good tool — [it] reduces major crime.⁴
- 13.3 These impressions were mirrored in reports on Police TV.⁵ The Hurstville local area command was reported as attributing its fall in crime to the use of the Police and Public Safety Act. However the LAC added that other strategies including daily briefings, saturation operations (with 53 operations in the preceding 12 months), an intelligence response team that 'effectively target profiled offenders and hot spot areas',⁶ a bicycle response team, liaison officers, and the use of informants were also responsible for their improved performance.
- 13.4 The senior officer responsible for overseeing the statewide implementation of the Police and Public Safety Act said:
- ... crime statistics ... clearly show there's been a significant reduction in a number of those crime categories where they've been occurring on the street.⁷
- 13.5 After a rapid rise from the early 1990s to 1996-97, crime levels have plateaued or fallen. The June 1999 Quarterly Update of NSW Recorded Crime Statistics indicated that some crime indicators had returned to 1996 levels, with falls between July 1997 and June 1999 in sexual assault, indecent assault and related offences, robbery with a firearm and motor vehicle theft. Other offences including assault, robbery with a weapon other than a firearm,⁸ break and enter, steal from motor vehicle and malicious damage to property

¹ See Chapter 2 'Background'.

² Focus group 2.

³ Focus group 2.

⁴ Interview.

⁵ Police TV is the weekly in-house news broadcast for the Police Service.

⁶ Detective Inspector Paul Lowe, on Police TV, No. 83, broadcast on 25 August 1999.

⁷ Commander Terry Collins, on Police TV, No. 78, broadcast on 21 July 1999.

⁸ As will be evident from later discussion, the number of offences for 'robbery with a weapon other than a firearm' rose steadily during late 1997 and early 1998, peaking in May 1998. The figures have since returned to July 1997 levels.

were stable. At the same time, indicators of policing activity such as traffic offences and drug offences were significantly higher over the same period.

- 13.6 The Director of the Bureau of Crime Statistics and Research, Dr Don Weatherburn, said at the time that:

We can't be certain about the reason for the turnaround but the fact that it is so sudden yet coincides with much higher levels of law enforcement activity suggests that police may have played a key role in stemming the increase in crime.⁹

- 13.7 The release of the September 1999 Quarterly Update by BOCSAR confirmed these trends with large falls in break and enter, vehicle theft, robbery with a firearm and robbery with a weapon other than a firearm. It is noted that these figures will be audited by BOCSAR against insurance claims, crime victim surveys, police emergency call statistics and police arrest rate data.¹⁰ This last source of data, the police arrest data, may assist in determining whether the decrease in crime can be attributed to the increase in policing activity.¹¹

- 13.8 Essentially, it is too early to determine whether there has been a sustainable decrease in crime, and the extent to which any reduction can be attributed to policing activity. Ongoing review of police use of searches, directions and other such powers should assist in examining the impact police have on crime levels. When looking at this issue, the possible contribution of the Police and Public Safety Act powers should be examined, using a number of key measures. To do so, it is recommended that police continue to record all uses of the powers, including those searches which do not result in the discovery of a knife as well as those 'reasonable directions' that are complied with.

Recommendation

33. That police continue the practice of recording all uses of the powers established by the Police and Public Safety Act, including those searches that do not result in the discovery of a knife as well as those 'reasonable directions' that are complied with.

Knife-related crime

- 13.9 One of the stated aims of the creation of the offence of custody of a knife in a public place was to reduce the incidence of crime involving knives. The difficulties of assessing the impact of any one crime fighting strategy or police power on the incidence of crime are widely recognised. Any changes in particular crime rates or trends should be considered in the context of overall trends, as well as the other factors that may have an impact on the trends.

⁹ Quoted in 'NSW Recorded Crime Statistics: Quarterly Update June 1999', Media Release, Bureau of Crime Statistics and Research, 6 August 1999.

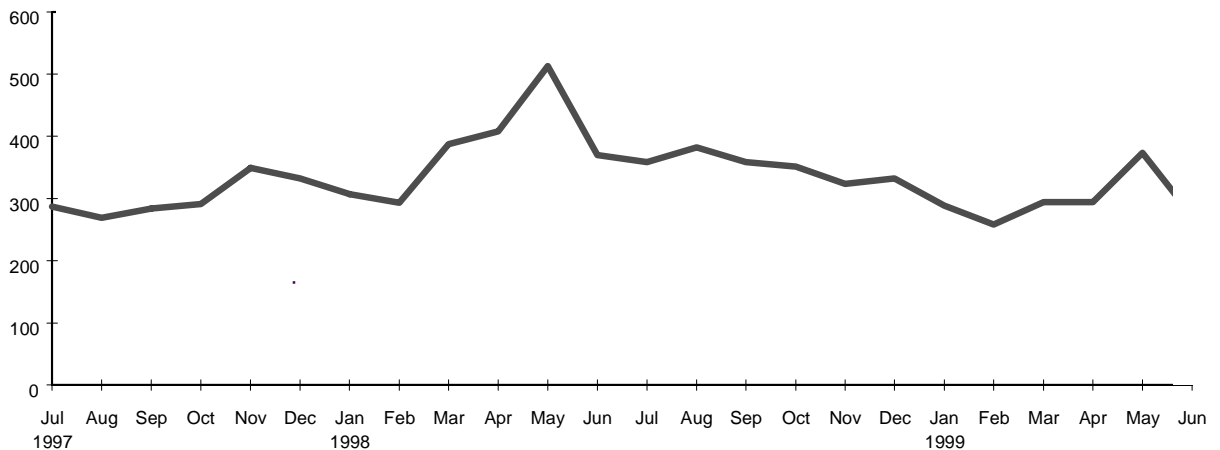
¹⁰ L. Doherty, 'Good crime figures under spotlight', Sydney Morning Herald, 26 October 1999. p. 3.

¹¹ 'What we need to do now in the Bureau is to examine the arrest figures more closely. If the areas of NSW with the biggest arrest rates have the biggest reductions in crime we will be on much firmer ground in crediting police with the drop in crime we see today.' per Dr Weatherburn, 'NSW Recorded Crime Statistics: Quarterly Update June 1999', Media Release, Bureau of Crime Statistics and Research, 6 August 1999.

13.10 However, two offences whose incidence might be expected to be directly affected by the creation of the offence of custody of a knife in a public place are robbery with a weapon not a firearm, and assault involving a knife as a weapon.

13.11 Although, the number of robberies with a weapon not a firearm in NSW decreased from 4090 in 1997-98 to 3884 in 1998-99, a 5% fall over the period, analysis by the Bureau of Crime Statistics and Research indicates that the change over this period cannot be regarded as statistically significant.¹² Monitoring of these figures over a longer period is required.

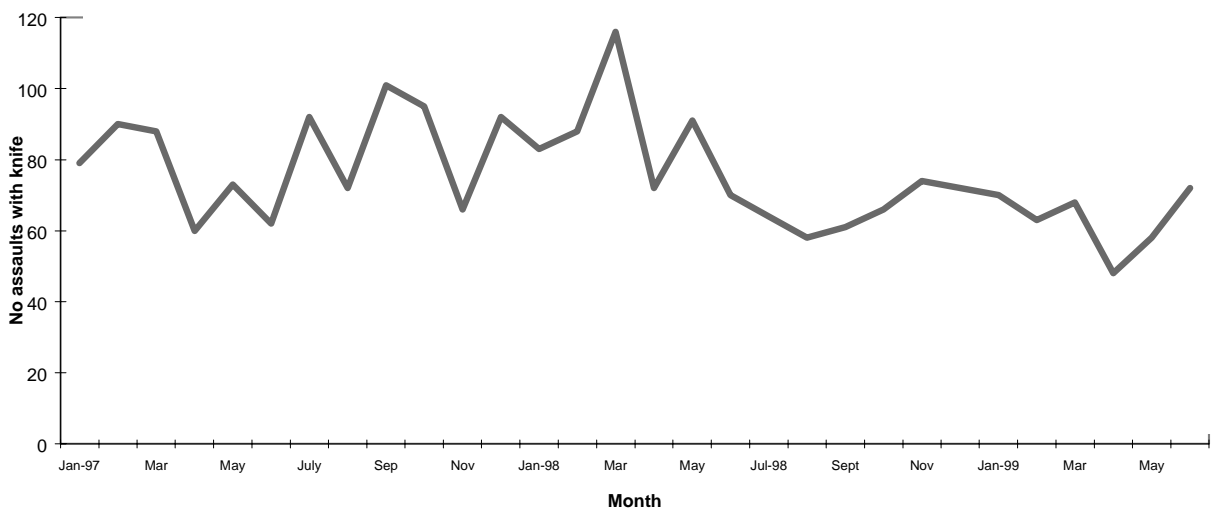
Graph 13.1: Robbery with a weapon not a firearm — NSW



Source: Data from NSW Bureau of Crime Statistics and Research

13.12 The Bureau also provided statistics for assault involving a knife as a weapon for the period, January 1997 to June 1999.

Graph 13.2: Assault with a knife as a weapon in non-residential areas — NSW



Source: Data from NSW Bureau of Crime Statistics and Research

¹² NSW Bureau of Crime Statistics and Research, NSW Recorded Crime Statistics, January 1995 to June 1999, Robbery with a Weapon not a Firearm using Kendall's rank-order correlation coefficient.

- 13.13 These figures should be viewed with some caution in light of the relatively small number of incidents recorded. The figures over this period reached a high point of 116 in March 1998, declining to their lowest point in April 1999 and remained below 74 in the 12 month period after the introduction of the legislation.
- 13.14 Careful monitoring of the types of measures discussed here needs to be conducted in the future to determine whether the drop in 1998–99 is sustainable. The potential impact of the Police and Public Safety Act would be better determined by monitoring trends in the incidence of relevant knife-related crime, with suitable analysis after the legislation has been in effect for a longer period. The Bureau of Crime Statistics and Research analysis of crime statistics and policing activity will be crucial to monitoring the longer term impact.

Recommendation

34. That the Bureau of Crime Statistics and Research be requested to monitor and analyse the longer term impact of police powers, especially stop and search, reasonable directions and name and address powers, on crime trends.

The role of police in crime prevention and reduction

- 13.15 One of the difficulties in ascribing the success of any particular crime prevention or reduction strategy is that no strategy could, or should, operate in isolation from other initiatives. As a general rule, policing does not lend itself to controlled experiments.
- 13.16 The difficulty of attributing a reduction to any one factor is summed up by an American criminologist reviewing the various explanations for the downward trends in crime in New York City:
- If there is an ascendant theory among ... criminologists, it may be simply stated: No single factor, cause, policy or strategy has produced the drop in crime rates.¹³
- 13.17 The difficulty of determining whether the implementation of the Police and Public Safety Act had a distinct impact on crime is that the legislation was accompanied by a number of other initiatives by the Police Service to respond to criminal activity. The introduction of the OCR, the focus on hot spots, and the targeting of repeat offenders by the NSW Police Service were just some of these initiatives. Any or all of these may have had an impact on the level of crime in the community. Police acknowledge that the Police and Public Safety Act powers were merely one aspect of an overall strategy to deal with crime, even if they differ on the extent to which it has assisted in reducing crime.
- 13.18 Identifying the contribution of police to crime prevention and reduction has itself been the subject of considerable discussion in recent years. The National Institute of Justice considered the role of police in its comprehensive evaluation of crime prevention initiatives in the United States. The review, *Preventing Crime: What Works, What*

¹³ J. Greene, 'Zero Tolerance: A Case Study of Police Policies and Practices in New York City', *Crime and Delinquency*, Vol. 45, No. 2, April 1999, p. 178.

Doesn't, What's Promising,¹⁴ took a holistic view of crime prevention and looked at a range of factors including community development; families; education; employment and training; the physical environment; the role of police; and the role of the criminal justice system.

13.19 The review identified four policing strategies that 'worked':

- targeting repeat offenders;
- targeting repeat victims;
- police patrols targeted at crime hot spots; and
- targeting drink driving.

13.20 Setting aside the last strategy, which has been a significant feature of policing in NSW since the early 1980s, the other three strategies are important elements in attempts to deal with crime in public places, and they have been adopted as broad strategies in NSW. In relation to the Police and Public Safety Act, the most relevant of these strategies involve the targeting of repeat offenders, and the targeting of hot spots by police operations.

Targeting repeat offenders

13.21 The Police Service has made the targeting of recidivist offenders a priority in terms of crime reduction strategies. Local area commanders are quizzed at OCRs on their activities to deal with repeat offenders. In our survey of local area commanders, every commander indicated that they were targeting these offenders in their command. Some of the commanders described the various strategies they had employed including the use of recent amendments to the *Drug Misuse and Trafficking Act* regarding repeat offenders,¹⁵ liaison with the Department of Corrective Services and Probation and Parole, and enforcement of curfews imposed on young offenders by local magistrates.

13.22 We asked commanders whether the Police and Public Safety Act powers were used as part of their targeting of repeat offenders. We were advised that the powers were used only as appropriate, or part of an overall package. One commander advised that he would use the powers when it was appropriate:

If their criminal history is relevant and where they are included with other matters including association, the legislation will be used.

13.23 Another commander said that the powers would not be used on repeat offenders unless an offender was in a hot spot and met the other criteria for being searched or for being given a reasonable direction.

¹⁴ L. Sherman et al, (1997), 'Preventing Crime: What Works, What Doesn't, What's Promising', a report to the US Congress, Washington DC, Ch. 8.

¹⁵ The *Drug Misuse and Trafficking Act* was amended in 1998 by the *Drug Misuse and Trafficking Amendment (Ongoing Dealing) Act* to create a new indictable offence of 'supplying prohibited drugs on an ongoing basis'. It made it an offence to supply any prohibited drug, other than cannabis, for financial or material reward on three or more separate occasions during a period of 30 consecutive days. The penalty for the offence is a maximum fine of 3500 penalty units or 20 years imprisonment, or both.

- 13.24 In the 12 months from July 1998, there were 2141 Police and Public Safety Act 'events' where there was another offence detected. This represented 10.4% of the recorded uses of the power over the year.¹⁶ While this does not indicate whether the offender concerned was a repeat offender, it does indicate a substantial number of cases where the powers were used in association with or resulted in the detection of another offence.
- 13.25 The majority of the 4076 'other offences' associated with the use of the Police and Public Safety Act were offensive language, offensive conduct, resist officer, assault, receiving and goods in custody, drug offences, and driving offences. These offences accounted for 2554 (63%) of the total number of 'other offences'. It is interesting to note that these offences are those regarded as indicators of the level of policing activity; offences that may have been detected in any event regardless of the existence of the Police and Public Safety Act powers.
- 13.26 'Judicial offences', which include such offences as 'breach of bail' and 'fail to appear', are another group of offences that might indicate that repeat offenders are coming into contact with police exercising Police and Public Safety Act powers. One of the by-products of the New York experience¹⁷, and apparently a key to the reported success of its policing strategies, was that a significant number of people who were apprehended on fairly minor charges were found to be on outstanding warrants for other, more serious crimes. As William Bratton explains in his account of policing strategies employed while he was in charge of the New York City Transit Police:
- An unanticipated by-product of the sweeps [for fare evasion] came when we checked the identification and warrant status of everybody we were arresting. During the early stages of the initiative, we found that one out of every seven people arrested for fare evasion was wanted on an outstanding warrant for a previous crime.¹⁸
- 13.27 In the 12 months from July 1998, there were 139 judicial offences detected in situations where the Police and Public Safety Act powers were exercised.¹⁹ These judicial offences represented 3.4% of the total number of offences detected, and 0.67% of the total number of recorded actions taken under the Police and Public Safety Act.
- 13.28 By comparison, judicial offences were detected in greater proportions as a consequence of street policing operations. Judicial offences accounted for 48 (8.8%) of the 548 charges in CitySafe III; 15 (9.4%) of the 159 charges in CitySafe IV; and 28 (11.4%) of the 246

¹⁶ It should be noted that areas with significantly higher recorded uses of the powers, which may indicate greater recording of 'unproductive' searches and events where persons obey a direction given by police, have substantially lower 'other offence' rates. For example, Wollongong, with 1416 recorded Police and Public Safety events, has 'other offences' as 5.8% of the total number of events, and Campsie, with 1028 events, has 'other offences' as 3.7% of the total. On the other hand, Tuggerah Lakes, with 102 recorded uses of the power, has 'other offences' as 33.3% of the total, and Camden, with 51 events, has 'other offences' as 29.4% of the total.

¹⁷ The phrase 'New York experience' refers to the change in police styles and practices in the New York Police Department in the 1990s, particularly the changes that have occurred since 1994 under the Giuliani administration in New York City.

¹⁸ W. Bratton (with P. Knobler), 'Turnaround: How America's Top Cop Reversed the Crime Epidemic', Random House, 1998, p. 154.

¹⁹ The 'judicial offences' consist of 'bench warrant' (32 instances in the period 1 July 1998 to 30 June 1999), 'breach bail conditions' (47), 'breach of recognizance' (13), 'fail to appear' (17), and 'other judicial offences' (30). Source: NSW Bureau of Crimes Statistics and Research. 'NSW Recorded Crime Statistics — July 1998 to June 1999: Counts of incidents in same event as 'police powers' incident.'

charges in CitySafe V. While it is necessary to have some regard to the nature of the location in which CitySafe took place, it would seem that CitySafe's use of powers in addition to the Police and Public Safety Act and different strategies was more effective in making contact with people who may have breached bail or committed other judicial offences.

- 13.29 The targeting of repeat offenders has been identified as a key strategy for the Police Service, but it is unclear to what extent data has been collated and analysed on the numbers of repeat offenders identified through policing activity. There is some evidence of some operations making use of data on repeat offenders,²⁰ but it is uncertain to what extent this occurs consistently on a statewide basis.
- 13.30 Presently, the crime trends are said to indicate the impact of targeting repeat offenders; that is, the overall targeting of repeat offenders is said to have brought about the decline in crime, but the exact numbers of repeat offenders identified as a result of police activity is presently unclear. Being able to identify the number of repeat offenders may assist in determining the extent to which the Police and Public Safety Act powers contribute to police contact with repeat offenders. It is therefore suggested that the Police Service examine the utility of developing indicators to measure the extent to which repeat offenders are targeted by policing activity, and use these measures as part of the Operation and Crime Review process to enable local area commands to explain their strategies regarding repeat offenders.

Recommendation

35. That the Police Service consider developing measures relating to the impact of the street policing powers on the detection and apprehension of repeat offenders, and that these be used to evaluate local area command performance on targeting repeat offenders.

Operations and Crime Review

- 13.31 While it is not the purpose of this report to review the function or efficacy of the Operations and Crime Review process, it is necessary to examine the impact that it had on the use of the Police and Public Safety Act powers.
- 13.32 In January 1998, the Police Service commenced its Operations and Crime Reviews (OCRs). The reviews, held fortnightly, involve discussions on the performance of local area commands in four key areas: crime reduction; public satisfaction; job satisfaction; and efficient and effective work practices.²¹ The reviews have parallels with the Compstat process, developed in New York City in the mid 1990s,²² and involve senior management reviewing operational policing issues and trend data for particular offences, and discussing this with local area commanders and their intelligence officers and analysts.

²⁰ See discussion on CitySafe later in this chapter.

²¹ 'Operations & Crime Review' in Police Service Weekly, Vol. 9, No. 51, 22 December 1997, p.6.

²² See the comments of The Hon. R J Carr, Premier, NSWPD, April 1, 1998, p. 3581.

CRIME REDUCTION

- 13.33 The OCRs have focused on particular crime trends, particularly those related to robbery, assault, break and enter, stealing and motor vehicle theft as well as street and drug offences. Development of strategies to identify hot spots, repeat offenders and repeat victims were identified as a priority from the outset. The priority given to these issues was reinforced by senior management at the OCRs that we observed on 20 January and 2 May 1999.
- 13.34 The OCR process is seen as a key accountability strategy for monitoring and improving performance in the area of crime reduction. The OCR has undergone review of its own, with changes to its format and focus, and has become increasingly sophisticated in the approach taken to the analysis of data and command performance. Some commanders and officers, however, still felt that not enough attention was paid to the specific localised factors that might account for variations in crime rates and performance. One commander expressed the view that commands could be criticised 'just purely on figures'. He went on to say:
- More understanding of local issues is needed. Proper analysis. For example this LAC had an awareness program with the local media educating the public regarding the legislation resulting in compliance before having to use [the powers]. There are also seasonal factors as well. It is very cold here at the moment so there isn't the congregating after pub closure you'd get in summer. Also [there are] less people going out.
- 13.35 We understand, however, that future developments in the OCR process will improve the consideration of local business plans to deal with specific local issues. These developments are to be encouraged.
- 13.36 We are aware that specific attention at OCRs has been given to the implementation and application of the Police and Public Safety Act, particularly on recorded uses of the powers conferred by the Act. In our survey of local area commanders, some expressed misgivings about the emphasis given at OCRs to recorded use of the Police and Public Safety powers. One commander who, while of the opinion that the OCR process was generally useful, had concerns about the criticism made of commands that recorded low use of the power:
- You give reasons [for low use of the powers] but are told figures should be greater. I'm the commander, I know what unique factors there are. You also have to have reasonable cause to use the legislation. All this was indicated at the OCR. Just to use the legislation to build up the numbers is wrong.
- 13.37 We asked the local area commanders whether they had adopted any different strategies following OCR feedback with regard to implementation and/or recording of Police and Public Safety activities. A majority of commanders (75%) said that they had not adopted any different strategies, however many of them indicated that additional reinforcement and encouragement was provided to managers and staff following an OCR. They recognised that the legislation was new, and the opportunity was taken to provide reinforcement through the internal electronic memorandum system, musters, monitoring by duty officers, and the activities of the Education and Development Officers in local commands.
- 13.38 Those commanders who had adopted different strategies as a result of their attendance at an OCR advised that these new strategies focused on improved recording of the use of the powers. Commanders told us that they had introduced intelligence forms and de-brief

sheets, and advised that instances of compliance with police directions and searches were now being recorded whereas prior to their attendance at the OCR, they had not been recording these events.

- 13.39 The OCR process has assumed an important role in the Police Service's internal accountability regime. We appreciate that the process is under continual evaluation and development by the Police Service, but it may be of some assistance to examine some of the issues arising from consideration of the Compstat²³ model, which shares some features with the OCR process.
- 13.40 Some of the comments on Compstat relate specifically to the New York Police Department,²⁴ but other points have more general application. Some have said that while New York may have needed Compstat to impose greater accountability for and emphasis on crime reduction for a police department that had lost sight of both of these goals, the necessity and value of this process for other police departments has been questioned. One police chief said of Compstat:

There are better ways of managing results ... It has to do with the people you put in charge, your expectations on them, and the conversations you have with them. I don't subscribe to public floggings.²⁵

- 13.41 The same chief was critical of Compstat's inability to measure the impact of its 'numerical accountability' on the police relationship with communities. Similar concerns have been expressed about the OCR process:

It is particularly worrying to see NSW police officers being encouraged to engage in 'in your face' policing and to see their performance judged in Operations and Crime Reviews simply by rates at which they stop and search, move on, and arrest people, without reference to other indicators such as complaints and police-public relations.²⁶

- 13.42 Some police departments, including New York, have responded to this sort of criticism by incorporating data relating to citizen complaints and commendations, as well as 'use of force' statistics into the process. There have been calls to go further and incorporate greater community input into the process, with the use of surveys or the direct participation of community representatives suggested as possible alternatives:

The question is, how can you get Compstat to focus the attention of police on creating real value for citizens? ... There's more to police work than the one dimension of reducing crime. Are police using their authority economically, fairly and courteously?²⁷

²³ 'Compstat' (short for 'computer statistics' meetings) was developed in New York in the mid 1990s. Following the introduction of information management systems that enabled police management to consider up to date data on crime trends, senior police management introduced weekly meetings with precinct commanders to consider the data. Crime hot spots were mapped, and these became the focus of attention at 'Compstat' meetings. It is generally recognised as crucial to the organisational and policing changes that have occurred since that time.

²⁴ In the article from which this commentary is drawn, the New York Compstat was variously described in the space of four sentences as a 'war room', a 'hot seat', and a situation where 'the verbal barrage is relentless, peppered with the occasional fist-pounding on the table', C. Swope, 'The Comstat Craze', *Governing Magazine*, September 1999.

²⁵ Jerry Sanders, recently retired Police Chief of San Diego, where the reduction in crime is comparable to New York. Quoted in Swope, Op. Cit.

²⁶ D. Dixon. 'Walls of Silence'. Paper presented at *The Future of Australian Multiculturalism* Conference. Research Institute for Humanities & Social Sciences, University of Sydney, 7-9 December 1998, p. 5.

²⁷ Mark Moore, Faculty of Management, Harvard University quoted in Swope, Op. Cit.

- 13.43 It is not suggested that the experience of the Compstat model is entirely relevant to the OCR process. Firstly, OCR is not merely a replica of Compstat — it has been designed to meet the needs of the NSW Police Service. Furthermore, the Police Service is subject to far greater external accountability than many of the US police departments that have adopted Compstat-style processes. However, it is worth noting the suggestions that the ‘numerical accountability’ measures developed for Compstat style processes should be enhanced by greater focus on the relationship between police and their community. There is merit in the Police Service combining ‘numerical accountability’ measures with goals and indicators that examine the impact of particular policing strategies on local communities. Modifying the OCR process in this way to better address the overall impact of policing activity on the community would also be consistent with the Police Service’s recently enhanced responsibility for dealing with problems and complaints.
- 13.44 Where such developments may produce the greatest benefit is in the area of police relationships with those communities where there is a significant risk of unproductive and/or non-cooperative relations. These might include police relations with young people, indigenous people, and people from non-English speaking backgrounds. The experience of young people and Aboriginal people with the use of the Police and Public Safety Act that we have described should be subject to close scrutiny through the OCR process. In this way, local commanders would be given the opportunity to account for the way in which these powers are used in their command, and the impact of their use, not only on crime, but on the community itself.
- 13.45 Consideration might also be given to appropriate community participation in the OCR process. For this to have any value, there would need to be continuous participation of a small number of community representatives with an understanding of the various issues under examination at the OCR, as well as the attendance of local community representatives on a case by case basis who would be able to provide input on the impact of command initiatives on the local community. Such participation would not only enhance the contribution of the OCR to the accountability of commanders, but would provide community representatives with a unique insight into the issues and pressures confronting police.
- 13.46 The OCR is a valuable resource and management tool, and any recommendations for modification are aimed at dealing with some other issues for which local area commanders should be held accountable. Foremost among these must be the relationship between the police and the community. This relationship has been identified as one of the key priorities in the Police Service’s Corporate Plan,²⁸ and has been addressed in recent annual reports. The Service should be well placed to build on the undoubted achievements of the OCR process to factor in sophisticated analysis of local factors and the ongoing active participation of community representatives to examine the broader impact of policing strategies at the local area. We recognise the efforts of the Police Service in this area, and encourage the ongoing development of more sophisticated tools designed to measure the impact of policing strategies on local communities.

²⁸ NSW Police Service, *Corporate Plan 1998-2001*, March 1998.

Operations

- 13.47 High profile and large scale targeted police operations have been developed, partly in response to the issues identified at OCRs, as a strategy to deal with local crime problems. These operations are seen as a way of developing localised and coordinated strategies for dealing with particular problems in particular areas. The reported success of some of the early initiatives in this area, most notably, Operation Puccini in Cabramatta, has also served to secure a strong reputation for highly visible and large scale police operations.
- 13.48 In the early stages of implementation, police indicated that Police and Public Safety Act powers were most useful and most often used as part of street policing operations. The Police Service has advised us that, throughout the implementation period, there were 217 operations across 44 local area commands that involved or focused on the use of the Police and Public Safety Act.²⁹ Among the more prominent of these were CitySafe, centred on the City of Sydney, and Innsbruck, centred on Bankstown.

CitySafe

- 13.49 The first CitySafe operation took place between 1 May and 30 June 1998. While it preceded the commencement of the Police and Public Safety Act, CitySafe was, in part, a response to the same events and trends that resulted in the introduction of the legislation. Following the media coverage given to violent street crime in the City of Sydney in early 1998,³⁰ the local area commands of City Central, Kings Cross, Surry Hills and The Rocks agreed on an operation involving the targeting of resources on particular areas of the City.
- 13.50 The operation was said to have resulted from the recognition by local area commanders that 'the majority [of] violent street crime in the city occurred in relatively small well-defined areas', and that this type of crime was 'particularly susceptible to high profile saturation-style policing operations.'³¹
- 13.51 The goal of CitySafe was to reduce the incidence of violent street crime, defined as robbery, assault and steal from the person offences, in the central Sydney area. The operational strategy was to identify high crime areas and times using crime density mapping, and deploy a highly visible uniformed presence in those areas at those times.³²
- 13.52 The effective use of police discretion was seen as one of the factors contributing to the success of CitySafe.³³ Police were encouraged to adopt a 'firm but fair' approach. As part of this approach, police were advised to exercise their discretion to issue warnings rather than prefer charges for minor street offences. This approach was emphasised so as to ensure maximum police visibility, by avoiding having police spending considerable time

²⁹ Figures obtained from Schedule of *Operations conducted within NSW focussing on Crimes Legislation Amendment (Police and Public Safety) Act 1998*, from Office of Deputy Commissioner, June 10, 1999.

³⁰ See Chapter 2, Background.

³¹ *Coordinator's Report on CitySafe*, 29 July 1998, p. 5.

³² D. Darcy. 'Zero Tolerance — not quite the influence on New South Wales policing some would have you believe' *Current Issues in Criminal Justice*, Volume 10, No. 3. March 1999, p. 292.

³³ *Coordinator's Report on CitySafe*, op. cit., p. 20.

processing offenders for minor charges. During the first CitySafe, 362 warnings were issued to adults and juveniles, constituting 73% of the actions taken during the operation.³⁴

- 13.53 For most crime categories there were decreases in numbers from April to June 1998, but there were increases in the numbers of assaults, break and enter, malicious damage, street offences, resist/hinder officer and drug detection. The latter figures should be treated with some caution because most of the significant increases involved relatively small numbers. For example, a 73% increase in 'street offences'³⁵ meant that the number of offences went from 26 in April to 45 in June, while a 48% increase in resist/hinder officer meant 27 offences in April and 40 in June.³⁶ As police acknowledged, the arrest of just one offender reportedly had a significant impact on robberies in The Rocks and Surry Hills commands.³⁷ In addition, many of the offences recording an increase are those offences regarded as indicators of policing activity, so an increase would be expected following an intensive street policing operation.
- 13.54 Repeat offenders were targets of the operation.³⁸ The first month of the operation saw 73% of arrested persons identified as repeat offenders, with 79% of these having been dealt with by the criminal justice system on five or more occasions. The following month, these figures were 63% and 65% respectively.³⁹
- 13.55 The reported success of CitySafe led to its continuation over 1998 and 1999. In all, there were five phases of CitySafe during the review period.⁴⁰ The extent of the use of the Police and Public Safety powers in those operations depended, in part, on which offences were given priority, as well as the individual decisions of officers when dealing with a suspect. For instance, CitySafe III focused on the Kings Cross LAC, with over half the arrests being made in that command, mostly for drug and property related offences.⁴¹
- 13.56 Searches in CitySafe III were more likely to be based on the powers in the *Drug Misuse and Trafficking Act* rather than the Police and Public Safety Act. According to police records, there were 41 searches for knives and other dangerous implements during CitySafe III, with 26 instances of 'bladed instruments' being discovered. There were 107 directions issued under s. 28F that were complied with, and three offences arising from refusals to comply. In CitySafe IV there were three 'knife offences', and 20 infringement notices issued for refusal to comply with a direction. The difference in search numbers between operations may be attributed to a change in focus and activity between operations.

³⁴ Darcy, op. cit., pp 292–3.

³⁵ 'Street offences' are one of the offence categories, along with assault/resist/hinder police and drug detection, which are regarded as a useful gauge of police activity. The category of 'street offences' includes such offences as offensive language, offensive conduct, consumption of alcohol in an alcohol free zone, consumption of alcohol in public by a minor. Since 1 July 1998, the category of 'street offences' also includes the various activities conducted under the Police and Public Safety Act.

³⁶ Darcy, op. cit., p. 294.

³⁷ Ibid, p. 295.

³⁸ Police Service Weekly. Vol. 10. No. 28, 13 July 1998, p. 4.

³⁹ Ibid.

⁴⁰ CitySafe III–VII.

⁴¹ *Coordinator's Report on CitySafe III*, dated 16 November 1998, and *Police Service Weekly*. Vol. 11. No. 2. 18 January 1999, p. 3.

Innsbruck

- 13.57 Operation Innsbruck commenced in July 1998 with the objective of reducing Bankstown's high levels of robbery, stolen cars, break and enters, drug offences and anti-social behaviour. Fifty officers from the Georges River region were initially involved in the operation. Police were actively involved in the development of the activities for the operation. A three day training workshop was conducted, with the operation commander saying that:
- Instead of telling the troops what we wanted them to do, we gave them ownership of the taskforce and they had to think of ways to solve the problems they'd be facing.⁴²
- 13.58 Target development teams were established for the purpose of examining the types of crimes committed, determining the pattern of activity, and providing advice to the operational teams on possible targets. Two operational teams were set up to be able to be sent out on to the streets at a moment's notice. The early phases of the operation emphasised 'proactive saturation', with more than 30 officers sent into the Bankstown CBD to gather information from members of the public on crime and alleged offenders in the area.
- 13.59 According to the local area commander, the first phase of Innsbruck, which ran from 1 July 1998 to 3 January 1999, resulted in 447 arrests, 1150 charges, 630 intelligence reports, and the recovery or seizure of property worth in excess of \$1 million. The second phase of Innsbruck, which commenced on 4 January 1999, resulted in 71 arrests, 176 charges, 332 intelligence reports, 606 traffic infringement notices, and the recovery of property and cash to the value of \$28 000.⁴³
- 13.60 Traffic policing was a key feature of the operation. Random breath testing was used in the vicinity of problem areas. Where motorists appeared to be attempting to avoid random breath testing locations they were followed, stopped and detained so as to determine whether their evasion tactics were due to intoxication or for other reasons such as being disqualified from driving, unlicensed, or in a stolen vehicle. The intelligence employed by the operation showed that many recidivist offenders were also disqualified or unlicensed drivers, and the traffic policing was believed to assist in disrupting their criminal activities.
- 13.61 Policing of street offences was not a priority in the early phase of the operation. However, in the days and weeks following the stabbing murder of Edward Lee in October 1998,⁴⁴ and the subsequent police investigation, greater use was made of proactive policing of street offences. In part, this phase was the result of crime mapping that showed a high incidence of robberies, drug offences, assaults, stealing, motor vehicle theft and break and enters as well as high incidence of complaints against young people in the area around the Bankstown CBD and the Bankstown Railway Station. The Police and Public Safety Act

⁴² Police Service Weekly, Vol. 11. No. 34. 24 August 1999, p. 6.

⁴³ Figures recorded to 2 June 1999, provided in correspondence to NSW Ombudsman from Superintendent D Madden, Local Area Commander, Bankstown.

⁴⁴ It is interesting to note that this incident, which reportedly saw '100-plus people on the street when police arrived', would have seemed tailor-made for the use of the 'demand name and address' powers established under s. 563 of the Crimes Act (see Chapter 11), but there is no evidence that these powers were used to any significant extent on this occasion.

powers were actively used on a number of occasions to deal with people who were apparently disrupting the public use of the retail areas at the time. While we were advised by local police of the extensive use of the Police and Safety Act powers, we are aware that there was significant under-reporting of the use of the powers, particularly in the early months of the implementation of the Act.

- 13.62 This aspect of the operation, referred to as 'All In', occurred on a weekly basis from October 1998 to January 1999, with anywhere from 48 to 200 police deployed on any one occasion. Police were drawn from Bankstown's operational safety group, highway patrol, bike squad, dog squad and mounted police as well as Innsbruck operational police. The deployment targeted theft hot spots, shopping centres, pool halls, car parks, licensed premises, pawn shops for knives, guns and stolen property, truancy, anti-social behaviour, random breath testing and prostitution. The operation also had the objectives of reducing community fear and gathering intelligence for future operations.
- 13.63 The 'All In' phase of Innsbruck resulted in 100 arrests, 280 charges, 90 cautions, 739 traffic and parking infringements notices, and 291 intelligence reports. In addition, five vehicles were confiscated, two vehicles were given defect notices, as well as 2360 random breath tests, 377 searches, 324 directions, 20 inspections of licensed premises, and nine knives found.⁴⁵
- 13.64 In March this year, we spoke to young people in and around Bankstown about their experience of the Police and Public Safety Act. Some claimed that during what they called the 'blitz' it was not uncommon to be searched three times a night or anywhere between 15 and 25 times a week.
- 13.65 Critics argued that there has been 'a particularly poor relationship between the police and young people, primarily of Arabic descent, in the Bankstown area'.⁴⁶ The perception that some groups were being unfairly targeted, along with the considerable media coverage of events in the Bankstown area, resulted in local police developing strategies to try to repair police-community relations. These initiatives involved visiting schools, youth centres, and other youth organisations, as well as the organisation of a 'Youth Expo'. These activities were focussed on explaining the police presence and activities, but also involved talking to young people about their own aspirations and thoughts about living in the Bankstown area.
- 13.66 While little external coverage, if any, was given to these activities, police saw them as important in restoring a workable relationship between police and young people in the area following a very tense period. Such an approach indicates the benefits of recognising the community's concerns, and developing appropriate and effective strategies to respond to those concerns. If it is not occurring already, these sorts of strategies should be recognised at OCRs, and their impact on crime reduction and strengthening police-community relations should be subject to scrutiny.

⁴⁵ Figures recorded to 2 June 1999, provided in correspondence to NSW Ombudsman from Superintendent D Madden, Local Area Commander, Bankstown.

⁴⁶ Submission, The Shopfront Youth Legal Centre, dated 7 July 1999, p. 11.

Puccini

- 13.67 Operation Puccini, centred on Cabramatta's CBD, was the one of the first of the large scale operations targeting crime in recent times. Commencing in July 1997, it focused on discouraging drug users and suppliers from operating from Cabramatta Railway Station and the nearby CBD. It was said to be in response to a perception that 'traditional law enforcement seemed to have little impact on the drug trade in Cabramatta.'⁴⁷
- 13.68 Operation Puccini preceded the introduction of the Police and Public Safety Act, and its focus on drug offences has meant that the Police and Public Safety powers have not been central to the police activity in Cabramatta. However, Puccini was the precursor to, and claims of its success has influenced, the large scale operations that have followed in its wake.
- 13.69 Where the Police and Public Safety Act powers have been used, some interesting issues become evident. A search of the COPS database for use of the Police and Public Safety powers specifically linked to Operation Puccini showed that 38 directions had been issued. Of these 38 directions, 28 were directions to leave Cabramatta for the reason that the person had no purpose being in Cabramatta. While these directions were issued to persons suspected of involvement in drug-related activity, it is by no means apparent that the power to give reasonable directions confers a power to proscribe whole districts or suburbs as off limits on the basis that the person has not stated a purpose for being there.
- 13.70 Operation Puccini is now in its 10th phase. Following its second phase it was said that:
- When it is decided that Cabramatta police can control the drug problem within its command without assistance, it will do so. It might not be known as an operation but the functions will remain the same.⁴⁸
- 13.71 This is perhaps indicative of the outcomes of operations like Puccini. Rather than being a one-off event, such operations are now part of routine practice for the area. In some areas, they have become the primary anti-crime initiative. Puccini, CitySafe and Innsbruck all started as one-off operations. Two years after Puccini commenced, 18 months after the first CitySafe, and 15 months since Innsbruck was launched, they still remain significant elements in the crime reduction strategy of each of the commands.
- 13.72 Police are recognising that one of the consequences of Puccini was to displace drug markets and the associated offences from the CBD of Cabramatta to nearby residences and other suburbs.⁴⁹ Critics of the nature and impact of Puccini suggest adverse public health implications, changes in criminal and risk taking behaviour and other problems as undesirable consequences of the operation. The concern about its impact on crime relates not only to its displacement effect, but the change in the nature of the criminal activity undertaken to get money to purchase drugs with property crime supplanting drug selling because of the increased risk of apprehension for the latter.⁵⁰

⁴⁷ *Police Service Weekly*, Volume 10, No. 22, 1 June 1998, p. 4.

⁴⁸ *Police Service Weekly*, Volume 11, No. 30, 2 August 1999, p.6.

⁴⁹ *Police Service Weekly*, Volume 10, No. 22, 1 June 1998, p. 4 and *Police Service Weekly*, Volume 11, No. 30, 2 August 1999, p.6.

⁵⁰ L. Maher et al. *Running the Risks: Heroin, Health and Harm in South West Sydney*, NDARC Monograph No. 38, National Drug and Alcohol research Centre. University of New South Wales, 1998, pp. 112, 114, 123-4.

13.73 Once again, this points to the necessity and utility of looking beyond data and statistics to determine the overall impact of policing strategies on criminal activity as well as the community. It is important to ensure that particular approaches do not have the effect of undermining otherwise sound and successful crime reduction strategies, and do not have the effect of creating unnecessary community concern that may diminish support for these initiatives. Again, it is important that these strategies, and their impact, be subject to scrutiny and discussion during the OCR process.

Oilgate

13.74 During July 1999, the Endeavour Region undertook Operation Oilgate. It was said to be an 'intelligence driven operation designed to crack down on street crime and anti-social behaviour'.⁵¹ It took place over four days, and involved the deployment of 90 police in Ashfield, Burwood, Campsie, Eastwood, Gladesville, Leichhardt, Marrickville and Newtown. It resulted in 61 arrests, 104 charges, 300 information reports, 19 first instance warrants, 177 traffic infringement notices, and 27 railway infringement notices. The arrests and charges were for offences ranging from robbery, drug offences, stolen vehicles, assault, stealing, goods in custody and fraud. In addition there were 215 searches for knives conducted, with three of those resulting in the discovery of a knife.

13.75 We were made aware of concerns about some of the strategies employed during Oilgate. The operation was said to have been 'conducted in a manner which broke down positive relations for a number of young people, community workers, and residents and shop owners'.⁵² We were advised that 'the behaviour of officers ... was inappropriate and indiscriminate',⁵³ with complaints of police incivility and rough handling of young people. There were concerns that police failed to give reasons to persons stopped and searched, as well as a failure to give reasons when photographs were taken of persons. The operation was also criticised for inappropriately targetting young people who were not the subject of local intelligence, which was said to be, in part, the result of failing to involve local officers.

13.76 The representations made to our Office following the operation indicated that among the concerns was a fear that the efforts to establish a positive working relationship between police and the community in the Marrickville area were undermined by the approach evident in Oilgate. These concerns were echoed by a Member of Parliament:

Operation Oilgate was regionally planned and implemented with little regard for local efforts to improve police and community relations. We have been informed by the Youth Justice Coalition, and it is very important to note, that the Marrickville coalition has been working towards improving such relations through a pilot police and community training project (PACT). Experiences such as those of 14 July this year undermine this good work and break down the community's confidence in and commitment to strategies to improve police community relations.⁵⁴

⁵¹ Police Service Weekly, Volume 11, No. 30, 2 August 1999, p.6.

⁵² Letter from Marrickville Youth Resource Centre, dated 11 August 1999.

⁵³ Ibid.

⁵⁴ Ms L. Rhiannon MLC, NSWPD Proof Copy, 21 October 1999, p. 89–90.

Issues arising from the conduct of operations

- 13.77 We have since been involved in positive discussions involving the Police Service and representatives of the local community to discuss the impact of Oilgate, with local police acknowledging the need for adjustments to the method and manner of future operations to avoid or minimise potential problems. The strategies agreed on in terms of future operations in this instance may offer guidance for the management and conduct of operations in other locations.
- 13.78 Some of the strategies proposed as a result of these discussions include:
- the development and use of quality intelligence, including the involvement of specialist officers;
 - enhanced understanding and improved application of the legal standards and limitations relevant to the Police and Public Safety Act powers;
 - understanding that the expanded police powers are merely one resource available to police, who can avail themselves of other policing tools, such as the *Young Offenders Act*;
 - development of accountability measures around the use of diversionary options, such as those contained in the *Young Offenders Act*; and
 - clear communication of the overall strategy with the local community, particularly representatives of those groups who may be particularly or adversely affected by intensive police operations.
- 13.79 One of the key themes to arise from examining the conduct of the various operations was the impact on the local community. As has been noted elsewhere, 'in a democratic society effective policing can be achieved only with community support and involvement.'⁵⁵
- 13.80 It is clear that police have the aim of conducting these operations for the benefit of the general community, and indeed, they enjoy considerable community support. However, such operations will have costs. Recognition also needs to be given to the:
- ... complex and sometimes contradictory responses from 'the community': demands for police action against [crime] is accompanied by concern about how such policing is conducted and about its counterproductive effects.⁵⁶
- 13.81 These 'complex and sometimes contradictory responses' have become evident in the reaction to some of the recent street policing operations. There are indications that some of the operations have adversely affected police relations with some in the community, particularly, but not only, young people and people from non-English speaking backgrounds. This has the potential to be counter-productive considering that it can undermine positive initiatives, such as in Marrickville, where there has been a deliberate strategy to improve police-community relations on other issues.

⁵⁵ G. Kelling, *'Broken Windows' and Police Discretion*, National Institute of Justice, Washington, October 1999.

⁵⁶ D. Dixon and L. Maher 'Law Enforcement, Harm Minimization, and Risk Management in a Street Level Drug Market'. Paper presented to the Australian Conference on Drugs Strategy, Adelaide, 27–29 April 1999.

13.82 The potential for injudicious use of police powers to undermine community confidence in police is highlighted by the following two cases. Both arise from concerns expressed by youth workers who contacted our researcher to talk about their experience of police use of the search and 'move on' provisions.

Cinema excursion

13.83 One enquiry was from a youth service in Western Sydney. The service specialises in working with young people from a particular ethnic background and is part of a larger service which deals with young people between the ages of 12 and 18 years as well as homeless youth.

13.84 The youth worker described the following incidents:

In July 1999, the service had organised a cinema excursion for about 25 young people. Prior arrangements had been made with the cinema management.

According to the youth worker, the first incident occurred when police searched some of the young people as they made their way to the designated meeting point, prior to the start of the film. The youth worker claimed that she and other workers attempted to talk to the police but were told: 'It has nothing to do with you'. She said that the police advised them that they were looking for weapons and had suspicions in relation to vehicle theft. She stated that police found nothing of interest on any of the young people searched.

The youth worker claimed that the second incident occurred after the film as the group attempted to leave the cinema. Police and security questioned a girl from her group at the cinema exit. The youth worker stated that she and the other workers attempted to intervene but were dismissed by the officer involved.

The youth worker stated that upon leaving the cinema complex approximately 20 police approached the group and the situation rapidly escalated. The youth worker alleged that the following incidents then occurred:

- a 15 year old girl was pushed against a wall and roughly handled by police;
- a youth worker who attempted to provide support for the girl on a number of occasions, was elbowed by police and then sprayed with OC (capsicum) spray;
- the same youth worker was pushed down stairs while handcuffed and suffering the effects of the spray;
- a baby was inadvertently knocked from a pram when police pushed a young boy and he fell on the pram;
- the mother of this baby was arrested for offensive language, which she allegedly used when reacting to the above incident; and
- police raised their batons in the air and told the young people to move away or they would be arrested.

The youth worker expressed concern about the police handling of the series of events which occurred over the evening. She felt that it was particularly inappropriate that police attempted to move the young people on since she and the other workers were responsible for their supervision and for transporting many of the younger children home.

A number of arrests, cautions and charges allegedly resulted from the events of that evening. The youth worker making the enquiry was advised about the process for making a formal complaint, however, no written complaint has been received by this Office.

- 13.85 According to the youth worker who made the enquiry, the service had a good relationship with the police commander in their area. The local area command was also represented on their management committee by the youth liaison officer. Of particular concern is the potential for incidents such as this to undermine the police youth liaison officer's efforts to develop a respectful and productive relationship between police and young people in their community.

Street party

- 13.86 Another enquiry was from a youth support service on the Central Coast. The service receives State Government funding to provide support to marginalised and disadvantaged young people. According to the youth worker who contacted our Office, the alleged incident occurred as follows:

In July 1999, the youth service organised a social event. The local council granted approval for street entertainment, including a band, outside the youth service building. The event was drug and alcohol free and approximately 100 young people attended.

During the evening, police arrived and stated that the band would have to stop playing because they had received complaints. The youth worker alleged that the police were holding batons when they arrived. The youth worker stated that she asked the band to stop playing and they did. At this point, additional police allegedly arrived and the roads were blocked by police cars.

The youth worker told us that the situation then began to escalate and the young people were verbally abusive towards the police. According to the youth worker, she and other workers calmed the young people down and they ceased their abuse. The youth worker stated that a number of incidents then occurred:

- police continued to detain one girl for offensive language despite being advised by the youth worker of the girl's unstable mental condition. The youth worker stated that the girl resisted and there was a struggle which resulted in bruising and cuts to the girl;
- police arrested two other girls who allegedly tried to intervene in the first arrest;
- police who remained at the scene attempted to disperse the remaining young people. The young people gathered inside the building and were allegedly told by police that if they left the premises they would be fined; and
- at the police station, the youth worker asked if she could be present during the first girl's interview. This was refused. The girl was extremely agitated when released from police custody and was again arrested but released without further charge.

The youth worker felt that the situation had escalated unnecessarily as a result of inappropriate police actions. She stated that it was irresponsible for the police to attempt to move the young people on because many of them were expecting to be picked up by their parents at 10pm when the event closed.

The youth worker stated that she had approached the local area commander about these matters but that he had 'a completely different version' of the evening's events. The youth worker making the enquiry was advised about the process for making a formal

complaint. She has since told us that the youth service has negotiated directly with the local command to prevent incidents such as this recurring.

- 13.87 It is important to note that we were not made aware of many allegations of such heavy-handed use of the s. 28F 'directions' powers during the review period. However, those concerns that were raised, including the two cases cited above, often highlighted important issues for the Police Service to address.

Police relations with the community

- 13.88 Our office has looked closely at a number of police operations. In some cases, the need to look at police-community relations has been addressed. In other instances, unnecessary friction and tension between police and the community has arisen because these kinds of issues have not been acknowledged or adequately addressed. It has long been accepted that police operations of this type can exacerbate existing tensions, particularly among groups where there has been a history of poor relationships with police, such as young people and indigenous people.

- 13.89 The risk for police is that a backlash against these initiatives could undermine the important crime fighting strategies developed by police, which have the support of the community in general. The challenge for the Police Service is to conduct intensive street policing operations without unnecessarily antagonising groups who may feel they have been unfairly targeted for police attention. To ensure that police operations can continue to meet the goal of effective crime reduction, it is necessary to ensure that they do not give rise to unnecessary complications that compromise or undermine those efforts.

- 13.90 Some of the criticism of these operations has focused on the consequences of involving police with little or no knowledge of local conditions. In each of the operations we have looked at there have been comments from community groups, and individual members of the public who come into contact with police, that problems occur not so much with local officers, but with officers brought from outside the area for the operation. While it may be necessary, and even useful, to involve officers from outside a particular area, there is a risk that a heavy-handed approach by police with no involvement in a particular community can unnecessarily undermine attempts by local police to develop a constructive relationship with that community.

- 13.91 Our examination of these operations has also shown that it is important that a clear and comprehensive briefing be provided at the outset to all officers involved in the operation. This briefing needs to address the scope and limits to the police powers identified for use during the operation, as well as the style of policing the Police Service is seeking to promote. It should also address the particular issues, concerns and sensitivities involved in dealing with the local community. It is important that, where appropriate, due regard be given to these matters if only to ensure that the focus and impact of the operation is not diminished through having to deal with complications arising from inappropriate tactics and practices. Where officers join the operation without having attended the original briefing, efforts must be made to acquaint them with the issues canvassed at the briefing.

- 13.92 Sometimes there is a failure to recognise that in seeking to target criminal behaviour, there is a risk of targeting law abiding citizens simply because they match a particular

profile. These issues can be addressed partly by more sensitive and intelligence-led policing. The Police Service is acknowledging the need for, and utility of, quality intelligence, and the use of such intelligence, particularly good local intelligence, in proactive operations will do much to reduce unwarranted and unnecessary police contact.

- 13.93 It would also be helpful for appropriate consultation to occur with community representatives, including people working with groups that are possible targets of policing operations. This needs to occur at the local level, before, during and following the operation.
- 13.94 This is not to suggest that police are obliged to pass on specific details of proposed operations, but rather it is suggested that police actively seek opportunities for working co-operatively and collaboratively with community representatives to achieve common objectives around crime reduction and police-community relations. This may entail discussion, and even negotiation, around the objectives and proposed strategies for policing operations, but it does not require the disclosure of specific targets or tactics.
- 13.95 Furthermore, it is important that police be in a position to deal quickly with concerns as they arise in the course of an operation. This is particularly pertinent when there are other initiatives in the area involving police and other members of the community. Without a prompt response to specific concerns, there is a risk that these other initiatives fall victim to a perception that the police are not interested in working together to solve local problems.
- 13.96 The reported success of these operations has meant that they have become almost a permanent feature of operational policing in their local areas. In essence, the operations have moved from being targeted policing strategies to ongoing policing techniques. Police also need to incorporate more effective means of managing the adverse impact such operations may have on relations with young people and Aboriginal people. It is important to minimise the fallout from these operations, and avoid the possibility of undermining or diminishing the benefits obtained from the implementation of such strategies. This has implications for the ongoing management of the relationship between police and the local community.
- 13.97 In 1997, the Police Service developed a framework for Standard Operating Procedures for 'sensitive operations',⁵⁷ following complaints about the conduct of a particular surveillance operation in a suburban shopping area. While the framework was developed specifically for the circumstances that were the subject of complaint, the principles hold good for the management of other proactive policing strategies that may have unintended adverse outcomes for particular groups in the community.
- 13.98 Given the critical nature of these issues, it is recommended that consideration be given to the development and adoption of a 'Proactive Operation Procedure' along those lines for the management and conduct of proactive street policing operations. Any such procedure will need to be subject to ongoing review and development. It should form part of, not merely an adjunct to, any local strategies or policies that address the issue of community relations in respect of the conduct of these types of operations.

⁵⁷ See D. Steadman 'Sensitive Operational Planning' in *Policing Issues & Practice Journal*, January 1998, Vol. 6, No. 1, pp. 15–6.

13.99 While it is appreciated that commanders should be held to account for their performance in crime prevention and reduction, some attention also needs to be given to the methods they employ to achieve this, and the impact of their strategies on their relationship with the community. Commanders should be able to develop operation procedures in accordance with the particular issues facing their command, but it is necessary for them to be held accountable against general indicators and performance measures. Such measures offer the possibility that police efforts to reduce crime will enjoy support across the entire community, and that complaints about particular initiatives will be minimised.

Recommendations

36. That the Police Service give consideration to appropriate community participation in the Operations and Crime Review to address the overall impact of policing activity on the community.
37. That the OCR give particular attention to those local area commands that have a relatively high recorded per capita use of the powers.
38. That the experience of young people and Aboriginal people of the use of the Police and Public Safety Act be subject to closer scrutiny through the OCR process.
39. That prior to proactive policing operations, especially those involving police brought in from outside the local command, all police be briefed on the particular issues related to the local community, as well as the scope and limits to the police powers identified for use during the operations, as well as the style of policing the Police Service is seeking to promote.
40. That consideration be given to the development and adoption of 'Proactive Operation Procedures' for the conduct and management of proactive street policing operations, and that the procedure address such issues as:
 - the need for appropriate consultation to occur with community representatives before, during and after the conduct of proactive police operations.
 - the need for processes for dealing promptly with concerns as they occur in the course of an operation.
41. That scrutiny be given at Operations and Crime Reviews to the impact of crime reduction strategies on police relations with the community.



Summary of recommendations

Summary of recommendations

Chapter 5: Searches

1. That the Police Service continue its monitoring of the ratio of 'productive' to 'unproductive' searches in each local area command.
2. That the Police Service monitor the proportion of Aboriginal people and young people searched and seek explanations for the rate of searches, at Operations and Crime Review briefings.
3. That each local area command actively seek the views of sections of the community likely to be affected by police use of search powers regarding concerns they might have about police, particularly Aboriginal people and young people where relevant.
4. That the various provisions empowering police to conduct searches without warrant be consolidated into a single legislative instrument.
5. That the use of the police powers, including powers to search and issue reasonable directions, be governed by codes of practice (made pursuant to a Regulation) which clearly articulate the rights of citizens as well as the powers of police.
6. That, in addition to requiring the search to be based on reasonable suspicion, the code of practice set out those factors (such as age, racial appearance, manner of dress and antecedents) that can not form the basis of a search in the absence of other factors.
7. That the Police Service complement the code of practice with instructional materials setting out case examples regarding what might constitute reasonable grounds to search.
8. That any changes to police powers be adequately communicated to both the community and police officers, and that the powers and procedures to be used are supported by ongoing training and supervision for police.
9. If presence in a location with a high incidence of violent crime is to be retained as a factor police may take into account in determining whether to search for knives and other implements:
 - section 28A(3) should be amended to make it clear that this factor can only be used in combination with other factors; and
 - based on their analysis of violent crime, local commanders should be required to define and document locations in their command where this provision would have effect, and advise officers accordingly.

Chapter 6: Custody of a knife

10. That future public education campaigns in regard to street safety or related issues, address the range of implements considered to be 'knives' under the Police and Public Safety legislation.
11. That the code of practice emphasise that police officers are to ask for, consider and record any explanation by a person found to have custody of a knife.
12. That the code of practice provide guidance to police for assessing the reasonableness of a person's explanation for custody of a knife in a public place or school, as well as advice on addressing 'all the circumstances', and illustrate their application through appropriate case studies.
13. That s. 11(2)(a)(i) of the *Summary Offences Act* be amended to provide: 'lawful pursuit of a person's occupation, education or training'.
14. That where an infringement notice is issued to a child, the child be advised of their right to obtain legal advice and where that advice may be obtained, consistent with the protections afforded by the *Young Offenders Act*.

Chapter 7: Parents who allow children to carry knives

15. That the review of the *Children (Protection and Parental Responsibility) Act 1997*, due to commence after 10 July 2000, give consideration to the issues identified in this review, including whether there is a need for or merit in greater consistency between s. 11D of the *Summary Offences Act* and the *Children (Protection and Parental Responsibility) Act*.

Chapter 8: Schools

16. That, unless impractical, police conduct any necessary searches for dangerous implements on school premises.
17. That the Department of Education and Training and the Police Service enter into an agreement to govern the arrangements between the two agencies as to:
 - when police shall be called upon to conduct searches;
 - the procedures to be adopted by school staff when they are required to conduct a search without the involvement of the police; and
 - the responsibilities of both agencies in the event of the discovery of a dangerous and/or prohibited article.

Chapter 9: Confiscated knives and other dangerous implements

18. That a further review of the handling and management of knives confiscated under the Police and Public Safety Act be conducted following the completion of the Mandatory Continuing Police Education Scheme training module on the handling of property and exhibits.
19. That consideration be given to the amendment of s. 28C and s. 28D to permit an application for the return of a knife to be made by the owner of a knife where the owner was not the person from whom the knife was confiscated.
20. That the Police Service recognise the need for the timely adjudication of applications for the return of confiscated knives, and establish appropriate procedures for the timely consideration and determination of such applications.

Chapter 10: Reasonable directions

21. That the Police Service continue its monitoring of the use of 'reasonable directions' in each local area command, including directions which are obeyed.
22. That the Police Service monitor the proportion of Aboriginal people and young people given 'reasonable directions' and seek explanations for the rate of directions, at Operations and Crime Review briefings.
23. That each local command actively seek the views of sections of the community likely to be affected by police use of 'reasonable directions' powers regarding concerns they might have about police, particularly Aboriginal people and young people where relevant.
24. That s. 28F of the *Summary Offences Act* be amended to enable an officer to dispense with any or all of the procedural requirements of s. 28F(4) provided that the officer does so only where the officer has a reasonable excuse in all the circumstances.
25. That the code of practice for the 'reasonable directions' power provide guidance on those situations where it is reasonably necessary to dispense with the procedural requirements before giving 'reasonable directions' in a public place.
26. That the Police Service obtain legal advice and provide guidance to police as to the meaning and application of:
 - 'obstruction', to determine how it relates to such activities as begging, collecting for charities, busking, or sleeping in public areas;
 - section 28F(1)(c), to address confusion and uncertainty regarding the proper application of this provision;
 - section 28F(2), as it applies to police officers being the person affected by the 'relevant conduct'.

SUMMARY OF RECOMMENDATIONS

27. That the use of 'reasonable directions' powers be governed by a code of practice (made pursuant to a Regulation) which clearly articulates the rights of citizens as well as the powers of police. Such a code should:
 - emphasise that the 'reasonable directions' power is not limited to directions to 'move on';
 - set out those factors (such as age, racial appearance, manner of dress and antecedents) that can not form the basis of a direction in the absence of other factors;
 - provide guidance to police regarding the situations in which a person's presence alone may warrant police intervention.
28. That the Police Service give consideration to further education and training specifically regarding s. 28G of the *Summary Offences Act*, including advice through Police Service publications.
29. That where a briefing is provided to officers prior to police activity in respect of an industrial dispute, demonstration, protest, procession or assembly, officers should be advised that the 'reasonable directions' power can not be used in respect of participants in that event.

Chapter 11: Power to demand name and address

30. That the Police Service give consideration to further advice, education and training, including information in Police Service publications, for officers on the appropriate uses of s. 563 of the *Crimes Act*.
31. That s. 563 be amended to clarify that an offence only arises from a failure or refusal to comply with the original request for name and address, and not where there is a failure to comply with the subsequent request for proof of name and address as well.

Chapter 12: Penalties

32. That infringement notices be retained as an option for dealing with offenders under the Act, subject to the following modifications:
 - a) That police be provided with more detailed policy guidance on what constitutes an offence under the Act, including practical examples of what might constitute a 'reasonable excuse' and when use of discretion not to take formal action against a person might be appropriate.
 - b) That police be encouraged to issue warnings where appropriate. For more serious breaches by young offenders, consideration be given to whether police should have the power to issue a directive for the young person to attend a nominated police station within a specified period to be dealt with under the *Young Offenders Act*. Failure to attend may result in the issuing of an infringement notice.
 - c) That police be authorised to formally caution adult offenders for first offences where appropriate, and that such a caution constitute having been dealt with for the purposes of any subsequent knife-related offences.

- d) That consideration be given to amending s. 29A of the *Summary Offences Act* to require police to:
 - seek a suspected offender's excuse for custody of a knife or refusing or failing to obey a reasonable direction before issuing a penalty notice, and
 - briefly note any excuse provide on the notice issued.
- e) That consideration be given to whether the Infringement Processing Bureau's current role in adjudicating on representations from members of the public be extended to assessing whether notices fully state the offence alleged, including whether the person was given an opportunity to provide an excuse.
- f) That the Police Service use audits and other monitoring to encourage officers who issue penalty notices for offences under the Police and Public Safety Act, to create corresponding records on the police computer system.
- g) That the appropriateness of the requirement that infringement notice penalties amount to the maximum penalty that may be imposed by a court, be assessed in the review of fines and penalties being conducted by the Criminal Law Review Division of the Attorney-General's Department.

Chapter 13: Crime reduction & operations based policing

- 33. That police continue the practice of recording all uses of the powers established by the Police and Public Safety Act, including those searches that do not result in the discovery of a knife as well as those 'reasonable directions' that are complied with.
- 34. That the Bureau of Crime Statistics and Research be requested to monitor and analyse the longer term impact of police powers, especially stop and search, reasonable directions and name and address powers, on crime trends.
- 35. That the Police Service consider developing measures relating to the impact of the street policing powers on the detection and apprehension of repeat offenders, and that these be used to evaluate local area command performance on targeting repeat offenders.
- 36. That the Police Service give consideration to appropriate community participation in the Operations and Crime Review to address the overall impact of policing activity on the community.
- 37. That the OCR give particular attention to those local area commands that have a relatively high recorded per capita use of the powers.
- 38. That the experience of young people and Aboriginal people of the use of the Police and Public Safety Act be subject to closer scrutiny through the OCR process.
- 39. That prior to proactive policing operations, especially those involving police brought in from outside the local command, all police be briefed on the particular issues related to the local community, as well as the scope and limits to the police powers identified for use during the operations, as well as the style of policing the Police Service is seeking to promote.

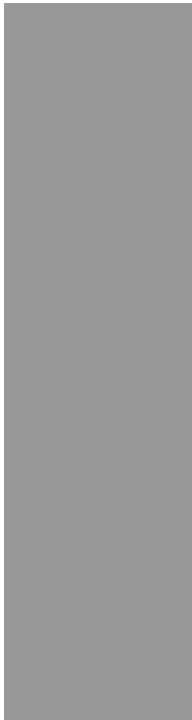
SUMMARY OF RECOMMENDATIONS

40. That consideration be given to the development and adoption of 'Proactive Operation Procedures' for the conduct and management of proactive street policing operations, and that the procedure address such issues as:
 - the need for appropriate consultation to occur with community representatives before, during and after the conduct of proactive police operations.
 - the need for processes for dealing promptly with concerns as they occur in the course of an operation.

41. That scrutiny be given at Operations and Crime Reviews to the impact of crime reduction strategies on police relations with the community.



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*Appendix A: List of submissions*¹

1. Aboriginal Justice Advisory Council (received 16 July 1999)
2. Barron, M.; Morris, C. and Powell, E. School of Social Science and Policy, University of New South Wales (sent July 1999)
3. Blue Mountains Community Legal Centre Incorporated (sent 3 June 1999)
4. Bracken, G. Aboriginal Community Liaison Officer (sent 12 July 1999)
5. Burnside (received 11 February 1999)
6. Department of Juvenile Justice, Youth Justice Conferencing (sent 1 July 1999)
7. Ethnic Affairs Commission (sent 12 July 1999)
8. Fact Tree Youth Service Incorporated (sent 14 July 1999)
9. Hawkesbury Community Legal Centre Incorporated (sent 30 June 1999)
10. Jones, R. Member of Legislative Council (sent 7 July 1999)
11. Justice Action (sent 30 June 1999)
12. Juvenile Justice Advisory Council of NSW (sent 16 June 1999)
13. Kingsford Legal Centre (sent 11 June 1999)
14. Mills, J. Member for Wallsend (sent 30 June 1999)
15. National Children's and Youth Law Centre (sent 6 January 1999 and 30 June 1999)
16. NSW Council for Civil Liberties (sent 12 June 1999)
17. NSW Department of Education and Training (sent 9 February 1999)
18. NSW Young Lawyers (Criminal Law Committee) (sent 12 July 1999)
19. Police Association of NSW (sent 5 August 1999)
20. Quakers Hill Local Area Command (sent 13 July 1999)
21. Riverstone Youth Centre (sent March 1999)
22. Shopfront – Youth Legal Centre (sent 7 July 1999)
23. UTS Community Law and Legal Research Centre (sent 5 July 1999)
24. Western Aboriginal Legal Service Ltd. (received 3 June 1999)
25. Youth Action and Policy Association NSW and Youth Justice Coalition (sent July 1999)

¹ We also received one submission made in the context of a complaint to this office. For reasons of confidentiality, this complainant has not been identified in this list of submissions.

Appendix B: Local area commander survey

For an explanation of the methodology used for this survey, see Chapter 3.

- Q1: What are the major crime issues in your local area command?
- Q2: Are you using the 'knife search' powers in your local area command? How are they useful?
- Q3: Are you using the powers to give reasonable directions in your local area command? How are they useful?
- Q4: How do you think the formal requirement to provide name and station, identify as a police officer, give reasons and warnings have operated in practice in your local area command?
- Q5: Please describe any operations or strategies in relation to street safety within your local area command.
- Q6: Is there a problem with 'gangs' in your local area command? Please describe.
- Q7: How has the introduction of the Police and Public Safety legislation influenced policing practices in your local area command?
- Q8: How have the Police and Public Safety laws been effective in reducing crime in your area?
- Q9: Do you have any concerns in relation to the recording of the Police and Public Safety legislation on COPS?
9(a) How could it be improved? (For instance, could the intelligence system be used to more accurately record the powers?)
- Q10: Police and Public Safety figures are regularly discussed at Operation and Crime Reviews. Do you think this is a useful initiative?
- Q11: Have you adopted any different strategies with regard to implementation and/or recording of the Police and Public Safety powers following Operations and Crime Review feedback?
- Q12: Section 28(a)(3) of the Act states that '... the fact that a person is present in a location with a high incidence of violent crime may be taken into account in determining whether there are reasonable grounds to suspect that the person has a dangerous implement ...'
12(a) What might be an example of such a location in your local area command?
12(b) How do you determine what such a location might be?
- Q13: What percentage of your staff have been trained in the Police and Public Safety legislation?
- Q14: Are there 'no loitering' signs in your local area command?
14(a) What advantages or disadvantages do you see with the use of these signs compared with the 'move on' legislation?
- Q15: What proportion of knife searches and reasonable directions are actually recorded on COPS?
- Q16: Are you targeting recidivist offenders in you local area command?

APPENDICES

Q17: Do you use the knife search or 'move on' powers as part of this targeting?

Q18: The Police and Public Safety legislation also confers on police a power to demand name and address in relation to indictable offences. Are you using this section in your local area command?

18(a) In what circumstances?

18(b) Has this been useful?

Q19: Do you consider that the Police and Public Safety Act makes it an offence to have a knife in a car?

[Questions 20 and 21 were in relation to the Ombudsman's review of the Police Powers (Vehicles) Act]

Q22: In relation to the Police and Public Safety or Police Powers (Vehicles) legislation, are there any other comments you would like to make?

Appendix C: Survey of legal practitioners

Introduction

As part of the review of police powers conferred under the *Crimes Legislation Amendment (Police and Public Safety) Act*, a survey of legal practitioners was conducted. This survey formed part of the overall review of the Act conducted by the NSW Ombudsman's Office pursuant to s. 6 of the Act.

Methodology

In order to collect data from relevant sections of the legal profession about the operation of the Act a survey was developed in consultation with several legal practitioners.

Legal services were selected because their practices had an emphasis on criminal law or provided legal services for young people and/or Aboriginal people. The legal services selected are the most likely to advise or represent clients who have had contact with police use of the powers under this legislation.

The survey was faxed to 23 Aboriginal Legal Service Offices, 24 Legal Aid Commission services (including Local Courts, Children's Legal Services and the Mental Health Advocacy Service) and 16 Community Legal Centres.

A small number of private practitioners (8) whose practices include the representation of young people, and two legal centres run by charitable organisations, were also surveyed.

Twenty completed surveys were received, all of which were completed by solicitors. Several surveys were completed by the senior solicitor of the service and contained information derived from several solicitors.

Respondents were asked to limit their comments to matters directly involving their clients or clients of their organisation. Some anecdotal evidence was provided and, where possible, this information was verified, in one case by speaking to the mother of the young person involved.

While an attempt was made to survey all relevant services, it must be noted that this study does not purport to provide a representative sample of legal practitioners or services. The purpose of the survey was to provide some qualitative information about the operation of the Act by providing legal practitioners with an opportunity to comment on general trends and provide examples.

Factors affecting the type of data available

1) Types of services

Legal practitioners may have limited contact with police use of these powers for a number of reasons. Firstly, their contact will be limited by the nature of the services and their policies, for example, legal aid is available subject to a means test (for adults) and subject to various policy limitations including limited representation in summons matters. Specialist services, such as the Aboriginal Legal Services and Children's Legal Services will not see the full range of people affected by the legislation. Consequently, some of the questions were not relevant to all of the

services surveyed. For example, most Legal Aid solicitors had only dealt with matters by way of charge and could not comment on the use of other methods of disposition by police.

Differences in the way services are organised also influenced the type of data available, for example, Community Legal Centres and some specialist youth services tend to have less structured interactions with clients and thus are able to comment on a wider range of police interactions with their clients than Legal Aid solicitors, who rarely see clients who have not been charged with criminal offences. Aboriginal Legal Services also tend to have broad contact with the community and are often able to comment on a wide range of matters.

2) Nature of the powers

Almost half of the respondents pointed out that the nature of the powers themselves means that legal practitioners will usually only be consulted if the situation escalates and charges are laid. For example, as one respondent commented, most people who are asked to move on by police will usually do so and a fruitless search where no other situation has arisen, whether justified or not, is unlikely to be reported except perhaps anecdotally to a youth worker.

Some of these responses raise the issue of consent policing, that is, the question whether, if a police request is complied with without further action by police, the interaction can be characterised as a use of police powers, or whether 'policing by consent' has occurred. It would appear that these incidents will rarely be reported to solicitors.

Therefore, the data from this survey will be weighted towards those situations where either charges have resulted or other problems have arisen in the interaction between police and clients of the services surveyed.

3) Groups against which powers are commonly used

Almost all of the respondents (17) said that, in their experience, the new powers were used mainly against young people, either juveniles or people in the 18 – 25 age group. One respondent from a Community Legal Centre expressed the view that 'young people rarely make complaints about police activity (and) are more likely to "cop it sweet" in the face of the use or misuse of police powers'. Another respondent expressed the view that 'searches and acquiescence to move on directions (by young people) are far more likely to occur due to consent to request (sic) rather than by way of a positive exercise of a specific police power, properly and legally executed'. Another respondent pointed to surveys conducted by peak youth organisations which demonstrate that young people often do not know about avenues of complaint such as the Ombudsman and are unlikely to complain even when they do know how.

Several respondents commented that Aboriginal people are inclined to congregate in public places due to cultural factors and that they are so accustomed to police intervention that many do not seek assistance even if unfairly treated. These services emphasised the problems in ascertaining the extent of police misuse of their powers due to these factors.

Clearly, these factors limit the type of information available to solicitors and legal centres and consequently, to this study. However many Aboriginal Legal Services, Community Legal Services and Children's Legal Services have access to networks of community and youth workers who are valuable sources of information regarding the use of police powers in their communities.

Other factors

Other factors which impacted on the type of data available relate to high workloads on the part of the services surveyed and the absence of sophisticated data retrieval systems. A common concern expressed by many respondents was the difficulty in retrieving information about cases.

Client confidentiality

One respondent expressed the view that 'the solicitor/client relationship ... and s. 26 of the *Legal Aid Commission Act* prevents us from divulging information of this kind' (that is, information about specific cases). Some services have provided cases with no identifying material included. In other cases, material which could identify individuals has been omitted from this report to protect client confidentiality.

Demographic data

Due to some of the problems referred to above, legal practitioners had to rely on estimations of the numbers of clients advised. Fourteen services made estimates of the number of clients advised about this legislation over the past month, a total of approximately 90 clients.

There was a wide range in the numbers of clients advised or represented. A small number of services reported only minimal contact with the legislation, for example, one service reported only two or three cases over the past twelve months, while another service reported having advised 200 – 250 clients over the past twelve months. The majority of services had advised or represented between 50 and 100 clients over the past twelve months.

Of these, almost all were either juveniles or in the 18–25 age group. A very small proportion were women. It appears that the data regarding ethnicity/Aboriginality of clients could be influenced by the demographic features of particular areas, for example in some parts of Sydney, lawyers report that, in their observation, the powers are used almost exclusively against young men of Middle Eastern or South East Asian appearance. In western NSW, the powers are reportedly used mostly against Aboriginal people.

Service policies affected these responses, for example, Legal Aid solicitors rarely represent Aboriginal people unless an Aboriginal Legal Service solicitor is unavailable or unable to represent the person.

Section 11C: Custody of a knife in a public place or school

Section 11C(2) Reasonable excuses

Respondents were asked whether their clients had offered a reasonable excuse either to police or the court and whether that excuse had been accepted. Five respondents did not answer or had had no contact with this part of the legislation.

Those who answered did not nominate any occasions where their clients offered an excuse to police and it was accepted. Part of the reason for this may be that solicitors are unlikely to be called upon for assistance unless the excuse has not been accepted.

Of the 11 respondents who said that their clients had offered an excuse to police, two said that they felt that police tended to leave the question of reasonableness to the magistrate, even though in a number of instances it seemed clear that the excuse was plausible and supported by other evidence.

In relation to the police decision as to whether an excuse is reasonable, one solicitor expressed the view that 'the attitude by police is generally (that) the onus is on the accused and they can give the explanation to the court.'

Case examples

A solicitor represented a person who had been camping in the bush for some weeks as a part of a protest against logging. He was charged in relation to a knife which he told police he used for preparing food while camping. The magistrate accepted the excuse and dismissed the charge.

Another case cited by an inner city legal centre involved a homeless young person who was living in his car, having had problems finding secure accommodation. Both he and the car were searched by police and he was fined \$550 by police for having a pocket knife in his car.

Another solicitor gave a number of examples, one of which involved a young Middle Eastern man driving his parents' car when scissors were found in the glovebox following a search by police. Neither the police nor the magistrate accepted the excuse, that the car was not his and the scissors were not in his possession. This solicitor expressed the view that 'no explanations seem to be reasonable'.

These responses present some evidence that police are not using the opportunity to assess the situation themselves to determine whether a reasonable excuse exists.

Relationship between 'reasonable excuse' and 'on the spot' fines

One respondent expressed the view that 'a law drafted around "reasonable excuse" is inconsistent with an on the spot fine'. She also expressed the view that 'there is no impartial person to intervene where there is a disagreement about what is a reasonable excuse'. While recipients of a penalty notice can elect to have the matter heard at court, her view was that an impartial person should make the assessment in the first instance. This argument appears to be based on the notion that, where police are empowered to issue penalty notices at the time that the offence is detected, some other mechanism should be developed to assess the 'reasonableness' of the excuse provided.

Submissions made by another respondent support this view. '[The issuing of penalty notices] means that police can misuse and abuse these powers with impunity safe in the knowledge that the recipient of the notice is unlikely to be bothered bringing the matter to court.' Further discussion of the use of penalty notices appears below.

Penalties

Respondents were asked to indicate how, in their experience, police were choosing to deal with matters arising under this Act. Police have a range of options available to them when dealing with offences, including on-the-spot fines, charge, issuing Court Attendance Notices (CANs), and warnings, cautions and conferences under the *Young Offenders Act*. Clearly, some of the respondents would have limited knowledge about the disposition of some matters, for example, policy limitations on the granting of legal aid in relation to summons matters.

Twelve services felt that the use of CANs had increased recently.

One solicitor noted that CANs were not being utilised in relation to this legislation in his area, in the west of Sydney, and that young people were being charged and detained as a result of incidents arising from the use of these powers.

Another solicitor noted that field CANs were commonly used after the individual has been arrested and taken to the police station. He commented that 'this practice appears to defeat the purpose of them', and noted that a side effect of this practice is that 'notwithstanding the presence of the defendant at the station, no fingerprints are taken. The prosecutor then seeks an order from the court...(an:)d another trip to the station needs to be made by the defendant.'

Five respondents expressed their concern at the frequent use of penalty notices by police in relation to young people. These respondents report that police commonly apply the maximum penalty of \$550 for possession of a knife and \$220 for failure to comply with a reasonable direction to move on. Two of these respondents expressed the view that young people dealt with by the court would be most unlikely to receive fines of this magnitude.

Three respondents commented that, in Aboriginal communities, the notices were rarely challenged and could conceivably lead to further action by police for unpaid fines. As one respondent said '(the use of penalty notices) can result in police misusing or abusing the powers granted under the legislation in the knowledge that there will never be any judicial examination of the use of the power.'

Relationship with Young Offenders Act

Eighteen respondents had not heard of any of these matters being dealt with under the provisions of the *Young Offenders Act*. As noted earlier, some services dealing only with adult clients would not have any direct experience in this area.

Four respondents expressed concern at the apparent contradiction between the spirit of the *Young Offenders Act* and this Act. According to one respondent, this Act 'appears to sanction a heavy handed response to young people by police (and) potentially brings young people, who previously would have limited contact with police, into contact with them.'

Only one respondent was aware of conferencing being used in relation to matters where 'in our view police have acted on the perception that the legislation gives police additional powers of search and as a result evidence of other offences ... is obtained'. It appears that this respondent is referring to searches conducted where evidence of other offences is detected and that conferencing has been conducted in relation to these offences not arising directly under this Act.

Section 28C: Power to search for knives

Nature of the power

Respondents were asked whether they had noticed any particular circumstances or trends in the way police use the knife search powers.

Twelve respondents referred to the lack of a practical distinction between searches under s. 28C and other powers of search and seizure. These respondents pointed to the difficulty in determining what powers police have used when a search is conducted in the absence of the proper warnings by police. One respondent referred to police conducting 'opportunistic

searches', another described the searches as 'speculative'. Another respondent referred to searches of his clients as 'fishing expeditions'.

One respondent said that 'the anecdotal evidence we have is that police are not specifically relying on any purported new power under the legislation. Rather, the search is conducted and on the rare occasion that the officers are called upon to justify it, they can simply rely on (other) principles of search.' This view was extremely widespread among survey participants. Another respondent said 'I believe that the power is thus widely misused in that it is used as a basis to search when there is no reasonable cause to otherwise search.'

Coupled with the evidence relating to the failure of police to comply with s. 28A(4) (see below), many respondents clearly felt that searches were not being conducted pursuant to the provisions of this legislation.

Police compliance with s. 28A procedural requirements

Respondents were asked whether, to their knowledge, police were complying with the provisions of s. 28A (4), which provides that 'A police officer may request a person to submit to a search ... only if the police officer:

- (a) provides evidence to the person that he or she is a police officer ... and
- (b) provides his or her name and place of duty, and
- (c) informs the person of the reason for the search, and
- (d) warns the person that failure to submit to the search may be an offence.'

Six services did not comment on this question and two said that they felt police were complying with these requirements. One respondent commented that uniformed police were more likely to comply and that plain clothes police were regarded by his clients as 'cowboys' who did not comply with the rules.

Ten services answered 'no', one service expressing the view that on many occasions people are searched without being informed as to the reason for the search, the search being justified retrospectively by what, if anything, is found.

This comment was echoed by five other respondents all of whom expressed the view that it was extremely difficult to tell what power police were using to search people because of their failure to comply with the legislation. One respondent lamented the fact that some magistrates 'do not seem to have grasped the requirements of the legislation and allow police searches which are unjustified'.

One respondent commented that police considered the requirement to identify themselves 'a bit of a joke' and rarely complied, sometimes relying on their badges, which may have insufficient information to comply with the requirements of the legislation.

The reported failure by police to tell people why they are being searched and the reliance on the results of the search to characterise it led to difficulties for the respondents in determining numbers of people advised about this legislation. If a person consults a solicitor after a search when they have not been told why they have been searched and either nothing or something other than a knife is found, the solicitor has no way of knowing whether the search was conducted under this legislation or pursuant to other police powers of search.

Of the ten respondents who answered 'no', two respondents commented that the requirements of s. 28A(4) appeared to provide a disincentive to police using this power of search as the power is more limited and requires more of police than other powers of search. These respondents did

not say that they had noticed police conducting less searches, rather that, if police were to conduct a search, they would be more likely to rely on other powers of search.

Four respondents representing a range of service types commented that their clients, in the words of one respondent, 'are not aware of the legislative limitations on police', and thus would not complain if searches were unlawful.

Types of searches conducted

A number of anecdotal reports were received from solicitors working with children referring to clients being 'strip searched'. The definition of 'strip search' is difficult to ascertain, one respondent using this term to refer to a search where the person was required to remove his outer clothes and shoes. One respondent said that, in his experience, the searches were more invasive than the legislation allows. Again, the ambiguity of the reasons for the search makes it difficult to differentiate the misuse of this power from powers, for example, exercised under the *Drug Misuse and Trafficking Act*.

In one area in the west of Sydney a number of reports were received of children being searched in and around the main street in public view. The mother of one young person reportedly searched in this way, who was interviewed as part of this survey, pointed to the traumatic nature of searches conducted in this way and said that her son had suffered psychological trauma as a result of repeated searches. She said that he was now fearful of police and had left the area as a result.

Case example

A community legal centre reported a case where a 14 year old girl, who had no previous contact with police, was walking home at night and was stopped and searched by male police officers, who confiscated a nail file she was carrying in her bag. While no further action was taken by police, the respondent reported that the girl was extremely frightened by the search.

Targeting of specific groups by police

Respondents were asked whether police appear to be targeting any specific groups in their use of the search powers. Seventeen respondents said that young people were targeted. One respondent felt that police partly targeted previous offenders or people known to them. However, this respondent said that he felt that many young people who would previously not come into contact with police had done so since the introduction of this legislation, as police appeared to be targeting locations rather than people, for example shopping malls and railway stations.

On the question of the determination by police of 'reasonable grounds' to carry out the search, seven respondents felt that police targeted certain groups. For example, in certain areas, young people of Middle Eastern or South East Asian appearance are reportedly searched frequently, while in other areas only Aboriginal young people are reportedly searched. One respondent expressed the view that police in her area used certain racial stereotypes to inform their decision whether to search. These respondents felt that this power had increased the contact between these groups and police.

One respondent from a partly rural area commented that 'the targeting of young people in the same way as may be appropriate in George Street, is not appropriate for country areas'. This respondent expressed the view that the relationship between young people and the police has deteriorated due to repeated searches. Another respondent in an adjoining area expressed similar views pointing out that only one of the searches about which clients had informed them had resulted in police finding a knife.

Determination of ‘reasonable suspicion’ by reference to whether the area had a ‘high incidence of violent crime’

Section 28 A(3) provides that ‘For the purposes of this section, the fact that a person is present in a location with a high incidence of violent crime may be taken into account in determining whether there are reasonable grounds to suspect that a person has a dangerous implement in his or her custody.’

Respondents were asked whether they had noticed whether police were using the criteria of whether the area had a high incidence of violent crime in forming a ‘reasonable suspicion’ prior to searching people.

Eight respondents, mainly from country areas, did not answer this question.

Of the remainder, many answered this question by naming the areas which they felt had been targeted by police – George St, Kings Cross, Marrickville, a park in a country town where Aboriginal people congregate. Railway stations and shopping malls in suburban Sydney, particularly where young people congregate, were nominated by five respondents.

A solicitor commented that ‘any railway station or anywhere in Cabramatta is referred to as a “high crime area” and generally accepted by the courts as such’. One respondent, who acknowledged the existence of a history of violence between groups in her area, expressed her concern that ‘a number of young people with no criminal history are being caught by the reactive approach by police to the violence in the area’.

Three respondents pointed to the difficulty in determining what is an area with a ‘high incidence of violent crime’. One service suggested that some kind of objective criteria needs to be developed to avoid the arbitrary determination by police of what constitutes an area with a ‘high incidence of violent crime’ which could result in injustice. One respondent expressed concern at the potential for a police officer to justify, after the event, a search which would otherwise be unlawful.

Section 28B: Power to confiscate knives and other dangerous implements

Respondents were asked to give examples of the types of implements confiscated from their clients under the legislation. Common examples included pen knives, fishing knives, scissors, Swiss Army knives. More unusual cases included a ring which had been shaped into a blade and a knife fork and spoon set used for camping. Several respondents mentioned incidents where their clients were apprehended carrying scissors to cut up marijuana.

Case examples

One respondent reported that a client wished to challenge charges related to the possession of a pair of scissors on the basis that they are not a ‘blade’. One young woman was reportedly searched and a nail file confiscated.

A solicitor reported a case where a boy was searched by police after leaving the library. They reportedly found a pair of scissors in his pencil case and issued a penalty notice. The solicitor said that he advised the parents to elect to have the matter heard by a magistrate but it appeared that the family were able to pay the penalty and wished to avoid the trauma of their child appearing in court.

Section 28F: Power to give reasonable directions in public places

Respondents were asked whether they had noticed any trends or circumstances in the use of the powers to give reasonable directions, or any particular groups targeted by police.

Seventeen respondents said that the power was commonly used to disperse groups of young people, in some areas, according to some respondents, almost exclusively young people of specific ethnic backgrounds. Six respondents said the powers were commonly used against young people in the vicinity of railway stations and shopping malls.

Eight respondents indicated that they had had very little contact with clients who had received a direction to move on.

The bulk of the evidence in this area was provided by respondents from areas with high concentrations of people from Indo-Chinese, Middle Eastern or Aboriginal backgrounds, who said that the powers were widely used in their areas.

One youth service which operates a telephone advice line, said that they receive up to ten calls per day from young people enquiring about matters arising under this legislation. These calls were mainly queries as to whether the young person should take the matter to court or not.

Three respondents reported that police, after using this power to 'move on' sex workers from certain areas, commonly set bail conditions which restrict the person from being in the area. One respondent commented that her client needed to frequent this area in order to conduct her business.

Relationship between the use of the powers and other charges

Respondents were asked whether any common pattern of charges accompanied the use of the powers under this legislation.

Charges most commonly mentioned were offensive language and the 'trifecta' (offensive language, resist arrest and assault police). One respondent said that, with the addition of one of the charges under this Act, 'the trifecta has become the quadrell'. In some areas, minor drug charges accompanied many of the searches.

Seven respondents referred to the potential for the use of these powers to escalate the situation into one where more serious charges are laid. One respondent expressed the view that 'This increased contact (between police and Aboriginal people) may also lead to the rapid deterioration of already volatile situations into serious disturbances.'

Case examples

A young man was sitting in a park talking quietly to a young woman and was asked by police to move on. He took offence at being asked to move on, challenged police and was charged with a number of offences including offensive language and resist arrest. The magistrate found that police had insufficient grounds to ask him to 'move on', and dismissed the charge of refusal to 'move on', however, in relation to other charges of offensive language and resist arrest he was dealt with under the provisions of s. 556(A) of the *Crimes Act*, which allows the magistrate to find the offence proved without proceeding to a conviction.

Three cases from far western NSW which occurred within a week of each other, involved young Aboriginal people being asked to move on by police. In two cases they were sitting outside a supermarket and in one case, people were congregating on a road in the vicinity of a hotel. In

two of the cases, according to police documents, the young people became verbally abusive and further charges were laid. It is clear from the breach reports in each of these cases that the young people strongly objected to being asked to move on. The respondent reported that the information in each of the matters were dismissed by the court.

A solicitor from another service commented that 'The apparent view of police is that the devil makes work for idle hands. A pre-emptive 'move on' is deemed appropriate even notwithstanding the lack of any criminal activity occurring.'

Police compliance with s. 28F procedural requirements

As with the search powers, ten respondents reported that police were not complying with the requirements in s. 28F(4) which provide that 'a police officer may give a direction ... only if before giving the direction the police officer:

- (a) provides evidence to the person that he or she is a police officer (unless the police officer is in uniform) and,
- (b) provides his or her name and place of duty, and
- (c) informs the person of the reason for the direction, and
- (d) warns the person that failure to comply with the direction may be an offence.'

Of the respondents who felt that police were not complying with this section, four had relatively minimal contact with the use of this power and were in some cases relying on anecdotal evidence.

Three respondents emphasised the problems in determining whether the requests to move on were legitimate, as one respondent put it 'most young people are sufficiently "intimidated" by the presence of police to move on without further incident'. One of these respondents expressed the view that in many cases where a young person has been asked to move on, the antecedent conditions (obstruction, harassment, intimidation or causing fear) have rarely been established. Rather, the use of this power is seen by this respondent as 'often not linked to any wrong doing or incivility (on the part of the) young person, but to the stereotypes and prejudices held by police officers'.

One respondent notes that 'with respect to the 'refusal to move on' charges that our Service has had contact with, the officers have failed almost completely to follow the required procedure'.

Another respondent indicated that at least one matter has been thrown out of court due to the failure of police to follow the required procedure.

Frequency of use of 'street policing' powers

Respondents were asked whether they had noticed any changes in the way police use their street policing powers generally. Two services had not noticed any changes.

One solicitor, responding on behalf of a number of solicitors, stated 'it appears to us that street policing has become much more intensive over the past twelve months'. This view was widespread, ten services giving similar responses.

Another solicitor expressed the view that, while police were not complying with the requirements, the legislation had served to legitimise more frequent and invasive searches of her clients.

All of the Aboriginal Legal Services respondents reported a perception that the use of search powers and other street policing powers generally had increased since the introduction of the

legislation. One service said ‘The common perception of our Service is that police are behaving in a way that suggests that they have an unfettered right to search any person who attracts their attention... They are more ready to wade into volatile situations than they would have previously.’

All of these respondents expressed concern that the already poor relationships often existing between police and Aboriginal communities have worsened since the introduction of this legislation. As one service pointed out: ‘It is clear to our service and our experience in western NSW that any increased contact between police and the community breeds resentment, anger and distrust.’

One respondent reported that young people have complained to them not so much about one specific search but the frequency of the searches. This solicitor expressed the view that ‘many Aboriginal youth are being stopped and searched with no reason given and on a frequent basis. These youth are complaining of this in the form of “harassment”’.

One solicitor reported that, due to the demographic features of the area the young people in her practice were more likely to come into contact with security guards in shopping malls than police. She expressed concern that the policing of public spaces in the area was largely becoming a private matter, with lifetime bans being imposed on young people by the owners of shopping malls, and upheld in trespass actions in the local court.

A senior solicitor working with children said that he had noticed a ‘heavier police presence’ and expressed concern that frequent use of these powers against certain groups of young people was making young people ‘bitter and antagonistic against police’. This view was echoed by all of the other services with the greatest contact with young people.

Summary of general trends

Certain general trends emerged from an analysis of the information provided by respondents to the survey. Many of these trends were mentioned by the majority of the respondents, regardless of the type of service, while some were more specific to certain types of services.

- 1) Most respondents pointed to the difficulty in determining which powers of search were being used by police.
- 2) Half of the respondents said that, in their experience, police were not complying with the procedural requirements of the legislation.
- 3) Most respondents thought that police targeted young people in their use of both the search power and the power to give reasonable directions.
- 4) Most respondents thought that police were using their powers to police public spaces more since the introduction of the legislation.
- 5) Some respondents expressed strong concern about the use of penalty notices in the maximum amount, especially in relation to young people with no capacity to pay.
- 6) All youth services expressed concern that the *Young Offenders Act* did not appear to be used by police in relation to matters arising under this legislation.
- 7) All services working with Aboriginal people commented that, since the introduction of these powers the amount of contact between Aboriginal people and police had increased.
- 8) It appears that respondents from areas with large numbers of Aboriginal or non-English speaking young people have had more contact with clients affected by this legislation than respondents from other areas.

Legal practitioners' survey

Name of agency/ contact person
Availability for interview yes / no
If yes, best time to telephone you

- (1) How many clients have you advised in relation to these amendments
 - (a) since July 1998?
 - (b) in the last 4 weeks?

In total, how many were:

- (a) from a non English speaking background
- (b) Aboriginal
- (c) women
- (d) juveniles
- (e) young people 18-25

- (2) In your experience, how are police dealing with matters arising under the Act?
Please comment on each option.
 - (a) issuing court attendance notices
 - (b) charge
 - (c) on the spot fines
 - (d) cautions or conferences under the *Young Offenders Act*
 - (e) other.....
.....
.....

- (3) Have you noticed any particular circumstances or trends in the way police use the:
 - (a) knife search powers (s 28A *Summary Offences Act*). Please describe.
.....
.....
.....
 - (b) 'move on' powers (s. 28F *Summary Offences Act*). Please describe.
.....
.....
.....

- (4) In matters dealt with by you or your organisation is there any indication that police are targeting any particular groups in their use of:
 - (a) the knife search powers (s. 28A *Summary Offences Act*). Please describe.
.....
.....
.....
 - (b) the 'move on' powers (s. 28F *Summary Offences Act*). Please describe.
.....
.....
.....

- (5) What changes (if any) have you noticed since July 1998 in the way police use their street policing powers generally?
.....
.....
.....

- (6) In relation to the carrying of knives, can you give examples where a 'reasonable excuse' has been offered to police at the scene? Was it accepted as reasonable by:
 - (a) the police? yes / no / not applicable / don't know
Please describe.
.....
.....
.....
 - (b) the court? yes / no / not applicable / don't know
Please describe.
.....
.....
.....

- (7) What types of implements have been confiscated from your clients under this legislation?
.....
.....
.....

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(8) The fact that an area has a high incidence of violent crime may influence police discretion to use the powers conferred by this legislation. Can you describe any instances where police have taken this factor into account?

.....
.....
.....

(9) Are police complying with the requirements to identify themselves, give reasons and a warning and search under clothes only, for any searches conducted or reasonable directions given under s. 28(4) of the Act?

.....
.....
.....

(10) Is there any common pattern of charges that your clients face in combination with any of the Police and Public Safety Act offences?

.....
.....
.....

(11) Please give details of any unusual or noteworthy cases. If the matter has been dealt with by a court please give sufficient information for the court documents to be located (i.e. name of defendant, court, name of judge/magistrate.)

.....
.....
.....

(12) Any other comments?

.....
.....
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.....

Appendix D: Directions which were not complied with

Our review of reasons given by police for s. 28F 'reasonable directions' (see Chapter 10) is based on COPS narratives recorded in the Bankstown, City Central, Lake Illawarra, Wollongong, and Orana local area commands. This is consistent with the approach used elsewhere in this report. However, in order to more comprehensively assess the circumstances involved in failures or refusals to obey directions we reviewed all 'Street Offence – refuse direction to move on' COPS narratives for the month of June. A total of 90 records were reviewed.¹

On the basis of COPS narratives alone, it is not possible to judge whether the circumstances of a particular event meet the requirements of the legislation for issuing a direction. In particular, it is difficult to assess from a narrative whether, in the circumstances, a person's behaviour or presence could have caused fear. A number of records reviewed did in fact raise significant questions as to the lawfulness of the direction. These incidents fall into the following categories.

Persons affected by alcohol

In some incidents the person directed was described as intoxicated but at the time of the direction was not described as exhibiting the relevant conduct under the Act. While there may be circumstances in which the *presence* of an alcohol affected person would be likely to cause fear to a 'person of reasonable firmness' the legislation would not seem to confer a power to 'move on' a person solely because they were intoxicated.

In two of these events the person used offensive language in the presence of the police *after* being issued with the direction. In one event juveniles were suspected of drinking alcohol and in another event the narrative also included reference to the person being in an area known for street offences.

Some of these events also raise questions about the timing of the 'relevant conduct'. In some of the events there appeared to be no 'conduct' prior to the initial direction. After the direction was issued, however, the person reacted with offensive and abusive language to the police. This behaviour may have been sufficient to constitute the 'relevant conduct' and may have formed the reason for *subsequent* directions to these persons.

Persons refusing to move away when police arrest other persons

Commonly these incidents involved persons who questioned police actions in arresting or otherwise dealing with another person. In some events the persons were described as abusing the police and on other occasions the person was standing nearby and refusing to move. In one incident the person was also described as intoxicated. In one of these incidents the person was also arrested for 'hinder police'. It is possible that a person hindering police could be described as 'obstructing' for the purposes of the legislation.

¹ A total of 91 records were originally examined, however, in one incident, recorded as a failure to obey a direction, a penalty notice was imposed for failure to comply with a council notice (a 'no loitering' sign). This appeared to indicate a recording error and was therefore excluded from the final audit.

Persons involved or suspected to be involved in drug offences

In some incidents the person of interest admitted to police that they intended to purchase drugs. In other incidents the person directed was suspected of involvement in drug offences.

In one of these incidents the narrative stated that the fact that the person was about to buy drugs '... would cause normal persons, had they been present, to be intimidated or be in fear'. The person had been sitting in an alcove in a lane way with another man. It may be that the other directions in this category could also be based upon s. 28F(c): the 'cause fear' provisions.

Other/unknown

Other examples of situations which appeared to fall outside the scope of the legislation included:

- persons who refused to 'move on' from a party which had 'got out of hand'. However, at the time they were directed to move they were on private property². One person stepped onto the street to speak with police, and when he refused to move on, was issued an infringement notice;
- a person who was rude to police and made offensive allegations to them;
- a person booked for consorting. The narrative states that when police initially spoke to the person, in the company of the other persons consorting, he was acting in a manner which could be 'deemed' intimidating by members of the public. At this point the person moved on. However, he returned alone and was issued an infringement notice. There is no indication that the behaviour deemed intimidating was still apparent. The legislation states that a person is not guilty of an offence unless they persist in the 'relevant conduct';³
- persons whose behaviour was not described and who were asked to move from a cab rank;
- a person who was searched for a knife and was suspected of trespass on a prior occasion;
- a number of persons described as 'loitering' in front of shops;
- a young person, known to police for 'various offences', who was seen talking with some men. He was told to leave the area and not return that day, but later returned and was issued an infringement notice.

In all of these incidents the persons directed received infringement notices.⁴ Given that most incidents of non-compliance are dealt with by infringement notice and few are scrutinised by the courts, it is essential that police understand the circumstances in which the legislation allows a penalty to be applied for refusal or failure to obey a direction.

² s. 28F(1) states that the direction may be given 'to a person in a public place'.

³ s. 28F(7) states 'a person is not guilty of an offence under subsection (6) unless it is established that the person persisted, after the direction concerned was made, to engage in the 'relevant conduct'.

⁴ Three narratives stated only that an infringement notice was issued and did not specify the offence, however, the circumstances of the event indicate that the notice was issued for 'failure/refuse to comply with direction'.

Appendix E: The ‘presence provision’ and street sex workers

The magistrate’s decision referred to in Chapter 10 of this report is also of interest when limited to its application to street sex workers. Whether or not soliciting was an offence¹ in the area was not a factor in the decision, although the police contention was that soliciting was prohibited in the area.² This decision was made in the context of complaints from local residents about the conduct of sex workers. Where there have been no complaints and where sex workers are not operating in residential areas the decision may be less relevant. However, it is likely to be applicable to other areas where residents commonly complain to police about sex workers in their neighbourhood.

It would appear that police in a number of other commands are making use of the legislation to move persons on where they suspect, but have insufficient evidence, that an offence has been committed. This perception is reinforced by records from the COPS data base and from interviews with street sex workers which were conducted as part of the review. In the absence of complaints or particular behaviour, where suspicion that the person is soliciting is the *only* reason for the direction, a police direction may not meet the requirements of the legislation.

A submission by one person affected by this use of the new powers stated:

Although it is no longer an offence to loiter for the purposes of prostitution since the repeal of the Summary Offences Act 1970, the [name of local command] police still attempt to enforce the law as if it still exists. They usually tell anyone present in the street who they suspect of being there for the purposes of prostitution to move from the area.

Our audit of the COPS data base for all local area commands in NSW over the 12 month review period located 44 events where directions were given in circumstances involving street sex workers.³ In six of these events the direction was not complied with. The 44 events were spread over nine local area commands, and all except three of the events occurred in the latter six months of the review period.

About 11.50 pm 8/1/99 the POI [Name] moved on from the said location after police directed her to do so after suspecting soliciting offences by the POI.

About 8.10pm 5/3/99 the POI was found parked on the Great Western Highway, Eastern Creek in the near vicinity of the prostitutes. Police feel that the POI was awaiting the services of one of the girls. The POI could not supply police a reasonable excuse why he was parked in the area of the hwy and was directed to move on. The POI left without incident.

¹ Part 3 of the *Summary Offences Act* sets out specific circumstances where soliciting for the purposes of prostitution and prostitution itself are unlawful. It is possible to solicit and engage in prostitution in circumstances which are not proscribed under the Act.

² The police statements of evidence include quotes by the officers during the incident to this effect, including ‘You know that prostituting here is against the law’.

³ This audit was conducted using the key words ‘prostitute’ ‘prostitution’ ‘solicit’ and ‘sex’. It is possible that relevant records may have been missed using this method.

While in most cases no conduct other than being present and suspected of soliciting is mentioned in the narratives, in some cases reference is made to the 'relevant conduct' specified in s. 28F(1):

At 10.30pm on Friday 19 February 1999, the above persons were seen by police. All POIs were dressed very flimsy and were very tall. All POIs were spoken to by police and informed that they are intimidating to the general public. All POIs are intimidating due to the way they are dressed, their height and the number of them. POIs were co-operative with police when police obtained particulars. All POI are transsexuals and were most likely to be prostituting and were seen standing along [street name, locality], outside a church. POIs were spoken to in regards to prostituting outside a church and were informed that if they were sighted there again they could be arrested. All POIs left the area at the request of police.

Much of the police action to move on street sex workers occurs in the context of pressure and complaints from members of the public. We attended a forum of police and various organisations working with sex workers, which discussed recent policing activity in regard to sex workers in that community. One commander who attended this meeting, commented that a typical scenario for police would be to receive numerous complaints from certain areas that sex workers were intimidating residents. Police would be so busy that they could not take action immediately but that when they did arrive they would 'move them on'.

The submission from Shopfront Legal Centre commented on the influence of resident complaints on police practices:

We understand that police have also tried to use their move-on powers to get rid of sex workers. This tougher approach coincides with the enactment of the Police and Public Safety Act and also appears to be a response to complaints from wealthy and powerful residents of [a particular apartment tower].

The police in this command told us that they would only move workers from 'illegal areas'.⁴ This practice of only moving workers from 'illegal areas' was confirmed by one sex worker who worked in the relevant area and who was interviewed during the review.⁵ This commander also stated that the practice of 'moving on' sex workers under the legislation was a conscious choice in the command and had been debated at the station. Legal advice from within the Police Service had provided support for the view that the law could be properly used in this manner.

The outreach workers in this command stated that the approach of some police when moving workers on, was of particular concern. Outreach workers reported that some police were particularly 'vicious' and handled sex workers roughly.⁶ One outreach worker had also been 'moved on' by police even though she explained that she was doing outreach work at the time. This worker complained to the relevant local area commander and apparently the officers involved were spoken to about their actions.⁷

In general, while there were still some issues to be resolved the outreach workers felt that their relationship with the police in this command was reasonably cooperative. However, the outreach workers expressed concern that the practice of moving sex workers from certain 'illegal' areas where soliciting had a long history, meant that sex workers moved to other 'illegal' areas where they felt they would be less likely to attract police attention. This meant that these workers were

⁴ Consultation, 28 July 1999.

⁵ Interview, 5 August 1999.

⁶ Consultation, 28 July 1999.

⁷ *ibid.*

in more isolated back streets and were more at risk. In addition, it made them less accessible to the outreach workers, and the health and other services they provide, as well as impacting on a different group of residents.

The outreach workers felt that the issue of sex work in illegal areas could not necessarily be solved by telling workers to move to legal locations.

During the review we also spoke with a commander⁸ from another area where street sex work occurs. This commander expressed the view that 'moving on' sex workers would cause similar problems to those resulting from the use of council 'no loitering' signs.⁹ He was concerned that forcing the sex workers down the road or into the side streets would disrupt positive initiatives (see below), compromise the safety and welfare of sex workers and make it more difficult to detect persons involved in associated criminal activity, notably the drug trade and demanding money with menace.

This commander explained that police needed to reconcile a number of competing demands to address these problems. In addition to harm minimisation and related strategies promoted by HIV/AIDS educators and sex worker outreach staff (in line with State Government health policy), he felt there was a need to respond to the victimisation of sex workers and reduce the impact of criminal activity associated with the sex trade. He felt that these objectives could be addressed more effectively through other policing activities and referred to a particular operation, which attempted to target criminals intimidating sex workers and/or supplying drugs, rather than targeting sex workers and drug users themselves.

We interviewed sex workers in this local area command and found few who had experienced use of the 'move on' legislation. Two sex workers stated that they had been asked to move from an area because the police said it was not a legal working area. One sex worker said she had been asked to 'move on' on three occasions. On one occasion she asked why she had to move as there were no 'no loitering' signs where she was standing. The police allegedly responded that they 'just wanted her to move'.¹⁰ She held her ground and no further action was taken by the police.

When asked how she 'got on' with the police in this area, another sex worker commented:

They're all right, yeah they're pretty good. The [local area command] coppers I find really good. They kind of look after us and they're always pulling up and going: 'Howya going? How's your night going?''¹¹

Outreach workers expressed satisfaction with the general approach of the commander in this area, but had reservations about some of the other officers working in the command. There were concerns that different police patrolled the area at different times and that although the police they regularly worked with did not arrest sex workers working in 'legal' areas, other police might take action against the workers.¹²

Sex workers may be unlikely to report or make complaints about uses of the law which they feel are inappropriate, for a number of reasons. One submission to the review stated:

The police get away with such tactics because of the vulnerable and unempowered situation most of the street workers are in, which is due to such factors as lack of knowledge of the law and how to have recourse to it, and the impact drugs have on a

⁸ Discussion with commander and other officers in a suburban LAC, 21 May 1999.

⁹ See discussion in relation to s. 632 of the *Local Government Act* in chapter 10.

¹⁰ Interview, 5 August 1999.

¹¹ *ibid.*

¹² Consultation 28 July 1999.

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person's ability to get it together and do anything. There are also other factors such as low self esteem, not much education, being ashamed of the work they do and fearing family or friends might find out if they don't try to cover it up.¹³

During our interviews with sex workers in one command, one sex worker disclosed to the outreach worker present during the interviews, the details of an attack by a man who forced her into his car. Even though the woman said she was badly injured from the attack and continued to work in the area, she was not prepared to approach police with the report. Instead, in our researcher's presence, she spoke with the outreach worker who took a description of the man involved and his car, in order to pass the information on to other sex workers. This appears to be an indication of the reticence of some sex workers to complain to police.

¹³ Submission from individual.

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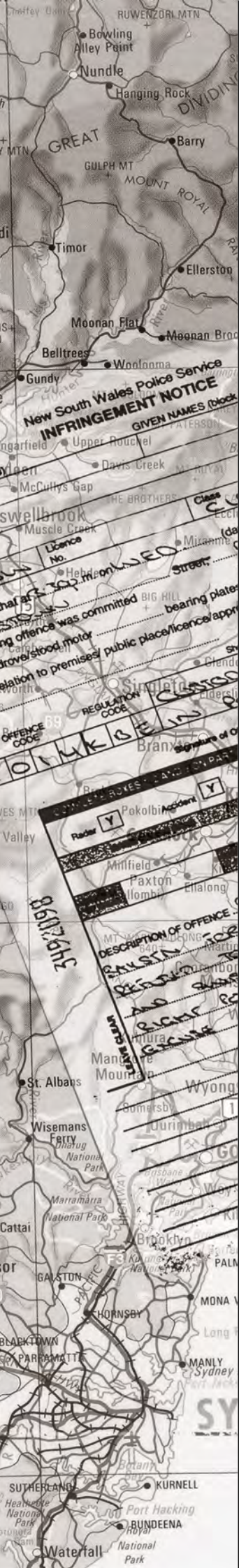
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